

# Attendance management after *Griffiths*: what next?

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# *Griffiths v SSWP [2015] EWCA Civ 1265*

## Facts

- C with periods of sickness absence
- 1 particular absence of 62 days
- Issued with Written Warning upon return to work pursuant to Attendance Management Policy
- Policy contained discretionary powers advantageous to disabled employees
- Diagnosis of post-viral fatigue and fibromyalgia

# *Tribunal judgment*

**Claims:** Reasonable adjustments only

**PCP:** Application of the policy (not the policy itself), as advanced by C: ie the issuing of the warning

**Comparator:** Non-disabled persons with same level of absence

# *Tribunal judgment*

## The duty point

Applied:

***RBS v Ashton [2011] ICR 632***

***Newcastle NHS FT v Bagley [2012] EqLR 634***

= upon application of correct comparison,  
no duty could arise



# *Tribunal judgment*

## ***RBS v Ashton***

- Policy applying to everyone
- Built-in adjustments for disabled
- Extensive absence
- Extensive “trigger point” extensions
- Eventually, sick pay withdrawn, and warning:  
Failures to make adjustments?

# *Tribunal judgment*

## **No substantial disadvantage**

- Must compare with persons who are not disabled, but whose circumstances are otherwise alike.
- Includes anyone subject to the sickness absence policy but not disabled.
  - paras.43, 45, 46, ***RBS v Ashton***

# *Tribunal judgment*

## The reasonableness point

Adjustments sought in ***Griffiths*** were:

- Rescission of the Written Warning in respect of past absence
- Increase to consideration point for the future: “buffer”



# *Tribunal judgment*

## The reasonableness point (cont.)

Applied:

***O'Hanlon v HMRC [2007] ICR 1359 (CA)***

***Salford PCT v Smith [2011] EqLR 1119 (EAT)***

= proposed adjustments not reasonable;  
facilitated absence rather than work



# *EAT judgment*

- Upheld tribunal judgment in full, for same reasons

## Duty point

- Followed *Ashton* and *Bagley*
- Further relied upon *London Borough of Hillingdon v Bailey [2013] EqLR 634*, to like effect

# *EAT judgment*

## Duty point (cont.)

- Tribunal's conclusion on duty point not inconsistent with ECJ in ***Ring [2013] IRLR 571***
- ECJ comment that disabled may be at greater risk of absence is made re indirect discrimination only

# *EAT judgment*

## Duty point (cont.)

- Tribunal judgment not inconsistent with para.78 onwards of ***O'Hanlon***
  - Comments there are *obiter*
  - Inconsistent with para.46
  - Pre-date ***Malcolm*** and EqA 2010 introduction of indirect discrimination

# *EAT judgment*

## Reasonableness point

- Upheld tribunal judgment
- ***O'Hanlon*** and ***Salford v Smith*** had been correctly applied
- Tribunal entitled to find on the facts that adjustments not reasonable anyway

## *As matters stood ...*

- ***Griffiths*** was culmination of line of EAT cases applying ***Malcolm*** comparator:

***Ashton:*** paras.39-46; 79

***Bagley:*** paras.71-80

***Rider:*** para.87

***Bailey:*** paras.21-26 (referring to ***Rider v Leeds City Council***)

# *General Dynamics IT Ltd v Carranza [2015]* *ICR 169*

- Different approach: frame PCP differently and ***Ashton/Griffiths*** can be avoided
- S.15 claim much better suited to this situation, but was “bound to fail” anyway
- Proposed adjustments not reasonable “step” either



# *Griffiths CA judgment: duty*

- Elias LJ (*obiter*) decides that ***Ashton*** was wrong
- PCP framed incorrectly
- Wrong to apply ***Malcolm*** comparator

# *Griffiths CA judgment: duty*

## Planks of the reasoning:

- HL in ***Malcolm*** couldn't have intended to overrule ***Archibald***
- Indications in ***O'Hanlon*** (*obiter*) re comparator issue
- ECJ judgment in ***Ring*** on indirect discrimination



# *Griffiths CA judgment: duty*

## Conclusion on duty question:

- Upshot: duty will arise if –
  - (i) disability-related absence
  - (ii) evidence of increased likelihood

# Griffiths CA judgment: reasonableness

- Elias LJ disagrees with **Carranza** on meaning of “step”
- But adopts **O’Hanlon** approach:
  - (i) disadvantage of stress – adjustments reasonable?
  - (ii) “invidious”, “subjective”, “arbitrary”



# *Griffiths CA judgment: reasonableness*

*“The Act is designed to recognise the dignity of the disabled and to require modifications which will enable them to play a full part in the world of work, important and laudable aims. It is not to treat them as objects of charity...”*

**(O’Hanlon, para.57, cited by Elias LJ at para.68)**

# *Griffiths CA judgment: reasonableness*

## Proposed adjustments not reasonable:

- **Rescission of warning:** depends on medical evidence and length of absence
- **Increase to consideration point:** arbitrary; can't eliminate stress unless continually adjusted; but may be required in some cases

# *Griffiths CA judgment: reasonableness*



## Other observations:

- Unfortunate language in policies
- Section 15 much more convenient analysis
- Section 20 better for looking forwards, s.15 better for looking back

# Post *Griffiths* issues

Talking points

# The self fulfilling prophecy

**What if the absence management policy causes the disabled employee to be stressed out, thus fuelling further absences?**

- Is there a duty to make reasonable adjustments?
- Is it a reasonable adjustment to abandon or suspend the policy?
- Could this problem disappear if the policy was expressed in 'less disciplinary' language?



# A reminder

## On the one hand...

Sick pay rules can result in financial hardship to disabled employees who are more likely to be absent due to disability related illness.

Not uplifting sick pay in these circumstances does not of itself breach the duty to make reasonable adjustments:

***O'Hanlon v Commissioners for HM Revenue & Customs*** [2007] IRLR 404 CA



# The *Meikle* conundrum

## On the other hand...

If the ill health is caused by a breach of duty on the part of the employer, then uplift to sick pay may be required:

- ***Nottinghamshire County Council v Meikle*** [2004]  
IRLR 703 CA
- relationship with *Griffiths*?

# The Problem with Steps...

What is a step after *Griffiths*?

- *Griffiths* @ 65-68
- *Carranza* @ 35, 36, 44



# Relevance of s.20 EqA 2010?

**In so far as attendance management cases are concerned, is it fair to say that s.20 is extinct as a cause of action?**

- Under what conditions could there be a successful reasonable adjustments claim?
- What are the alternatives?



# Questions



Finally...

Thank

you