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Disability and Capability - Michelle Ní Longáin

What are you to do with a disabled employee, if you've adjusted his or her work-pattern but attendance or performance is not improving?

How long must you wait before:

1. Reviewing the arrangement; or
2. Dismissing the employee?

Section 2 Employment Equality Acts

“disability” means—

- (a) the total or partial absence of a person’s bodily or mental functions, including the absence of a part of a person’s body,
- (b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,
- (c) the malfunction, malformation or disfigurement of a part of a person’s body,
- (d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or...

Section 2 Employment Equality Acts

...“disability” means—

(e) a condition, illness or disease which affects a person’s thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour,

and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person.

- Section 6 – Discriminatory Grounds – also discrimination by association.
- Unlike the UK, there are no exclusions - such as addiction to alcohol / non-prescription medication.

Reasonable Accommodation

- defence to disability dismissal / discrimination allegation

The Employment Equality Acts Say...

- Employer is not required to employ someone who will not undertake the duties or is not fully competent or capable of doing the job.
- However, a person with a disability is fully competent and capable of undertaking any duties if the person would be so fully competent and capable on reasonable accommodation being provided by the employer.
- These limitations have been construed strictly against employers, and have been interpreted expansively.

Reasonable accommodation – stand alone obligation

The Employment Equality Acts also say: Section 16(3)(b)

Employer shall take **appropriate measures**, where needed in a **particular case**, to enable **a person** who has a disability –

- a) to have access to employment;
- b) to participate and advance in employment; or
- c) to undergo training;

unless the measures would impose a disproportionate burden on the employer.

Reasonable Accommodation

Disproportionate burden

In determining whether the measures would impose such a burden account should be taken, in particular, of:

- Financial and other costs entailed;
- The scale and financial resources of the employer's business;
- The possibility of obtaining public funding or other assistance.

Reasonable Accommodation

“Appropriate Measures”

What it meant by?

Means:

- a) **Effective and practical** measures, where needed in a particular case, to **adapt the employer’s place of business** to the disability concerned;
- b) Includes the **adaptation of premises, patterns of working time, distribution of tasks** or the provision of training or integration resources;
- c) does not include any treatment, facility or thing that the person might ordinarily or reasonably **provide for himself/herself**.

Reasonable Accommodation

“Appropriate Measures”

What it meant by?

An Employer v A Worker (EDA 13/2004)

- Provision of special treatment/facilities not an end in itself.
- Enables a person with a disability to have access to, participate and advance in employment.
- Can involve affording the person more favourable treatment than would be awarded to a person without a disability.

Reasonable Accommodation

“Appropriate Measures”

What is meant by?

An Employer v A Worker (continued)

- Scope is determined by what is reasonable.
- What is reasonable includes cost considerations.
- Must have regard to the circumstances of the case.

“Appropriate Measures”

How far must you go?

“Essential functions” -v- “Essential tasks”

Nano Nagle School v Marie Daly [2015] IEHC 785

- Employee must be able to perform the **“essential functions”** of the post.
- This is **without prejudice** to the obligation to provide reasonable accommodation.
- **“Essential tasks”** not of the existing position, but of the **reorganised position**.
- May involve significant change in the **contractual relations** between the parties.

Nano Nagle School v Marie Daly

- Claimant (SNA) had serious accident, spinal injuries, paralysis from the waist down.
- OH recommended risk assessment “to ensure safe return to work.”
- Assessment recommended **“Ms. Daly be consulted on all matters relative to her reintegration in the workplace”**
- Further risk assessment concluded:
 - 16 categories of duties;
 - Claimant could do 9 “wholly or partly”
 - Claimant could not do 7.

Nano Nagle School v Marie Daly

- On cross examination (Labour Court), the school principal was asked if she had formed the view in relation to the Claimant's capacity before receiving the risk assessment.
- The principal replied that the level of accommodation that would be required "was not possible"
- Principal thought it would be unfair to other staff to allocate all "heavy lifting and other physically demanding" work to the other staff
- Crucially, the Principal did not discuss the possibility of reallocating tasks, nor did she seek health and safety advice on doing so.
- Claimant argued underlying philosophy is to *"adapt the job to the person, not the other way round"*

Nano Nagle School v Marie Daly

Held:

- Reallocation of tasks “*cannot be fairly be characterised*” as creating a wholly new job.
- Adaptation of distribution of tasks must...include a consideration of whether a reduction of those tasks may be necessary to comply with Section 16(1)
- An appropriate point may be reached when “appropriate measures” transform the job into something entirely different.

Reasonable Accommodation

–Procedural Requirements

- Requires active engagement with the employee.
- Employer must have all material facts.
- Look at the medical evidence available from the employee's doctor and obtained by employer.
- Consider whether any measures could be adopted that would assist/resolve the situation/enable the employee to return to work.
- Allow employee full opportunity to present relevant medical evidence and make submissions before making any decision adverse to employee.
- Duty is proactive and ongoing – the onus is not on the employee to provide suggestions.

The Standard?

- *“That of a reasonable employer who understands his or her legal duty and wishes to uphold the right of a disabled employee to work and earn a livelihood.”*

The “Cut Off”?

- *“Where an employer reaches an honest and informed decision having considered all of the available options, the Court must show a high degree of deference, and should not seek to substitute its opinion of what is possible or reasonable.”*

However...

- *If...the employer fails to properly understand the scope of its duty or fails to adequately consider all of the options that may be available they will have failed in their statutory duty.*

Dismissal of a person with a disability

Humphries v Westwood Fitness Club (2004)

- Labour Court – decision upheld by the Circuit Court.
- Employee's dismissal arose primarily from the employer's belief that her condition (anorexia) would impair her ability to carry out the duties for which she was employed. Her dismissal was, *prima facie*, discriminatory.
- There is a complete defence to a claim of discrimination on grounds of disability, if it can be shown that the employer formed a *bona fide* belief that the employee was not fully capable of performing the duties for which she was employed.

Dismissal of a person with a disability

Humphries v Westwood Fitness Club (2004)

- The employer should make adequate enquiries to establish fully the factual position in relation to the employee's capacity.
- The enquiries depend on the circumstances but always involve looking at medical evidence to determine the level of impairment arising from the disability and its duration.
- If it is apparent that the employee is not fully capable, the employer is required to consider what (if any) special treatment or facilities may be available.
- Such enquiry could only be regarded as adequate if the employee concerned is allowed a full opportunity to participate at each level and is allowed to present relevant medical evidence and submissions.

Summary of Obligations – From Multiple Cases

- Dismissal only arises after full consideration of any potential “reasonable accommodation[s]”.
- Duty is proactive – the onus is not just on the employee to provide suggestions, **but**
- Requires active and ongoing engagement with the employee.
- Employer must have all material facts.
- Look at the medical evidence available from the employee’s doctor and obtained by employer.
- Proposed accommodations may be discounted after full consideration.

Summary of Obligations

- Consider whether any measures could be adopted / added to / amended, that would assist / resolve the situation / enable the employee to return to work.
- Allow employee full opportunity to present relevant medical evidence and make submissions before making any decision adverse to employee.
- Obligation on employee to also engage.

Alcoholism

“A Nutritionals Production Company” EDA 145

- Informed him on **June 22** his employment was at risk. At this time alcoholism undisclosed.
- Company decided to dismiss, but arranged to inform him at meeting on **June 29**.
- Employee did not attend, instead entered a 3-month full time treatment programme, notifying company by medical certificate and call from family member.

Held:

- Notice of a decision is required before it has legal effect.”
- Employer had an obligation to consider whether his condition prevented him from performing his duties and whether he could be provided with reasonable accommodation.”

Disability and Disciplinary Action

“A Post Person v A Postal Service – DEC-E-2005-26

Held:

- *The Respondent “At all relevant times had made more than adequate enquiries so as to establish fully the factual position in relation to the complainant’s capacity...”*
- *“It was reasonable for the respondent not to raise the issue of his disability with the complainant every time it was unhappy with the complainant’s work performance...”*
- *“It is well established that individuals with a disability are subject to the disciplinary procedures (of their employer) as long as their employer takes proper account of their disability.”*

Back to the Question...

- No absolute answer. It depends!!
- All the factors identified are relevant
 - e.g. the appropriateness of the measures – were they sufficient to enable participation?
- Was there a disproportionate burden?
- Did you do what you said you would do – or what you were medically advised to do?
- Remember!
 - The Standard, The “Cut Off” and the However

REMEMBER!

The Standard?

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The “Cut Off”?

- *“Where an employer reaches an honest and informed decision having considered all of the available options, the Court must show a high degree of deference, and should not seek to substitute its opinion of what is possible or reasonable.”*

However...

- *If...the employer fails to properly understand the scope of its duty or fails to adequately consider all of the options that may be available they will have failed in their statutory duty.*

Discussion and Q & A

- Questions, comments and issues arising
- Thank you

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