

Changes to Disability and Age Discrimination Law



Introduction

In the recent case of London Borough of Lewisham v Malcolm, the House of Lords has made significant changes to the concept of less favourable treatment and disability related discrimination.

Disability Discrimination

The Disability Discrimination Act 1995 as amended provides for the following categories of discrimination;

- direct discrimination
- disability-related discrimination
- subjecting a disabled person to harassment
- victimisation
- failure to make reasonable adjustments

Disability discrimination differs from other strands of discrimination insofar as there is an additional obligation on an employer to take such steps as are reasonable to prevent any policy, practice, physical feature of the place of work or any other arrangements being made which place a disabled employee at a disadvantage as compared to a non-disabled

employee. Failure to comply with the duty to make reasonable adjustments is separate ground of claim for disability discrimination. In effect the duty to take reasonable adjustments is a form of positive discrimination and places disability discrimination in a unique category in the UK.

Comparison – Less Favourable Treatment

The definition of disability related discrimination in the Disability Discrimination Act is that a person discriminates against a disabled person if

“ 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”

Until the case of Malcolm v London Borough of Lewisham, the leading authority on consideration of less favourable treatment in disability discrimination cases was the Court of Appeal decision in Clark v TGD t/a Novacold.

The Court of Appeal held that the correct comparator was a non-disabled person to whom the disability related “reason” did not apply. A problem for employers has always been long term absence due to ill-health and how to manage the situation. In such circumstances, where an employee is absent on long term leave due to a disability, the correct comparator, under the Clark case, would be a non-disabled person who was not absent through ill health.

The Court of Appeal made the point that the test does not turn on a like-for-like comparison of treatment of the disabled person and another non-disabled person in similar circumstances. as would be the position in sex discrimination and race relations cases.

In almost all cases concerning long term ill health absence, if the correct comparator was a non-disabled person who was not absent from work due to ill health, it would be virtually impossible for the employer to show that he would have treated the non-disabled person in the same way, ie such a person who was at work would clearly not be dismissed. That meant that the employer, in such cases, had to rely upon the defence of justification.

Malcolm House of Lords Decision

The Malcolm case did not relate to an employment situation, but rather to the secure tenancy of a local authority flat by London Borough of Lewisham to Mr Malcolm. Mr Malcolm suffered from schizophrenia and was a disabled person under the Disability Discrimination Act. The Local Authority discovered that the flat had been sub-let by Mr Malcolm to a third party and raised proceedings to repossess the property. Mr Malcolm argued that the action of the Council was disability related discrimination.

The House of Lords has ruled that the Clark case was wrongly decided and that the correct comparator in disability related discrimination cases will be a non-disabled person who has the same abilities as the Claimant. In the example of a long term absence situation, the comparator will now be another employee who had been off sick as long but for non-disability related reasons.

The consequence of the House of Lords decision is that it will now be sufficient for an employer to show that he would have treated a non-disabled person the same way as he treated the claimant, by dismissing him by reason of capability, and that there was no less favourable treatment.

This change to the comparator will significantly weaken the effect of the concept of “less favourable treatment” in disability legislation and it clearly is a case that is favourable to employers.

Conclusion

Over the past few years, in many cases the Courts have moved towards the interpretation of discrimination law in favour of disabled persons. The Malcolm decision has moved away from the idea of requiring to treat disabled persons “more favourably” with the important exception of the duty to make reasonable adjustments.

On the face of it, this change potentially will benefit employers on the basis that it will be easier to manage disabled persons in the workplace. In practice, it is likely that the focus of disability discrimination claims will turn to the question of reasonable adjustments. A claim for failure to meet reasonable adjustments under Section 3 of the Act will not require comparison with non-disabled employees but an objective examination as to what, if any reasonable adjustments could have been made to accommodate the employee’s disability.

In a long term ill health absence case, the focus may be on arguments from the employee’s perspective that the reasonable adjustment obligation would require the employer to allow for a further period of rehabilitation. We expect further case law to develop following upon the Malcolm decision and we will provide future updates as and when these developments occur.

AGE DISCRIMINATION

The Advocate General has now issued his Opinion in the Heyday case which relates to whether or not it is lawful for an employer to apply a default retirement age to employees at age 65.

Background

The case was raised by Heyday, a membership organisation supported by Age Concern, to challenge the UK Age Discrimination Regulations which allow for mandatory retirement of employers at age 65. The High Court in England referred the case to the European Court of Justice (“ECJ”) in December 2006.

Since the case was referred, approximately 260 applications alleging unfair dismissal on the grounds of enforced retirement at age 65 have been accepted and “stayed” (put on hold) by Tribunals pending the decision of the ECJ. The recent Court of Appeal case of Jones v Solent SD has confirmed that all Tribunal cases regarding default retirement age should be “stayed” in this fashion pending the outcome of Heyday.

European Court of Justice

The first stage of the standard ECJ process is for the Advocate-General to consider the background facts and existing law and produce recommendations for the Court which has now been done. The Advocate General takes the view that the UK Regulations retirement provisions are within the scope of the European Directive and that the Directive itself does not prevent member states from introducing retirement provisions to suit the country’s labour market needs. The term “market needs” refers to the requirement for there to be a flow of workers, whereby older workers leave the market to allow younger people to fill more senior positions freeing up lower positions and so on.

The ECJ is not obliged to follow the Advocate-General’s Opinion, however, it seems likely that the Court will agree with the Advocate-General on the retirement point which is consistent with a previous decision of the Court involving retirement law in Spain (Palacios). There is however no guarantee that this is the position the Court will ultimately adopt.

What Next?

Once a decision has been taken by the ECJ the case will return to the High Court to decide whether allowing retirement at age 65 to be a fair dismissal is objectively justified by UK labour market needs. Until such time as the High Court determines these issues, which may not be until 2011, uncertainty will continue as to the use of default retirement age.

If you would like to discuss any aspect of this update further, please contact any member of the Paull & Williamsons’ Employment Division whose details are:-

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