

Short and intermittent sickness absences & disability

19 May 2016

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Key principles

- Sick absence management decisions ultimately rest with management
- However, management must make (and be able to evidence) well-informed decision-making...
 - ‘Band of reasonable responses’ approach
 - Potential contributors → HR, OHA, Disability expert, H&S assessor

Attendance policy & disability – legal considerations

- Fair dismissal principles, notably adopting a fair procedure throughout...
- Disability discrimination:
 - Discrimination arising from disability) ...both include the concept of
 - Indirect disability discrimination) justification...which in turn depends upon the employer fulfilling...
 - The Duty to make reasonable adjustments -> cornerstone of disability law

Discrimination arising from disability

Hall v Chief Constable of West Yorkshire Police

- To establish a claim for discrimination arising from disability there need only be a "loose" causal link between the disability and any unfavourable treatment – a relatively low hurdle for claimants to satisfy
- Sufficient to show that the unfavourable treatment was caused by a consequence of claimant's disability – employer's motivation is irrelevant
- Employers have an opportunity to defend a claim by showing that either the unfavourable treatment was justified or else that they did not know / could not reasonably have known that the employee was disabled

Reasonable adjustments and absence management

Griffiths v Secretary of State for Work and Pensions (Court of Appeal)

- DWP operated a staged attendance management policy which provided for an escalating warning process, culminating in dismissal or demotion
- Policy was activated when an employee reached "the consideration point" – 8 working days' absence in any rolling 12 month period
- Policy provided that the consideration point could be extended as a reasonable adjustment for disabled employees
- G incurred 62 days sickness absence due to post-viral fatigue and fibromyalgia

Reasonable adjustments and absence management

- G was issued with a written warning on reaching the consideration point
 - no disability-related extension was granted

- G brought a grievance which was rejected

- G brought a disability discrimination claim for failing to make reasonable adjustments, alleging that the DWP should have:
 - disregarded the absence and have revoked the warning; and/or
 - extended the consideration point (possibly to 20 days)

Reasonable adjustments and absence management

- ET and EAT rejected G's disability discrimination claim, holding that:
 - The duty to make reasonable adjustments was not engaged:
 - G had not been put to a substantial disadvantage since the attendance management policy was applied to all employees;
 - G had been subject to the same sanctions as would have been applied to a non-disabled person who had been absent for the same period
 - The adjustments sought by G were unreasonable in any event
- G appealed to the Court of Appeal...

Reasonable adjustments and absence management

Court of Appeal ruled that:

- PCP = the requirement to maintain a certain level of attendance at working order not to be subject to the risk of disciplinary sanctions (rather than the entire policy) – this requirement would substantially disadvantage disabled employees with disability-related sick absences
- ET and EAT were wrong to conclude that the duty to make reasonable adjustments was not engaged because the absence management policy was applied equally to everyone – duty is activated once there is evidence that a PCP places a disabled person at a substantial disadvantage because of their disability
- The sort of modifications to the attendance procedure sought by G could amount to reasonable adjustments...but did not do so here

Attendance Policy management – practical considerations

- Can adjustments be made to prevent disability-related sickness absences altogether? ...if not...
- Can adjustments be made to minimise disability-related sickness absences such that AP trigger points are not breached? ...if not...
- Would it be a reasonable adjustment to extend AP trigger points and, if so, by how much?

Relevant factors...

- big picture commercial factors
- local/case-specific commercial factors
- personal factors (incl. whether any extension arbitrary)

Attendance policy management – considerations

- Has point been reached when warnings should be triggered? ...if so...
 - Employer should warn the employee before implementing any warnings (ideally in non-disciplinary language) and should continue to review adjustments to avoid/minimise absences
- Despite warnings, has the point been reached when the consideration of dismissal should be triggered? ...if so...
 - Are there adjustments which might avoid dismissal, e.g. redeployment to a different role?
 - Ill health retirement?

Q & A

- Any questions?