

A&L Goodbody

Disability & Absence Management – The Devil is in the Detail !

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Agenda

- Absence Management – short term and long term
- Definition of a Disability under Irish Law
- Knowledge of a Disability
- Reasonable Accommodation – how burdensome?
- Proof is in the pudding...
- Ripping the band aid off...

Absence Management – Short Term and Long Term

- What does contract require?
- What does sick leave policy say?
- Custom and Practice ?
- Sick Pay regimes
 - > Statutory – “medical certificate” stating employee is “unable to work”
 - > Contractual/Discretionary
- Different approaches for short term recurrent absence than long term absence?

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..."*

“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)

“Constructive Knowledge”

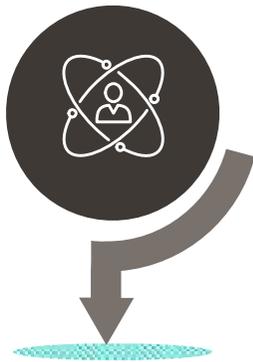
Senior Nurse v A Health Provider ([ADJ-00014052](#)) (2019)

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)

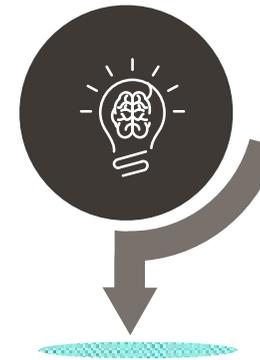
Employer had constructive notice of employee’s disability. Employer “*failed in its duty to inquire further*” and was “*aware that [the employee] had a disability but chose to ignore it*”.

“Disability” – more than an assertion required...



A Retail Company v A Worker – EDA2021

Labour Court unwilling to accept “stress” constituted a disability



A Worker and a Government Department- EDA 094

Labour Court emphasised “*manifestations or symptoms produced by a particular condition, illness or disease*” is what is important rather than the “*taxonomy or label which is to be ascribed thereto*”

Reasonable Accommodation – How Burdensome?

- **Derbhala Dwyer v Avista clg** – WRC - ADJ-00037899
 - > Following the obligations set out in the Supreme Court judgment of **Nano Nagle v Marie Daly**, the WRC held that “...an employer must engage in some form of exploratory action to ensure compliance with its duties under section 16. This may involve consultation with the employee, independent assessment or some other step for compliance.”

- **Tracy Costello v AIB** – WRC – DEC–E2019-007
 - > Complainant suffered from chronic fatigue syndrome/fibromyalgia and asserted that she repeatedly asked for shorter working hours but this request was not accommodated.
 - > Subject to absence management in respect of her excessive absence.
 - > She claimed being subject to progressive disciplinary process caused her stress, which compounded her attendance issues.
 - > Succeeded in her claim on the basis AIB failed to properly consider her request to work permanently on reduced hours.

Reasonable Accommodation – How Burdensome?

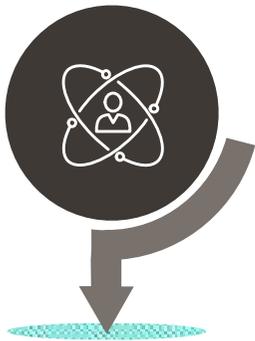
- **Northumberland Tyne & Wear NHS Foundation Trust v Ward – UK EAT 2019**
 - > Employee suffered from ME/Chronic Fatigue Syndrome
 - > Occ.health advised employee would have higher level of sickness related absences than non-disabled employees
 - > Absence management policy provided for action after **3** periods of absences in a 12 month rolling period – accommodation of **5** periods granted
 - > Accommodation withdrawn, absence increased and absence management procedure triggered, ultimately leading to her dismissal
 - > EAT concluded employee had been unfairly dismissed – employer withdrew reasonable accommodation and that resulted in breach of policy which culminated in her dismissal.
 - > Adapted absence management policy was the most effective adjustment that could reasonably have continued.

Proof is in the pudding...

- **A Production Coordinator v A Pharmaceutical Company** – WRC – ADJ00023346
 - > “....at its core, the Complainant's position is that she should have been left to manage her return to work process with little or no engagement from her employer and that when she was fit and ready to return to work she would advise the Respondent accordingly...”

- **Administrative Officer v Aviation Company** – WRC – ADJ00027126
 - > Investigation conducted into irregular use of flexi-time scheme
 - > Employee went on sick leave and certified as fit to return by occ.health but didn't
 - > Certified by her own GP as unfit throughout
 - > Referred for second opinion which corroborated first
 - > AO found employer justified in taking disciplinary action due to unjustified lack of engagement
 - > HOWEVER – dismissal procedurally unfair – employer acted with “undue haste” in dismissing her, didn't warn her dismissal was a possibility and declined a request for an appeal

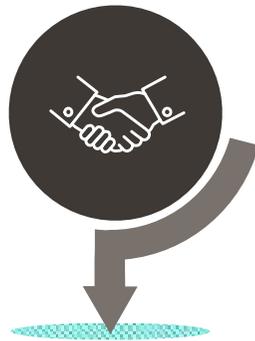
Ripping the band aid off...Issues!



01

Disciplinary issue at all?

- Failure to comply
with procedures or
inability to do so



02

“Mental Health” – disability?

- Importance of
occ.health input



03

Causal Connection

- Is there one?



04

Reasonable Adjustments

- Properly consider
(and trial?) before
discounting?

Ripping the band aid off...Options

Police Sick Pay

Insist receipt of company sick pay is contingent on compliance with absence procedures – but watch out for reasonable accommodation obligation



Leave as is

Employee likely to be happy with that – their colleagues are unlikely to be though!



Take Disciplinary Action

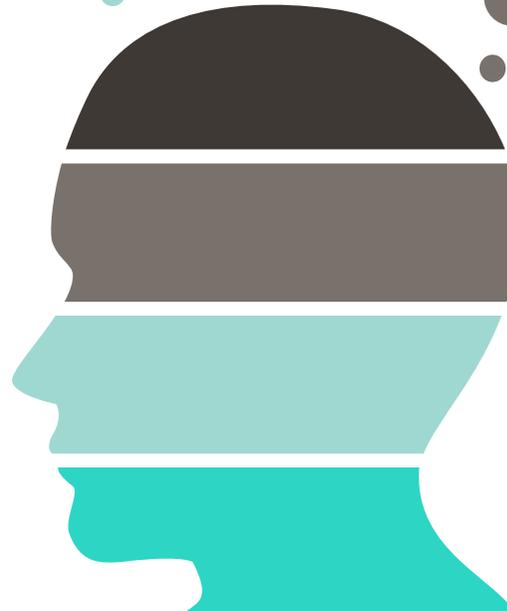
May become necessary but only after exploring/implementing reasonable accommodations



Dismissal

Last resort!

Likely to be a long and winding road...unless “mental health” issues do not amount to a disability





Questions?
