SUMMARY

2010/58: Discrimination on grounds of perceived disability not outlawed (UK)

<p>Under current UK law, a claim for disability discrimination can only be brought by a person who has a disability or is associated with a disabled person, not a person who is wrongly perceived as having a disability. This will change when the relevant provisions of the Equality Act 2010 come into force.</p>

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Background

There are three categories of unlawful disability discrimination under the Disability Discrimination Act 1995 ('DDA'). These are, in outline:

- 'direct' discrimination – less favourable treatment 'on the ground of the disabled person's disability';

- 'disability-related' discrimination – less favourable treatment 'for a reason which relates to the disabled person's disability' (which cannot be shown to be justified); and

- a failure to comply with the duty under the DDA to make reasonable adjustments for disabled persons.

The decision of the House of Lords (which, at the time, was the UK's highest court) in *London*

Borough of Lewisham – v – Malcolm [2008] IRLR 700 made it more difficult for claimants to bring claims of 'disability-related' discrimination. Malcolm was a non-employment case in which the claimant, who was schizophrenic, had been evicted by the local authority as a result of having sublet his council-owned flat. Mr Malcolm claimed that this amounted to disability-related discrimination, contending that he should be compared with a non-disabled person who had not sublet the flat. His argument was that he would not have sublet his flat if he had not been suffering from schizophrenia. The House of Lords, however, adopted a narrow interpretation requiring an employee to show that he or she was treated less favourably than a non-disabled employee who behaved in the same way would have been treated. As a result, Mr Malcolm could not establish that he had been treated less favourably than the relevant comparator – so the local authority was not obliged to establish that its actions were justified.

The approach in *Malcolm* has been applied in employment cases and has made it difficult, for example, to bring claims challenging dismissal for sickness absence. In order to avoid this difficulty, claimants are increasingly relying on the third category under the DDA, asserting that the employer has failed to make reasonable adjustments which would have enabled them to remain in employment.

Facts

Mr Aitken was a police constable who had previously been diagnosed with obsessive compulsive disorder ('OCD'). At an office Christmas party in late 2005, he behaved aggressively and bizarrely towards his colleagues. The incident was investigated and it was ultimately concluded, with medical advice, that he posed no danger to his colleagues or to the public. However, he had difficulty controlling his behaviour at times.

Mr Aitken took extensive sick leave. On the irregular days on which he attended work, he was not permitted to have contact with the public, on the basis of medical advice given to the employer. He was retired on medical grounds in mid-2007. He brought a claim for unfair dismissal and disability discrimination. An Employment Tribunal dismissed his claims for direct disability discrimination, disability-related discrimination and failure to make reasonable adjustments and he appealed to the Employment Appeal Tribunal ('EAT').

The EAT's Judgment

One of Mr Aitken's main arguments was that he had been treated less favourably because of

an (inaccurate) perception that he had a dangerous mental illness. Although medical advice had confirmed that he posed no danger to the public, he alleged that he had been treated as if he did. The EAT noted that the tribunal at first instance had made a clear and unchallenged finding of fact that he had been treated as he had because of how his behaviour had appeared to others, rather than any stereotypes about mental illness.

In any case, the EAT concluded that he had been treated more favourably than a person who was not suspected of having a mental illness would have been treated: a non-disabled employee would probably have been dismissed immediately. The EAT also noted that the language of the DDA did not extend to discrimination on the basis of a perceived disability; it only covered discrimination against employees who were *actually* disabled.

Another of Mr Aitken's arguments, in relation to his claim of disability-related discrimination, was that he should be compared to someone who had not behaved at the party in the way he had done. However, applying the *Malcolm* ruling, the EAT held that the correct comparator was an employee who had behaved in the same way but was not disabled.

In relation to the claim of failure to make reasonable adjustments, the EAT confirmed the tribunal's decision that the employer was entitled to take into account the need for a police officer not to appear to present a risk to the public, even if he did not in fact pose a risk.

Commentary

The Malcolm decision has created significant difficulties for claimants alleging disability-related discrimination. The effect of the House of Lords' approach to comparators is to reduce the distinction between 'direct' and 'disability-related' discrimination to vanishing point. The Equality Act 2010, which consolidates and harmonises existing UK discrimination law but has yet to be brought into force, contains measures to remedy this problem. It introduces a new category of *indirect* disability discrimination, in line with other strands of discrimination law. If a disabled employee can show that he or she is placed at a disadvantage by a provision, criterion or practice, the employer must show that its provision, criterion or practice is justified to avoid a finding of unlawful indirect discrimination.

In addition, the Equality Act creates a new category of 'discrimination arising from disability' which will replace 'disability-related' discrimination. This is, however, fairly close conceptually to indirect discrimination and the overlap between the new categories is likely to give rise to confusion. The relevant provisions of the Equality Act came into force on 1 October 2010.

The Equality Act will expressly allow claims to be brought on the basis of perceived disability, which Mr Aitken was unable to do under the DDA. Another recent case, J v DLA Piper (15 June 2010, UKEAT/0263/09) has also confirmed that the current legislation does not cover claims based on perceived disability. It is interesting that in both cases the EAT declined to adopt a purposive approach to interpreting the legislation. This contrasts with the very creative approach in *EBR Attridge Law LLP –v- Coleman* (No.2) [2010] IRLR 10 (see EELC 2010/9, Issue 1, March 2010), where the EAT determined that a individual could bring a claim under the DDA for discrimination on the grounds of their association with a disabled person, despite the clear drafting of the statute. It remains to be seen whether this signals a retreat from the EAT's recent phase of judicial activism or simply a pause for thought pending the Equality Act entering into force.

Comments from other jurisdictions

The Netherlands (Peter Vas Nunes): The Dutch Disability Discrimination Act, which came into force in 2003 as a partial transposition of Directive 2000/78/EC, has from the outset outlawed discrimination on the basis of disability, whether real or perceived. A perceived disability covers both (i) the situation where the employer and/or the employee mistakenly believe(s) there to be a 'handicap' in the meaning of the Act, i.e. an impairment which has a substantial and long-term adverse effect on the person's ability to perform his work (e.g. the employee has a HIV infection, which in itself does not qualify as a 'handicap') and (ii) the situation where the employee and/or the employer mistakenly believe a real impairment to have a long-term adverse effect (e.g. the employee has suffered a stroke, which need not necessarily cause long-term impairment). A recent example where a court dealt with a case of perceived disability concerned an employee who was hired on 7 January with effect from 1 March 2010. On the evening of 7 January, just hours after the parties had signed the employment contract, the employee had a heart attack. He did not mention this to his employer. However, in a telephone conversation with his employer on 18 February, he mentioned that he would be unable to come to work on 1 March because he was having heart problems. He was fired on account of his medical condition, which – so the employer wrote – would make it impossible for the employer to purchase sickness/disability insurance (that would cover loss resulting from his absence from work) for the first five years. The legal issue was whether the dismissal was for reason of a 'disability'. Although Dutch law does not define this concept, it is generally held to mean a permanent or long-term inability to do one's job. A heart attack need not cause permanent or long-term disability. In fact, many employees who have suffered a heart attack are fully fit for their job. Therefore, had the Disability Discrimination Act outlawed only **real** disability, the plaintiff might have lost the case. However, the fact that the employer mentioned uninsurability for a period of five years indicated that it believed – rightly or

mistakenly – that the disability would (or might) last a long time. Hence, the employee was deemed to have been dismissed on account of a perceived disability and his claim was upheld. In an earlier judgment, in 2007, an employer was ordered to reinstate someone it had dismissed before his first day at work on the grounds that he would be unable to drive a car for at least six months following the first day of work, having had a stroke shortly after being hired. The court found that the plaintiff had a real or perceived disability, and that in both cases the dismissal was discriminatory.

Subject: Disability discrimination

Parties: Aitken – v – Commissioner of Police of the Metropolis

Court: Employment Appeal Tribunal

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Case number: UKEAT/0226/09

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Creator: Employment Appeal Tribunal
Verdict at: 2010-06-21
Case number: UKEAT/0226/09