



HR Broadcast –

Disability Discrimination and Sickness Absence

Should company rules relating to sickness absence be relaxed for people suffering from a disability where that disability causes them more absence than people without a disability?

The danger for the employer is that setting rules where a disabled person might be less likely to be able to comply could amount to indirect discrimination. It needs to be remembered that in order to bring a claim for discrimination no length of service is needed and there is no cap on awards which may be made by a tribunal.

The dilemma may be encountered in particular where an employer defines a particular number of days' absence in any one year, and once any employee passes that number, they may become the subject of disciplinary proceedings.

We know that it is incumbent upon employers to make reasonable adjustments for people with disabilities but there have been many cases on whether reasonable adjustments should extend to allowing extra sickness time off work.

Employers sometimes call the defined level of absence either a trigger point or a consideration point.

A recent case involved an employee of the Department for Work and Pensions (G). After extended absence which passed the consideration point the employee concerned was given a warning. G in turn raised a

grievance and argued that two reasonable adjustments should have been made to the policy to avoid placing her at a disadvantage.

G argued that the whole of a long period of absence should have been disregarded and also that she should be permitted to have longer periods of absence under the policy before she faced sanctions.

The employer dismissed G's grievance and G took her case to the Employment Tribunal. She lost both at the Tribunal and on appeal to the Employment Appeal Tribunal. Applying existing case authority, both levels of Tribunal took the approach that the policy was applied equally to all employees and was therefore not discriminatory.

The case went to the Court of Appeal which concluded that earlier case authority was wrong. To apply the same criteria to a disabled person would place them at a substantial disadvantage, exactly what the law on discrimination tries to avoid.

It was also clear that the adjustments proposed by G would have the effect of removing any disadvantage to her. The question was then whether or not these were reasonable adjustments and this is where G failed on appeal. Further periods of absence were likely to arise and it was unreasonable to expect the employer to write off the extended initial absence even if this was caused by a condition relating to the disability.



On the question of extending the latest absence, which lead to disciplinary proceedings, the Appeal Court concluded that there was no obvious period by which the period of absence should be extended. So the conclusion is that unless the employee can propose an extended period at which the consideration point should bite, after which there is a realistic probability of the employee returning to work, then the Employer was justified in reaching the conclusion it did.

The end result is that employers must give proper consideration to allowing more absence than would normally be allowed to non-disabled employees. The question would be this; will allowing a reasonable amount of additional absence remove the disadvantage to this employee? If it would make no difference and if there is still little chance of the employee returning to work then this would not amount to a reasonable adjustment.

It must be remembered that each case will turn on its own individual facts and the greatest care must be taken in pursuing disciplinary matters against disabled people who are absent as a result of their disability. A reasonable step by the employer might involve obtaining a report from an Occupational Health specialist or a GP report as to the likely date of return to work and the nature of the work which the individual will be able to do on return. Then the employer will be better informed and more likely to reach a conclusion which would be treated as reasonable by a tribunal.