

A&L Goodbody

# Managing Undisclosed Disabilities – A Legal Minefield

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# Agenda

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- Definition of a Disability under Irish Law
- Is an Employee Obligated to Disclose their Disability?
- Pre-Employment Medicals and Medicals Generally – A Panacea?
- Knowledge of a Disability and ‘Lack of Knowledge’ Defence
- Impact of Undisclosed Disability on HR Process
- Managing the Data Protection Aspects of Employee Disability Disclosures

# Definition of a Disability under Irish Law

> S.2 Employment Equality Acts 1998-2021 defines disability as:

- (i) *"the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,*
- (ii) *the presence in the body of organisms causing or likely to cause, chronic disease or illness,*
- (iii) *the malfunction, malformation or disfigurement of a part of a person's body,*
- (iv) *a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or*
- (v) *a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour..."*

# Is an Employee Obligated to Disclose his/her Disability?

- An employee/prospective employee is **NOT** required to voluntarily disclose his/her disability on an application, during interview or once hired.
- However, an employee is required to truthfully respond to a pre-employment questionnaire – potential for disciplinary action if they misrepresent the position (whether expressly or by omission).
- Immediate obligation on employers to make reasonable accommodation once notified - s.16 Employment Equality Acts.
- **A Waiter v A Hotel** [ADJ-00014091](#) (2019)
  - > Employee resigned on 3<sup>rd</sup> day of employment due to inability to work his rostered hours due to his disability.
  - > He was HIV positive but did not disclose this until the conversation with his manager during which he resigned
  - > AO concluded that once the employee disclosed his disability, the employer was obliged to ascertain the extent of his disability and to engage with him to ascertain whether he would be fully capable of doing the job with the provision of reasonable accommodation.
  - > This obligation arose irrespective of the fact he may not have disclosed his disability until after he had verbally indicated he needed to resign.

# Pre-Employment Medicals – A Panacea?

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- No general legal requirement to conduct pre-employment medicals – standard in certain sectors/in respect of certain roles (e.g. safety critical roles).
- In fact, employers who insist on the conduct of pre-employment medicals in all cases may have to justify that decision if challenged:
  - “*The operation of pre-employment medical examinations/questionnaires are not per se unlawful. In some circumstances it is necessary for an employer to determine the capability of a prospective employee to perform certain duties or, as the respondent indicated, to examine what needs to be done to accommodate someone with a disability and those mechanisms facilitate those issues*”.
  - (X v An Electronic Component Company - DEC-E2006-042)**
- Dual purpose – establish fitness to work AND necessity for reasonable accommodation.
- Can positively trigger reasonable accommodation obligations.

# Medical Assessments Generally – Common Complaints



# Medical Assessments – Top Tips

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**01**

## Identify an appropriate expert

Talk to your network!

**02**

## Detailed Referrals

Take time to complete referral and make sure it is detailed – but remember referred employee will likely see referral form.

**03**

## Provide relevant context

- Nature of role
- Absence history
- Timing of disclosure of disability
- Areas of underperformance
- Any reasonable accommodations in place/planned to be put in place

**04**

## Ask multi-layered questions

- Fitness to work
- Fitness to participate in HR process
- Relevance of disability to performance/conduct issue
- Need for specialist input

# Impact of undisclosed disability on HR process

- The issues may be real, longstanding and directly relevant to the process.
- Health problems may be a reaction to the process itself (e.g. stress).
- Issues raised could be diversionary.

# “Knowledge” of a disability

1

**Actual:** employer knows employee is disabled

2

**Imputed:** employer’s agent knows employee is disabled (e.g. manager), with knowledge then imputed to employer

3

**Constructive:** employer ought to have known of disability (e.g. aware of facts which could reasonably indicate the existence of a disability)

# 'Lack of Knowledge' Defence

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**Swan O' Sullivan v Counihan (EDA10/2018)**  
To “*be answerable for disability discrimination against an employee, the employer must have actual or constructive knowledge that the employee was a disabled person*”.

**Senior Nurse v A Health Provider ([ADJ-00014052](#)) (2019)**  
No actual/constructive notice of disability where condition not disclosed to employer and no medical evidence provided.

**Receptionist/Office Administrator v Manufacturing Company ([ADJ-00023749](#)) (2020)**  
Employer had constructive notice of employee's disability. Employer “*failed in its duty to inquire further*” and was “*aware that [the employee] had a disability but chose to ignore it*”.

# Impact of undisclosed disability on HR process

- A Clerical Officer v A Public Service Employer [ADJ-00018924](#) (2019)

Disclosure of OCD diagnosis on the fourth probation performance review meeting

Reasonable accommodation was afforded (i.e. reduction in workload with his agreement) but performance did not improve



Employee placed on a PIP which resulted in his probation being extended, which he ultimately passed

AO: employer did its best to provide “*reasonable accommodation despite having only belated and inadequately supported indications of his medical condition*”

# Impact of undisclosed disability on HR process

- Gemma Kiernan v J&E Davy (t/a Davy Stockbrokers) [ADJ-0003172](#) (2022)

Performance concerns raised with employee who then had a fit at home – Medmark confirmed her fit/underlying medical condition would not prevent her performing the tasks she was expected to perform

Employee then placed on PIP (i.e. after Medmark report) – during PIP she received formal epilepsy diagnosis



10 days after receipt of formal diagnosis, HR met her and suggested she might wish to resign as her performance hadn't sufficiently improved and she was likely to fail the PIP

AO:

- Epilepsy diagnosis informed HR's decision to approach her prior to expiry of PIP and propose her resignation
- Epilepsy diagnosis should have triggered further medical referral and enquiries re reasonable accommodation

# Impact of undisclosed disability on HR process

- **Baldeh v Churches Housing Association of Dudley (UK EAT Case)**

Employee (who had depression) dismissed at end of probation

Not in dispute that employer did not know of disability at the time of dismissal, however, they were aware of it during appeal hearing



Conduct which resulted in decision to dismiss may have been connected to her disability

UK EAT: appeal was part of overall decision to dismiss and decision to dismiss in those circumstances could have been discriminatory

# Impact of undisclosed disability on HR process

## ■ An Employer v A Worker (EDA1927)

Employee (with less than 1 year's service) dismissed for performance reasons

Court was concerned at appeal person's evidence that they didn't "see" a causal connection between employee's depression and under-performance

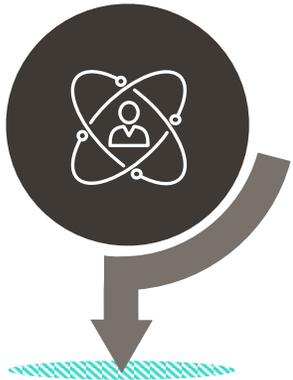


Employee produced medical cert confirming they had "depression" after appeal meeting but before decision to reject appeal communicated

Court was not able to establish whether depression existed at time performance related concerns were raised with employee and suggested burden was on employee to prove that was the case as opposed to being on employer to prove the opposite

# Impact of Undisclosed Disability on HR Process – Practical Tips

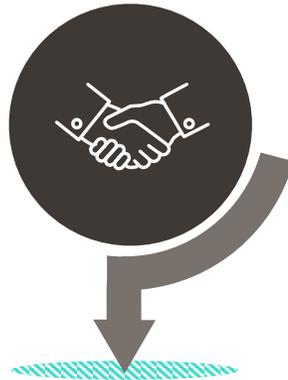
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**01**

## Significance of non-disclosure

- Employee not obliged to disclose a disability
- Pre-employment medical?



**02**

## Medical evidence essential

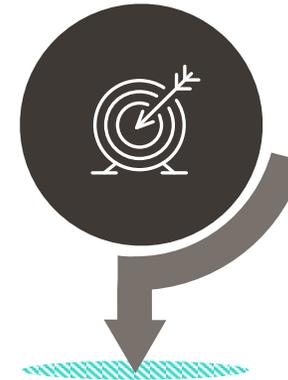
- Medical input will likely be required in all cases



**03**

## Consult with employee

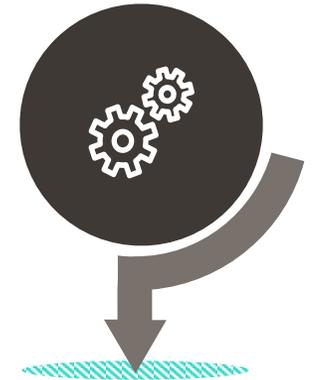
- Establish whether employee agrees or disagrees with medical evidence at an early juncture



**04**

## Evidence based decision making

- Expect employee to claim adverse decision is related to disability so ensure you can objectively justify decision reached



**05**

## Timing of disclosure

- Don't assume a belated disclosure doesn't constitute a "relevant" disclosure

# Managing the Data Protection Aspects of Disability Disclosures

Classified as **Special Category** data under the GDPR

1

Legal basis for processing is required – Article 6 GDPR (e.g. performance of legal obligation)

2

Additional conditions for processing – Article 9 (e.g. necessary to establish fitness to work)

3

Need for robust Data Privacy Notices/Data Protection Policies

4



# Managing the Data Protection Aspects of Disability Disclosures – Practical Tips

- 1 Be transparent about who will see medical data
- 2 Keep engagement with occupational health “on the record”
- 3 Restrict access to medical records/data (hard copy and electronic)
- 4 Communicate with managers about health data on a need to know basis
- 5 Ensure managers are aware of constraints on processing of health data and respect confidentiality (i.e. not gossip)



# Questions?

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