Employment

Disabled Employees: Reasonable adjustments and attendance policies

A problem that many employers face with disabled employees is how to avoid discrimination when dealing with absences. As employers will be aware, they have a duty to make reasonable adjustments where they know (or ought reasonably to know) that a person has a disability and there is a provision, criterion or practice (PCP) which places the disabled person at a substantial disadvantage compared to those who are not disabled. Failure to make a reasonable adjustment amounts to discrimination. The duty is set out in section 20(3) of the Equality Act 2010 (EqA 2010), which provides:

> "Where [Company] A's provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage in comparison with those who are not disabled, A must take such steps as it is reasonable to have to take to avoid the disadvantage."

In a recent important court case (*Griffiths v Secretary of State for Work and Pensions [2015] (Griffiths)*) the Court of Appeal confirmed that an employer's duty to make reasonable adjustments for a disabled employee can apply to an attendance (or absence) management policy and when issuing disciplinary warnings for sickness absence. This means that, where an employee's disability is more likely to cause them to be absent from work than non-disabled colleagues, employers should adjust their policies to prevent disabled employees from being put at a substantial disadvantage.

In *Griffiths*, the claimant argued that the Department for Work and Pensions' (DWP) absence management policy, which was activated when an employee reached 'the consideration point' of eight working days' absence in any rolling 12 month period, was discriminatory. Ms Griffiths was absent for 62 days due to disability-related illness and, as a result of the DWP's attendance management policy, she reached a consideration point and was issued with a written warning. She argued that this was discriminatory because the DWP included her disability-related absences when calculating whether the consideration (or 'trigger') point had been reached.

The Court of Appeal agreed that, where an employee's disability leads to a level of absence which a non-disabled employee is unlikely to have, the employer has a duty to make reasonable adjustments in respect of the attendance management policy.
The question of the extent to which adjustments are reasonable will depend on the particular facts of the case in question. Employers are advised to consider adjusting their attendance management policy in cases of absences involving disability and consider what reasonable adjustments might be necessary to avoid the policy discriminating against disabled employees.

By way of some good news, however, employers are not required to consider adjustments that do not help to integrate a disabled employee in the workforce. For example, the Court of Appeal have previously held that extending sick pay for a disabled employee was not an adjustment which it would have been reasonable to require the employer to make (*O'Hanlon v Commissioners for HM Revenue & Customs* [2007] EWCA Civ 283).

In light of the fact-specific nature of disability discrimination, employers should take specialist legal advice before addressing any absence or sickness issues involving disabled employees.

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