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Weighing up all the tactical scenarios, when and how do you amend trigger points and progress warnings for frequent short-term absences due to an underlying mental health condition?

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Cost implications - absences for Irish businesses

- **How?**
 - Financial cost to organisations.
 - Requirement to replace absent staff with other workers or overtime payments.
 - Medical cost referrals.
 - Indirect costs such as the effect on productivity and quality.
 - Increased work pressure on other colleagues.
 - Administration time in managing absence.
- **Workplace Absenteeism (SFA 2014 survey)**
 - Annual days lost due to absenteeism in Ireland – 4.05 million days
 - Annual cost of absenteeism to the Irish economy: €490,000,000
- **Workplace Absenteeism linked with mental health conditions**
 - Short-term absences: anything up to four weeks – 34%
 - Long-term absences: anything four weeks or more – 49%



Avenues of redress for employees with mental health conditions

- **Disability discrimination**

- Legislation imposes a duty not to discriminate directly or indirectly against candidates for employment or employees because of their disability and imposes a proactive duty to make reasonable accommodation.
- Employees with mental health conditions may be disabled if they fall under section 2(e), Employment Equality Acts (as amended).
- No service requirement for discrimination claims.

- **Health and safety**

- Legislation imposes a general duty on employers to ensure the health, safety and welfare at work of their employees, including requirements to assess health and safety risks (including stress related illnesses) to their employees and other third parties.

- **Personal injury claims**

- Employers' duty to protect and take reasonable care of employees' health and safety.
- An employer who is aware of an employee's potential stress related illness or vulnerability may need to take reasonable remedial steps (e.g. redistributing work, counselling etc.) or risk a compensation claim for personal injury.

Avenues of redress for employees with mental health conditions

- **Unfair dismissal**
 - An employee with twelve months' service is protected from unfair dismissal.
 - A mental health illness may well constitute a fair reason for dismissal on grounds of capability but if the procedure followed is unfair, the employee can claim compensation or reinstatement/reengagement.
 - Employer's obligation to act reasonably.
- **Constructive dismissal**
 - Employers are under an implied duty to take reasonable steps to ensure an employees' safety, including a duty not to cause psychiatric harm to an employee by reason of the amount or the character of work imposed.
 - Breach of this duty can give rise to constructive dismissal and/or breach of contract claims.
- **Bullying and harassment claims**
 - Employers need to implement and enforce comprehensive codes of conduct, including adequate complaints and investigatory procedures, ensuring they are compliant with the Codes of Practice.

If an employer suspects an employee has a mental health issue, what should they do?

- **Identify any potential problems**
 - Know how to act on their suspicions or knowledge.
- **Help to encourage more openness about mental health**
 - Encourage employees to disclose any problems that employees are experiencing.
 - Hard to know the appropriate measures to provide if there is no knowledge that a mental health difficulty exists.
 - This allows a response at an early stage.
- **At basic level, try to understand the causes and whether work is having an impact**
 - Employer should then consider whether anything can be done to assist.
- **If the employee's condition also qualifies as a “disability”**
 - Employer will have to ensure that it complies with its duty "to make reasonable accommodations" for employee.

Is an underlying mental health condition a “disability”?

- **A disability per Employment Equality Acts 1998 -2015 (as amended), section 2(e)**

“A condition, illness or disease which affects a person’s thought processes, perceptions of reality, emotions or judgement or which results in disturbed behaviour, and which 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.”
- **Bolger *et al.*, Employment Equality Law, Dublin: Thomson Reuters, 2012,**

“An overly restrictive definition could be seen to unduly narrow the class of individuals to which the protection relates [...] it is important that any definition is able to cope with new disabilities which emerge with new medical developments and discoveries.”
- **Mr A v A Charitable Organisation (DEC-E2011-049)**
 - Stress is not a disability in itself, but conditions commonly linked to stress may well be.

Broad meaning of ‘disability’ re. mental health

- **Government Department v A Worker (EDA-094)**

*“It is accepted that **depressive illness or clinical depression** is a disability within the statutory meaning.”*

- **Ms B v A Newsagents & Deli (DEC-E2013-149)**

*“Having received the medical certificate [...] a prudent employer would have sought a second medical opinion before dismissing her [...] the complainant’s condition reflected a serious disorder – **anorexia nervosa** and remains under the care of a psychiatrist. Therefore I am satisfied that the complainant’s condition is a disability within the meaning of Section 2 (e) of the Acts.”*

- **D v A Local Authority (DEC-S2007-057)**

*“Phobic disorders are classified by the World Health Organisation in its classification of mental and behavioural disorders [...] the complainant has a **phobic disorder** which is ongoing as well as a physical condition which requires physiotherapy. Accordingly I am satisfied that Ms D has a disability as defined by the relevant Act.”*

Broad meaning of ‘disability’ re. mental health

- ***An Employee v A Governmental Department (EDA-062)***

*“[...] the definition 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. Moreover, the Court accepts the conclusion [...] that **alcoholism is, in effect, an incurable condition and it could never be said that a person has fully recovered from the condition.**”*

- ***Humphries v Westwood Fitness Club [2004] 15 ELR 296***

*“I am satisfied that the illness **anorexia** is a disability within the meaning [...] and therefore certain statutory provisions come into play.”*

- ***Sea and Shore Safety Services v Byrne (EDA-143)***

*“[...] the Complainant suffered from “**excess anxiety and post-traumatic stress** due to ongoing exposure to rodents at her place of work.” It stated that she found it difficult to sleep and that she washed her shoes when she went home each evening in case they were contaminated by rats. She was prescribed medication to assist her recovery. On the basis of the uncontested medical evidence before it the Court finds that the Complainant had a disability within the meaning of section 2(e) of the Act.”*

Key notes on disability discrimination

- **Wide ranging definition**
 - No statutory threshold of severity for the condition or impairment to meet the definition.
 - Definition is interpreted in broad manner by the WRC/Labour Court.
 - People who have mental health difficulties are covered by the Employment Equality Acts.
- **Work-related and non-work related**
 - An illness does not have to be work-related to come within definition.
 - No distinctions are made between disabilities based on how the disability was acquired.
- **Employees and potential employees**
 - Applies to wide range of employees and potential employees in wide range of employments.
 - No requirement for a minimum period of service or minimum number of hours worked.

What is Reasonable Accommodation?

- **The mere existence of a disability is not a complete bar to dismissal.**
 - An employee can be dismissed for incapacity (i.e. an incapability to do the job).
 - But first, an employer should determine if reasonable accommodations can be made.
- ***Humphreys v Westwood Fitness* [2004] 15 ELR 296 (Dunne J)**
- **Assessment of the factual position and consultation with employee.**
 - Each case is dependent upon its own set of facts:-
 - Obtain all material facts/seek clear medical guidance in respect of the condition.
 - Consult with and give employee fair notice if dismissal is being considered.
 - Provide opportunity for employee to provide input before the decision is made.
- **Active engagement with the employee is recommended unless measures would impose a disproportionate burden on employer.**
 - Access to employment.
 - Participating and advancing in employment.
 - Undergoing training.

Meaning of 'reasonable accommodation'

- ***Farrell v Kerry Group Services Limited (DEC-E2012-109)***

Described the evaluation of reasonable accommodation as process orientated which;

"[...] places an obligation upon an employer to embark upon a process of ascertaining the real implications for the employer's ability to do the job, taking appropriate expert advice, consulting with the employee concerned and considering with an open mind what special treatment or facilities could realistically overcome any obstacles to the employee doing the job [...] assessing the actual cost and practicality of providing that accommodation."

- ***Nano Nagle v Daly [2019] IESC 63 (McMenamin J)***

An employer is required to engage in an in-depth consideration of the appropriate measures.

"The test is one of reasonableness and proportionality: an employer cannot be under a duty entirely to re-designate or create a different job to facilitate an employee. It is, therefore, the duty of the deciding tribunal to decide, in any given case, whether what is required to allow a person employment is reasonable accommodation in the job, or whether, in reality, what is sought is an entirely different job."

‘Reasonable accommodation’ re. mental health

- **Reasonable accommodations pertinent to mental health conditions**
 - Transferring certain duties away from employee.
 - Providing counselling within workplace or access to employee assistance programme.
 - Adjusting attendance hours or work load.
 - Allowing employee to work from home or time off to attend medical appointments.
 - Providing additional training.
 - **This list is not exhaustive.**
- **Data Protection concerns**
- **Jim Lucey, Medical Director at St Patrick’s Mental Health Services and Clinical Professor of Psychiatry in Trinity College (2019)**

“My advice is that the employee should know their rights. They don’t have to disclose and the employer can’t ask [...] if you knew the diagnosis, it wouldn’t assist you at all in making the right accommodations. You’re the employer, you’re trying to assist somebody integrating into a work environment in a mentally healthy way. That simply means you’re trying to reduce the amount of stress [...] but you’re not trying to be the clinician. It’s none of your concern what the diagnosis actually is.”

- Employer should not seek any more information than is necessary for consideration of provision of reasonable accommodation.

Key notes on reasonable accommodation

- **Employer has a duty to be proactive**
 - Employee has no duty to provide suggestions.
- **Requires active engagement with the employee.**
 - Employer must seek to have all material facts.
- **Look at the medical evidence available from the employee's doctor and obtained by employer.**
 - Allow employee to have full opportunity to present relevant medical evidence
 - Allow employee to have full opportunity to make submissions before making decision adverse to employee.
- **Consider whether any measures could be adopted**
 - That would assist / resolve the situation / enable the employee to return to work.

Pertinent policies relating to underlying mental health conditions and resulting absences

- **Employer has responsibilities**
 - Must consult and consider what/if measures can be put in place.
- **Caution: Disciplinary Policy may not be correct first step**
 - If caused by a mental illness, this should generally be treated as a capacity issue.
 - Implement and adhere to Sick Leave Management Policy would be appropriate first step.
 - Strikes balance between genuine absence due to ill health and maintaining workplace efficiency and productivity.
 - Must be a thorough review of potential accommodations available.
- **Disciplinary/ Performance Policy may be applicable**
 - If repeated short term absences, consider referral to occupational health provider.
 - Important to make clear when short-term sickness absence will *not* apply.
 - The organisation might suspect misconduct is involved (i.e. employee is not really sick).
 - In that case, the employer can apply its separate Disciplinary Policy instead.

Disciplinary Dismissal to follow Sick Leave Management Policy

- **Inherent requirements – Evidence of incapacity**
 - Obtaining medical evidence from employee/ independent medical practitioner to support decision to dismiss.
 - This will mitigate against the risk of employee later making a successful claim.
 - Labour Court will look at medical evidence but it has been found that an employer can have ‘constructive’ knowledge of disability - *Connaught Gold Cooperative Society v A Worker* (EDA-0822).
- ***Bolger v Showerings (Ireland) Limited* [1990] ELR 184 (Lardner J)**
- **Sets out the key requirements to be met when an employee is being dismissed for incapacity.**
 - The High Court held that the onus is on the employer to show that:
 - The incapacity was the reason for the dismissal.
 - The reason was substantial.
 - The employee received fair notice that the question of his or her dismissal was being considered.
 - The employee was afforded an opportunity of being heard.

Dismissal for persistent short-term absences: must show fair process followed

- **Conduct and performance issues**
 - Unless established that employee unable to perform requirements of role, employer to be careful to ensure that mental health issues do not form part of reason for any decision to terminate employee's employment.
 - Must remain focussed on the performance or conduct issue at hand.
- **Procedural Fairness**
 - Ensure fair process followed before dismissing employee with mental illness.
- **Unfair Dismissal: Defences due to persistent short-term absences**
 - Incapacity was the reason for dismissal.
 - Employer acted reasonably in effecting dismissal.
 - Make the employee aware of the standards of attendance expected.
 - Fair notice that dismissal for incapacity was being considered
 - Employee given opportunity to be heard.

Best Practice Tips

1. Have a detailed sickness absence management policy in place

2. Keep in contact with an absent employee as appropriate

3. Keep records

4. Conduct return to work interviews

Best Practice Tips

5. Exercise caution in considering terminating an employee's employment:

- Ensure you are in possession of all material facts and medical evidence
- Ensure that the employee is aware that the employer is considering the possibility of terminating his/her employment
- Give the employee an opportunity to be heard and to produce medical evidence
- Consider reasonable accommodation where the employee has a disability

Best Practice Tips

6. **Keep work pressures and work hours under review – are they appropriate?**

7. **Employee Assistance Programme**

8. **Deal with issues as they arise - do not ignore underperformance or signs indicating stress or mental illness and think that it will go away...**

Thank you

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