



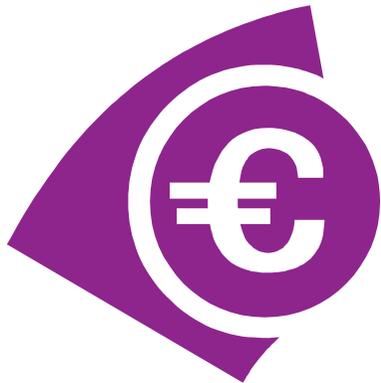
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**How do you conclude a situation where poor performance is driven by short, intermittent sickness absences caused by stress?**

**Deirdre Lynch, Partner, 23 October 2018**

## The cost of absence



- SFA 2014 survey revealed that absence cost small businesses €490 million annually:
  - Back pain/injury and anxiety/depression were most commonly cited reasons.
- 2011 survey revealed a cost to Irish economy of €1.5 billion.
- Expenditure of management time.

## Agenda

- Evidence of Incapacity
- Disability & Reasonable Accommodation
- Stress
- Dismissal
- Tips

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# **Evidence of Incapacity**

## Evidence of incapacity

- Sickness absence policies usually require a medical certificate after three days' absence.
- Ensure that the employment contract reserves the right to have the employee medically examined.
- Caution must be exercised in referring employees for medical examination: ***John Delaney v Central Bank of Ireland*** (2011).

## Evidence of incapacity - Data Protection

- Under the GDPR and the Data Protection Acts 1988-2018, health data constitutes “special category data”.
- Normally, an employer does not need to know precisely what illness/injury a sick employee suffers from – only whether the employee is ‘fit’ or ‘unfit’ for work.
- There are very limited exceptions, e.g. in cases of infectious disease.

## Potential legal issues

- Unfair dismissal: obligation to act reasonably.
- Employment equality claim: disability and reasonable accommodation.
- Personal injury claim: health and safety, stress, bullying.

## Identifying the right process

- Issues of conduct, work performance, and attendance need to be managed on an ongoing basis.
- Important to set out roles, responsibilities, obligations and entitlements in respect of sick leave in the Sick Leave Policy.

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# **Disability & Reasonable Accommodation**

## Disability

- No *de minimis* threshold for the condition or impairment to meet the definition.
- Definition is very broad manner and minor/temporary conditions have been held to come within the definition.
- Labour Court will look at medical evidence in order to determine whether an employee has a disability.
- Employer can have 'constructive' knowledge of disability - ***Connaught Gold Cooperative Society v A Worker*** (EDA 0822).

## Reasonable Accommodation

- ***Humphreys v Westwood Fitness (2004)***
  - Obtain all material facts in respect of the condition.
  - Give employee fair notice if dismissal is being considered.
  - Provide opportunity for employee to provide input before the decision is made.

## 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.

## Reasonable Accommodation

- Where an employee is dismissed by reason of incapacity and the underlying cause is attributable to a disability, if the employer has considered the provision of reasonable accommodation and provided same, it will be in a position to defend a claim of discrimination.
- If, however, the employee would have had an acceptable attendance record, been able to return to work, been able to perform properly, had reasonable accommodation been provided and it wasn't, the employer will be at risk of a successful discrimination claim unless the employer can show that this would have imposed a disproportionate burden.

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**Stress**

# Stress

- Particular considerations arise for managers when dealing with stress in the workplace.
- If work related stress causes an illness, this may give rise to exposure for an employer, most commonly in the form of a personal injury claim.
- Stress is unlikely to be a disability of itself but it may result in another disability e.g. anxiety or depression - ***A Government Department v A Worker (EDA 1 94)***; and ***Mr A v A Charitable Organisation (DEC-E2011-049)***.

# Stress

- Most people experience a certain level of stress in their work and personal lives **but** where:
  - the employee suffers an injury, the injury is caused by a breach of duty by the employer and the injury was reasonably foreseeable, the employer will be liable.
- Stress claims in an employment context may often arise in scenarios where the employee argues that she/he has been assigned an excessive workload or subjected to unfair treatment e.g. bullying.

## Stress - *Sutherland v Hatton* (2002)

- Leading (UK) case on workplace stress.
- Key factor - was the kind of harm reasonably foreseeable?
- Foreseeability depends on what the employer knows about the individual employee.
- An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability.
- Factors likely to be relevant to considering foreseeability are:
  - (a) The nature of the work done by the employee.
  - (b) Signs of impending harm to health.

## Stress - *Maher v Jabil* (2005)

- Maher claimed that he was overworked and suffered “burn out”.
- Psychiatrist recommended lighter level of work but warned of possible effect of this.
- Maher claimed that he was then given a non-job and suffered “rust out”.
- Clarke J concluded that the injury suffered was not foreseeable.
- Burn out - The productivity targets of management were not objectively excessive in light of staffing and equipment available.
- Rust out - Maher had not put the employer on appropriate notice of the difficulties with the alleged non-job.

## The nature of the work done

- Is the workload much more than is normal for the particular job?
- Is the work particularly intellectually or emotionally demanding for this particular employee?
- Are the demands made of this employee unreasonable when compared with the demands made of others in the same or comparable jobs?
- Is there an abnormal level of sickness or absenteeism in the same job or the same department?

## When to take action

- To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he or she should do something about it.
- Line managers play an essential role. They are usually best placed to identify a person who is suffering from stress and to be able to assist in reducing/eliminating/exploring the risk factors.

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**Dismissal**

## Guiding legal principles

- Responsibilities include obligation to act fairly prior to dismissal - *Unfair Dismissals Acts 1977 to 2015*.
- An employer can dismiss for incapacity but must follow an appropriate process and consider alternatives.
- Where an employee's absence is caused by a "disability", the employer has certain responsibilities but the employer nevertheless may dismiss for poor attendance.
- Referral to occupational health.
- Reasonable accommodation.

## Persistent short-term absence

- ***Bolger v Showerings (Ireland) Limited (1990)***
  - High Court considered the relevant test to be applied to dismissal for incapacity
  - For a dismissal on grounds of incapacity to be deemed fair the onus is on the employer to show that:
    - it was the incapacity that 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; and
    - the employee was afforded an opportunity of being heard.
- ***Bus Átha Cliath – Dublin Bus v McKevitt (2018)***

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**Tips**

## Best Practice Tips

1. Have a detailed sickness absence policy in place

2. Keep in contact with an absent employee

3. Keep records

4. Conduct return to work interviews

## Best Practice Tips

### 5. Exercise caution in 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 – have you got one?**

8. **Deal with issues as they arise - do not ignore inappropriate behaviour and think that it will go away...**

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# Discussion and Q&A

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Thank you



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