New guidance on handling disability-related absence

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The Court of Appeal in *Griffiths v Secretary of State for Work and Pensions* (SOSWP) has grappled with the tricky issue of an employer's duties when trying to manage disability-related absence.

The facts of the case are straightforward. Ms Griffiths had been employed by SOSWP for over twenty years when she began to experience the symptoms of post viral fatigue and fibromyalgia. SOSWP admitted that she had a disability for the purpose of the disability discrimination legislation. Upon her return from a 66 day absence from work, 62 of which were related to her disability, she was given a formal written improvement warning under an Attendance Management Policy. The Policy envisaged that formal action might be taken against an employee after they had accrued 8 working days of sickness absence in any 12 months, and Ms Griffiths' absence was almost eight times longer than this. Ms Griffiths was informed that further absence might lead to more serious sanctions. After pursuing a grievance unsuccessfully, she submitted a complaint to the Employment Tribunal.

Ms Griffiths asserted that SOSWP should have made adjustments to its Attendance Management Policy to take into account the fact, as a disabled person, she was more likely than a non-disabled person to be absent from work – and therefore to be disadvantaged by the Policy. She said that SOSWP's failure to:

- disregard her disability-related absence (and therefore rescind the warning); and
- increase the point at which it would consider taking formal action against her as a disabled person in relation to sickness absence ('the consideration point');

Amounted to a failure to comply with its legal duty to make reasonable adjustments when a provision, criteria or practice puts a disabled person at a substantial disadvantage compared to non-disabled colleagues.

The Court of Appeal has confirmed that an employer does have a duty to make reasonable adjustments to an attendance management policy if an employee's disability makes them more likely to be absent from work than non-disabled colleagues.

This overrules previous case law on this issue (which said that disabled employees were not disadvantaged when compared to non-disabled employees absent for the same period, and therefore the duty to make reasonable adjustments was not engaged).

However, the Court of Appeal also decided that it was not reasonable to expect SOSWP to adjust its Policy as Ms Griffiths had suggested. Therefore it did not fail in its legal duties to her.

In reviewing the findings of the original tribunal, the Court of Appeal was satisfied that there were good reasons for not making the specific adjustments requested. In particular, it noted that this was not a one-off health condition and further periods of potentially lengthy absence would, on the medical evidence, be likely to arise. In that context, it was not reasonable to expect SOSWP to write off the 62 day period of absence (which was almost eight times longer than the consideration point) and SOSWP was entitled to have regard to the whole of Ms Griffiths' absence record when making a decision on accommodating her absences. Furthermore, there was no obvious period by which the consideration point should be extended; any extension is effectively arbitrary and a relatively short extension would (in cases where future absences are likely to be long) be of limited, if any, value. As earlier cases have recognised, the purpose of disability discrimination law is to enable disabled employees to remain in employment, not to make long-term provision for them when they are not able to work.

Employers may take some comfort from this part of the Court of Appeal's judgment. However, as Lord Justice Elias pointed out very clearly on the Court's behalf, this case only concerned one part of the protection afforded to disabled employees: the positive duty to make reasonable adjustments in relation to the implementation of an attendance management policy. Had SOSWP wanted to dismiss Ms Griffiths, other laws would have kicked in – in particular the requirement not to treat a disabled person unfavourably for a reason arising out of disability. But just as a failure to make adjustments might be justified on the basis that they are not reasonable, unfavourable treatment might also be justified if it is proportionate in all the circumstances.

This leads us to the key lesson to learn from this case: our discrimination laws are numerous and wide-ranging and employers will rarely be able to escape their ambit; however, most of those laws also provide employers with an opportunity to justify their actions to avoid liability. An employer who thinks about and handles individual cases carefully and sensitively, attempting to balance its own interests with those of its employees, ought never feel the wrath of the law.

Key to this is:

- working from a clear understanding of the medical position and the prognosis;

- pressing occupational health advisors to give clear advice and guidance;
- focusing on whether or not there are adjustments that could facilitate a return to work rather than prolonging the absence;
- being flexible about the application of an absence management policy if it is clear that the employee is soon going to be fit to return.

For advice on handling sickness absence or any other employment matter, please contact a member of the Withers Employment Group.

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