

What happens when a disabled employee goes on sick leave a lot?

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What is interesting about this case – *HMRC v Whiteley* – is not the judgement but the guidance given by the Employment

Appeal Tribunal relating to disabled employees who exceed the number of days permitted under a sickness absence policy.

Mrs Whiteley, an asthma sufferer, worked for HMRC. As a result of her condition, she had 15 days' off sick between January and October 2010. Under HMRC's sickness absence policy, warnings were issued to employees who took more than 10 days' absence in one year. HMRC made an allowance for Mrs Whiteley's disability by reducing her sickness absence from 15 to 12 days but as this was still more than 10 days, a warning was issued.

Mrs Whiteley brought a claim in the Tribunal that HMRC had failed to make reasonable adjustments. The Tribunal agreed with her on the basis of medical evidence. However, on appeal, the EAT found that the medical evidence had been wrongly interpreted. As such, the case has been remitted back to the Tribunal. We will update you when the new judgement is published.

However, the EAT has suggested two types of approach that employers may adopt when making allowances for sickness absence caused by the interaction between an employee's disability and other illnesses (e.g. flu).

1. Consider each absence day in detail (with medical expert evidence if necessary) to understand if it is attributable to the disability; or
2. Investigate what level of absence an employee with a particular disability would reasonably be expected to have over the course of an average year.

An employer in a similar situation to HMRC will need to consider which approach would be appropriate to adopt. The second approach may be more attractive to employers and HR teams as it can be applied fairly easily.

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