

A blurred photograph of several business professionals in a modern office hallway. The image is taken from a low angle, showing the lower legs and feet of the people as they walk. The lighting is bright and cool, with a blue tint. The background shows office windows and a railing.

Redundancy and Dismissal: Hints, Tips and Solution-Focused Answers for Employers

23 October 2018

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Overview

- How many "false dawns" of a return to work do you allow an employee on long-term sickness leave - How long is too long?



Overview

- Questions to be asked as the Employer.
- Legal Framework for managing long term absences.
- Steps to be followed when managing long term absence.
- Practical Issues that arise along the way –
 - Sick Pay
 - Permanent Health Insurance
 - Early Retirement on Grounds of Ill Health
 - Data Protection
 - Annual Leave Accruals



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Part 1
**QUESTIONS TO BE ASKED
AS HR/EMPLOYER**



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Questions to be asked.....

- What is the employee's length of service?
- How long it is expected their employment would continue – retirement/fixed term/specific purpose?
- What is the nature, effect and likely duration of the illness?
- What is the medium to long term prognosis on their likely return to work?
- Have they exhausted their sick pay entitlements?
- Is there a PHI Policy/disability scheme in place?
- In all of the circumstances, is it reasonable for the employer to wait any longer?

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Part 2
**LEGAL FRAMEWORK FOR MANAGING
LONG TERM ABSENCES**



Legal Framework

- Employment Equality Acts 1998-2008
- Unfair Dismissals Acts 1977-2007
- Personal injury claims
- Breach of contract/ injunction
- GDPR & Data Protection Acts 1988-2018
- Penalisation Claim under H&S

Liability

- Equality Acts:
 - 2 years remuneration for effects of discrimination
 - 2 years for discriminatory dismissal
 - Other orders: specific course of action
- Unfair Dismissal Acts:
 - 2 years remuneration, reinstatement or engagement.
- Penalisation Claim under H&S legislation
 - Unlimited jurisdiction

- Personal injury claims
 - District Court limit: €15,000
 - Circuit Court limit: €60,000 for personal injury
 - High Court – Unlimited Jurisdiction
- GDPR & Data Protection Legislation – now includes actions for compensation for stress and emotional suffering.
- Breach of Contract Claim - PHI

Equality Acts

- Nothing requires an employer (or employment agency) to employ or promote someone if they :
 - will not do the job or accept the conditions
 - are not competent and available to do the job
- However, a person with a disability must be regarded as competent and capable of doing the job if they could do so with assistance of special treatment or facilities – concept of “reasonable accommodation”.

Equality Acts

- Equality Acts: What is a “Disability” -
 - Total or partial absence of bodily/mental functions
 - Presence of organisms likely to cause chronic disease/illness
 - Malfunction/malformation/disfigurement of body
 - Condition/malfunction resulting in learning differently
 - Condition/illness/disease affecting thought processes, perception of reality, emotions or judgement resulting in disturbed behaviour

Equality Acts

- Epilepsy
- Alcoholism
- Depression
- Aspergers Syndrome
- Narcolepsy
- Multiple sclerosis
- IBS
- Vertigo



Reasonable Accommodation

The test for reasonable accommodation

- An Employer should ensure they have all the material facts about the employee's condition. This would involve looking at the medical evidence available to the employer either from the employees doctors or obtained independently
- S.16 (3) of the Act requires the employer to consider what if any special treatment or facilities may be available by which the employee can access employment, participate/advance in employment and/or undergo training
- Consultation: An employee must be given fair notice that his/her capacity is under question and the opportunity to influence the employers decision

The Nano Nagle Decision 2018

- This is a significant decision on the scope of employers' obligations to provide reasonable accommodation for employees with a disability and when termination due to incapacity may be validly considered by an employer.
- Whilst an employer is bound to attempt re-distribution of tasks to accommodate a disabled employee, they are not required to do so for all tasks.

The Nano Nagle Decision 2018

- An employer should consider re-distribution of tasks only where the tasks are non-essential to the role. If the employee cannot undertake the essential tasks of the role then this may be grounds for termination of the employee's employment.
- This case also suggests that, in considering reasonable accommodation for an employee with a disability, an employer is entitled to take into account other legitimate interests which they may also have to accommodate.

Unfair Dismissals Acts

- Unfair Dismissals Acts 1977 – 2007
 - Section 6(4) – capability
- Incapacity considerations
 - *Bolger v Showerings (Ireland) Limited [1990] ELR 184*
 - Ill health was the reason for the dismissal.
 - Substantial reason.
 - Employee received fair notice that dismissal for incapacity was being considered.
 - Employee was afforded an opportunity of being heard.

How Long before Dismissal?

- Case by case, 6 months at least, 12 more reasonable
- Reasonableness will depend on a number of factors:
 1. Position of the employee – recruiting, retention
 2. Ability of the employer to cover absence – need to consider termination
McElhinney –v- Templemore Cooperative Society Limited UD1982-434
 3. Length of service *Lawless –v- Dublin County Council*
 4. Warnings given to the employee

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Part 3 PROCESS



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Step 1 - Medical

- Obtain an independent medical – failure to do so can be fatal to defence: *McCrorry Scaffolding EED055*
- Job description –v- detailed normal day to day duties.
- Give proper consideration to medical reports from the employee – is it necessary to obtain second opinion/ consultant report? *A Teacher –v- A Vocational Education Committee EE/2008/183*
- Beware trap of being alleged to have improperly influenced the medical opinion.

Step 1 - Medical

- Be clear on purpose for the assessment – ask the right Qs!
- Fit for work -v- fit to attend meetings
- Capable of performing the duties and discharging the responsibilities set out in list of duties
- Is a consistent return to work achievable?
- Subject to a condition which is likely to reoccur
- Fit to work a normal working week associated with the role and to carry out workload of a full time person within those hours.
- Capable of having company policies and procedures applied?

Step 2 - Accommodation

- Retain records of efforts to consider reasonable accommodation – reduced hours, duties, working from home, alternative roles etc.
- Ergonomic/ occupational assessment: *Carroll –v- Heinz Frozen & Chilled Foods Limited E2011-114*
- Retain detailed evidence on cost of accommodation and financial circumstances of the employer
- UK Code of Practice (spend at least as much as would cost to recruit and train a replacement).

Step 3 - Engagement

- Inform employee of purpose of medical assessment (provide copy of briefing letter –sensitive personal data)
- Provide employee with copy of medical report. Arrange meeting to discuss.
- Involve employee in consideration of reasonable alternatives. Invite suggestions.
- Write to or email employee regularly to summarise steps taken. Constant and clear engagement is a key part of an employer's defence.

Step 3 - Engagement

- Write to the employee in advance of any meeting at which termination is to be considered, advising them this is something which is being considered and recapping on steps taken.
- Do not make a decision on termination without having adjourned the meeting to take time to consider and (if necessary carry out further enquiries into) the employee's suggestions.
- Provide right to appeal against decision.

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Part 4
PRACTICAL ISSUES THAT ARISE



PHI/Insurance Considerations

- Permanent Health Insurance:
 - condition of scheme to remain employee
 - exposure to breach of contract claim
 - cannot use PHI medicals for other purposes
- Insurance company:
 - preliminary notification is prudent even if no threat of claim/proceedings yet received.
 - Notify immediately if stress/work related stress is cited.

Surveillance – Private Investigators

- Data protection/GDPR considerations
- Consequences of inappropriate surveillance
- *Sweeney –v- Ballinteer Community School [2011] IEHC 131*
- Order to destroy personal data
- Significant monetary fines under GDPR for breach
- Should be last resort option only undertaken with legal advice
- *Noel Farrell –v- Kepak Group (Meat Division) 2014 EAT*



Facebook

- How was the Facebook evidence obtained? Beware Data Protection issues.
- Issue raised by other employee – ask for print out
- Investigation hearing
- Must be given the information in advance
- Don't jump the gun– employee may not be fit for work but may be fit (or recommended) for other activities i.e. holiday



Victimisation

- Protection against “dismissal or other adverse treatment” as a reaction to having taken certain protected action set out in s74(2) EEA. No defence to victimisation.
- Includes making complaints of discrimination, issuing proceedings, acting as witness, supporting a complainant or giving notice of intention to do any of these things.
- Increasingly valuable supplemental or standalone claim.
- *Pauline Stone – Moloney & Sons Ltd v- DEC-2010-096* 2 years awarded for victimisation and victimisatory dismissal.

Victimisation

- *Maher –v- CIE Medical Dept & CIE, DEC-E2010-046*
 - Applied for position and was refused due to medical history (heart condition)
 - Lodged claim that refusal was disability discrimination
 - Further job application was ignored.
- *Complainant –v- A Department Store DEC-E2002-017*
 - Sought advice from Equality Authority following several unsuccessful applications for a job.
 - “In view of the untrue and unfounded allegations... we are not for the foreseeable future going to accept any application from you for employment...”

Summary of Practical Steps

- Determine reasonable accommodation first
- Pattern of absence over a protracted period
- Reasonable steps to ascertain the medical situation, employee, medical adviser
- No improvement expected - up to date, independent medical opinion
- Any underlying factors for the absence?
- Opportunity to comment on the medical findings



Summary of Practical Steps

- Level of absenteeism was unacceptable/prejudicial to the employer
- Warnings - successive and progressive
- Reasonable time to improve, opportunity to influence termination
- No prospect of return
- No alternative duties available
- Fair procedures were followed



Questions?





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