Employment Law Brief

with

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The central idea behind the Equality Act 2010 was that it would bring together all the different grounds for unlawful discrimination under one umbrella creating a coherent and consistent framework. To a large extent it has done that. Claims for sex discrimination work in much the same way as claims for race discrimination or discrimination based on sexual orientation or religious belief. Each has their own issues, but in broad terms the law works in the same way using the same provisions.

But disability discrimination is not like that. It has its own concepts of discrimination that are not found in relation to the other protected characteristics. In many ways disability discrimination sits alone in the Equality Act. The reason is straightforward. When it comes to the workplace, disability can have a direct effect on how or indeed whether an employee can do a job. Disability discrimination law must take account of that. Mere equal treatment will not create a level playing field because the organisation of the workplace creates barriers and disadvantages for disabled people which require positive steps to eliminate. As a result, we have the duty to make reasonable adjustments – a form of positive action that is not imposed in relation to any of the other protected characteristics. We also have Section 15 of the Equality Act which encompasses unfavourable treatment because of something arising in consequence of a disability.

Employers I work with tend to take a positive approach to making reasonable adjustments to accommodate an employee's disability where that involves the provision of special equipment or an adjustment in job content or work pattern. Where they struggle however is when the main manifestation of the employee's disability is absence from work. To what extend does an employer have to tolerate an increased level of absence from a disabled employee?

Those advocating for disability rights have always been at pains to emphasise that disability should not in any way be equated with ill-health. Nevertheless, the definition of disability discrimination in the Equality Act means that almost any long-term health condition, from heart disease to anxiety and depression will amount to a disability.

When it comes to absence management employers are used to intervening when an employee's absence hits certain triggers in terms of the number or duration of absences. If attendance does not improve, then a series of warnings will eventually culminate in a decision to dismiss. It was established in the case of **Griffiths v Secretary of State for Work and Pensions** (2017, Court of Appeal) that the duty to make reasonable adjustments did apply to the triggers used in absence management procedures. The Court also emphasised however that S.15 discrimination was likely to be the most relevant consideration. Dismissal for long-term absence where that absence arises from a disability will be discrimination unless the employer can show that it is a 'proportionate means of achieving a legitimate aim'.

Quite how much of an adjustment is needed – and when dismissal will be regarded as proportionate is a difficult question. In a recent Tribunal decision – **McKenzie v University Hospitals of Leicester NHS Trust** – a nurse was dismissed for unacceptable absence over an extended period caused by a variety of illnesses including migraine and depression. She succeeded in her claim of unfair dismissal, disability discrimination and a failure to make reasonable adjustments.

Every case turns on its own facts, but the way in which the Tribunal approached the key questions in deciding this case provide some useful pointers for employers hoping to avoid a similar finding.

The employee had been absent for a total of 85 days in the 12 months leading up to her dismissal including a period of long-term absence due to mental health issues. Any employer might struggle to accommodate that level of absence, but in this case the employee was dismissed after her return to work. The occupational health assessment carried out on her return was optimistic and it was expected that those future absences were likely to be reduced. The long-term absence was related to her coming off her medication and was unlikely to be repeated in the future.

While it was accepted that the employer had the legitimate aim of maintaining an appropriate level of service for patients, its actions were not proportionate given the circumstances. The OH assessment had recommended a three-month period of return during which her absence could be monitored with the possibility of redeployment to a more junior role if that was unsuccessful. There was no medical basis for assuming that her absence would continue to be a serious problem in the future.

This is an important point about absence management. A dismissal is not a punishment for past absences - it must be based on what is likely to happen in the future rather than what has happened in the past. The fact that an employee has been off for an extended period does not justify dismissal if he or she will be capable of returning in the near future.

The Tribunal also made some findings about reasonable adjustments and absence management triggers. The employer had made allowances for likely absences due to migraine but the way in which it had set the adjusted targets meant that there was no room for any non-disability related absence. The Tribunal held that the purpose of reasonable adjustments was to ensure a level playing field but that could not be achieved if disability-related illness took the employee up to the limit of the absence that the employer was prepared to tolerate.

In truth the use of automatic trigger points in relation to an employee whose absence may be affected by disability is always going to lead to difficulties. While it is generally accepted that an employer is not obliged to disregard disability related absence completely, the Tribunal was surely right to point out that it is unfair to expect such an employee to avoid the colds and infections that lead to occasional absences from all employees. Where the expected disability-related absences are modest – in this case they related to relatively infrequent migraines – it may well be necessary to discount them completely for the purposes of automatically triggering warnings.

The better approach is to monitor the attendance of an employee and make a sensible judgment - based on the frequency of the absences that are occurring and the nature of the employee's duties - as to whether the employee's absences are

preventing them from performing in their role to an acceptable standard. Trigger points may be useful in highlighting the need for a discussion or supportive intervention but should not be a substitute for the employer making a careful judgment as to whether the employee's absence is a cost that can be borne in the interests of allowing a disabled employee to remain in work.