



EMPLOYMENT, PENSIONS AND EMPLOYEE BENEFITS

Giving Reason to Reasonable Accommodation

by **Elizabeth Mara**

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A recent decision of a Workplace Relations Commission Adjudication Officer (“AO”) (ADJ – 00000508) considers the extent of an employer's obligation to make reasonable accommodation for an employee with a disability and finds that, taking into account the scale and resources of the employer and its engagement with the employee over a 9 month period, dismissal on the grounds of capacity was justified.

The facts of the case and the implications for employers are examined below.

Background

The employee suffered with rheumatoid arthritis and fibromyalgia, which affected her ability to sit at a desk for long periods of time. The employee was absent on long term sick leave for a period in 2013. She returned to work on 2 January 2014 but commenced a further period of sick leave on 22 October 2014. The employer engaged with the employee on a number of occasions during her sick leave in 2015 to ascertain her ability to return to work. The employee submitted various medical evidence and sick certificates to her employer indicating that she was not capable of returning to full time employment or employment based on a 4 day week scenario (as desired by her employer) or to provide a reasonable indication of when she might be in a position to do so. The employer argued that filling the employee's role on a temporary basis was causing damage to its business and, in circumstances where the employee was not in a position to return to work, it ultimately made the decision to dismiss her on 3 July 2015.

The employee brought a claim for discriminatory dismissal under the Employment Equality Acts, 1998 to 2015 (the "**Equality Act**").

In this case, the employer accepted the employee's medical evidence and did not have her independently assessed. The employee was critical of the employer's failure to have her medically evaluated prior to taking the decision to dismiss her claiming that the employer was obliged to establish whether she was capable of undertaking the work she was contracted to carry out.

The AO acknowledged that it may be good practice for an employer to arrange its own independent medical assessment but found that in these particular circumstances, the employer had clearly accepted the bona fides of the employee regarding her condition and/or the medical advice and care she was receiving. The AO noted that there was no dispute between the parties regarding the employee's condition and her inability to return to work at the time of her dismissal and therefore an independent medical assessment was not necessary.

Reasonable Accommodation

The employee argued that the employer had made no effort to accommodate her disability and that she had been discriminated against.

The employer said that it had done its utmost to facilitate the employee's return to work. The employer argued that the medical advice, following a nine month absence, was that the employee was not in a position to return to work and there was no indication as to when or if she might be in a position to do so. The employer's position was that the inability to fill the employee's role on a permanent basis was significantly interfering with its business and it therefore took the decision to terminate the employee's contract.

The employer submitted documentary evidence showing that prior to making the decision to dismiss, it had arranged 3 meetings with the employee on the 27 February, 1 April and 3 July 2015 to discuss and ascertain her ability to return to work.

The Equality Act

Section 16(3) of the Equality Act obliges an employer to take appropriate measures to enable a person with a disability to have access to employment or to participate in employment so long as the measures do not impose a disproportionate burden on the employer. In determining whether a measure imposes a disproportionate burden, account shall be taken of the financial and other costs entailed and the scale and financial resources of the employer. The Act, however, does not oblige an employer to retain an employee in a position when the individual is not "fully competent and available to undertake" the duties attached to that position.

Of concern to employers generally are the lengths to which they must go to ensure compliance with the legislation on the provision of reasonable accommodation.

Decision

The AO was satisfied that, having regard to the medical evidence presented by the employee, she was not fit to return to work and carry out her duties. The AO was satisfied that "given the size and nature" of the employer's business, the on-going consultation with the employee on sick leave over a period of nine months was a "reasonable period of time to have provided to the employee in order to accommodate/facilitate either a return to work or the establishment with some degree of certainty as to when that might happen

”.

The AO also acknowledged and accepted the employer’s evidence that the ongoing temporary replacement of the employee was proving problematic for the employer and was impacting on the efficient and effective management of their business.

The AO concluded that the employer made a decision to dismiss the employee at a time when the employee was not in a position to return to work or to provide any reasonable indication as to when she might be in a position to do so. In those circumstances, the AO was satisfied that the employer could not be expected to continue with an indefinite arrangement to temporarily replace the employee as to do so would place an unreasonable burden on the employer’s business.

The employee’s claim of discriminatory dismissal was rejected.

Highlights for Employers

This case is a helpful example of the threshold which an employer must meet in order to successfully defend a claim for discriminatory dismissal where an employee is on long term sick leave.

The case highlights the importance of having medical evidence to support a decision to dismiss together with providing evidence of the need to replace the employee. The AO in this case appears to have been significantly influenced by the inability of the employee to provide any indication as to when she may be able to return to work.

The finding by the AO that an independent medical assessment was not required is interesting but must be viewed in the context of the particular facts of this case and the full acceptance by the employer of the employee’s medical evidence. However, best practice for an employer is to obtain an independent medical assessment, notwithstanding this decision.

While this case helpfully demonstrates that an employer’s obligation to make reasonable accommodation is proportional to its scale and financial resource, each case will be determined on its own facts and the extent of any adjustments to be made for an employee’s disability will vary from case to case.

If you would like further information on this topic, please contact Elizabeth Mara at emara@lkshields.ie.

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