

A&L Goodbody

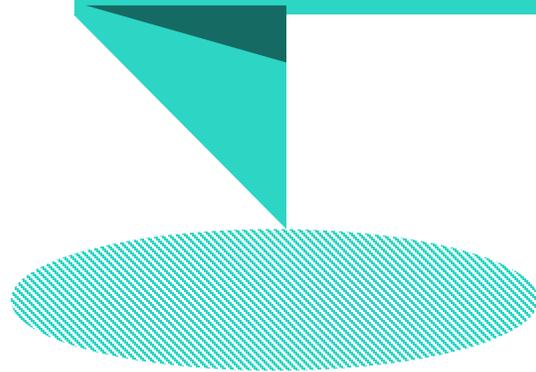
White Paper Conference

Managing Disability in the
Workplace: Long Term Absence and
Dismissal

Michael Doyle, Partner

22 October 2019

When diagnosis and time-frame for recovery are not certain, how many “*false dawns*” of a return to work do you allow a disabled employee who’s on long-term sick leave?





Reasonable Accommodation

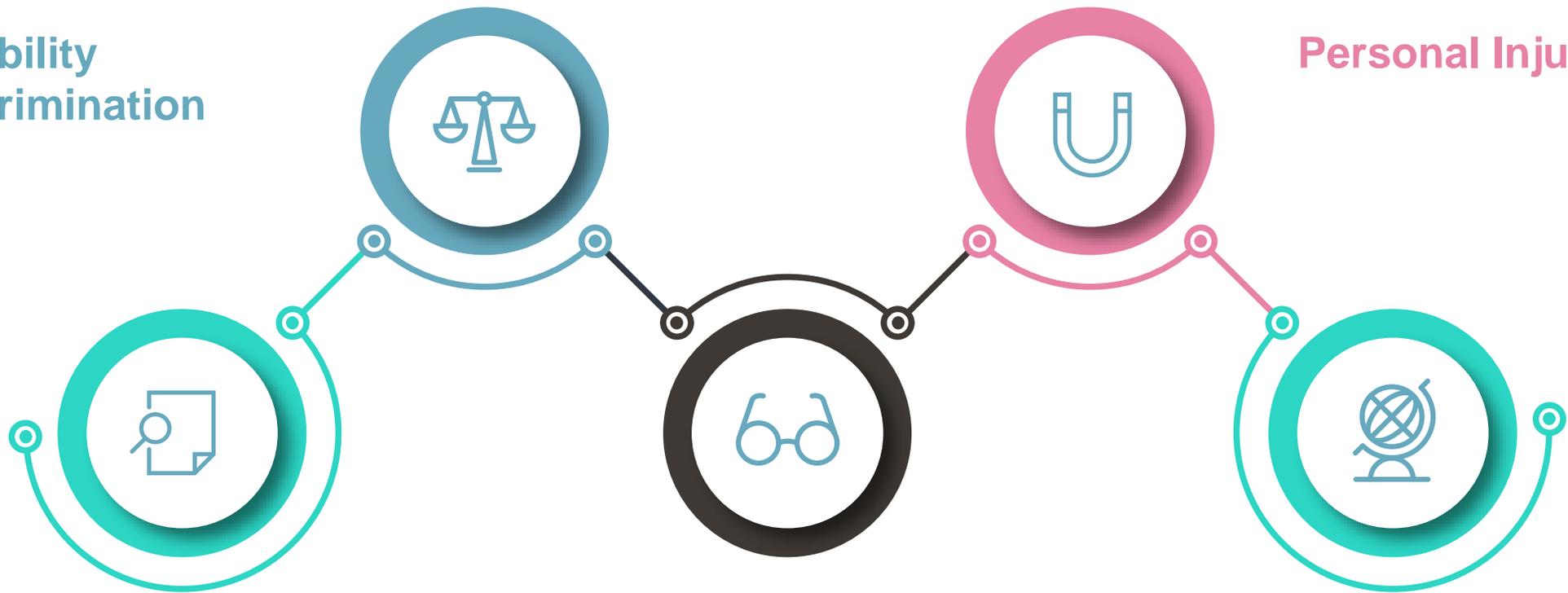
Appropriate Measures

Disproportionate Burden

The Litigation Context – Potential Claims

Disability
Discrimination

Personal Injuries

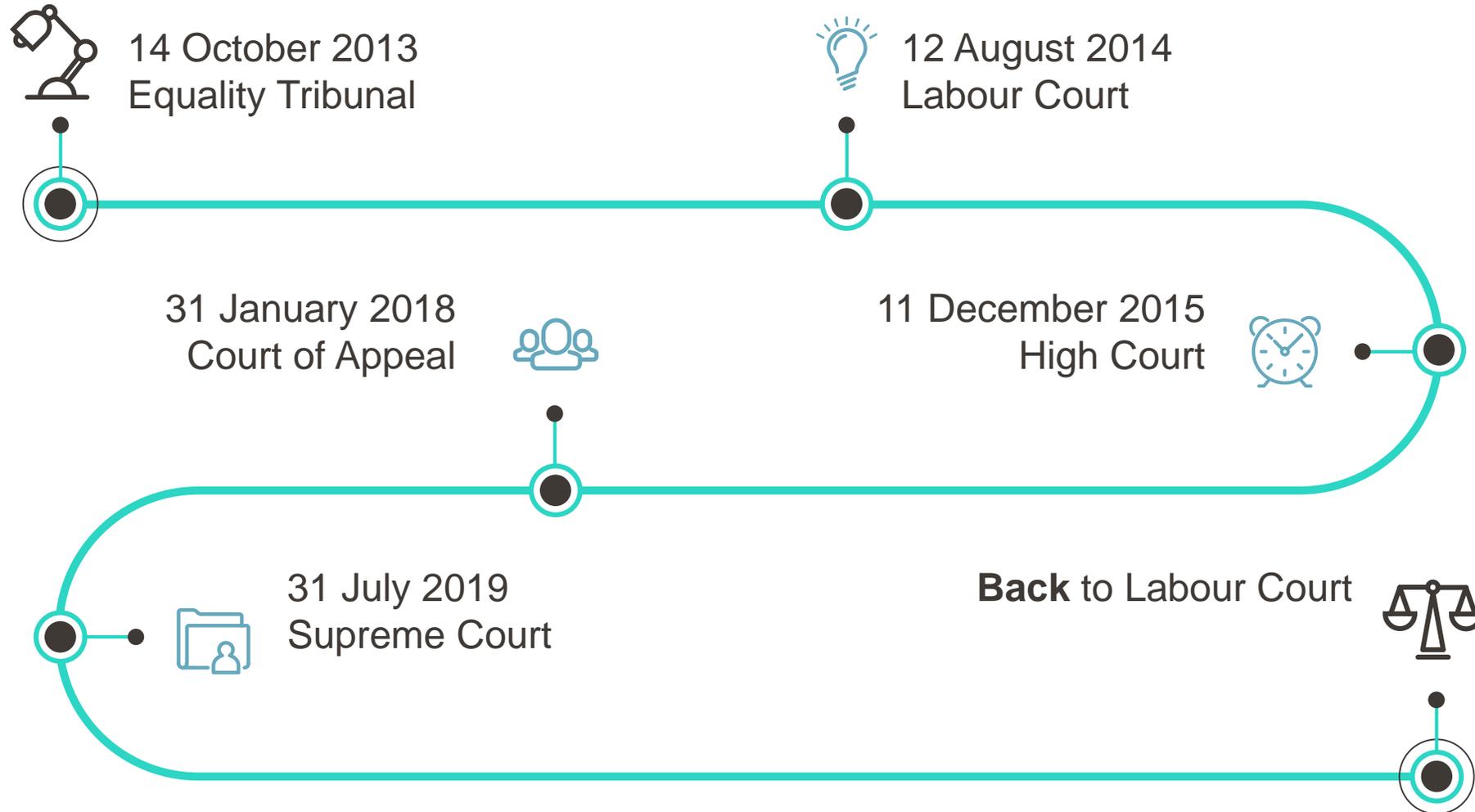


Discriminatory Dismissal

Breach of Contract

Unfair Dismissal

Nano Nagle v Daly



Supreme Court – Key Takeaways

REASONABLE ACCOMMODATION

Objectively evaluate appropriate measures to facilitate a return to work

REDISTRIBUTION

Consider the redistribution of both core duties and non-core tasks



MEDICAL ADVICE

Be fully informed by up-to-date medical advice

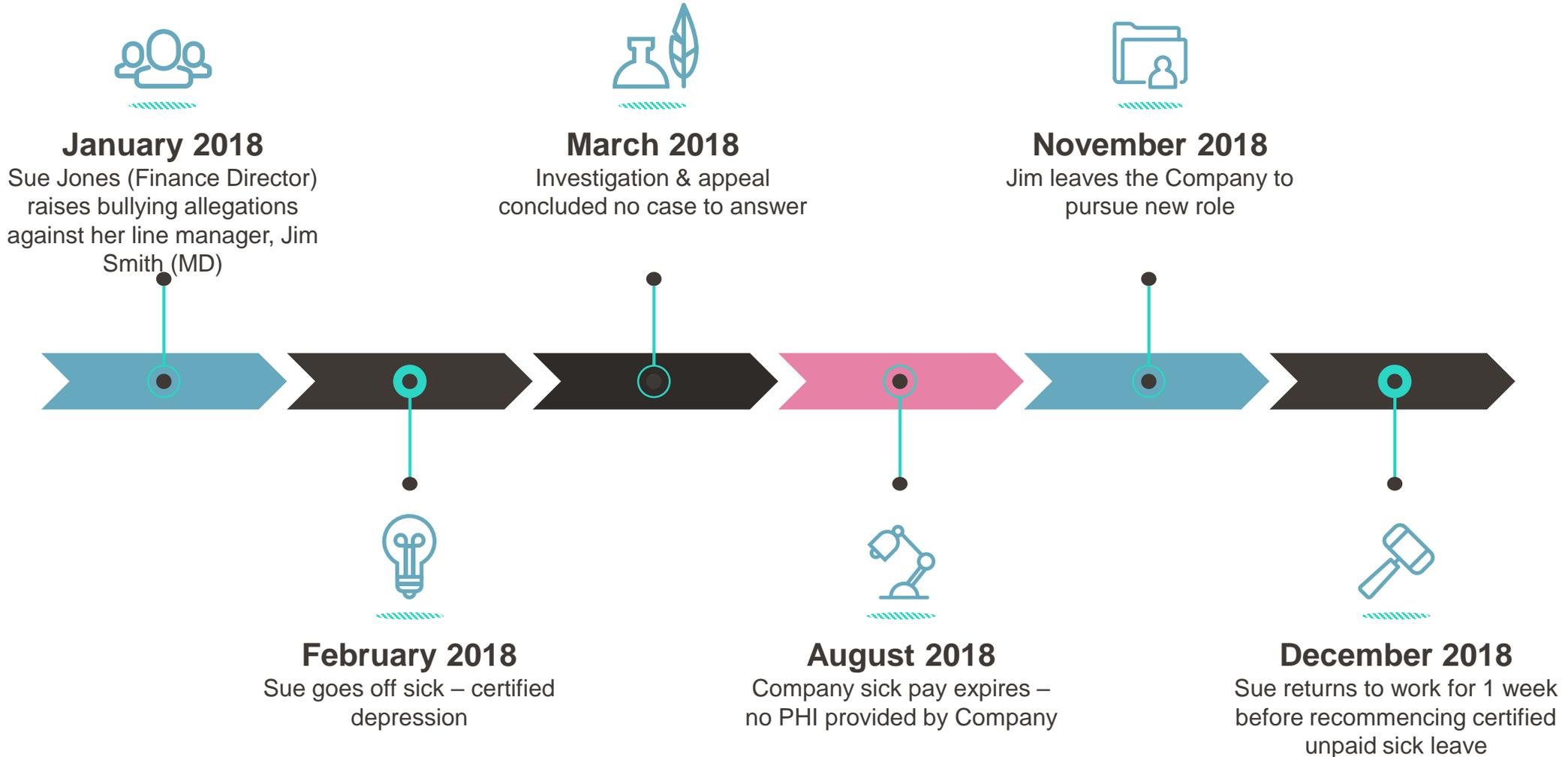
CONSULTATION

Though not necessarily mandatory, a “wise” employer will engage and consult with the affected employee



- *McGrath v Trintech Technologies Ltd (2005)* – court will enforce employer’s right to terminate on notice where there is a good reason for the termination (e.g. redundancy)
- *Awan v ICTS UK Limited (2019)* – implied term to the effect that once employee entitled to payment of disability benefits under LTD scheme, employer cannot terminate on grounds of incapacity

Case Study



Case Study – Recent Events



January 2019

Company sought medical evidence re: Sue's prognosis – very little information



June 2019

New MD appointed – keen to hire permanent replacement Finance Director (Sue's role)



July 2019

Prognosis remains unclear – though Sue advises Company she is awaiting Consultant report & likely fit to return in 6 months



May 2019

Sue seen by Company's Occ Health provider
Report: uncertain when Sue will be fit to return



June 2019

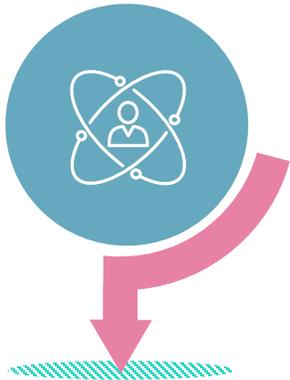
Company invites sue to meet with new MD – considering termination in light of absence duration and uncertain prognosis



August 2019

Company dismisses Sue on grounds of incapability
Company receives discriminatory dismissal claim

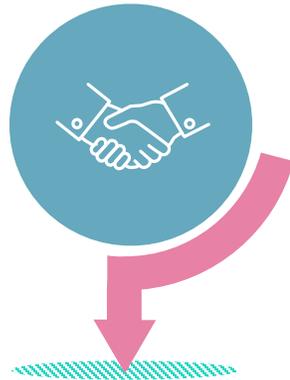
Case Study – key steps taken



01

Medical Advice

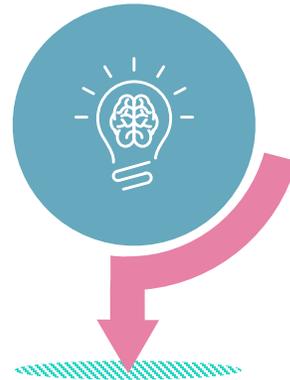
Regular medical certs
Regular Occ Health referrals
Inconclusive return date
Specialist Opinion awaited



02

Engagement

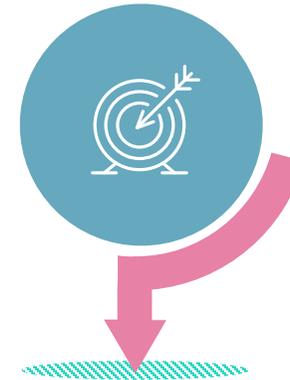
Met with Sue on several occasions during absence
Aware position couldn't be held open indefinitely
Advised of possible capability dismissal



03

Reasonable Accommodation

Explored with Occ Health
None could be provided that would materially impact ability to return to work



04

Dismissal Process

Fair procedures
Right to be accompanied
Chance to influence decision
Option of appeal

Why take action at all?



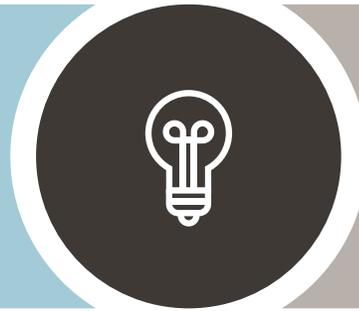
Business Impact

Employee's continued absence may impact ability to permanently backfill role



Benefit Accrual

Employee continues to accrue statutory annual leave



Paperwork

Ongoing administrative responsibility



Litigation

Risk of disability discrimination claims



Costs

Potential financial cost depending on terms of employment contract / benefit arrangements etc.

Medical Advice

Up-to-date & Relevant
Medium – long term prognosis
Conflicting evidence
Rely on expert



Employee's Illness

Nature of illness
Likely length of absence
Effect of absence/impact on business
Sick pay



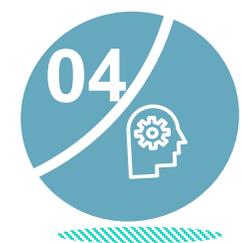
Reasonable Accommodation

Appropriate measures?
Disproportionate burden
Employer resources
Public funding



Consultation

Regular direct engagement
Employee input
Paper trail



Fair Dismissal Process

'No surprises'
Impartial decision-maker
Reasoned and justifiable decision
Right of appeal



PHI/ill-health early retirement

Entitlement to PHI – in waiting period or on cover
Eligibility for ill-health early retirement – potential material financial cost



Questions?



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