

**GRIFFITHS v SECRETARY OF STATE FOR WORK AND PENSIONS -
COURT OF APPEAL CLARIFIES DUTY TO MAKE REASONABLE ADJUSTMENTS**

Many employers operate attendance management policies which provide that action may be taken against an employee if their level of absence exceeds a specified threshold. The important issue addressed by the Court of Appeal in ***Griffiths v Secretary of State for Work and Pensions*** [2015] EWCA Civ 1265 is whether the duty under section 20 of the Equality Act 2010 (EqA) to make reasonable adjustments for a disabled employee may require an employer to make adjustments to an attendance management policy if the employee's disability makes them more likely to be absent from work than non-disabled colleagues. ***Griffiths*** makes clear that the duty to make reasonable adjustments is engaged in these circumstances, effectively overruling the EAT's decision in ***Royal Bank of Scotland v Ashton*** [2011] ICR 632.

Background

G was employed by the Secretary of State for Work and Pensions (SoS) as an administrative assistant. She had a number of periods of absence from work which were mainly due to a disability. The SoS operated an Attendance Management Policy (the Policy) which provided that formal action would be taken against an employee where her absences from work exceeded 8 days in any rolling period of 12 months (the Consideration Point). In May 2012, on her return to work from a continuous period of absence lasting 62 days, G was given a Written Improvement Warning under the Policy and informed that further unsatisfactory attendance could lead to more serious sanctions. After pursuing an unsuccessful grievance, G presented a complaint to the employment tribunal in which she contended that two reasonable adjustments should have been made for her. They were:

- that the period of disability-related absence which led to the issue of the Written Improvement Warning should have been disregarded for attendance management purposes and the warning rescinded;
- that the Consideration Point at which formal action would be taken against her should have been increased for the future by 12 days i.e. to 20 days in any rolling period of 12 months, to accommodate the fact that she was likely to have a higher

level of sickness absence than non-disabled workers in the future and to reduce her risk of being dismissed for a reason related to her disability.

Was the duty to make adjustments engaged?

In resisting G's claim, the SoS argued that the duty to make reasonable adjustments had not been triggered at all. He contended that the application of the Policy to G had not placed her at a substantial disadvantage in comparison with employees who were not disabled, because the Policy applied in the same way to all employees and a non-disabled employee with the same level of absence as G would have been subjected to the same sanctions. In support of this contention, the SoS submitted that the like-for-like comparison adopted by the House of Lords in *Lewisham London Borough Council v Malcolm* [2008] 1 AC 1399 in the context of disability-related discrimination under the Disability Discrimination Act 1995 should be applied when determining the proper comparator in a complaint of a failure to make reasonable adjustments.

The SoS also argued that the adjustments proposed by G were not "steps" within the meaning of section 20(3) EqA, because they would not enable G carry out her duties and might simply facilitate her absence from work.

Both arguments found favour with a majority of the employment tribunal (ET) and with the EAT. G appealed to the Court of Appeal.

Duty to make adjustments may apply to an attendance management policy

The Court of Appeal had no hesitation in rejecting the respondent's contention that the approach in *Malcolm* must be applied to a claim under section 20 of the EqA. Elias LJ pointed out that the nature of the comparison exercise in a complaint under section 20 is clear: one must simply ask whether the provision, criterion or practice (PCP) puts the disabled person at a substantial disadvantage in comparison with a non-disabled person. The fact that both may be subjected to the same disadvantage when absent for the same period of time does not eliminate the disadvantage if the disabled employee is more likely to be absent than the non-disabled colleague. He decided that comments in *Ashton*, holding that in the context of attendance management policies the comparison was with

persons who were not disabled but were otherwise in the same circumstances, were incorrect. Hence both the ET and EAT were wrong to find that the s.20 duty was not engaged because the policy applied to all employees. Ms Griffiths was substantially disadvantaged by its application because she was more likely to be absent owing to her disability.

The Court of Appeal also rejected the respondent's contention that "steps" within the meaning of section 20 are confined to measures that will enable disabled employees to return to work or carry on working. Elias LJ expressed the view that any modification or qualification to a PCP which would or might remove a substantial disadvantage to a disabled person is in principle capable of amounting to a relevant step. The only question is whether it is reasonable for that step to be taken.

Although the Court of Appeal overturned the ET's conclusions on these two important issues of principle, it upheld the tribunal's alternative finding that, on the particular facts of her case, the adjustments that G had proposed were not reasonable. In the Court's view, it had been open to the majority of the ET to find that in all the circumstances, including the length of G's future anticipated absences, the suggested adjustments were not steps which the SoS could reasonably be expected to take.

However, Elias LJ emphasised that the fact that an employer may be under no duty to make positive adjustments to an attendance management policy does not mean that he will be entitled to dismiss the employee. The section 15 duty not to treat an employee unfavourably because of something arising from disability also requires an employer to make allowances for a disabled employee. If the employee is dismissed, the question will still arise as to whether dismissal is a proportionate response to the employee's pattern of absences in all the circumstances, including the important fact that the absences may be wholly or partly disability-related.

Practical implications of Court's ruling

It is understood that numerous tribunal claims were stayed pending the decision in **Griffiths** on the basis that, following **Ashton**, the duty to make reasonable adjustments might not be engaged by the application of attendance management policies to disabled

claimants. It now seems clear that, in any case in which a disabled person has disability-related absences which trigger the application of the policy, the duty to make reasonable adjustments will normally be engaged. It will be for tribunals to decide on the facts of each specific case what adjustments are reasonable. As Elias LJ explains in *Griffiths*, claims may also potentially be brought on the same facts for discrimination arising from a disability (s.15) or, perhaps, for indirect discrimination under s.19 EqA.

Ms Griffiths, whose claim was supported by her union the PCS and the EHRC, was represented by Michael Ford QC and Melanie Tether of Old Square Chambers, instructed by Rakesh Patel of Thompsons.