

Long-term absence

Practical advice for HR and employers

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2020





Long Term Absence:

Weighing up the risk-based pros and cons, at what point do you dismiss if sick certs are arriving every month, giving no indication of a return to work, and there is **no engagement with the company doctor?**

- **Legal Framework** and potential pitfalls
- **Procedure** for managing long term absence and dismissal
- **Risk Assessment** for Employers/HR;
- **Dismissal:** when to dismiss?
- **Other issues** to consider



PART ONE

LEGAL FRAMEWORK



Legal Framework for HR/Employer

Employers must take care to adhere to provisions of:

- Employment Equality Acts 1998-2008
- Unfair Dismissals Acts 1977-2007
- GDPR & Data Protection Acts 1988-2018
- Health and Safety Legislation

Employers should also be aware of the potential for:

- Personal injury claims
- Breach of contract/ injunction

Potential Liability in the event of a claim

Equality Acts:

- 2 years remuneration for effects of discrimination
- 2 years for discriminatory dismissal
- Other orders: specific course of action

Unfair Dismissal Acts:

- 2 years remuneration, reinstatement or engagement.

Personal injury claims

- District Court limit: €15,000
- Circuit Court limit: €60,000 for personal injury
- High Court – Unlimited Jurisdiction

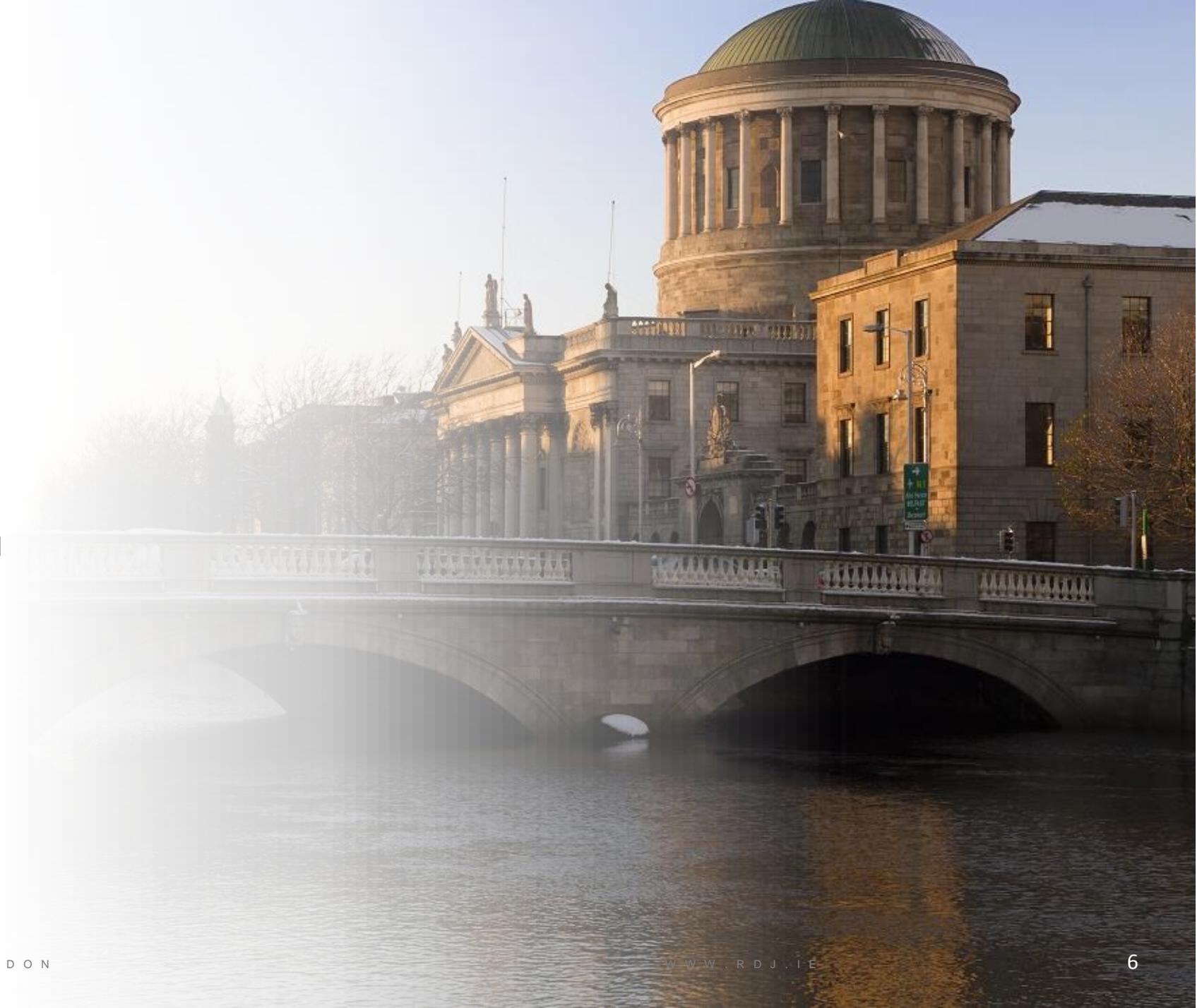
Potential Liability in the event of a claim

Note also:

GDPR & Data Protection Legislation – now includes actions for “non-material” damage, i.e. compensation for stress and emotional suffering.

Breach of Contract Claim –
Permanent Health Insurance

Health and Safety Legislation –
Penalisation Claims



Potential Liability in the event of a claim

Note also:

Health and Safety Legislation – Obligations on **Employees**

Section 13 (1) (f) - *attend such training and, as appropriate, undergo such assessment as may reasonably be required by his or her employer or as may be prescribed relating to safety, health and welfare at work or relating to the work carried out by the employee.....*

Employment Equality Acts



Nothing in the Act requires an employer (or employment agency) to employ or promote someone if they:

- will not do the job or accept the conditions
- are not competent and available to do the job

However, a person with a disability must be regarded as competent and capable of doing the job if they could do so with assistance of special treatment or facilities – concept of “**reasonable accommodation**”

Employment Equality Acts



Equality Acts: **What is a “Disability”**

- Total or partial absence of bodily/mental functions
- Presence of organisms likely to cause chronic disease/illness
- Malfunction/malformation/disfigurement of body
- Condition/malfunction resulting in learning differently
- Condition/illness/disease affecting thought processes, perception of reality, emotions or judgement resulting in disturbed behaviour

Note also that recognised disabilities include: epilepsy, alcoholism, depression, Asperger's Syndrome, narcolepsy, multiple sclerosis, IBS, vertigo.

Unfair Dismissal Legislation

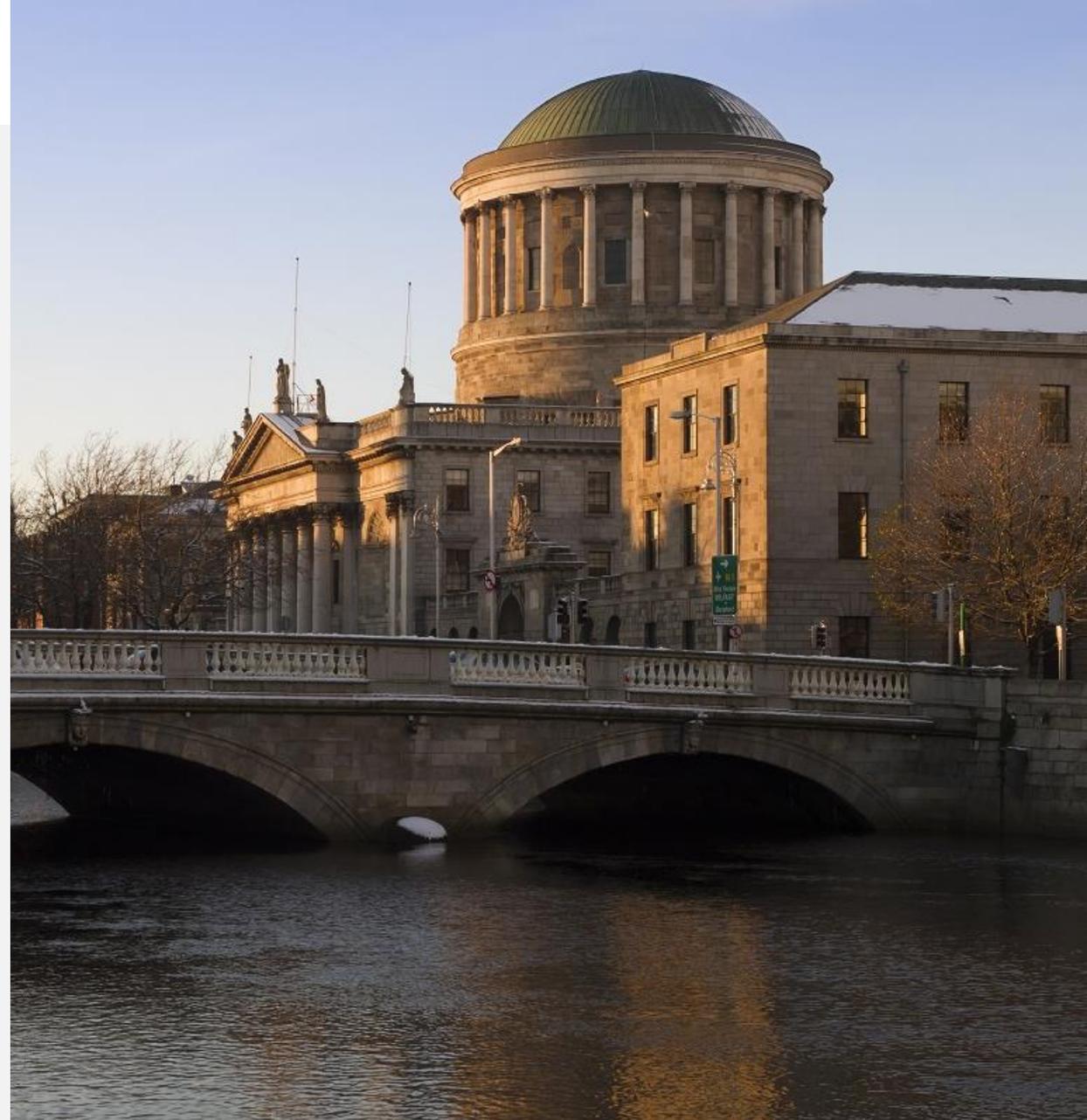
Unfair Dismissals Acts 1977 – 2007

Section 6(4) – capability

If dismissing for incapacity, must be mindful that the following is done:

***Bolger v Showerings (Ireland) Limited* [1990] ELR 184**

- Make clear ill health was the reason for the dismissal.
- That it was a substantial reason (and decision on basis of having all material facts on the medical condition).
- Employee received fair notice that dismissal for incapacity was being considered.
- Employee was afforded an opportunity of being heard.

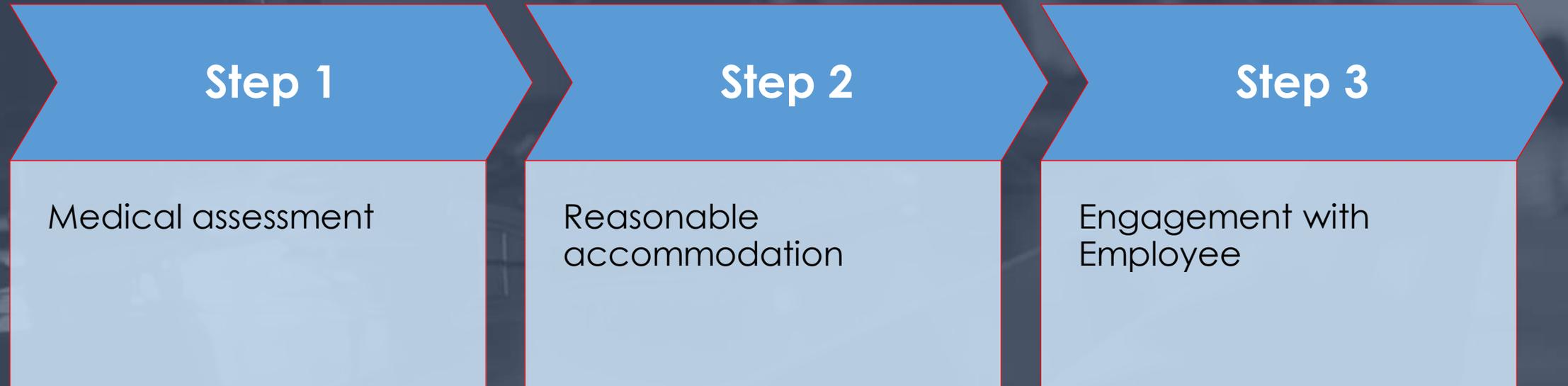


PART TWO

PROCEDURE FOR HANDLING LONG TERM ABSENCE



Handling long-term absence – Procedure



STEP 1 Medical Assessment



- Employer's and employee's obligation under the *Safety, Health and Welfare at Work Act 2005*
- Clause included in the contract?
- Technically – disciplinary matter – failing to follow reasonable instruction.
- Unlikely to form grounds for dismissal in and of itself.
- Safer to follow the dismissal for incapacity route.
- Has the employer done all it reasonable can to obtain medical evidence?

STEP 1 Medical Assessment



- Express contractual term will assist in incapacity dismissal.
- Also, has the employee been warned of the consequences of non-engagement with occupational health?
- Advise option to provide qualified consent.
- Patience is key!
- Number of attempts to achieve co-operation.
- Full explanation of the potential consequences of not engaging.

Donegan –v- Dublin City Council [2018] High Court

- Unfit for work pending specialist assessment by consultant psychiatrist.
- Employee refused to be assessed by consultant psychiatrist.
- Pay suspended.
- Refusal to comply with instructions of employer led to dismissal.
- “...*entirely reasonable*” for the employer to require assessment.
- Duty to do so, given 3 medical opinions.
- Could not accept employee back into workplace – dismissal was fair.



What is the purpose of **Medical Assessment?**

Ensure you establish whether or not the employee is:

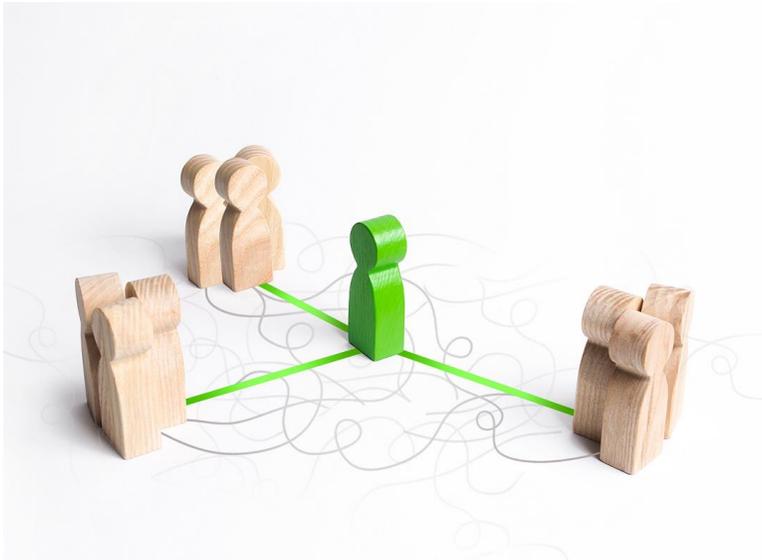
- Fit for work?
- Fit to attend meetings?
- Capable of performing duties and discharging responsibilities of their job description?
- Subject to any long-term condition that may need to be managed?
- Fit to work their normal working hours?
- Capable of being subject to company policies and procedures?

Is a consistent return to work achievable?



STEP 2

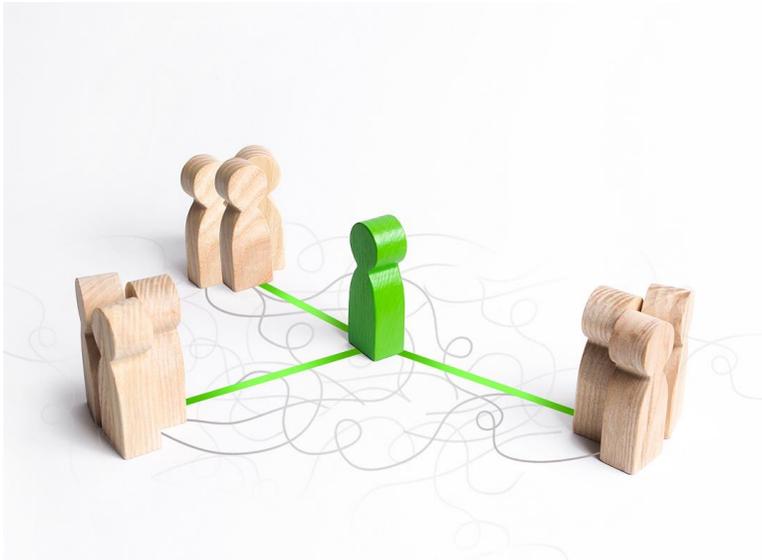
Reasonable Accommodation



- Medical Assessment may indicate reasonable accommodation could allow the employee to return to work.
- Or where there is no engagement, ask the employee about reasonable accommodation.
- Consider reduced hours, duties, remote working, alternative roles, etc. and retain records of the efforts.
- Carry out an ergonomic/occupational assessment:
Carroll –v– Heinz Frozen & Chilled Foods Limited E2011-114.

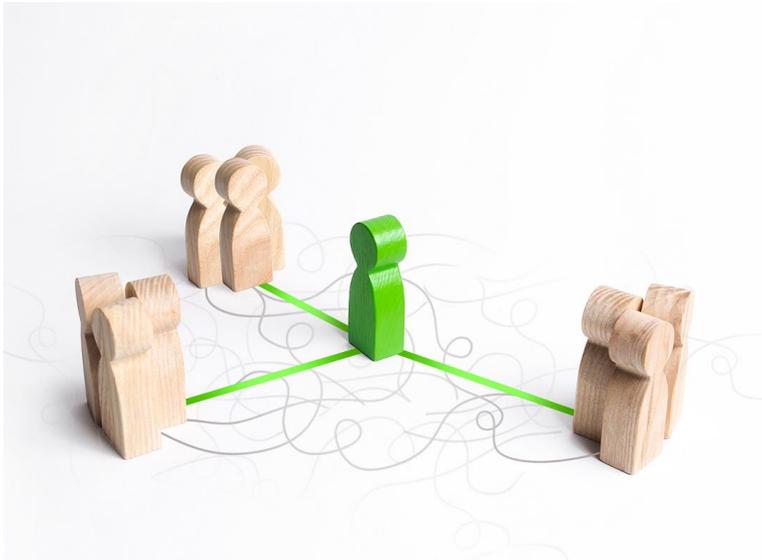
STEP 2

Reasonable Accommodation



- Consider cost of accommodation and retain evidence of these calculations and the financial position of the employer.
- In UK, Code of Practice recommends you accept a spend of at least as much as it would cost to recruit and train a replacement.
- Attempts to accommodate must be comprehensive and genuine –
An Individual v A Respondent 2016 ADJ-00001672

What is “Reasonable Accommodation”



THE TEST for reasonable accommodation

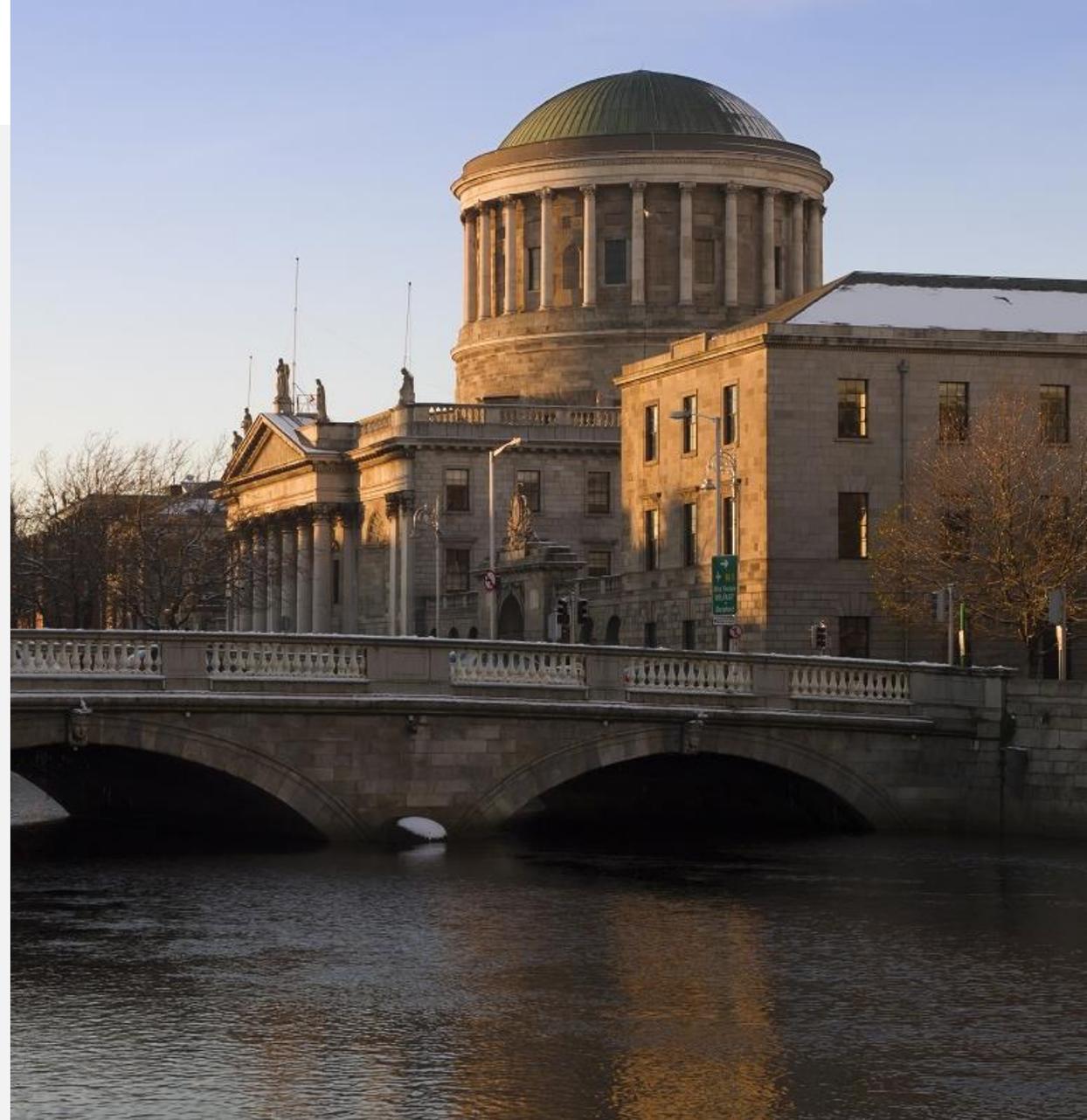
An Employer should ensure they have all the material facts about the employee's condition. This would involve looking at the medical evidence available to the employer either from the employee's doctors or obtained independently

S.16 (3) of the Act requires the employer to consider what if any special treatment or facilities may be available by which the employee can access employment, participate/advance in employment and/or undergo training

Consultation: An employee must be given fair notice that his/her capacity is under question and the opportunity to influence the employers decision

Nano Nagle Decision (2019)

- This is a significant decision on the scope of employers' obligations to provide reasonable accommodation for employees with a disability and when termination due to incapacity may be validly considered by an employer.
- Reasonable accommodation does not involve a distinction between essential and non-essential duties. Must consider reorganisation of all.
- Found that test is of **reasonableness and proportionality** - the employer must consider if redistribution of tasks would place a "disproportionate burden" on them. Not expected to entirely redesignate or create a different job for an employee.
- This case also suggests that, in considering reasonable accommodation for an employee with a disability, an employer is entitled to take into account other legitimate interests which they may also have to accommodate.



STEP 3 Engagement



Ensure you maintain engagement and communication with the employee throughout the process.

- Inform employee of the purpose of the medical assessment and give copy of any correspondence containing sensitive personal data
- Provide employee with copy of the medical report and give the opportunity to discuss at a meeting
- Involve employee in discussion of any alternative roles and approaches and invite their input.

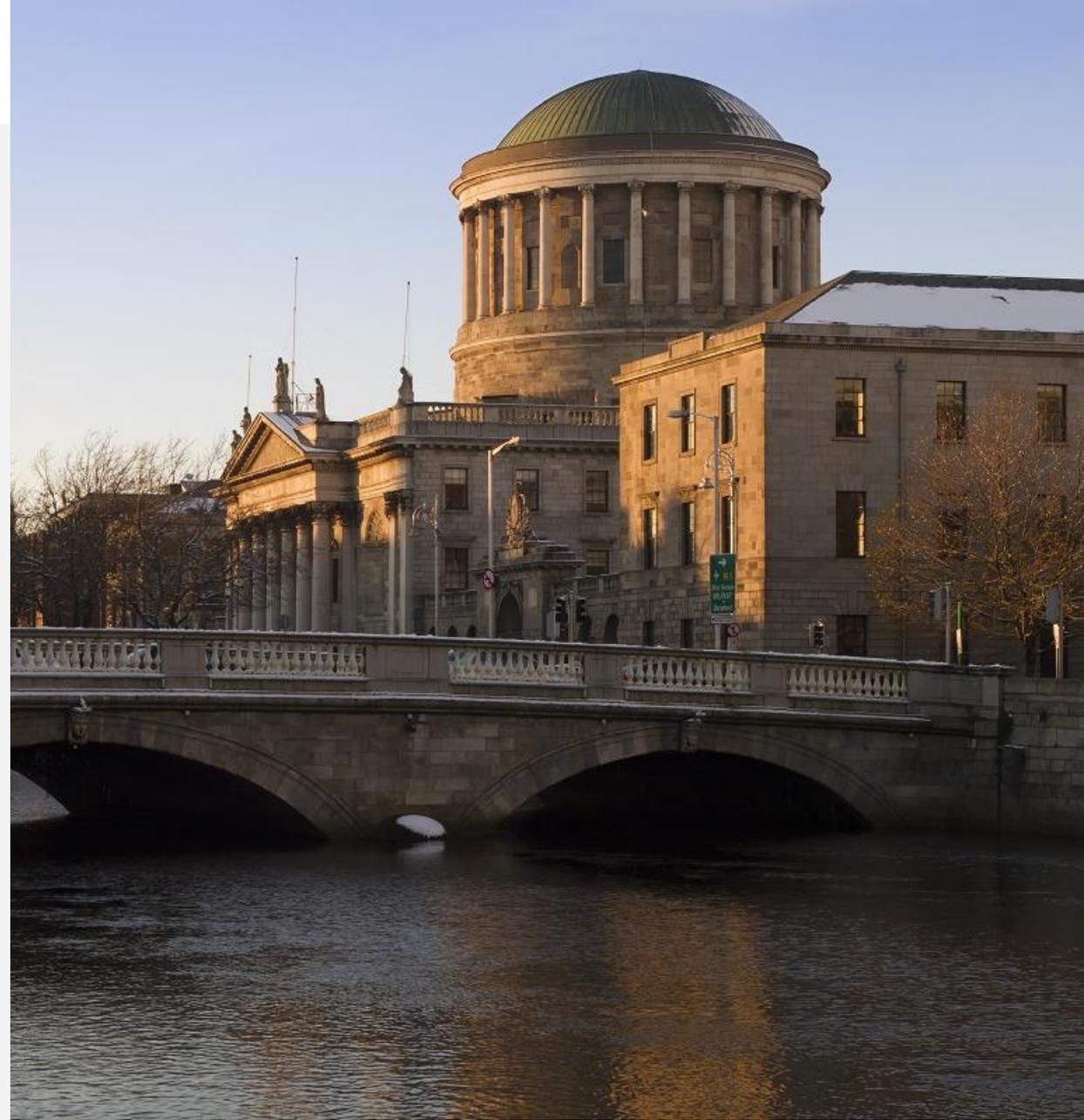
STEP 3 Engagement



- Give employee regular written updates on the process – communication is key to the employer's defence.
- If termination is being considered, inform the employee in advance of any meeting in respect of this decision.
- Do not make a decision on termination without adjourning the meeting for a time to consider and enquire into the employee's suggested alternative.
- Provide a right to appeal.

A Warehouse Operative v A logistics Solutions Company (WRC 2019)

- Polish employee – absent for 8 continuous months.
- Refused to attend appts with occupational health.
- Not resident in the State whilst absent.
- Employer did their best to accommodate – accepted medical certs from Poland.
- Attendance Control Programme – onus on employees to attend occupational health and welfare meetings.
- Employer was “very reasonable”.



PART THREE

RISK ASSESSMENT AS HR/EMPLOYER



Risk Assessment for the Employer/HR



- Does the company have an **absence policy**? Does it cover key areas?
- What is the employee's **length of service**?
- What is the **future of their employment** (are they due to retire/on a fixed term contract/contract for specific purpose)?
- What is the **nature, effect and likely duration** of their certified illness?
- What is the **prognosis** on their return to work?

Risk Assessment for the Employer/HR



- Are they in receipt of **sick pay entitlements** or has this been exhausted?
- Is there a Permanent **Health Insurance Policy**/disability scheme in place?
- In the actual **circumstances at hand**, is it reasonable for the employer to wait any longer?

PART FOUR

WHEN TO DISMISS



When is it reasonable to consider dismissal?



- Employee is certifying their illness each month
- But no indication of return to work
- And/or medical prognosis indicating indefinite absence
- And/or no engagement with the company doctor

What is the reasonable length of time to wait without indication of return to work?



Case by case, 6 months at least, 12 more reasonable

Reasonableness will depend on a number of factors:

- Ability of the employer to cover absence – need to consider termination *McElhinney –v- Templemore Cooperative Society Limited* UD1982-434
- Length of service *Lawless –v- Dublin County Council*
- Warnings given to the employee
- Position of the employee – recruiting, retention

PART FIVE

OTHER ISSUES THAT MAY ARISE



Other Issues

- Permanent **Health Insurance** / other Insurance Considerations
- **Surveillance** and use of private investigators
- Can **social media** evidence be obtained?
- Risk of claim of **victimisation**



PHI and Insurance



Permanent Health Insurance:

- Scheme only subsists where person remains employee
- May open company to a breach of contract claim
- Cannot use PHI medicals for other purposes

Insurance Issues

- Must notify insurance company at preliminary stage – even prior to threat of or service of claim or proceedings
- Should notify as soon as stress/work-related stress is mentioned

Surveillance and Private Investigation



- Potential pitfalls in **data protection/GDPR** legislation
- May be **consequences for inappropriate surveillance**
 - *Sweeney v Ballinteer Community School* (2011) IEHC 131
 - Significant monetary fines under GDPR for a breach
 - Order to destroy personal data
- Should be **last resort only** and should undertake legal advice

Social Media



- Company must be careful if obtaining evidence on social media - **data protection issues apply**
- If another employee has raised the concern, ask for them to **provide a print-out**
- The information must be given over in advance
- **Take care not to jump the gun** – employee can be unfit to work and fit for other activities.

Victimisation



- Protection against “*dismissal or other adverse treatment*” as a reaction to having taken certain protected action set out in s74(2) EEA. No defence to victimisation.
- Includes making complaints of discrimination, issuing proceedings, acting as witness, supporting a complainant or giving notice of intention to do any of these things.
- Increasingly valuable supplemental or standalone claim
- ***Pauline Stone – Moloney & Sons Ltd v-* DEC-2010-096** 2 years awarded for victimisation and victimisatory dismissal.

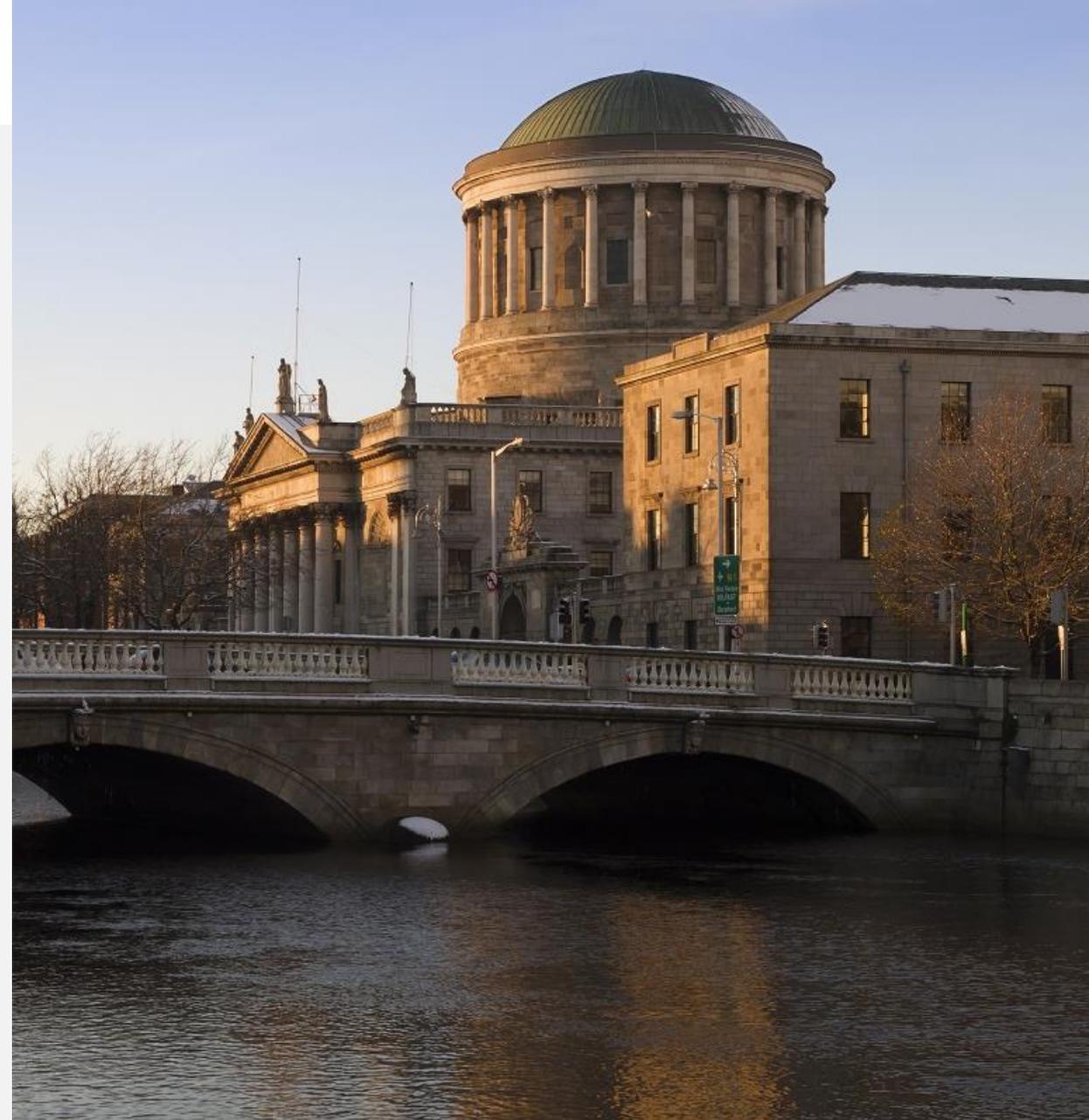
Victimisation

Maheer –v- CIE Medical Dept & CIE, DEC-E2010-046

- Applied for position and was refused due to medical history (heart condition)
- Lodged claim that refusal was disability discrimination
- Further job application was ignored.

Complainant –v- A Department Store DEC-E2002-017

- Sought advice from Equality Authority following several unsuccessful applications for a job.
- *“In view of the untrue and unfounded allegations... we are not for the foreseeable future going to accept any application from you for employment...”*



SUMMARY



Summary

- Maintain records of the absence
- Ascertain the medical situation
- Consider reasonable accommodation
- Communicate with the employee
- Ensure employee aware of consequences of non-engagement
- Give opportunity to comment on medical report and make alternative suggestions to dismissal – given due consideration
- Assess long term or underlying cause for the absence requiring consideration?

Summary (Cont'd)

- Where no reasonable prospect of return to work, give due and fair process in approaching dismissal.
- Ensure clear that length of absence was unreasonable or prejudicial
- Give warnings and retain evidence of each progression
- Give reasonable time to improve and engage, and give an opportunity to influence the termination decision
- Decision made on basis that:
 - No prospect of return
 - Or no engagement with procedures
 - No alternative role available
 - Fair procedures were followed

Questions?

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