

EQUALITY LAW: WHERE ILLNESS BECOMES A DISABILITY

- Deirdre Crowley

The recent annual report from the Equality Authority shows a marked increase in respect of cases taken on the grounds of disability and stress.

Section 2 of the Employment Equality Acts 1998-2004 defines "disability" as:

- Total or partial absence of a persons bodily or mental functions or
- A condition, illness or disease which affects a persons thought processes, perception of reality, emotion or judgment or which results in disturbed behaviour"

An employer, before deciding on the continued employment of a sick employee, must assess if the sickness might be deemed a disability and what special treatment and facilities may be put in place to allow the employee to continue in, or return to, their employment, and whether this accommodation is reasonable in all the circumstances of the case.

In considering what is may be an un-reasonable change or accommodation, the employer should be able to show that they would impose a disproportionate burden on the business and this depends on the size and resources of the business.

An employer's first response to ill health should be to evaluate the cause of the illness and consider improvements to the working conditions of the ill employee rather than simply leaving him/her out on sick leave. This should be done before an employer considers entering the realm of dismissal.

The employer must also satisfy himself that the employee at all times received fair notice that the question of his/her dismissal for incapacity was being considered.

A leading case in the area of ill health and disability remains *Humphries v Westwood Health & Fitness*

Club unreported, Circuit Court, February 13, 2004 which addressed the following key points:-

1. The factual position concerning the employee's capability must be looked at. This would involve looking at the medical evidence available to the employer either from the employee's Doctor or available independently.
2. If it is apparent that the employee is not fully capable to perform his/her role, Section 16 (3) of the Act requires the employer to consider what, if any, special treatment or facilities maybe available by which the employee can become fully capable. The cost of such special treatment or facilities must be considered and whether or not it would be disproportionate.
3. Enquiries in relation to special measures to be adopted by an employer can only be regarded as adequate if the employee concerned is allowed a full opportunity to participate and is allowed to present relevant medical evidence and submissions.

A recent case in the United Kingdom, *Edwards v Governors of Hanson School* determined that the issue as to whether an employer has caused work related stress in the first place is now directly relevant in determining both the *fairness* of any dismissal and also the amount of compensation that ought to be awarded in *compensation*.

SUPREME COURT RULES AGAINST EMPLOYEE IN BULLYING CASE

- David McCarroll

In a recent judgment, delivered by Justice Fennelly, the Supreme Court held that a plaintiff employee had failed to discharge the burden of proving that his depression was caused by his treatment during his employment.

The plaintiff, in *Quigley v Complex Tooling and Moulding Ltd*, had been dismissed in October 1999.

He took two subsequent actions – an unfair dismissal case before the Rights Commissioner (which the Company appealed to the EAT) and a personal injuries action before the High Court arising from alleged bullying in the workplace. The High Court awarded Mr Quigley over €75,000 in compensation.

The Company appealed the decision to the Supreme Court on two grounds;- 1 that the treatment suffered by the plaintiff did not amount to bullying - the Court held against the Company on this ground; and 2 the Company argued that there was insufficient evidence of a causal link between the bullying found by the High Court and the psychiatric injuries suffered. The Company succeeded on this ground.

Mr Quigley had first attended his doctor in January 2001, some 14 months following his dismissal. The medical report recorded that he had “become increasingly anxious about his impending case” (ie the appeal by the Company of the Rights Commissioner’s decision to the E.A.T.) and that “his symptoms of depression had intensified”. He could not succeed in his claim unless he could discharge the burden of proving that his depression was caused by his treatment during his employment. The Supreme Court found that the medical evidence presented was consistent only with the plaintiff’s depression having been caused by his dismissal and the subsequent Unfair Dismissal proceedings, not the bullying and harassment.

Therefore, even though Mr Quigley was bullied, the personal injury was not caused by the bullying, rather it was due to the dismissal and the legal case. It is not enough in a personal injuries case for an employee to simply prove that they were bullied. They must also prove that such treatment caused a personal injury.

**EMPLOYEE AWARDED €34,000 AFTER
DISMISSAL FOR WORKING WHILE ON
LEAVE**

- Jennifer O’Sullivan

The Employment Appeals Tribunal awarded €34,000 in compensation to a window-fitter who was dismissed after his employer engaged a private investigator to observe him while taking two days’ unpaid leave.

The company became suspicious after observing the employee’s car parked near a local bog on the first day off. Surveillance by an investigator was arranged and when he returned to work, the

employee was told that the investigator's report showed he was working on the bog on his second day off, when he said he was minding his children. The claimant’s defence was that he had left home around midday after the return of his wife and child from hospital. He was not paid for the work but was simply helping a friend.

The Tribunal held that the company could only dismiss the employee if it could establish he was paid for the alternative work. The cornerstone of this decision is that it is not reasonable for an employer to fully dictate what an employee can and cannot do in while on leave. The employer should apply full fair procedures and give the employee the opportunity to put their side of the story forward.

Generally, what an employee chooses to do with their own free time will be a matter for themselves. If an employee carries out work for a competitor of their employer, whether paid or unpaid, this clearly breaches the implied duty of trust and confidence and may be grounds for dismissal following a full investigation and subsequent disciplinary hearing. In addition, the Organisation of Working Time Act 1997 makes it an offence for an employer to employ a person where the total working hours of that person, involved in two or more jobs, would exceed the permitted maximum.

An employer should consider inserting a clause in all contracts of employment setting out that the employee may not, without having first obtained the prior consent of their employer, engage in any other employment outside their hours of work which is similar to or connected with the employer’s business.

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