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Sick pay policies – a priority of rights?

ANNE PRITAM

THE QUESTIONS



If – as is increasingly common – an employer maintains fully pay through cancer, why not offer the same in mental health situations?

Do policies of this type – whether formal or informal – leave you open to challenge?

Sick leave and sick pay



- **Formal policies**

- Clear
- Written
- Consistent
- Centralised
- Objective
- Inflexible
- Too detailed

- **Informal approaches**

- Inconsistent
- Unknown
- Flexible
- Agile
- Feudal
- Bespoke

- Discretionary flexibility, a policy or even contractual concessions will put paid to “substantial disadvantage”

THE QUESTIONS



- **Griffiths v DWP 2015 (CA)**
- **Williams v Trustees of Swansea Uni pension scheme 2015 (EAT)**
 - Where a disabled person is treated more favourably than a non-disabled person
 - s/he cannot complain that s/he is less well treated than another disabled person.
- **The older case law**
 - Purpose of sick leave & pay
 - Disabled employees ≠ objects of charity
 - Disabled are at an advantage
- **Section 15 arguments?**

What is a disability?



- **Equality Act 2010**
- **S6(1) A person P has a disability if:**
 - (a) P has a physical **or mental** impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
- **s6(4) This Act... applies in relation to a person who has had a disability as it applies in relation to a person has the disability ...**

What is a disability?



- **Certain conditions = disability**
 - Cancer
 - HIV infection
 - Multiple sclerosis
- **Deemed disability - set by regulations**
 - blindness
 - severe sight impairment
 - partial sight

What is a disability?



- **Progressive conditions**

- Where person has an impairment as result of condition which
- has/had some effect on day to day activities and is
- likely to result in impairment having a substantial adverse effect
- likely = could well happen; more probable than not

- **Can a mental health condition be a progressive condition?**

- Alzheimer's
- Depression
- CFS, ME, myalgia
- Medical expert evidence – harder consensus?

What is a disability?



- **Certain conditions ≠ disability**

- Tendency to set fires
- Tendency to steal
- Tendency to physical or sexual abuse of others
- Exhibitionism
- Voyeurism
- Seasonal allergic rhinitis UNLESS it aggravates another condition

What is a disability?



- **Mental ill-health can be a disability**
- **Must still meet the tests:**
 - Substantial
 - long-term
 - adverse effect
 - ability to carry out
 - normal
 - day-to-day activities.

Reasonable adjustments



- **Whether the duty arises depends on whether there had been**
 - substantial disadvantage
 - in comparison with non-disabled persons
 - = a non-disabled person absent for sickness reasons for the same amount of time but not for disability-related sickness
- **Worry and stress ≠ substantial disadvantage in themselves (*O'Hanlon v HMRC CA 2007*)**
- **Any non-disabled person would feel the worry and stress**

Direct or Indirect discrimination



- **Direct discrimination**
 - Less favourably treated than whom?
 - No degree of disability acknowledged within statute
- **Indirect discrimination**
 - Provision, criterion or practice
 - Application of policy
 - Not policy itself
 - Where disabled better treated at all
 - No disadvantage

Justifying policies under s 15



- **Very often policies will constitute discrimination arising from something (s15)**
- **but justification will usually be possible**
- **Legitimate aim**
 - Organisational
 - Fair, effective, consistent management
 - Planning
 - Recruitment
 - Cost
- **“Costs plus”**
 - Woodcock v Cumbria PCT (CA 2012)

Justifying policies under s15



- **Proportionality**

- *"To be proportionate, a measure has to be both an appropriate means of achieving the aim and (reasonably) necessary in order to do so."*