

Capability Dismissal

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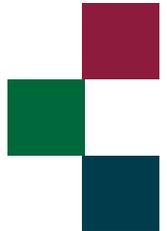
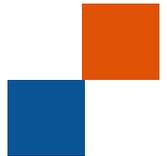
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*How do you break the cycle with a **capability dismissal** when performance management has led to **stress** and, consequentially, **absence** and a **refusal to return to work?***

Humdinger – 5 scenarios

- No cert
- EE cert unfit ER cert unfit
- EE cert unfit ER cert fit
- EE cert fit ER cert unfit
- EE cert fit ER cert fit



Proper Procedure – Sickness and Absence policy

- Comprehensive policies and procedures to deal with sickness absence are a necessity
- Ensure employees are aware of these procedures
- Have a paper trail
- Employee should be involved at all stages – direct and collaborative

Sickness and Absence policy

Policy should set out clear rules in relation to:

- How to report sickness absence
- The requirement to keep the employer informed
- Evidence of incapacity
- Level of sick pay (if any)
- Right to send employee for medical examination
- Evidence of capacity to return to work
- Details of return-to-work procedures
- Consequences if employee does not comply with rules
- Procedure to follow when considering capability dismissal

Stress

“An employer does not guarantee to cocoon employees from stress and upset, nor is the employer a guarantor of the safety or health of the employee. Whether workplace stress is unreasonable is a matter of judgment on the facts. It may turn upon the nature of the job being performed as well as the workplace conditions. The employer's obligation will vary according to the particular circumstances. The contractual obligation requires reasonable steps which are proportionate to known and avoidable risks”

- **Ruffley v Board of Management of St Anne's School (Supreme Court)**

Stress (Cont'd)

"reasonable to assume that being subjected to a disciplinary process...are events which might be accompanied by a certain degree of stress, they are events which are encountered in the normal course of the management of a business or organisation. In the absence of any reason for a contrary conclusion, an employer is entitled to assume that an employee is able to withstand such stress."

- **Shortt V Royal Liver Assurance Ltd 2008**
- ***BUT... PI risk?***

Employment Equality Acts 1998-2015

Is the illness a disability

- If the illness is classed as disability, Employment Equality Acts 1998-2015 (“EE Acts”) apply – substantial protection on employees suffering from disability
- 1998 Act requires employers not to discriminate against those with disabilities
- If discrimination, employee could be awarded up to two years’ gross remuneration

Employment Equality Acts 1998-2015

Definition of disability in Ireland

- Disability very broadly defined under EE Acts
- Covers:
 - Total or partial absence of a person's bodily or mental functions to include absence of part of a person's body
 - Malfunction, malformation of a person's body
 - A condition, illness or disease which affects a person's thought process or judgement

Employment Equality Acts 1998-2015

Definition of disability in Ireland

- No reference to specific diseases or impairments/No requirement for certain threshold of severity
- Short term illness would come with definition
- Held to cover almost all temporary and permanent physical and mental conditions

“Stress” MAY be covered under the 1998 Act

Disability definition

- Irish definition of disability much broader than Framework Directive - no requisite threshold of severity or duration of disability that has to be met

“While a disability does not necessarily have to be very substantial or long-term in order to come within the definition, effects or symptoms that are present to an insignificant extent are likely to be disregarded by the Tribunal or Labour Court.”

- **A Government Department v A Worker, EDA/094**
- Equality Tribunal and now WRC has said on numerous occasions that “work related stress” in and of itself is NOT a disability

Disability definition (Cont'd)

- **BUT** beware actual or constructive knowledge of other illnesses/conditions
- Adjudicator – "*disability must be looked at 'in the round'. It cannot be reduced to a game of bingo where a complainant's doctor labels a condition on the medical certificate in a certain way and the disability provisions automatically apply and s(he) calls it something else and the disability provisions do not apply.*"
- **Ms B v A Newsagents and a Deli 2013**

Contemplating Dismissal

- Employers are not obliged to retain employee who is unable to fulfil their contractual duties s16(1)
- However, the law (EE Acts and UD) imposes a very high bar before employee can be dismissed
- Dismissing employee by reason of disability → up to two years' remuneration under EE Acts or Unfair Dismissals Acts 1997-2015 (“UD Acts”)
- Dismissal is a **last resort** once all other avenues have been exhausted

Step 1. Medical Evidence

Referring employee for medical assessment

*Necessary to obtain better understanding of employee's condition, and what they are capable of doing in the workplace

Employer should:

- Be clear about the reason for referring an employee
- Ensure material given to doctor is relevant and available to employee so they can adequately prepare
- Ensure material given to company doctor is not biased and merely outlines the facts and instructions to the doctor
- If company doctor's opinion conflicts the employee's doctor, employer should think about appointing independent medical advisor to assess the employee

Medical Evidence

Referring employee for medical assessment

Delaney v Central Bank of Ireland

- Highlighted the need to follow fair procedures in referring an employee for assessment
- The Bank was in breach of fair procedures in failing to furnish the Plaintiff with all documentation provided by way of brief to the consultant psychiatrist and by providing the psychiatrist with notes prepared by the employee who was referred to as the protagonist in the bullying case
 - *The “source of the material was infected by a real likelihood of partiality or bias”*

Reasonable Accommodation

- Reasonable accommodation is the obligation to afford more favourable treatment to an employee with a disability than would be provided to an employee without a disability
- Reasonable adjustments to working conditions
- “Disproportionate Burden”
- Facebook v corner shop

Reasonable Accommodation (Cont'd)

Examples of Reasonable Accommodation

- Implementing a phased return to work or flexible / shorter working hours;
- Allowing time off to attend medical appointments;
- Facilitating working from home;
- Altering some of the employee's duties;
- Distributing tasks to other employees;
- Making physical adjustments to the workplace;
- Giving or arranging training or mentoring; and/or
- Acquiring or modifying special equipment.

Reasonable Accommodation (Cont'd)

Case Law Takeaways

- Only required to take such measures if they would not impose a “disproportionate burden”
- Consider possible options available - Underlying philosophy is to adapt the job to the person, unless this would place a disproportionate burden on the employer
- *an employer cannot be under a duty entirely to re-designate or create a different job to facilitate an employee, as this would almost inevitably impose a disproportionate burden on an employer*
- Supreme Court in Nano Nagle
- No obligation to consult with employee but SC said “a wise employer will provide meaningful participation in vindication of his or her duty under the Act”

Step 2. Consult

Meet with employee to:

- discuss prognosis;
- make enquires to see if you can accommodate disability; and eventually
- warn employee that dismissal on grounds of incapacity is being considered.

How Soon Can You Dismiss?

- Million-dollar question
- No specific timeline in legislation or by the WRC

Depends on factors such as:

- Employee's willingness to participate in the process
- Nature of illness
- When the company doctor can see the employee
- What the employee's prognosis is

How Soon Can You Dismiss?

- If the employee can produce medical evidence that they will be fully fit to return to their job following a reasonable period/particular treatment → difficult to reasonably terminate employment in advance of that.
- **Most important** that employee receives warnings that job is at risk and they are given a chance to participate in discussion about their potential dismissal.

Summary

Inquiries Expected of an Employer

Procedure is set out under EE Acts in *Niamh Humphries v Westwood Fitness Club*

Employer should:

- Understand the nature and extent of disability
- Whether the employer can accommodate the disability? (without disproportionate burden)
- Seek employee's input (e.g. on medical evidence, any other matter)
- Give employee fair notice that dismissal on grounds of incapacity is being considered

“A bona fide belief that an employee is incapacitated is a good defence”.

Summary

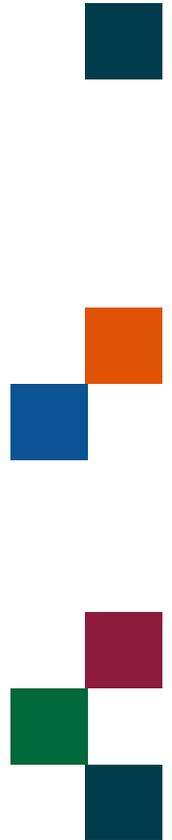
Inquiries Expected of an Employer

Follow *Humphries* and you also tick the box for procedure under UD Acts in *Bolgers v Showerings* (EAT)

Employer must demonstrate:

1. Ill health was the substantial reason for the dismissal
2. Employee receives fair notice that dismissal for incapacity was under consideration
3. Employee was afforded opportunity of being heard

Questions?



Thank you



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