



**The National Mental Health
Stigma Reduction Partnership**

Summary of Case Law Review on Mental Health in the Workplace

**Case Law Review under the Employment
Equality Legislation on Mental Health in the
Workplace**

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Background

This document is one of the main outcomes of See Change's Equality Mainstreaming Project 2013–2014, on promoting workplace equality in relation to mental health.

See Change is Ireland's national mental health stigma reduction partnership. See Change's aim is to create a comprehensive and lasting change to the organisational culture of Irish companies and organisations in relation to mental health issues in the workplace setting.

The project proposal was originated by the need to support people with personal experiences of mental health problems in the workplace. The project's aims include challenging stigma about mental health, preventing discrimination in the workplace and supporting managers and employers with legal and policy guidance.

This project's funding was provided by the Equality Mainstreaming Unit in the Equality Authority. The Equality Mainstreaming Unit is one of the initiatives set up under the [Human Capital Investment Operational Programme](#) 2007–2013, and is co-funded by the European Social Fund (ESF).

The main objective of the Equality Mainstreaming Unit is to promote workplace equality and address labour market inequalities in Ireland for specific groups at risk of discrimination under the nine grounds covered by the Equality legislation (for more information, see www.equality.ie).

Employees with mental health problems may be protected under the disability ground in the Irish Equality legislation (Employment Equality Acts 1998–2011). The aspects of employment that are covered are advertising, equal pay, access to employment, vocational training and work experience, terms and conditions of employment, promotion or re-grading, classification of posts, dismissal and collective agreements. See Change is working on this project with a number of key partner organisations. These include the Equality Authority, Irish Business and Employers' Confederation (IBEC), Business in the Community Ireland (BITCI), the Irish Congress of Trade Unions (ICTU), Suicide or Survive (SOS), Sigmar, St John of God Hospital and EHA.

This document was written by Eilis Barry BL.

Disclaimer: The views expressed in this document do not necessarily represent those of the See Change project partners or of the Equality Authority.

Foreword by Eilis Barry BL

The focus of this review is on the case law under the Employment Equality legislation that deals with mental health issues. Cases on other types of disability will be cited for illustrative purposes.

This booklet is intended for information purposes only. This is not a legal document and should not be taken as legal advice. This area of law is evolving all of the time and recent cases of the decisions of the Equality Tribunal and the Labour Court can be accessed at <http://www.workplacelrelations.ie>.



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1.1 Rights of People with Mental Health Problems

Employees with mental health problems that come within the definition of disability in the EEA have significant enforceable rights. These include rights not to be discriminated against on grounds of their mental ill health, not to be harassed on account of their mental disability or victimised for asserting their rights. In addition, employers have significant obligations to be proactive about making appropriate arrangements to enable employees with mental health disabilities to participate fully in employment. The basis for these rights and obligations is the Employment Equality Act 1998–2011 (which will be referred to as “the EEA”).

1.2 Scope of the Employment Equality Acts (EEA) 1998–2011

The scope of the EEA is very broad.¹ It covers all aspects of the working relationship including the recruitment process, pre-employment medical screening, occupational health assessments, job adverts and the conduct of interviews. It also includes all of the terms and conditions and policies in employment.²

The EEA also applies to a very wide range of employees in a wide range of employments, including full-time, part-time and temporary employees, public and private sector employees.³

There is no requirement for a minimum period of service or minimum number of hours worked in order for the legislation to apply. It applies to job applicants as well, and even former employees are protected against post-employment discrimination in the form of victimisation, for example in relation to employment references.⁴

1.3 The Nine Grounds of Discrimination

The nine discriminatory grounds specified in the EEA are, gender, civil status, family status, sexual orientation, religion, age, disability, race and the Traveller community. The grounds that are most relevant to mental health in the workplace are considered in part 3.

¹ Section 8 of the EEA.

² Such as pay, collective agreements, overtime, shift work, transfers, promotion, grievance and disciplinary measures, counseling, work experience, training and vocational training. It also extends to lay offs, redundancies and dismissals.

³ The EEA also applies to vocational training bodies, employment agencies, trade unions, professional and trade bodies. It extends to self-employed contractors and partners in partnerships.

⁴ It even extends to former employees who are protected against post-employment discrimination in the form of victimisation – the ECJ in *Coote v Granada Hospitality Ltd* (1998, ECRI-5199) held that the protection extended to sex discrimination in the form of victimisation in the form of a refusal to provide a reference.



1.4 Discrimination (Indirect Discrimination, Discrimination by Imputation and Association)

There are different types of discrimination covered by the EEA, including indirect discrimination, discrimination by imputation and discrimination by association.

Discrimination is defined as the treatment of a person in a less favourable way than another person is, has been or would be treated in a comparable situation on any of the nine grounds, which exists, existed, may exist in the future or is imputed to the person concerned.⁵

Disability discrimination arises, for example, where a person is treated less favourably on grounds of a mental disability, which a person has, than either a person without a disability or a person with a different disability.⁶ It may also arise if a person is treated less favourably on the basis of a mental illness that she/he had in the past, or may have in the future, or if she/he is suspected of having a mental illness even if she/he does not.

It may constitute discrimination if an employer offers the exact same facilities to an employee with a disability as offered to employees without a disability.⁷

There has to be a connection between the disability and the alleged discriminatory acts, but the disability does not have to be the only reason for the less favourable treatment as long as there is a material reason for the less favourable treatment.⁸

Unconscious or inadvertent discrimination

It is not necessary to establish that an employer intended to discriminate.⁹ The Labour Court have stated that:

[A] person with a disability may suffer discrimination not because they are disabled, per se, but because they are perceived, because of their disability, to be less capable or less dependable than a person without a disability. The Court must always be alert to the possibility of unconscious or inadvertent discrimination and mere denials of a discriminatory motive,

⁵ Section 6 EEA.

⁶ An instruction to discriminate is also prohibited.

⁷ In *Gallagher v McCosker & Sons* the Complainant, who was profoundly deaf, worked with the Respondent for 30 years as a painter. A refresher "Safe Pass" (health and safety) course was organised by another employer and the Complainant, along with colleagues, was to attend. The Complainant was led to believe that a sign language interpreter would be available to assist him, as at previous courses. However, no sign language interpreter was ultimately on hand on the day. The Equality Officer found that offering the same opportunities and facilities to the Complainant as was offered to the other employees who did not have a disability constituted discriminatory treatment.

⁸ The Labour Court stated in *A Government Department and An Employee* that "The proscribed ground – in this case the Complainant's disability – need not be the sole or even the principal reason for the conduct impugned; it is enough that it is a contributing cause in the sense of being a 'significant influence'".

⁹ Though it may have some relevance in a claim of indirect discrimination.



in the absence of independent corroboration, must be approached with caution.¹⁰

1.5 Employees with Different Disabilities

The disability ground is defined as “between two persons ... that one is a person with a disability and the other either is not or is a person with a different disability”.

In *O v A Named Company*¹¹ the employee had been admitted to St John of God’s suffering from anxiety and depression and was certified as fit to return to work on a phased basis. The employer argued that given that the work was project based, and given the size of the organisation, it was not feasible to offer the complainant a phased return to work. The Equality Officer found that that the Respondent discriminated against the Complainant by treating him less favourably than a former colleague with a different disability, as the arguments for not allowing the Complainant to return to work on a phased basis also applied when his former colleague was allowed time off on a daily basis to attend treatment for his condition (alcoholism).

1.6 Knowledge of the Disability

It may not be immediately obvious that an employee has a disability, especially a mental health disability. Employers regularly seek to defend discrimination claims on the basis that they were unaware of an employee’s disability.

An employer must be able to demonstrate that it had no actual, constructive or implied knowledge of the employee’s disability in order to defend a discrimination claim. The employer may not necessarily be able to defend a claim on the basis that they were unaware of the disability, even if the employee has not explicitly informed the employer that he/she has a disability, in circumstances where there were clear signs or indications that an employee did have a disability.

In *Connacht Gold-Co-operative Society v A Worker*¹² the employer sought to defend a disability discriminatory dismissal claim on the grounds that it had no knowledge that the Claimant was suffering from depression, as it had received certificates stating that the employee was unfit for work due to “illness/medical illness” and “stomach trouble”.¹³ The Labour Court overturned the finding of the Equality Tribunal that the employer was aware of the depression and held that the employer was not aware of the Claimant being diagnosed with depression:

The Court is supported in this conclusion by the lack of any symptoms or indications that he was suffering from depression. It was agreed by all that his work was very satisfactory ... On balance the Court believes that the Respondent was not aware of the Complainant’s disability and

¹⁰ *A Technology Company v A Worker*, EDA0714.

¹¹ DEC-E2003-052.

¹² EDA0822.

¹³ The Claimant’s doctor had advised against putting “depression” on the cert on the basis that he would only be out of work for a short time and colleagues should not be made aware that he suffered from a mental illness.



furthermore, there was no indications/signs to alert it to enquire about his need for “reasonable accommodation. ”

However, in *Flynn v Emerald Facility Service*¹⁴ the employer denied being informed that the employee had an alcohol problem, even though it had asked the Claimant to stay away from work and issued disciplinary proceedings because the Complainant had the smell of alcohol on his breath on several occasions. The Equality Officer concluded that the Complainant had never stated to his employer that he was an alcoholic or asked for reasonable accommodation to be granted.

The Equality Officer in *A Cleaning Operative v A Contract Cleaning Company*¹⁵ was satisfied therefore that the employer was well aware that the Complainant had a health problem, rejecting the employer’s argument that the employer was not aware of the Complainant’s disability, because the medical certs she submitted did not specify the illness from which she suffered (high blood pressure). The Equality Officer noted that “the respondent did not ask the complainant about her health nor did they request further certification. Likewise I note that the complainant’s request for a change from night to day shift was facilitated.”¹⁶

1.7 Defenses and Exemptions

There are a number of general and specific exemptions that may be relied on by employers to defend a discrimination claim.¹⁷ Some of the exemptions apply to particular types of employment,¹⁸ while others apply to all kinds of employment, for example the genuine occupational requirement exemption.¹⁹ There are exemptions in relation to particular grounds²⁰ and to provisions in other legislation.

1.8 Capacity and Competence

An employer is not required to employ someone who will not undertake the duties or is not fully competent or capable of doing the job. However, a person with a disability is fully competent and capable of undertaking any duties, if the person would be so fully

¹⁴ DEC-E2009-065.

¹⁵ DEC-E2010-089.

¹⁶ In the recent UK EAT case of *Jennings v Barts and the London NHS Trust* the UK EAT considered that it was enough to know that the Claimant suffered from a mental impairment. The subsequent change of the particular label attached to the symptoms (from PTSD and panic attacks to major depression and paranoid personality disorder) did not affect the question of whether they ought reasonably to have been aware that he was disabled.

¹⁷ It is beyond the scope of this review to set out all of the exemptions that may apply.

¹⁸ For example the Guards, defense forces and employment by the State.

¹⁹ Difference in treatment is allowed which is based on a characteristic related to any of the nine grounds in respect of access to employment, but only to the extent that the characteristic constitutes a genuine and determining occupational requirement and the objective is legitimate and the requirement proportionate.

²⁰ There is an exemption on the age and disability ground in relation to the Defence Forces - section 37(5).



competent and capable on reasonable accommodation being provided by the employer.²¹

The Tribunal or Labour Court will invariably consider whether an employee is competent or capable of doing the job, at the same time as considering whether an employer has complied with the obligation to provide reasonable accommodation.

1.9 Health and Safety

The Equality Tribunal and the Labour Court take health and safety concerns very seriously, but generalised concerns about health and safety will not relieve employers from their obligations to provide reasonable accommodation.²² There is no explicit exemption in relation to health and safety in the EEA.²³ The exemption on competence and capacity in section 16 (referred to above) would include a competence and capacity to do the job in a safe manner. However this exemption does not take precedence over or defeat the reasonable accommodation obligations.

Even where there are accepted health and safety concerns, the duty to provide reasonable accommodation may require employers to consider possible alternative positions within their employment. In *Bus Eireann v Mr C*²⁴ the Respondent refused to continue employing the Claimant because his hearing fell below levels set out in international standards on driving public transport vehicles. The Labour Court clearly accepted the importance of complying with international safety standards. However it remarked on the little effort made, if any, to consider alternative working arrangements for the Claimant, and this failure meant that the employer could not rely on the capacity and competence exemption in section 16(1)b.

However it may be the case that, if an employer has taken all of the requisite steps in relation to the obligation to provide reasonable accommodation, the nature of the effects of the disability and the working environment may be such that the continued employment of the person with a disability in that particular job is impossible.

The employer successfully invoked health and safety considerations in *An Employee v A Company*²⁵ (the case was settled on appeal). The case is unusual in that the Tribunal held that the Complainant was dismissed because of his disability. (It would appear from the determination that the employee had anxiety and depression.) It would be more usual for the finding to relate to the Claimant's capacity rather than his/her disability:

²¹ Section 16.

²² In *McCrary Scaffolding (NI) Ltd v A Worker* the employer unsuccessfully claimed an entitlement on health and safety grounds to dismiss a scaffolding labourer following a number of seizures. The employer had not obtained an assessment of the employee's health from an occupational physician or a safety assessment and therefore could not demonstrate that the employee was not fully competent or capable of performing his duties.

²³ Health and safety measures to protect the health or safety at work of persons with a disability are included in the positive action section (section 33) allowing measure to ensure full equality in practice between employees.

²⁴ EDA0811.

²⁵ DEC-E2010-062.



It is clear that an employer is entitled to take account of possible dangers occasioned by a disability from which an employee suffers. It is equally clear that in some circumstances an employer has an obligation to do so.

The Tribunal also found that the Respondent had completed a process-oriented approach when considering the employee's return, and had carried out appropriate enquiries in accordance with the obligation to carry out reasonable accommodation. The Tribunal also noted that the medical advice sought by the Respondent stated "no recommendations that could be made in relation to accommodations that it would be appropriate in managing [the Complainant's] future risk within the workplace".²⁶

1.10 Pre-employment medical assessments

Pre-employment medical assessments are not expressly prohibited by the EEA, but employers need to exercise caution when using information obtained from them so as not to fall foul of Employment Equality Legislation. In *Ms X v An Electronic Component Company*,²⁷ the Equality Officer held that the operation of pre-employment medical examinations or questionnaires is not unlawful per se, and acknowledged that in some circumstances a medical exam may enable an employer to determine the capability of a prospective employer to perform certain duties, or examine what needs to be done in order to accommodate someone with a disability.

There are limited situations where an employer needs to ask questions about a person's health or disability. It may be necessary for an employer to determine the capability of a prospective employee to perform certain intrinsic functions of a job. In practice, even if a function were intrinsic to a job it would be necessary to ascertain whether the person could do the job with reasonable accommodation.²⁸

²⁶ It is also significant that the Complainant became ill in 2002 and had been placed on a disability benefit scheme and was dismissed in 2007.

²⁷ DEC-E2006-042.

²⁸ In the UK except in very restricted purposes, an employer is not allowed to ask any job applicant about their health or disability until a person has been offered a job outright or on a conditional basis. In the UK an employer can ask questions to ascertain whether someone needs reasonable accommodation for the recruitment process. This includes asking such a question as part of the application process or during an interview. Questions about previous sickness absences count as questions that relate to health and disability. No one else such as an occupational health practitioner can ask these questions on your behalf either. The UK Guidance advises that questions can be asked once the employer has made the job offer. At that stage you can make sure that someone's health or disability would not prevent them from doing the job, though an employer must consider whether there are reasonable accommodations that would enable them.



1.11 Examples of Cases Involving Mental Ill Health Where an Employer was Found to have Discriminated Against an Employee

Extension of probation

In *A Prison Officer v the Minister for Justice Equality and Law Reform*,²⁹ the Claimant suffered from work-related stress and anxiety, and was diagnosed as suffering from depression and reported that she was bullied at work. The Claimant's probationary period was extended because of prolonged absences due to sick leave. The Respondent stated that the cause of her work-related stress and anxiety was the subject of investigation at local level, and no mistreatment was found. It was normal practice for someone with such levels of sick leave not to be considered for permanency. The Equality Tribunal held that the extension of an employee's probationary period on two occasions while she was absent from work on sick leave was less favourable treatment.³⁰

Access to promotion

In *A Government Department V An Employee*³¹ the Claimant, who was a recovering alcoholic, was successful in a discrimination claim concerning his employer's failure to promote him. Fourteen other candidates with equal ranking and assessment to the Claimant were deemed suitable for promotion when the Claimant was not. It appeared that there was a general consensus against his suitability for promotion, but no rationale was granted for the consensus relied upon. This, coupled with the absence of any minutes or records of the promotional committee's meetings, "made it impossible for the Respondent to satisfy the Court that the reasons for the Claimant's exclusion from the promotion panel was wholly unrelated to his disability".

Unwarranted disciplinary measures

The imposition of unwarranted disciplinary measures on an employee was held to constitute direct discrimination in *Mr L v A Manufacturing Co.*³² The employee had worked as a general operative since May 1995 and was diagnosed with clinical depression in 2002. On his doctor's advice he reluctantly told his employer. The employer seemed initially supportive but the employee was then placed under considerable pressure. The Equality Officer held that the employer had resolved to impose a disciplinary sanction on the Claimant, prior to its receipt of the latest medical report. It was therefore unaware that the company doctor had concluded that the Complainant was no longer suffering from depression.

²⁹ DEC-E2007-025.

³⁰ The Claimant was awarded compensation of €8,000 and the Respondent was ordered to make all necessary adjustments to her seniority and dating back to the date that she would have become established, had she not been absent on sick leave.

³¹ EDA062.

³² DEC-E2005-054.



Breach of confidentiality

In *Mr L v A Manufacturing Co*,³³ the Complainant, who had clinical depression, alleged that he was subjected to breaches of confidentiality, which included a claim that the HR Manager had discussed his medication with the Shop Steward.

The Equality Officer stated: "It would appear possible that she inadvertently said more than she intended, on the understanding that the Shop Steward was aware of the situation. On balance, this would appear to constitute less favourable treatment than would be afforded to someone without a disability."

Failure to carry out a work appraisal due to embarrassment

The case of *Mr C v A Distribution Co*,³⁴ while dealing with a physical disability, (psoriatic arthritis), is of relevance to mental health issues. The Equality Officer found that the reason the Complainant received a low ranking in relation to quality and quantity of work was because of his disability, and as a result he was discriminated against in the marking on the performance assessment report:

[I]t was unfair to the complainant for the assessor/manager to consider that there was an issue with his performance and fail to appraise him of the matter, thereby failing to give him an opportunity to improve. He also treated the complainant differently relative to other persons without a disability as the supervisor stated in evidence that he had spoken to others who he considered had performance issues. The assessor also submitted that he had not received any disability awareness training.

1.12 Indirect Discrimination

Indirect discrimination does not tend to arise very much in disability discrimination claims, as Claimants tend to rely more on the requirements in relation to reasonable accommodation. Indirect discrimination occurs where there is less favourable treatment in effect or by impact. It happens where people are, for example, refused employment or training not explicitly on account of a disability but because of a provision, practice or requirement, which someone with a particular disability would find hard to satisfy.

If the provision, practice or requirement puts people who belong to one of the grounds covered by the Acts at a particular disadvantage, then the employer will have indirectly discriminated, unless the employer can show that the provision can be objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

In the case of *Gorry v Office of the Civil Service Commission*,³⁵ the Claimant, who had dyslexia, contended that the application of the educational requirement to have a Leaving Certificate constituted indirect discrimination on grounds of disability. The

³³ DEC-E2005-054.

³⁴ DEC-E2004-012.

³⁵ ADE0521.



Labour Court held that section 36(4) of the EEA, which allows for the requirement of specified educational qualification, constituted a complete defence.³⁶

1.13 Discrimination by Association – Carers

Discrimination by association happens where a person associated with another person belonging to a specified ground (for example someone with a mental health disability) is discriminated against because of that association.

An employee who cares for a person with a mental health disability may come within the scope of the prohibition of discrimination by association.³⁷ The family status ground in the EEA may also provide some protection for carers of people with disabilities (see part 3).

1.14 Discrimination by Imputation

Both the definition of discrimination and the definition of disability recognise that individuals may be identified or labeled as disabled even when such individuals have no such disability. In essence it covers situations where a person has no mental illness or physical disability within the meaning of the definition of disability, but is treated as having such an illness.

In *An employee v A retailer*³⁸ the Complainant had been out on sick leave with a stress-related illness from January to March 2008. He was deemed fit by his doctor to resume work. When he contacted the Manager, the Respondent told him not to return, and that he would hear from their solicitor. The Complainant heard nothing, and despite phone calls and several letters from his solicitor, the Respondent's solicitor made no formal communication for over three months. Then they wrote to arrange for the Complainant to be medically examined. The Complainant attended and was medically examined. However, he was never informed of the outcome of the examination and no other communication took place despite three more letters from his solicitor. Eventually he resigned his position.

The Equality Officer concluded that the Respondent imputed a disability to the Complainant as the Respondent considered he was not fit to return to work due to a stress-related illness. The Equality Officer considered it reasonable for the Complainant to resign. He was awarded one year's pay as compensation (€17,524).

³⁶ However the claim was taken under the unamended 1998 EEA and without reference to the obligation on reasonable accommodation in the Directive introduced into the 1998 EEA by the Equality Act 2004. It is arguable that the absolute nature of the educational requirements exemption may be in breach of the duty to provide reasonable accommodation under the 2004 Act or should be at least part of the reasonable accommodation process.

³⁷ The Court of Justice in *Coleman v Attridge Law Case* (C-303/06) has held that the prohibition of direct discrimination is not limited only to people who are themselves disabled but extends to employees who care for disabled people.

³⁸ DEC-E2011-229.



1.15 Harassment

Harassment (and sexual harassment) of an employee is prohibited in the workplace, or in the course of employment by another employee, the employer's clients, customers or other business contacts of the employer.³⁹

Harassment has a specific meaning in the EEA and should not be confused with generalised bullying.⁴⁰ It is any form of unwanted conduct related to any of the discriminatory grounds.⁴¹ It is conduct, which has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person.⁴² A negative environment created by the attitudes of an employer to difficulties experienced by employees with mental impairments, may create a hostile work environment for the disabled person.⁴³

Disability harassment is usually cited with other claims such as reasonable accommodation or victimisation, and the focus in disability case law tends to be on these other causes of action.

Harassment of an employee is discrimination by the employer. However it is a defence for an employer to prove that the employer took reasonably practicable steps to prevent the person harassing the victim or prevent the employee (where relevant) from being treated differently in the workplace or in the course of employment (and to reverse its effects if it has occurred).⁴⁴

The Labour Code and Equality Tribunal have regularly spelt out the need for employers to have, implement and enforce a comprehensive code of conduct on harassment and sexual harassment, which includes an adequate complaints and investigation procedure, and to provide the necessary training.⁴⁵

Harassment – cases involving mental health

In *Byrne v Sea and Shore Safety Services Ltd*⁴⁶ the Complainant had a phobia concerning rats. The Complainant alleged that she was harassed on 3 August 2010 when she was shouted at regarding the smell of dead rodents. The Director at the hearing conceded that he “may have raised his voice at her”. He did not contest her evidence that he referred to the rats as “her little friends” in the course of that

³⁹ These include any other person with whom the employer might reasonably expect the victim to come into contact and the circumstances of the harassment are such that the employer ought reasonably to have taken steps to control it.

⁴⁰ Section 14 EEA. The Acts prohibit the victim being treated differently by reason of rejecting or accepting the harassment (or where it could reasonably be anticipated that he or she would be so treated).

⁴¹ Sexual harassment is any form of unwanted verbal, nonverbal or physical conduct of a sexual nature.

⁴² The unwanted conduct may include acts, requests, spoken words, gestures or the production, display or circulation of written words, emails, text messages, pictures or other material.

⁴³ *Disability Discrimination Law* by Olivia Smith.

⁴⁴ This defence is not applicable where the harassment is the employer.

⁴⁵ The Equality Authority has published a Code of Practice on Sexual Harassment and Harassment at Work.

⁴⁶ ADE/13/22.



conversation. The Labour Court found that the Respondent created a hostile and intimidating environment through his behaviour towards the Complainant on her return to work on 3 August 2010. The hostile environment was connected with the rodent problem the Complainant had raised with the Company, and was thereby connected with her disability, and her complaint of harassment was upheld.

In *Mr L v A Manufacturing Co*⁴⁷ the Complainant, who had been diagnosed with clinical depression, was unsuccessful in a claim of harassment. The alleged intimidation included allegations of taunting and jibing by his work colleagues, using phrases such as “you’ve had it” and “the HR manager is out to get you”. These taunts were allegedly accompanied by gestures of chopping, hanging and throat-cutting. The Equality Officer stated that the Complainant did not adduce any evidence that the conduct was in any way connected with his disability. His own evidence was that he rarely telephoned to say he was ill, but gave excuses such as having car trouble.

In *Stafford and Rural Homes Ltd v Hughes*,⁴⁸ the employer initiated disciplinary proceedings in response to a grievance procedure invoked by an employee with an adjustment disorder and depression, and added other allegations subsequent to the proceedings. The UK EAT found that this amounted to harassment (and victimisation)⁴⁹ as the employer remained unable to accept that the Claimant was a disabled person, and was therefore unable to make any allowance for the Claimant’s distorted perception of events.

1.16 Victimisation

It is unlawful for an employer to dismiss or penalise an employee for making a complaint of discrimination to the employer, initiating proceedings under the EEA (or the Equal Status Acts) or giving notice of intending to do one of the protected acts

⁴⁷ DEC-E2005-054

⁴⁸ 2009 WL 592525 (EAT) (UK) and discussed in *Disability Discrimination Law* by Olivia Smith, pp.338–339.

⁴⁹ The grievances included allegations that were not factually correct but could be attributed to the Complainant’s distorted perceptions of events, traceable to his disability. The EAT found that the grievances were not issued in bad faith. It was noted that the disciplinary panel failed to understand that his disability might have affected his behavior, particularly how he constructed the detailed grievances.



listed in paragraphs (a) to (g) of section 74(2).⁵⁰ The Equality Tribunal and the Labour Court take victimisation very seriously.⁵¹

Victimisation – cases law involving mental health

An employee in *Sea and Shore Safety Services Ltd v Byrne*⁵² was successful in claiming that she had been victimised in respect of her removal from the sick pay scheme and her redundancy after she had sought reasonable accommodation in relation to a phobia.

The Court found that the employee suffered from a phobia, and identified the reasonable accommodation she required but the Company failed to engage with her to assess and/or address her needs.

The Court also found that the Complainant was victimised when the Company decided to dismiss the Complainant as a means of dealing with the Employment Equality issues she was raising, taking the opportunity presented by the Company's trading position to terminate the Complainant's employment. It awarded her €20,000.

In *Buckley v BOM St Joseph's Junior School*, the Complainant alleged unsuccessfully that a referral to a psychiatrist before he returned to work constituted victimisation for his claim of discrimination and failure to provide reasonable accommodation.⁵³ The Equality Officer noted that it was not for her to decide whether or not it was appropriate for the employer to refer the Complainant for a psychiatric evaluation. The Equality Officer took into account that the Complainant had been on extensive sick leave for stress, anxiety and uncontrolled diabetes. Additionally the Complainant attributed the stress to his dealings with the principal (which had been ongoing prior to the complaint of discrimination and reasonable accommodation). The Equality Officer found that the referral to a psychiatrist was not connected to his discrimination claim and was not victimisation.

The Equality Officer also found that it was not unreasonable of the principal to require details in advance of monthly medical appointments and treatment that took most of the day.

-
- ⁵⁰ (a) a complaint of discrimination made by the employee to the employer;
(b) any proceedings by a complainant;
(c) an employee having represented or otherwise supported a complainant;
(d) the work of an employee having been compared with that of another employee, for any of the purposes of these Acts, or any enactment repealed by these Acts;
(e) an employee having been witness in any proceedings under these Acts or any such repealed enactment;
(f) an employee having opposed by lawful means an act which is unlawful under these Acts or any such repealed enactment; or
(g) an employee having given notice or an intention to take any of the actions mentioned in the preceding paragraphs.

⁵¹ Section 74(2).

⁵² EDA143: ADE/13/22

⁵³ DEC-E2011-014



1.17 Vicarious Liability

Employers are liable for anything done by an employee in the course of his or her employment, unless the employer can prove that he or she took reasonably practicable steps to prevent the discrimination.

1.18 Remedies and Enforcement

Claims under the EEA are heard by the Equality Tribunal and, on appeal, the Labour Court.⁵⁴ Claimants can represent themselves or be represented by a union, solicitor or advocacy group.⁵⁵

People with intellectual or psychological difficulties

A parent, guardian or other person acting in place of a parent, can be the Complainant, where a person is unable, by reason of an intellectual or psychological disability, to pursue a claim effectively.

Anonymity

Hearings are in private. An employee can ask for his/her name to be anonymised, and anonymity is often granted in respect of the identity of the parties. It is regularly granted in disability claims, particularly those involving mental health issues, but it cannot be guaranteed.⁵⁶ For example the identity of the Claimant was concealed in *Ms M v HSE*⁵⁷ as the investigation involved confidential medical information. The Claimant was a nurse who was diagnosed with depression.

Mediation

The Equality Tribunal usually offers the option of mediation. It is voluntary and confidential and provides a good opportunity for an employer and an employee to reach agreement on matters such as reasonable accommodation.

Time limits

You must make your complaint of discrimination or harassment within six months of the date of the latest act of discrimination⁵⁸ (this does not apply in equal pay claims).

⁵⁴ There is a further appeal on a point of law to the High Court – section 90 EEA.

⁵⁵ The Equality Authority can provide information on claims and may at its discretion provide legal assistance to people who wish to bring claims. A person may apply to the Equality Authority under section 67 EEA for assistance in bringing a claim but the Equality Authority does not provide representation in every case.

⁵⁶ However anonymity cannot be guaranteed, as it may be lost – for example if the case is subject to a judicial review.

⁵⁷ DEC-E2005-036.

⁵⁸ The six-month time limit can be extended up to 12 months by the Director of the Equality Tribunal for “reasonable cause”.



In *A Public Service Employer and a Worker*⁵⁹ the Court concluded that a failure to provide reasonable accommodation “amounted to the keeping in force of a discriminatory regime, rule, practice or principle”. In other words, a failure to provide reasonable accommodation could stall the application of the normal deadlines for submitting a complaint. The Respondent had also continued to review the decision it had taken on where to locate the Complainant, and this could also prevent the time from running against the Complainant.⁶⁰

Remedies

An order for compensation can be made up to a maximum of 104 weeks remuneration or €40,000 (whichever is greater), or €13,000 where the person was not in receipt of remuneration at the time of the referral of the claim.⁶¹ An employee was awarded a year’s salary for constructive dismissal, in circumstances where his employer was found to have imputed a stress illness to him.⁶²

Re-engagement/Reinstatement

In addition the Tribunal can order reinstatement or re-engagement. This occurs rarely, though the Labour Court has recently ordered an employer to reengage an employee from the date of the determination.⁶³ The Complainant had a poor attendance record, and was processed through the attendance management procedure and issued with a final warning with clear notification that unless his attendance levels improved he would be dismissed. He failed to meet the requirements, and was called to a meeting at which the Respondent intended to give him notice of dismissal. He did not attend the meeting. Instead he was diagnosed with an alcohol dependency, and entered a treatment programme. He notified his employer, and it was decided to hold off issuing the notice of dismissal. He was invited to a meeting after he had finished the programme and invited to make a case as to why he should not be dismissed. He cited his alcoholism and sought accommodation to return to work now that his disability was under control:

While his condition was undiagnosed and unmanaged the complainant could not perform the duties of the post. However when it was diagnosed and managed his position changed. It is clear that the respondent had an obligation to consider whether his condition prevented him from so doing and whether he could with reasonable accommodation be put into a position to do so. It failed to do so.

Significant orders – disability training

It is a common feature in discrimination claims that in addition to compensation, orders are made directing the employer to do certain things, such as providing training. In *An Employee v A Government Department*⁶⁴ the Equality Officer found that the employer

⁵⁹ EDA14/10

⁶⁰ *Cast v Croyden College* [1998] IRLR318

⁶¹ The Tribunal can also award equal pay and up to three years’ arrears in an equal pay claim.

⁶² *An Employee v A Retailer*, DEC-E2011-229.

⁶³ *An Employer and A Worker*, ADE/12/64.

⁶⁴ DEC-S-2004-024.



had discriminated against the Complainant (who was a recovering alcoholic) on grounds of disability when it failed to select him for promotion on the basis of seniority. The Equality Officer ordered that the Claimant be appointed to the relevant grade with immediate effect and that the employer should take immediate steps to ensure that the promotions process is conducted in an open and transparent fashion and that adequate records must be retained.⁶⁵

The Department of Social and Family Affairs was ordered to undertake the training of staff working in its personnel department, on the obligation of an employer to provide reasonable accommodation.⁶⁶

1.19 Positive Action

Employers can take steps with a view to ensuring full equality in practice between employees on all of the nine discriminatory grounds, including measures to protect the health and safety at work of persons with a disability.⁶⁷

⁶⁵ The Labour Court on appeal upheld the decision.

⁶⁶ DEC-E2005-032 – *Boyle v Department of Social and Family Affairs*. In *Mr O v A Named Company* (DEC-E2003-052), the Equality Officer ordered the senior staff of the company to undertake appropriate training in disability issues with the emphasis on the requirements of the EEA.

⁶⁷ And to prevent or compensate for disadvantages linked to any of the grounds (there are different provisions on the gender ground) and measures to create or maintain facilities for safeguarding or promoting the integration of such persons into the working environment – section 33 EEA.



2. Specific Provisions Relevant to the Disability Ground and Mental Health in the Workplace

2.1 Discriminatory Grounds and Mental Health Issues

The disability ground is obviously the most relevant to mental health issues. Claims that relate to mental health issues are regularly brought on a number of the discriminatory grounds, for example gender and disability where an employee develops a disability during or after pregnancy. The grounds of gender and disability are likely to be involved in any claim in relation to gender identity disorder.⁶⁸

Claims that relate to mental health may also involve a number of disabilities, for example where an employee develops reactive depression after an accident that causes a physical disability.⁶⁹ An employee may have a learning disability and a mental health issue.

The family status ground provides protection to the resident primary carer of a person with a disability. Therefore an employee who cares for someone with a serious mental health issue may also have the benefit of the protection under the EEA.

2.2 The Meaning of Disability within the EEA

There is a very broad definition of disability in the EEA. The majority of conditions, including most mental health issues, will come within the protection provided by the legislation.⁷⁰ There have been a small but growing number of challenges as to whether a particular condition constitutes a disability for the purposes of the legislation.

2.3 The Definition of Disability

If an employee/potential employee can bring their condition within any aspects of the definition of disability, then the protection of the legislation will apply.⁷¹

⁶⁸ In *Hannon v First Direct Logistics*, the Claimant was successful in a constructive discriminatory dismissal claim on the gender and disability grounds when it was claimed that her work life was made intolerable after she had informed her employer of her true identity and her need to live in this identity at work.

⁶⁹ The employee in *Feore v Alzheimer Society of Ireland* (DEC-E2006-010) had a back injury and reactive depression.

⁷⁰ However tribunals do require medical evidence to verify the existence of the condition even though this is not actually explicitly required by the legislation.

⁷¹ Disability is defined to mean:

- the total or partial absence of a person's bodily or mental functions, including the absence of a part of a person's body,
- the presence in the body of organisms causing, or likely to cause, chronic disease or illness,
- the malfunction, malformation or disfigurement of a part of a person's body,
- a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or
- a condition, illness or disease which affects a person's thought processes, perceptions of reality, emotions of judgment or which results in disturbed behavior,



The disability does not have to be work-related in order to come within the definition. The Equality Officer in *Mr O v A Named Co* held that “it is irrelevant whether the stress was work-related, the fact is that he suffered stress (a disability under the 1998 Act) and the issue of discriminatory treatment, harassment and victimization must be investigated in that context”. A disability can be acquired during the working life.

2.4 Severity and Duration of the Disability

There is no requisite threshold of severity or duration of disability that has to be met in the definition itself.⁷² While a disability does not necessarily have to be very substantial or long-term in order to come within the definition, effects or symptoms that are present to an insignificant extent are likely to be disregarded by the Tribunal or Labour Court.⁷³

There have been a number of cases where a condition was found not to be a disability. In *Colgan v Boots Ireland Ltd*⁷⁴, the employee injured his ankle when a cage fell on it. He was treated by first aid, attended a nurse practitioner and did not take sick leave. The Equality Officer found that he had sustained a minor malfunction of the body but this was not sufficient to meet the definition of disability.

In *Stobart (Ireland) Ltd v Beashe*⁷⁵ the employee had depression. The employer argued that the Claimant was suffering from an illness, as distinct from a disability. The Respondent argued that the Claimant did not attend a medical practitioner regarding his “disability” other than on one occasion and was not prescribed further medication, and that he had therefore recovered from his “disability” in a very short time:

The obligation on the Respondent was to establish whether the Complainant’s condition was likely to be long or short term either by engaging with the Complainant directly or through his or the Company’s own medical advisors. It was not sufficient that it made no enquiries and sought to rely on subsequent events to justify its decisions.

Moreover it is clear from evidence before the Court that the Complainant continues to suffer to some extent from the illness particularly around the time of the anniversary of his father’s death. In that context the Court finds that the Complainant was suffering from a disability within the meaning of the Act.

In *Maloney v MJ Clarke & Sons Ltd*⁷⁶ the Complainant, who was profoundly deaf, had sustained injuries and what were described as “psychological scarring” as a result of a fall from a roof. The Equality Officer found that in the absence of the GP being available

and shall be taken to include a disability which that exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person.

⁷² The EU Framework Directive does not itself contain a definition of disability. The ECJ in *Chacon Navas* held that a disability is a limitation which results in particular from physical, mental, or psychological impairments and which hinders the participation of the person concerned in professional life. It will be probable that it will last for a long time.

⁷³ *A Government Department v A Worker*, EDA/094 (the employee had a depressive illness).

⁷⁴ DEC-E2010-008.

⁷⁵ EDA1411.

⁷⁶ DEC-E2010-140.



to give evidence, there was no explanation as to how “psychological scarring” is a disability.

The Equality Tribunal and Labour Court have usually interpreted the definition of disability in a broad and all-encompassing way. In *Fernandez v Cable & Wireless*,⁷⁷ where the employee had a reaction to an intravenous injection used to deal with her kidney infection, the Equality Officer accepted that the illness though temporary in nature, amounted to a disability. Hypertension was held to be a disability within the meaning of the Act, even when it was being treated and well managed. Asthma and irritable bowel syndrome were also held to be disabilities.⁷⁸

2.5 Conditions that have been Found to be Disabilities

The following conditions have been found to be included within the definition of disability (this is not exhaustive):

Depression, reactive depression, stress, anxiety and depression, severe generalized anxiety disorder, alcoholism, claustrophobia agoraphobia, schizophrenia, anorexia, phobia.

Epilepsy, wheelchair user, Amputated leg, scarring on the face, facial disfigurement, back injury, maxillary osteoma, ulcerative colitis,

Whip lash injury, serious neck injuries, visual impairment, high myopia and bilateral amblyopia, hearing aid user, profound deafness, diabetes, cerebral palsy, Fredericks’ ataxia, hypertension, multiple sclerosis, vertigo, osteoarthritis, autoimmune disease of the liver, HIV status, paraplegia, intellectual disability, fibromyalgia, ADHD, dyslexia, Down’s syndrome, low BMI, a number of digits missing from limbs, broken toe.

2.6 Depression, Anxiety and Stress and Work-related Stress

The Equality Officer in *Mr O v A Named Company* stated that “the fact is he suffered stress (a disability under the 1998 Act)”.

However in *Mr O* the Equality Officer had regard to extensive medical evidence. It would appear that Mr O had been admitted to St John Of God’s with anxiety and depression. There was also a diagnosis of obsessional personality disorder/panic disorder. In *Ms A and A Charitable Organisation*⁷⁹ the Equality Officer observed that: “I am ... not satisfied that the submission of a medical certificate indicating that an individual is suffering from ‘work-related stress’, in and of itself, comes within the meaning [of the definition of disability]”. She also stated that the conclusions in the case of *Mr O v A Named Company*⁸⁰ should not automatically lead an employer to conclude that any employee suffering from stress is suffering from a disability within the meaning of the EEA.⁸¹

⁷⁷ DEC-E2006-013.

⁷⁸ *A Civil Servant v Civil Service and Local Appointments Commission*, DEC-E2004-029.

⁷⁹ DEC-E2011-049.

⁸⁰ DEC-E2003-052.

⁸¹ In *Ms A* later medical reports revealed that Ms A was suffering from an adjustment disorder and depression and anxiety, and it was accepted from the receipt of these reports that the Respondent had been notified of a disability.



The Complainant in *A Government Department v A Worker*⁸² was a prison officer whose probationary period had been extended due to her level of sick leave. The Respondent argued that her GP's diagnosis of work-related depression/stress couldn't amount to a disability.

The Court stated:

It is accepted that depressive illness or clinical depression is a disability within the statutory meaning. It would appear to follow that adjustment disorder, which manifests itself in the same symptoms as depressive illness, should be likewise classified as a disability.⁸³

The Respondent had argued that a strict interpretation of the statutory definition would produce the result that mere unhappiness or ordinary stress or disappointment that effects a person's emotions would have to be classified as a disability. This would be an absurd result:

The Court must take the definition as it finds it.. Nevertheless no statute can be construed as to produce an absurd result or one that is repugnant to common sense ... It would appear to the Court that if the statute were to be construed so as to blur the distinction between emotional upset, unhappiness or the ordinary human reaction to stressful events or the vicissitudes of life on the one hand, and recognized psychiatric illness on the other, it could be fairly described as an absurdity.

But it was not necessary for the Court to reach such a conclusion in that particular case. The Court decided that the medical evidence demonstrated that her condition was more suggestive of a depressive illness than an adjustment disorder.

The employer in *Ms B v A Newsagents & Deli*,⁸⁴ also argued that work-related stress was not a disability. The Equality Officer stated that:

disability must be looked at "in the round". It cannot be a game of bingo where a complainant's doctor labels a condition on the medical certificate in a certain way and the disability provisions automatically apply and s(he) calls it something else and the disability provisions do not apply.⁸⁵

2.7 Phobias

In *Sea and Shore Safety Services Ltd v Byrne*, the Complainant had a phobia concerning rats. The Complainant submitted a medical report, which stated that the Complainant suffered from "excess anxiety and post-traumatic stress due to ongoing

⁸² EDA094.

⁸³ The Court did not therefore make a finding that adjustment disorder constituted a disability.

⁸⁴ DEC-E2013-149 – the Complainant worked for four years in the shop. The shop was owned by two individuals who appear to have had a breakdown in their relationship resulting in the Complainant being asked by one to spy on the other, and she was caught in the crossfire.

⁸⁵ The Equality Officer was satisfied that the Complainant had informed one of the owners, Mr Z, that she was not sleeping and was suffering panic attacks, thereby putting the employer on notice of those problems. The Equality Officer stated that that information combined with the medical certificates would have prompted a prudent employer to seek a second opinion.



exposure to rodents at her place of work".⁸⁶ The Court held that the Complainant had a disability within the meaning of section 2(e) of the Act, but there was no definitive finding in the decision that a phobia was in itself a disability for the purposes of the EEA.

The Claimant in *D v A Local Authority*⁸⁷ had claustrophobia and agoraphobia, which led to severe anxiety and panic attacks confining her to home. The Equality Officer was satisfied based on medical evidence that the Claimant had a phobic disorder.

2.8 Anorexia Nervosa/Bulimia

Anorexia and bulimia are disabilities for the purposes of the EEA.⁸⁸

2.9 Alcoholism

In *A Complainant v Café Kylemore*⁸⁹ the Equality Officer concluded:

It appears ... from the ... definition [cited] that alcoholism is an addictive disease and the consequences of that addiction leads to a health problems both mental and physical. I am satisfied that the condition of alcoholism comes within the definition of disability in the Equal Status Act.

The Claimant in *An Employee v A Government Department*,⁹⁰ who was a recovering alcoholic who received treatment for his condition in 1995 and had not drunk alcohol since, was repeatedly turned down for inclusion on a promotional panel. The Respondent argued that alcoholism was not a disability and that the Complainant was not suffering from alcoholism because he had not drunk alcohol since 1995.

The Labour Court approved the conclusion of the Equality Officer that Alcoholism is "an incurable condition and it could never be said that a person had fully recovered from that condition".

In *A Worker v A Department Store*,⁹¹ the Respondent alleged that the Claimant returned to the Respondent's premises at 10pm, verbally abused two individuals, urinated in the loading bay and threw a glass at a company truck. The Claimant unsuccessfully argued that this was a discriminatory dismissal as he was an alcoholic. However the Equality Officer noted that the Claimant produced no evidence of his alcoholism and had never consulted a qualified professional about his disability or been assessed for alcoholism.

⁸⁶ It stated that she found it difficult to sleep and that she washed her shoes when she went home each evening in case they had been contaminated by rats. She was prescribed medication to assist her recovery.

⁸⁷ DEC-S2007-057, and unreported, Circuit Court, Judge Hunt, 15 April 2008. The discrimination claim concerned the provision of housing, was brought under the Equal Status Act.

⁸⁸ Judge Dunne in the Circuit Court judgement of *Humphries v Westwood Fitness Club* affirmed the finding of the Labour Court.

⁸⁹ DEC-S2002-24.

⁹⁰ DEC-S2004-024.

⁹¹ DEC-E2011-048 – the Claimant had been drinking since 1.30pm on the day of the incident and had no recollection of events.



3. Reasonable Accommodation

An employer has a positive duty to take “appropriate measures” to enable a person with a disability to have access to employment, participate or advance in employment or to undergo training unless this would give rise to a disproportionate burden on the employer.⁹² The reasonable accommodation duty applies at all stages of the employment relationship. The particular circumstances of the case will trigger the application of the duty as the measures are to be taken “where needed in a particular case”.

“Appropriate measures”:

- a. means effective and practical measures, where needed in a particular case, to adapt the employer’s place of business to the disability concerned,
- b. without prejudice to the generality of paragraph (a), include the adaptation of premises and equipment, patterns of working time, distribution of tasks or the provision of training or integration resources, but
- c. does not include any treatment, facility or thing that the person ordinarily or reasonably provides for himself or herself.⁹³

Section 16(3)(c) lists the factors to be taken into account in determining whether the measures impose such a burden:

- i. the financial and other costs entailed,
- ii. the scale and financial resources of the employer’s business, and
- iii. the possibility of obtaining public funding or other assistance.

3.1 Reasonable Accommodation as Effective and Appropriate Accommodation

The case law of the Tribunal and the Labour Courts views reasonable accommodation as being an accommodation that is effective in enabling the person to carry out the job, with the emphasis on what is effective rather than what is reasonable.⁹⁴ There is no obligation on an employer to carry out an inappropriate measure or one that will not meet the needs of the employee.

Substantive duty

The nature and extent of an employer’s duty to an employee with a disability was set out in the Labour Court determination *An Employer and A Worker*.⁹⁵

This can involve affording the person with a disability more favourable treatment than would be accorded to an employee without a disability. Thus it may be necessary to consider such matters as adjusting the person’s attendance hours or to allow them to work partially from home. This duty to provide special treatment may also involve relieving a disabled employee of the requirement to

⁹² This requirement is implemented in section 16(3)(b) of the EEA.

⁹³ Section 16(4) EEA.

⁹⁴ The term “reasonable” is often understood as a means to reduce or limit the obligation.

⁹⁵ [2005]ELR 159.



undertake certain tasks which others doing similar work are are expected to perform.

Proactive duty – procedural component – assessment of need

There are important procedural aspects in considering what an appropriate measure is. The basis of the procedural aspect is to ensure that employers have sufficient information at their disposal to evaluate their compliance with the substantive obligation.⁹⁶

The Labour Court stated that:

the duty to provide special treatment or facilities is proactive in nature. It includes an obligation to carry out a full assessment of the needs of the person with a disability and of the measures necessary to accommodate that person's disability.⁹⁷

Two-stage enquiry – process-oriented approach

The most comprehensive guidelines for considering reasonable accommodation were set out by the Labour Court in a case involving mental health (anorexia) – *Humphries v Westwood Fitness Club*⁹⁸:

At a minimum, however, an employer should ensure that he or she is in full possession of all the material facts concerning the employee's condition and that the employee is given fair notice that the question of his or her dismissal for incapacity is being considered. The employee must also be allowed an opportunity to influence the employer's decision.

In practical terms this will normally require a two-stage enquiry, which looks firstly at the factual position concerning the employee's capability including the degree of impairment arising from the disability and its likely duration. This would involve looking at the medical evidence available to the employer either from the employee's doctors or obtained independently.

Secondly, if it is apparent that the employee is not fully capable Section 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 become fully capable.

⁹⁶ [ADE/05/16]

⁹⁷ The court referred to the UK EAT decision of *Mid Staffordshire General Hospitals NHS Trust v Cambridge*:

since that duty cannot be complied with unless the employer makes a proper assessment of what needs to be done ... The making of that assessment cannot be separated from the duty imposed by s.6(1), because it is a necessary precondition to the fulfillment of that duty and therefore part of it.

⁹⁸ [2004] 15 ELR 296 is the seminal case on the provision of reasonable accommodation and is consistently referred to in subsequent cases.



Finally, such an enquiry could only be regarded as adequate if the employee concerned is allowed a full opportunity to participate at each level and is allowed to present relevant medical evidence and submissions.⁹⁹

The obligation on employers is to carry out a process-orientated approach. They need to ascertain the real implications for the employee's ability to do the job, take appropriate expert advice, consult with the employee concerned. They also must consider with an open mind what special treatment or facilities could realistically overcome any obstacles to the employee doing the job for which she/he is otherwise competent, and assess the actual cost and practicality of providing that accommodation.¹⁰⁰

Treatment after return to work

In *Mr O v A Named Company*¹⁰¹ the Equality Officer stressed the importance of dialogue between an employer and employee after the employee had returned from six months sick leave (with anxiety and depression):

What must be remembered here is that the Complainant was returning to work after a six-month absence. It is my opinion that the respondent did not act reasonably when it assigned tasks to the Complainant on the first day back. The Respondent was aware that stress aggravated the Complainant's condition and it could have afforded him a couple of days settle back into routine work before assigning him tasks.

Contact with clients/monitoring of work

In *Mr O* the Complainant was told on his return from work that he was not to have any contact with clients, and that his work would be monitored. The Respondent did not want the Complainant to have contact with clients because of its concern at the impression he would make with regard to his previously stated memory loss. Given that the Respondent organisation was small, the Respondent was concerned at remaining competitive in the market place:

In these circumstances I am satisfied that the respondent was justified in its decision in the short-term but the Complainant should have been told that this was subject to review and reversed if the respondent was satisfied with his performance ...

I am satisfied the only reason the respondent was monitoring the work of the Complainant was because of his disability and while there was naturally a level of monitoring in the workplace, this extra monitoring had the effect of adding to his stress levels. I find that, in these two respects the Complainant was discriminated against by the respondent...

I am satisfied that the respondent should have afforded the Complainant an opportunity to express his own wishes in terms of workload on his return

⁹⁹ Judge Dunne in the Circuit Court affirmed this determination on appeal.

¹⁰⁰ *Farrell v Kerry Group Services Ltd.*

¹⁰¹ DEC-E2003-052.



to work in an effort to find common ground which would have been acceptable to both parties.

Remaining on the books

In *Kennedy v Stresslite Tanks Ltd & Stresslite Floors Ltd*,¹⁰² the Respondent had paid the Complainant six months' sick pay, and had indicated to him that such payments would cease. The consultant indicated in the medical reports provided to the Respondent, that the Complainant's own doctor should be approached in three to four months for an opinion and prognosis. The Equality Officer held that the Respondent could have ceased payment of sick pay and left the Complainant on the books of the company rather than dismiss him.

Onus to suggest accommodations

*Mr A v A Government Department*¹⁰³ concerned the return to work of an employee following a back injury. The Equality Officer did not accept that the onus should lie solely on the Complainant to suggest specific arrangements:

I find it is not reasonable to demand from a worker who is coming to terms with disablement and has been absent from the workplace for a long time, to remember in detail all working arrangements that his employer facilitates, that would assist his current situation.

The Equality Officer awarded the Complainant €25,000 compensation.¹⁰⁴

Alternative attendance patterns/redistribution of tasks

In *An Employer v A Telecommunications Company*¹⁰⁵ the Respondent company argued that there were no reasonable accommodation measures that could have enabled the Complainant in undertaking his duties, which were inherently physical and heavy in nature. For that reason he was instructed to remain on sick leave. The Complainant, who had worked for the Respondent for approximately 36 years, argued that he was fit to return to work in an adjusted capacity. The Equality Officer found there was no evidence that consideration was given to alternative attendance patterns or the redistribution of tasks. She concluded that the considerations appeared to have been ad hoc and informed with no records of either contacts made or reasoned decisions recorded. She found that the Respondent failed to consider many possible alternatives.

Adjusting attendance hours – working from home

The Labour Court in *An Employer v A Worker*¹⁰⁶ specifically held that “adjusting the person’s attendance hours or ... allow[ing] them to work partially from home” were part

¹⁰² DEC-E2009-078.

¹⁰³ DEC-2008-023.

¹⁰⁴ for the “distress and unnecessary hardship the respondents actions caused during a very difficult period of his life when the complainant faced the challenge of having to learn to live with a long-term disablement”.

¹⁰⁵ DEC-E2009-073.

¹⁰⁶ ADE048.



of the provision of reasonable accommodation, in addition to the relieving of the disabled employee “of certain tasks which other doing similar work are expected to perform”.

Arrangement of accommodation

In *A Worker v A Manufacturing Co*¹⁰⁷ the employer accepted that they wished for the Claimant to communicate his accommodation needs to his coworkers. The employee (who has a visual impairment) stated that he did not wish to do so. The Equality Officer stated that:

it was not appropriate to convey a notion to the complainant that he could be accommodated if his fellow workers were agreeable to it, or to leave the complainant with the burden of arranging his reasonable accommodation, which the Acts define as the obligation of an employer, after all.

Attendance at counseling during work time

In *Ms B v A Manufacturing Company* the Complainant, who suffered from a psychiatric illness and had literacy problems, had a history of both short-term and long-term absences during the course of her work. It would also appear that she had alcohol problems. The Respondent outlined a number of ways in which they had assisted Ms B. She was facilitated with five months leave of absence to attend rehab, the Respondent sourced adult literacy classes for her and they facilitated Ms B's attendance at counseling during work time. In 2004 the Complainant secured a different position with the Respondent, with an increase in earnings.¹⁰⁸

In *Sea Shore Safety Services Ltd v Byrne* the employee had a severe phobia about rats. The employee wanted the company to develop and institute a coherent and effective plan to deal with the rodent problem. The Labour Court found that the Respondent had failed to provide reasonable accommodation because it had failed to assess the accommodation sought by the Complainant, had come to no conclusion as to whether the accommodation sought was reasonable, and because she was not informed and remained unaware of the resolution of the problem.

Countervailing measures to ameliorate disadvantage

From *A Government Department v An Employee*:

The scope of an employer's duty is determined by what is necessary and reasonable in the circumstances. It may, as in the instant case, involve relieving the person with a disability from the requirement to undertake certain work which is beyond his or her capacity. However if this results in a diminution of the person's prospects of advancement in employment it would seem reasonable to conclude, on a purposive construction of the Section, that the employer should then consider if any countervailing measures could be taken to ameliorate that disadvantage.

¹⁰⁷ DEC-E2010-229.

¹⁰⁸ The Equality Tribunal found that her discrimination claim was out of time.



In *An Employee v An Employer*¹⁰⁹ the Complainant complained that the Respondent had not sought recommended therapeutic treatments, which were not available for the Complainant through the health service. The Equality Officer also found that matters, which related to clinical management of the Complainant, did not constitute measures for the purposes of the Act.

Disability/sick pay schemes

It could be argued that an extension of a period of sick leave so as to allow a disabled person time to recuperate and enable them to return to work could amount to an appropriate measure. However it is unclear whether an extension of a sick leave payment policy could be held to be an appropriate measure, given that it would not necessarily meet the objective of enabling access or participation in employment.

3.2 Disproportionate burden

There are very few decisions yet on what constitutes disproportionate burden. It is clear from the cases on physical disability that an Equality Officer will have particular regard to the size of an organisation and its resources.¹¹⁰ See also the *Stresslite* case referred to above.

¹⁰⁹ DEC-E2010-062.

¹¹⁰ In *O'Sullivan and Siemens Business Services Ltd* [DEC-E2006-058] the Equality Officer held that the provision of an assessment test in an electronic format could not in any sense be considered as imposing a disproportionate burden.



4. A Summary Statement of Guidance, Learning, Best Practice and Policy Recommendations¹¹¹

4.1 Pre-employment

Remove general questions to job applicants and third parties that relate to health and disability (e.g. questions concerning sickness absence) in recruitment materials.

If seeking references in advance of an offer being made, do not ask for information about sickness absence.

Train employees and instruct agents making recruitment decisions of their practical responsibilities, especially on what they can and cannot do.

Structure the recruitment exercise, as far as is possible, to focus objectively on relevant and necessary skills, knowledge, abilities and experience, avoiding unnecessary references to health and disability questions.

Carry out disability awareness training for key personnel, including training around mental health, the obligation to provide reasonable accommodation and the general requirements of the EEA.

4.2 Auditing Policies and Procedures

It is a good idea for employers to keep all their policies, practices and procedures under review, and to consider the needs of disabled people as part of this process. It is advisable for employers to do this in addition to having a specific policy to prevent discrimination.

For example an annual appraisal could provide that during the interviews, disabled employees should be asked whether they need any (further) reasonable adjustments.

A redundancy policy that has sickness absence as a selection criterion could be amended to exclude disability-related absence. The sickness absence policy could also be changed so that disability-related sickness is recorded separately.

Disciplinary and grievance procedures may need to be adjusted to cater for people with mental illness.

Employers should review policies procedures, practices and requirements to ascertain if they put people with mental illness at a particular disadvantage. If these policies are justified and necessary, see if they can be carried out in a less discriminatory manner.

Disciplinary and grievance procedures may need to be adjusted to cater for people with mental illness.

Offering the exact same facilities to an employee with a mental disability as offered to employees without a disability or with other disabilities may constitute discrimination.

¹¹¹ The following guidance is drawn from the analysis of the case law, developments in the areas of employment and equality law and other resources relevant to mental health anti-discrimination, harassment, and reasonable accommodation. (It does not constitute legal advice and should not be taken to be a comprehensive statement of the law.)



Harassment Code of Conduct

Employers need to have, implement and enforce a comprehensive code of conduct on harassment and sexual harassment that includes an adequate complaints and investigation procedure. They also need to provide the necessary training. Employers should review their policies and procedures to ensure they comply with the Equality Authority Code of Practice on Sexual Harassment and Harassment at Work.

4.3 Reasonable Accommodation

Employers need to be proactive about their obligations to provide reasonable accommodations.

Be alert for indications/signs or symptoms to enquire about the need for reasonable accommodation.

Have specific policies and procedures that deal with reasonable accommodation. It would be helpful to designate someone in the employment whom an employee can go to to discuss reasonable accommodation.

Carry out a full assessment of the needs of the person with a disability and of the measures necessary to accommodate that person's disability. It is necessary to ascertain the factual position concerning the employee's capability, including the degree of impairment arising from the disability and its likely duration.

Obtain appropriate comprehensive medical reports either from the employee or independently.

Obtain appropriate expert advice. It may be necessary to carry out risk assessments.

Consult with the employee concerned at every stage and opportunity. The employee must be allowed an opportunity to influence the employer's decision and should be allowed present relevant medical reports and submissions.

Consider with an open mind what special treatment or facilities could realistically overcome any obstacles to the employee doing the job for which she/he is otherwise competent.

It may be necessary to consider such matters as:

- adjusting the person's attendance hours
- allowing them to work partially from home
- relieving a disabled employee of the requirement to undertake certain tasks that others doing similar work are expected to perform.

Even if the medical reports make no suggestions for accommodations, it would be advisable to discuss with an employee with a mental disabilities accommodations as they may have developed their own strategies for coping, which may require some accommodation.

Assessing the actual cost and practicality of providing that accommodation.

Flexible working options may be an effective strategy for meeting the workplace needs of workers with mental illness.

Examples of reasonable accommodations for people with mental disabilities may include but are not limited to:

- variable start and finish times and days worked



- working from home
- ability to work part-time
- discretionary leave where additional sick leave provisions are made available to the worker
- offering the worker a variety of tasks
- offering a work area in a quieter location
- providing a privacy screen or arrangement to offer the worker their “own” space
- changing or sharing responsibilities or tasks, such as providing administrative duties rather than telephone or face-to-face contact with customers.

It may be helpful to devise particular strategies as appropriate depending on the mental illness, including strategies to address difficulties with:

- thinking processes (e.g. memory and concentration)
- organisation and planning
- social interaction
- physical symptoms as a result of mental illness or medication, and what to do about performance concerns.

5. Guidance and Best Practice from Other Jurisdictions

The following are useful resources for guidance and advice relevant to mental health in the workplace:

- The UK Equality and Human Rights Commission Guidance for Employer on Pre-employment Health Questions and on Section 60 of the UK Equality Act
- UK Disability Rights Commission Code of Practice on Employment and Occupation
- The Australian Human Rights Commission 2010 Workers with Mental Illness: A Practical Guide for Managers.



6. Other National Instruments

1. The Equality Authority Code of Practice on Sexual Harassment and Harassment at Work¹¹²
2. The Equal Status Act¹¹³
3. The Disability Act 2005.¹¹⁴

There are a number of other statutes and codes of practice that may provide protection and avenues of redress for people with mental health disabilities. These include but are not limited to:

- Unfair Dismissals Acts 1977–2007
- Safety Health and Welfare at Work Act 2005
- Data Protection Acts 1988–2003
- Industrial Relations Act 1990 (Code of Practice on Grievance and Disciplinary Procedures (Declaration) Order 2000
- Industrial Relations Act 1990 (Code of Practice Detailing Procedures for Addressing Bullying in the Workplace) (Declaration) Order 2002
- Health and Safety Authority Code of Practice for Employers and Employees on the Prevention and Resolution of Bullying at Work.

¹¹² Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012 (SI No. 208 of 2012). The code aims to give practical guidance to employers, employers' organisations, trade unions and employees on what is meant by sexual harassment and harassment in the workplace, how it may be prevented and what steps to take if it does occur to ensure that adequate procedures are readily available to deal with the problem and to prevent its recurrence.

¹¹³ The Equal Status Acts 2000–2011 have equivalent provision in relation to the prohibition on discrimination, sexual harassment and harassment in the provisions of goods and services, accommodation schools and other educational establishments. The definition of disability is similar and therefore the case law under the Equal Status Acts is of relevance. The obligation to provide reasonable accommodation is less onerous than under the EEA.

¹¹⁴ The Disability Act 2005 provides for accessibility of public services, accessibility of environments including transport, information and buildings subject to exemptions. It also provides for an individual's rights to an independent assessment of need for disabled people. It also provides for a 3% employment target in the public sector. Section 47 requires public bodies to, in so far as practicable, take all reasonable measures to promote and support the employment by it of people with disabilities.



6.1 Relevant International instruments

Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.¹¹⁵

UN Convention on the Rights of Persons with Disabilities.¹¹⁶

¹¹⁵ [2000] OJL 303/16. This Framework Directive provides that “the principle of equal treatment” shall mean that there shall be no direct or indirect discrimination whatsoever on any of the discriminatory grounds, which includes the disability ground. Article 5 provides that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. The Equality Act 2004 amended the EEA to give effect to this obligation. These Directives take precedence over Irish law, which should be read and interpreted having regard to the provisions of the Directives.

¹¹⁶ The ECJ in *HK Danmark, acting on behalf of Ring v Dansk Almennyttigt Boligselskab* [2013] EqLR 528 held that the Framework Directive must be interpreted consistently with the UN Convention on the Rights of Persons with Disabilities. The Equality Legislation has to be interpreted so far as possible as to be consistent with the EU Framework Directive. The latest ECJ decision creates an interpretative chain, the net result of which is that the EEA will now have to be interpreted, so far as possible, to be consistent with the Convention on the Rights of Persons with Disabilities.