

What are you to do with a disabled employee, if you have adjusted his or her work pattern but attendance or performance is not improving?

Paula Cole



# How long must you wait before:

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- Reviewing the arrangement
- Dismissing the employee

- Duty to make reasonable adjustments
- Disability Discrimination
- Unfair Dismissal

# *Griffiths v The Secretary of State for Work & Pensions (1)*

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- Mrs Griffiths was employed as an Administrative Officer from 1976
- In October 2009, she started to suffer from fibromyalgia
- In May 2011, following a 66 day absence (62 of which related to her fibromyalgia) she was given a formal written improvement warning under the DWP's Attendance Management Policy
- The DWP Policy provided that formal action could be taken against an employee where their absence exceeded 8 days in any rolling period of 12 months (the Consideration Point)

# *Griffiths v The Secretary of State for Work & Pensions (2)*

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- Mrs Griffiths raised a grievance stating she was disabled and that, due to her disabled status, her employer should have made the following reasonable adjustments:
  - the period of disability related absence which led to the written warning should have been disregarded and the warning rescinded; and
  - the Policy should be amended to allow her in the future to have longer periods of absence before she is placed at the risk of sanctions

# *Griffiths v The Secretary of State for Work & Pensions (3)*

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- Mrs Griffiths' grievance (and appeal) were dismissed and she issued a claim in the Employment Tribunal for failure to make reasonable adjustments under Section 20 of the Equality Act
- Mrs Griffiths' claim failed in both the Employment Tribunal and the EAT and it went to the Court of Appeal

# *Griffiths v The Secretary of State for Work & Pensions (4)*

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- The Judge in the Court of Appeal looked at Section 20 of the Equality Act which says:
  - “... (2) the duty comprises the following three requirements:
    - (3) the first requirement is a requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage ...”

# *Griffiths v The Secretary of State for Work & Pensions (5)*

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- The PCP in this case was agreed to be:
  - “a requirement to attend work at a certain level in order to avoid receiving warnings and a possible dismissal”

# *Griffiths v The Secretary of State for Work & Pensions (6)*

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The Court of Appeal found that a disabled person such as Mrs Griffiths is put at a substantial disadvantage by the PCP in this case.

Whilst all employees, both disabled and able bodied, will suffer stress and anxiety if they are ill in circumstances which may lead to disciplinary sanctions, the risk of this occurring is greater for disabled employees whose disability results in more frequent and perhaps longer absences

# *Griffiths v The Secretary of State for Work & Pensions (7)*

- Unfortunately for Mrs Griffiths, the Court of Appeal also held that neither of the steps she had suggested were reasonable adjustments.
- Because of the nature of Mrs Griffiths' illness, her 62 day absence was not exceptional and further periods of lengthy sickness absence were likely to arise – so it was not reasonable to expect the DWP to disregard such an extended period of absence.
- In a case such as Mrs Griffiths, when future absences are likely to be long, a short extension to the time was pointless and therefore not reasonable
- An employer is entitled to say, after a pattern of illness absence that he cannot accommodate the employee's absences any longer.

# *Griffiths v The Secretary of State for Work & Pensions (8)*

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- In reality, this case was about whether it was appropriate for the DWP to impose a disciplinary sanction given that the absence was disability related.
- It is that treatment which was at the heart of Mrs Griffiths' complaint, not the failure by the DWP to make a reasonable adjustment

# *Griffiths v The Secretary of State for Work & Pensions (9)*

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- So this wasn't really a claim that Mrs Griffiths should have brought under Section 20 for failure to make a reasonable adjustment
  
- What she should have done is bring a claim under Section 15 for discrimination arising out of disability

# *Section 15 Equality Act – discrimination arising from a disability*

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- Section 15 of the Equality Act provides:
  - “ ... a person (A) discriminates against a disabled person (B) if:
    - a) A treats B unfavourably because of something arising in connection with B’s disability;  
and
    - b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim”

- The application of sanctions and/or the dismissal of an employee for absences which are disability related would amount to unfavourable treatment arising as a consequence of the disability and the employer would therefore need to justify it.
- As it is unfavourable treatment – not less favourable it does not matter how a non-disabled person is treated

- Mrs Griffiths could also have brought a claim for indirect disability discrimination under Section 19 of the Equality Act which provides:
  - 1) a person (A) discriminates against another person (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to the protected characteristic of B;
  - 2) ... a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B if:
    - a) A applies or would apply, it to persons with whom B does not share the characteristic,
    - b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared to persons with whom B does not share it,
    - c) it puts, or would put, B at a disadvantage and
    - d) A cannot show it to be a proportionate means of achieving a legitimate aim

# *Dismissal of a disabled employee without making a reasonable adjustment – potential liabilities*

- So an employer who dismisses a disabled employee without making a reasonable adjustment which would have enabled an employee to remain in employment is potentially liable for:
  - 1) failure to make reasonable adjustments – Section 20 Equality Act;
  - 2) discrimination arising out of disability – Section 15 Equality Act;
  - 3) indirect discrimination – Section 19 Equality Act

AND

Unfair dismissal

- Unless the employer can show:
  1. it wasn't a reasonable adjustment;
  2. they can justify discrimination arising out of disability;
  3. they can also justify indirect discrimination;
  4. they followed a fair procedure; and
  5. it was within the range of reasonable responses

So what would a reasonable adjustment have been in this case?

- Paragraph 6.2 of the Equality and Human Rights Code of Practice:
- “The duty to make reasonable adjustments ... requires employers to take positive steps to ensure that disabled people can access and progress in employment. This goes beyond simply avoiding treating disabled workers.. unfavourably and means taking additional steps to which non-disabled workers..are not entitled.”

# *Reasonableness of the adjustment*

In deciding whether a step is reasonable the following factors should be taken into account:

- Size of the employer;
- Practicability of the proposed step;
- Cost of making the adjustment;
- Extent of the employer's resources; and
- Whether the step will be effective or not



# *Justifying indirect discrimination and discrimination arising from a disability*

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How do employers justify indirect discrimination and discrimination arising from a disability?

- By showing that it is “a proportionate means of achieving a legitimate aim”

- What does that mean in the context of managing disabled employees in terms of attendance and performance at work?
- Legitimate aims could be seeking to achieve consistent attendance at work; and performance of duties consistent with role
- A warning process could be a proportionate means of achieving both those aims

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Can an employer fairly dismiss an employee for poor performance and/or attendance?

- Yes – provided they follow a fair procedure
- And it is a reasonable response in the circumstances

How long must you wait before reviewing the arrangements and dismissing an employee depends on the facts of each case (including the medical evidence and the job the employee does)

But, subject to the facts of each case employers are entitled to say “enough is enough”

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