West Midlands employers
PEOPLE & LEADERSHIP SOLUTIONS

HR Bulletin

E-Update 56 - December 2015

Sickness Absence – Reasonable Adjustments and Proportionality?

One of the hardest issues to judge in employment law is the extent of an employer's duty to make reasonable adjustments for employees with a disability. This is particularly the case where the adjustment in issue is not the purchase of specialist equipment, or alterations to the working environment but the application of the employer's absence management policies.

A précis so far

The case law on reasonable adjustments has not always been helpful – particularly when it comes to the issue of absence. In two cases, *Royal Bank of Scotland v Ashton* and *Griffiths v Secretary of State for Work and Pensions* the EAT held that there was actually no duty to make reasonable adjustments to an absence management policy. The EAT took the view that provided the policy applied equally to disabled and non-disabled employees it could not cause a substantial disadvantage to a disabled employee when compared with an employee who was not disabled. This was so even if it could be shown that the disability increased the likelihood that the employee would be absent, because a non-disabled employee with the same level of absence would be treated just the same.

This always felt wrong and the position has now been clarified by the Court of Appeal considering Ms Griffiths' appeal[1]. The Court makes it clear that the comparison exercise should be carried out with someone who does not have the disability or the absence that it causes. An absence management policy that kicks in once absence has reached a particular 'trigger' level therefore causes a substantial disadvantage to a disabled employee whose disability leads to increased absence from work. Put this way, it seems quite obvious really.

Disregarding Triggers

Another issue put to rest by the Court of Appeal is whether disregarding a trigger point and not giving a warning to an employee is the sort of 'step' that is envisaged by the duty to make reasonable adjustments. In *General Dynamics Information Technology Ltd v Carranza* the EAT held that an adjustment had to consist of a positive step aimed at getting the employee back to work, not merely the passive step of ignoring a warning. However the Court of Appeal in Griffiths has said that there is no need to take such a narrow view. The issue is whether the adjustment would remove – or partially remove – the disadvantage that the employee would otherwise suffer.

Reasonable adjustments

All of this means that the duty to make reasonable adjustments is indeed engaged when an employee with disability-related absence comes within the ambit of the employer's absence management procedures.

[1] Griffiths v The Secretary of State for Work and Pensions, Court of Appeal, 10/12/15 [2015] EWCA Civ 1265

However, the Court of Appeal in Griffiths also upheld the Tribunal's finding that there had been no actual failure to make reasonable adjustments in that case. The employer could not be expected to simply write off the extended absence – some 62 days - that the employee had taken even if it was related to her disability. And when it came to the extension of trigger points, the Tribunal had been entitled to hold that it was not clear how much extra absence should be allowed to alleviate the employee's worries about a potential dismissal. There was no suggestion that all disability related absence had to be discounted and there was no basis on which a fair figure could be arrived at. In particular where the absences caused by a disability were likely to be frequent and extensive there was limited value in granting a relatively short extension of a trigger point.

The result of Griffiths therefore is that the duty to make reasonable adjustments does arise in the context of absence management but we are no nearer to knowing what adjustments it is reasonable to make when an employee's disability causes a serious absence problem. Certainly where the disability causes just a few extra days absence every year then the employer should probably adjust any trigger points to ensure that the employee does not go on to receive a warning – but in the local Government context most employers are doing that already. It is the more serious cases of prolonged and frequent absence that cause the difficulty.

Pragmatism

The Court of Appeal acknowledged that that there comes a point when an employer is entitled to say that it will not continue to accommodate the employee's absences any longer. Just when that point is reached, however, remains difficult. The Court made it clear that the employer is entitled to take the whole of the employee's absence record – including disability-related absence - into account but also stressed that the employer's legal obligations were not confined to the duty to make reasonable adjustments. An employee would also be entitled not to be discriminated against under s.15 of the Equality Act.

There is increasing emphasis in the case law on s.15 which provides that it is discrimination to treat an employee unfavourably because of something 'arising in consequence' of a disability. Any decision to dismiss an employee for absence will very likely meet this test and so the question will be whether the dismissal is 'a proportionate means of achieving a legitimate aim'. Just how this test relates to the more familiar question of reasonableness in an unfair dismissal claim is not entirely clear - but it does seem that there is no 'band of reasonable responses' test. The Tribunal will have to reach its own view as to whether what the employer has done is proportionate.

Darren's Thoughts

In my experience employers in local government are only likely to dismiss an employee whose absence is clearly a serious and on-going concern and (in the case of long-term absence) where there have been several attempts to find ways of returning the employee to work. This does not guarantee that the proportionality test will be met, and Tribunals have in the past been slow to understand that public sector employers cannot simply absorb an unlimited amount of absence. Where a local authority feels it has reached the end of the line with an employee it should therefore be prepared to argue its corner and explain to the Tribunal why a dismissal was appropriate. Proportionality is about balancing the rights of the employee against those of the employer. The key thing to focus on the employer's side is the impact of the absence on the employer's ability to deliver high quality services to the public as well as the effect that the absence has on the other employees who have to provide cover for their absent colleague. After all, the purpose of disability discrimination law is to remove the obstacles that could prevent disabled employees from participating in the workplace on an equal basis with others. It is not there to require employers to just put up with a bad situation. The Court of Appeal decision in Griffiths provides support to an employer that tries to solve an absence problem, but is not afraid to act when no other solution is available.

Keep in Touch

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Christmas Crackers – How not to get a job?

This time of year, the numerous online journals and commercial networkers compete for the professional equivalent of the Christmas Cracker humour. In the festive spirit we thought we'd share one or two which caught our eye...

http://www.recruitmentgrapevine.com/ shared with the world the story of a jobseeker roundly mocked on Twitter after sending his Christmas wish list instead of his CV when applying for a job.

Adding fuel to the fire, the MD of the recruiter, pop culture online publication, What Culture decided to share the mishap with the world through his Twitter account revealing the details in full. Inevitably, the social media world immediately took to their keyboards, with offerings such as *"Instead of shrugging and saying 'I don't know' when he is asked by relatives, this man has a plan. Organised and strategic. Hire him!"* together with *"A man who doesn't know how to prioritise the DVDs he wants is not leadership material."*

But the unfortunate jobseeker is not the only candidate who has made a mistake during the application process.

http://www.careerbuilder.co.uk/ used their Twitter feed to share examples of some of the most ridiculous mistakes and lies found on CVs. From their longer list here's our top ten, counting down to number one in true 'pop chart' style;

10. Applicant's stated job history had him in three different companies and three different cities simultaneously
9. Applicant for a driver position claimed to have 10 years of experience but had only had a driver's licence for 4 years
8. Applicant said to have gotten fired "on accident"
7. Applicant's reference was an employer from whom they had embezzled money and had an arrest warrant out for the applicant
6. Applicant vying for a customer service position gave "didn't like dealing with angry customers" as the reason for leaving her last job
5. Applicant wrote "whorehouse" instead of "warehouse" when listing work history
4. Applicant's email address was **2poopy4mypants@....**
3. Applicant claimed to be a former CEO of the company to which they were applying
2. Applicant claimed to be a Nobel Prize winner

and award for most innovative....

1. Applicant claimed to have worked in a jail when they were really in there serving time

More seriously, CareerBuilder also asked employers on attributes they like to see, with feedback that they prefer CVs that: are customised for the position (61%); are accompanied by a cover letter targeted around the job (49%); addressed to the hiring manager or recruiter by name (26%) and including links to applicant's online portfolio, blog or website (21%).

Happy Christmas and a post CSR new year to you all!