Frequent sickness absence caused by disability requires a lighter touch

The EAT has given guidance on how an employer should respond to numerous intermittent sickness absences of an employee with a disability.

Disability discrimination and employers' knowledge

The Court of Appeal has set out what an employer does and does not need to know in order to be found to have discriminated against a disabled employee.

How does an employer know whether an employee is disabled?

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The Court of Appeal has decided that the test was not whether the employer did all it could to determine whether an employee was disabled and exhaust every option open to them; rather, it was whether the employer could be reasonably expected to know the employee was disabled.

The facts of this case are not unusual.

Ms Donelien was a court officer employed by Liberata for almost 11 years. Her employment featured numerous of short-term sickness absences for which various explanations were given (including, on one occasion, no explanation) and often no advance notice of her absence was given. Liberata referred Ms Donelien to Occupational Health in May 2009, posing a number of questions as it did so.

In July 2009, OH reported that Ms Donelien was not disabled; however, the report failed to engage with a number of the questions posed. Liberata followed up by requesting a second

OH report. Whilst the second report was more detailed (and again stated that Ms Donelien was not disabled), it still failed to answer some questions.. Liberata did not go back to OH a third time, but instead held ‘return-to-work’ interviews with Ms Donelien and reviewed correspondence from her GP.

Liberata dismissed Ms Donelien in October 2009 on the basis of unsatisfactory attendance, a failure to comply with absence notification procedures and a failure to work contractual hours. In response, Ms Donelien brought a number of claims in the Employment Tribunal including a failure to make reasonable adjustments.

The Employment Tribunal found that Ms Donelien was disabled from August 2009. The question was whether Liberata had constructive knowledge of that disability.

This case confirms that employers are allowed to place weight on the reports provided by OH, so long as they exercise their own independent judgment and avoid blindly relying on them.

Donelien v Liberata UK Ltd [2018] EWCA Civ 129

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