



Employment Bulletin

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WILL DISABILITY DISCRIMINATION EVER BE THE SAME AGAIN?

The House of Lords decision in *Mayor and Burgesses of the London Borough of Lewisham -v- Malcolm* [2008] UKHL 43 has made major changes to the law of disability related discrimination. Although the case concerned a housing authority's decision to evict a schizophrenic tenant who had unlawfully sublet his flat, the decision has direct relevance to employment cases.

The decision looked closely at the test at s3A of the Disability Discrimination Act 1995 which provides that; "a person discriminates against a disabled person if - (a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply".

This test requires a comparison between the treatment the disabled person receives with the treatment of "others". The majority view (4 to 1) was that this had to be interpreted narrowly so that there would only be discrimination if a non-disabled person to whom the same treatment applied would receive more favourable treatment. As a result, if an employer dismisses somebody for being off work sick for a long period of time (and the employer's policy would be to do so regardless of whether the person was disabled or non-disabled), then the reason is the absence from work, and not one that relates to the underlying disability itself. In these circumstances the employer will not be liable under the DDA.

Practical Tip

This decision is set to have far-reaching implications for employment disability cases making it more difficult for employees to bring claims. However, the practical effect may well be that the focus will turn to the employer's obligation to make reasonable adjustments (which Claimants will argue would help avoid the need for a dismissal in the first place).

If you require any specific advice in connection with the material contained in this bulletin, or on any other Employment Law issues, please contact a member of the Employment Team on 0151 600 3000. If you no longer wish to receive the bulletin please let us know by return email.

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