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



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



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



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- Eventually, sick pay withdrawn, and warning: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?

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**



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"



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



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

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

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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



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



 Elias LJ disagrees with *Carranza* on meaning of "step"

- But adopts O'Hanlon approach:
 - (i) disadvantage of stress adjustments reasonable?
 - (ii) "invidious", "subjective",
 "arbitrary"
 (iii) "invidious", "subjective",
 (iii) "invidious", "subjective",

"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)

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



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*?

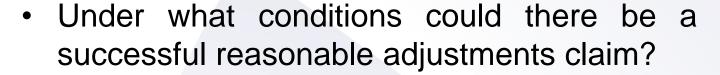
- *Griffiths* @ 65-68
- Carranza @ 35, 36, 44





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?



What are the alternatives?





Questions



Finally...

Thank

you

