

# Spearing | Waite

Employment Law

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## Newsletter News update For HR Specialists

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### Disability Discrimination - Where are we now?

The Disability Discrimination Act 1995 ("the DDA 1995") sets out three types of disability discrimination that can occur in the employment field:

- Direct discrimination on grounds of a person's disability.
- Discrimination for a reason related to a person's disability,
- A failure to make reasonable adjustments in relation to a disabled person

The law surrounding disability claims has been recently reshaped by the case of **Mayor and Burgesses of the London Borough of Lewisham v Malcolm [2008]**. Although this case, concerned a housing authority's decision to evict a schizophrenic tenant who had unlawfully sublet his flat, the relevant housing and employment provisions of the DDA 1995 are identical and must be read in the same way. This has recently been confirmed in the employment case of **Stockton on Tees Borough Council-v-Aylott**.

The decision has far-reaching implications for employment cases with respect to claims for disability related discrimination making it more difficult for employees to bring this type of claim.

#### The Former Stance

Until now, the leading case on disability-related discrimination was **Clark v TDG Ltd t/a Novacold**. The approach adopted was that the appropriate comparator for such a claim should not simply be a non-disabled person, but someone to whom the underlying reason for claimant's treatment does not apply. So, by way of example, if a disabled person was dismissed for being off sick for six months, and if that absence was related to his disability, the comparator would be someone (whether disabled or not) who had not been off sick for six months. Since such a comparator clearly would not have been dismissed, the burden would shift to the employer to show justification for its actions.

#### The New Stance

The House of Lords in the Malcolm case held that the correct comparator is a non-disabled

**person** who, like the claimant, had unlawfully sublet his flat. Since that comparator would also have been evicted by the housing authority, no disability-related discrimination had occurred.

As the EAT noted, this has reduced the effectiveness of the disability-related discrimination provisions. It follows that the focus of most disability claims in employment cases will now be on the employer's duty to make reasonable adjustments

However, employers should not change the way in which they treat disability and disability-related matters. It is important to be mindful that the duty to make reasonable adjustments and the prohibition on harassment are unaffected.

In addition, while knowledge (or, at least, imputed knowledge) of a disability is now needed before discrimination can be established, Tribunals will no doubt take a dim view of employers closing their eyes to the obvious.

### **Holidays and long term sick**

Another recent case has also shaped the law relating to holiday rights for employees on long-term sick leave. This area has been in a state of uncertainty for some time in particular, with respect to whether holiday entitlement under the Working Time Regulations 1998 (WTR) accrues during periods of sick leave, whether a worker on sick leave (particularly where any sick pay entitlement has been exhausted) can take paid annual leave instead, and whether a worker whose employment terminates following an extended period of sickness absence is entitled to a payment in lieu of untaken holiday.

The long awaited Judgement in the case of ***Stringer and others -v- HM Revenue & Customs C-520/06*** ECJ was delivered early this year. The ECJ ruled on the effect of long-term sick leave on a worker's right to annual leave. The main points were that:

- A worker on sick leave accrues annual leave despite not working.
- It is for member states to decide whether a worker can take their annual leave during a period of sick leave.
- At the end of a leave year, a worker on sick leave who has been prevented from taking

annual leave must be allowed to carry it over and take it at a later date. The House of Lords have yet to decide whether the WTR can be interpreted so as to give effect to this.

- The right to be paid in lieu of accrued holiday on termination applies even if the worker has been on sick leave for the whole or part of the leave year.

On the face of it, it would appear that the Court of Appeal's judgment is a victory for workers with significant cost implications for employers. It is likely to provoke dismay from business owners, especially in view of the prevailing state of the UK economy. Indeed, some employers may even consider making changes to contractual sick pay entitlements in order to offset some of the costs.

### **Key update- April 2009**

#### ***1 April 2009***

##### Increase in statutory annual holiday entitlement

- Under the Working Time (Amendment) Regulations 2007 statutory annual leave entitlement under the Working Time Regulations 1998 will be increased from 4.8 weeks to 5.6 weeks.

#### ***6 April 2009***

##### Repeal of the statutory dispute resolution procedures

- The proposed changes focus on providing clearer guidance to employers and employees, with the main aim of resolving workplace disputes within the workplace itself.

##### Payment changes

- The weekly rate of Statutory Sick Pay will be £79.15 (up from £75.40).
- The prescribed weekly rate of SMP, SPP and SAP will be £123.06 (up from 117.18).

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