Absence management and the duty to make reasonable adjustments | back to top

The Court of Appeal has recent handed down judgment in the case of Griffiths v Secretary of State for Work and Pensions (2015 EWCA Civ 1265). The principal issue in this case was whether the duty to make reasonable adjustments for a disabled employee (under section 20 of the Equality Act 2010) is capable of applying to an absence management policy. The judgment is significant in that it makes it clear that the duty may be engaged in such circumstances.

Background

The claimant suffered from post-viral fatigue syndrome and fibromyalgia and had a number of periods of absence from work, which were largely due to her disability. Her absence was dealt with in accordance with the respondent's Absence Management Policy (the Policy), which provided that formal action would be taken where absences exceeded eight days in any rolling period of 12 months. The Policy also provided that adjustments could be made for disabled employees.

On her return to work, following a continuous period of absence of more than 60 days, the claimant was given a written improvement warning under the Policy and was informed that any further unsatisfactory attendance could lead to a more serious sanction. The claimant raised a grievance arguing that it would be reasonable for the respondent to (a) disregard the absence period with the result that the warning was withdrawn; and (b) extend the trigger point at which the Policy would be engaged in the future. The claimant's grievance was rejected and she subsequently brought an employment tribunal claim.

The respondent argued that the duty to make reasonable adjustments had not been triggered, because the Policy applied to all employees and a non-disabled employee would have been treated in the same way as the claimant. It also contended that the reasonable adjustments duty should be confined to measures that would enable a disabled employee to return to work or continue working.

The Tribunal and the Employment Appeal Tribunal decided that there had been no breach of the duty to make adjustments and the claim failed. The claimant therefore appealed to the Court of Appeal.

Court of Appeal decision

The Court of Appeal essentially said that where an employee's disability leads to a level of absence which a non–disabled employee is unlikely to have, the rules of an attendance management policy will put the disabled employee at a substantial disadvantage. It also rejected the respondent's contention that the reasonable adjustments duty should be confined to measures that would enable a disabled employee to continue working. It decided that any modification which would or could remove a substantial disadvantage to a disabled person is capable of being relevant for these purposes.

That said, despite the Court of Appeal overturning the Tribunal's conclusions, it upheld the tribunal's finding that, on the facts of the particular case, the adjustments the claimant proposed were not reasonable.

Conclusion

As a result of the Court of Appeal's decision, it now seems clear that, in cases where a disabled person has a disability-related absence which prompts the application of an absence management policy, the duty to make reasonable adjustments will normally be engaged. It will then be for employers to consider on the facts of each case what adjustments, if any, would be reasonable in the particular circumstances.

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