

# Ruling to have far-reaching consequences

A LANDMARK ruling by the House of Lords will have major implications for the way employment lawyers, businesses and many others interpret and implement the Disability Discrimination Act (DDA). The ruling is likely to curtail the opportunities for staff to bring claims under the DDA against employers.

The case was London Borough of Lewisham v Malcolm and involved an application by

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Lewisham to recover possession of a secure tenancy, unlawfully sub-let by the tenant, Courtney Malcolm. It was not disputed that in sub-letting his flat Mr Malcolm was in breach of his tenancy agreement. However, Mr Malcolm suffered from schizophrenia and said Lewisham's actions amounted to unlawful discrimi-

nation under the DDA. Mr Malcolm argued:

■ The reason he sub-let his flat was related to his disability, because it had effected his ability to rationalise and think clearly, leading to him making a serious error of judgement in believing it was appropriate to sub-let;

■ The sub-letting, being the reason for the application to recover possession, was a reason related to his disability; and

■ As Lewisham would not have applied to recover possession from someone to whom that reason (the unlawful sub-letting) did not apply, he had been unlawfully discriminated against for a reason related to his disability.

The Court of Appeal earlier agreed with Mr Malcolm's position and held, in order to assess whether Mr Malcolm had been unlawfully discriminated against, that it was necessary to

## on the interpretation of discrimination act

compare his treatment with the likely treatment of someone who had not unlawfully sub-let. As Lewisham would never have applied for an eviction order against someone who had not unlawfully sub-let, that would always lead to a conclusion of unlawful discrimination, with limited grounds under which that could ever be justified.

The Lords allowed Lewisham's appeal and over-

turned the Court of Appeal decision. Employers, and all who now have duties under Part III of the DDA, must now reassess the meaning of the act and consider the following principles:

■ A person can only be liable for discrimination for a reason related to a disability if they know or ought to know the individual is disabled;

■ The phrase "a reason which relates to a disability" has to be

construed narrowly. If an employer dismisses somebody for being off work sick for a year, the reason is absence from work

■ The correct comparator is somebody to whom the underlying reason still applies; ie, someone who was also absent but was not disabled.

The Lords concluded Lewisham would have treated anyone who had unlawfully sub-let their flat in the same

manner as Mr Malcolm, and it was not relevant the alleged reason for Mr Malcolm so discriminated to his disability. He had not therefore been less favourably treated for a reason related to his disability, or unlawfully discriminated against.

The implications of this judgment will be felt for years to come.

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SCOTSMAN, 11 08 08, pp. 38-39