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## Newsletter

News update for  
HR Specialists



**Kim Abbott**

**Below, we look at two disability discrimination cases which significantly change the law in this area.**

### **ECJ Decision: Coleman v Attridge Law**

The ECJ has, on 17<sup>th</sup> July 2008, published its landmark decision in *Coleman v Attridge Law*, in answer to questions posed of it by London South Employment Tribunal. Following the Advocate General's opinion given on 31 January 2008, the ECJ has confirmed that the *Equal Treatment Framework Directive* is intended to prohibit associative discrimination in the context of direct discrimination and harassment.

Ms Coleman alleges she was directly discriminated against and harassed by her former employers on grounds of the disability of her son, for whom she is the primary carer. According to the ECJ's decision, the Directive is intended to prohibit direct discrimination or harassment on grounds of disability, even where the person concerned is not disabled themselves.

The Directive applies to age, sexual orientation, religion and belief, as well as disability. Following the ECJ's decision, direct discrimination by association in those other contexts must also be prohibited. (Notably, the Employment Equality (Age) Regulations 2006 do not yet appear to afford protection from direct discrimination by association in the context of age.)

Readers will appreciate the potential impact of this decision, and the further and more onerous steps that employers may have to take to ensure that they do not discriminate by association.

### **London Borough of Lewisham v Malcolm, House of Lords**

This is another extremely important judgment, in relation to disability discrimination.

In addition to the provisions outlawing disability discrimination in employment, the Disability Discrimination Act (DDA) extends into other areas, including the provision of goods and services and the management and disposal of premises. Although the above case involved repossession proceedings of local authority owned property, its decision will have far reaching effects upon employment matters.

All the provisions of the DDA share a common definition of disability and of disability related discrimination. *"An employer discriminates against a disabled person if, for a reason which relates to the disabled person's disability, the employer treats him or her less favourably than the employer treats or would treat others to whom that reason does not or would not apply, and the employer cannot show that the treatment in question is justified."* In order to determine whether less favourable treatment has occurred, it is

essential that the tribunals and courts identify an appropriate (usually hypothetical) comparator, illustrating how others would have been treated. The established approach, for many years, has been that approved in an employment case, *Clark v Novacold* (1999.) There, the Court of Appeal held that there is no requirement that the comparator be in the same or not materially different, circumstances as those which apply to the complainant. So, an employee dismissed for lengthy sickness absence related to his disability should be compared to an employee who had not been absent at all, rather than one absent for a reason unrelated to disability. As the comparator would not have been dismissed, less favourable treatment would be established.

Their Lordships had to consider whether *Novacold* had been correctly decided or whether a different approach to comparators should be taken.

Malcolm suffers from schizophrenia. He occupied a Council flat, and sublet it, contrary to his tenancy agreement, during a time when he was not taking his medication. The Council began possession proceedings and Malcolm asserted that this was disability discrimination. The first hearing was in the County Court, the second in the Court of Appeal and the final in the House of Lords.

Their Lordships decided that the approach to comparators in *Novacold* would make it too easy for a complainant to prove disability related discrimination. They cited the example of a disabled tenant, who, due to his disability had not paid the rent. If the correct comparator is someone who is not disabled, but had paid the rent, as *Novacold* would suggest, less favourable treatment would be easy to make out, as a landlord would not seek to evict a paying tenant.

Their Lordships said that the correct approach was to use, as a comparator, a person who did not have a disability, but was otherwise in the same circumstances as Malcolm. Applying that test to the present case, it became clear that the Council would have sought possession of any flat which had been sublet in breach of the rules of tenancy and so it had not discriminated against Malcolm.

Their Lordships then considered whether it is necessary for an organisation or individual to have actual or implied knowledge of a

complainant's disability in order to be able to commit unlawful disability related discrimination. They decided that the alleged discriminator does need to have actual or at least imputed knowledge of the disability, unless the act complained of is so inherently discriminatory.

So, not only was the treatment afforded to Malcolm not less favourable than that which would have been afforded to an appropriate comparator, but was also not for a disability related reason. Rather, it was a purely housing management decision which had nothing to do with Malcolm's disability. Even if Malcolm's schizophrenia had led him to sublet the premises, this was too remote a connection to the reason for his treatment.

Tribunals will not be obliged to apply the stricter *Novacold* comparator test in disability claims, meaning that claimants will rarely clear the initial hurdle of showing less favourable treatment. In reality, we suspect that claimants will frame their complaints in terms of a failure to make reasonable adjustments. For example, an employee dismissed following prolonged disability related sickness absence might argue that it would have been a reasonable adjustment to discount any disability related absences.

It takes a long time for cases to reach the House of Lords, so we can safely assume that this judgment will not be revisited in the near future.

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