



**BYRNE
WALLACE**

LAW FIRM

Weighing up all the tactical scenarios, when and how do you amend trigger points and progress warnings for frequent short-term absences due to an underlying mental health condition?

Michelle Ní Longáin, Partner

22 October 2019

Cost implications - absences for Irish businesses

- **How?**
 - Financial cost to organisations.
 - Requirement to replace absent staff with other workers or overtime payments.
 - Medical cost referrals.
 - Indirect costs such as the effect on productivity and quality.
 - Increased work pressure on other colleagues.
 - Administration time in managing absence.
- **Workplace Absenteeism (SFA 2014 survey)**
 - Annual days lost due to absenteeism in Ireland – 4.05 million days
 - Annual cost of absenteeism to the Irish economy: €490,000,000
- **Workplace Absenteeism linked with mental health conditions**
 - Short-term absences: anything up to four weeks – 34%
 - Long-term absences: anything four weeks or more – 49%



Avenues of redress for employees with mental health conditions

- **Disability discrimination**

- Legislation imposes a duty not to discriminate directly or indirectly against candidates for employment or employees because of their disability and imposes a proactive duty to make reasonable accommodation.
- Employees with mental health conditions may be disabled if they fall under section 2(e), Employment Equality Acts (as amended).
- No service requirement for discrimination claims.

- **Health and safety**

- Legislation imposes a general duty on employers to ensure the health, safety and welfare at work of their employees, including requirements to assess health and safety risks (including stress related illnesses) to their employees and other third parties.

- **Personal injury claims**

- Employers' duty to protect and take reasonable care of employees' health and safety.
- An employer who is aware of an employee's potential stress related illness or vulnerability may need to take reasonable remedial steps (e.g. redistributing work, counselling etc.) or risk a compensation claim for personal injury.

Avenues of redress for employees with mental health conditions

- **Unfair dismissal**
 - An employee with two years' service is protected from unfair dismissal.
 - A mental health illness may well constitute a fair reason for dismissal on grounds of capability but if the procedure followed is unfair, the employee can claim compensation or reinstatement/reengagement.
 - Employer's obligation to act reasonably.
- **Constructive dismissal**
 - Employers are under an implied duty to take reasonable steps to ensure an employees' safety, including a duty not to cause psychiatric harm to an employee by reason of the amount or the character of work imposed.
 - Breach of this duty can give rise to constructive dismissal and/or breach of contract claims.
- **Bullying and harassment claims**
 - Employers need to implement and enforce comprehensive codes of conduct including adequate complaints and investigatory procedures, ensuring they are compliant with the Equality Authority and HSA Codes of Practice.

If an employer suspects an employee has a mental health issue, what should they do?

- **Identify any potential problems**
 - Know how to act on their suspicions or knowledge.
- **Help to encourage more openness about mental health**
 - Encourage employees to disclose any problems that employees are experiencing.
 - This allows a response at an early stage.
- **At basic level, try to understand the causes and whether work is having an impact**
 - Employer should then consider whether anything can be done to assist.
- **If the employee's condition also qualifies as a “disability”**
 - Employer will have to ensure that it complies with its duty "to make reasonable accommodations" for employee.

Key notes on disability discrimination

- **Wide ranging definition**
 - No statutory threshold of severity for the condition or impairment to meet the definition.
 - Definition is interpreted in broad manner by the WRC/Labour Court.
- **Work-related and non-work related**
 - An illness does not have to be work-related to come within definition.
 - No distinctions are made between disabilities based on method of acquisition of disability.
- **Employees and potential employees**
 - Applies to wide range of employees and potential employees in wide range of employments.
 - This includes full, part and temporary employees, public and private sector employees.
 - No requirement for a minimum period of service or minimum number of hours worked.
- **However**
 - Just because an employee has a disability does not mean they cannot be dismissed for incapacity.
 - But first, employer to determine if **reasonable accommodations** can be made.

What is Reasonable Accommodation?

- ***Farrell v Kerry Group Services Limited (DEC-E2012-109)***

“[...] places obligation upon an employer to embark upon a process of ascertaining the real implications for the employer’ ability to do the job, taking appropriate expert advice, consulting with the employee concerned and considering with an open mind what special treatment or facilities could realistically overcome any obstacles to the employee doing the job [...] assessing the actual cost and practicality of providing that accommodation.”

- ***Nano Nagle v Daly [2019] IESC 63***

“The test is one of reasonableness and proportionality: an employer cannot be under a duty entirely to re-designate or create a different job to facilitate an employee.”

- Balance implementing effective/appropriate measures with financial burden incurred.
- Nature and extent of measures dependent on circumstances of each case.
- Particular regard given to size and resources of the organisation in question.

Meaning of 'reasonable accommodation' re. mental health

- **Active engagement with employee unless measures would impose a disproportionate burden on employer.**
 - Access to employment.
 - Participating and advancing in employment.
 - Undergoing training.
- ***Humphreys v Westwood Fitness* [2004] 15 ELR 296**
 - While circumstantial to facts, Dunne J held that nature and extent of employer's enquiries should be to:-
 - Obtain all material facts in respect of the condition.
 - Give employee fair notice if dismissal is being considered.
 - Provide opportunity for employee to provide input before the decision is made.

‘Reasonable accommodation’ re. mental health

- **Reasonable accommodations pertinent to mental health conditions**
 - Transferring certain duties away from employee.
 - Providing counselling within workplace or access to employee assistance programme.
 - Adjusting attendance hours or work load.
 - Allowing employee to work from home or time off to attend medical appointments.
 - Providing additional training.
 - **This list is not exhaustive.**
- **Data Protection concerns**
 - **Jim Lucey, Medical Director at St Patrick’s Mental Health Services and Clinical Professor of Psychiatry in Trinity College (2019)**

“My advice is that the employee should know their rights. They don’t have to disclose and the employer can’t ask [...] if you knew the diagnosis, it wouldn’t assist you at all in making the right accommodations. You’re the employer, you’re trying to assist somebody integrating into a work environment in a mentally healthy way. That simply means you’re trying to reduce the amount of stress [...] but you’re not trying to be the clinician. It’s none of your concern what the diagnosis actually is.”
 - Employer should not seek any more information than is necessary for consideration of provision of reasonable accommodation.

Key notes on reasonable accommodation

- **Employer has a duty to be proactive**
 - Employee has no duty to provide suggestions.
- **Requires active engagement with the employee.**
 - Employer must seek to have all material facts.
- **Look at the medical evidence available from the employee's doctor and obtained by employer.**
 - Allow employee to have full opportunity to present relevant medical evidence
 - Allow employee to have full opportunity to make submissions before making decision adverse to employee.
- **Consider whether any measures could be adopted**
 - That would assist / resolve the situation / enable the employee to return to work.

Pertinent policies relating to underlying mental health conditions and resulting absences

- **Employer has responsibilities**
 - Must consult and consider what/if measures can be put in place.
- **Caution: Disciplinary Policy may not be correct first step**
 - If caused by a mental illness, this should generally be treated as a capacity issue.
 - Implement and adhere to Sick Leave Management Policy would be appropriate first step.
 - Strikes balance between genuine absence due to ill health and maintaining workplace efficiency and productivity.
 - Must be a thorough review of potential accommodations available.
- **Disciplinary/ Performance Policy may be applicable**
 - If repeated short term absences, consider referral to occupational health provider.
 - Important to make clear when short-term sickness absence will *not* apply.
 - The organisation might suspect misconduct is involved (i.e. employee is not really sick).
 - In that case, the employer can apply its separate Disciplinary Policy instead.

Disciplinary Dismissal to follow Sick Leave Management Policy

- **Inherent requirements – Evidence of incapacity**
 - Obtaining medical evidence from employee/ independent medical practitioner to support decision to dismiss.
 - This will mitigate against the risk of employee later making a successful claim.
 - Labour Court will look at medical evidence but it has been found that an employer can have ‘constructive’ knowledge of disability - ***Connaught Gold Cooperative Society v A Worker (EDA-0822)***.
- ***Bolger v Showerings (Ireland) Limited [1990] ELR 184***
 - The High Court considered grounds of incapacity for dismissal in order to be deemed fair.
 - Lardner J held that onus is on the employer to show that:
 - The incapacity was the reason for the dismissal.
 - The reason was substantial.
 - The employee received fair notice that the question of his or her dismissal was being considered.
 - The employee was afforded an opportunity of being heard.

Dismissal for persistent short-term absences: must show fair process followed

- **Conduct and performance issues**
 - Unless established that employee unable to perform requirements of role, employer to be careful to ensure that mental health issues do not form part of reason for any decision to terminate employee's employment.
 - Must remain focussed on the performance or conduct issue at hand.
- **Procedural Fairness**
 - Ensure fair process followed before dismissing employee with mental illness.
 - Give employee genuine opportunity to demonstrate fitness for work, or to establish a link between conduct or performance issues and the employee's mental health.
- **Unfair Dismissal: Defences due to persistent short-term absences**
 - Incapacity was the reason for dismissal.
 - Employer acted reasonably in effecting dismissal.
 - Make the employee aware of the standards of attendance expected.
 - Fair notice that dismissal for incapacity was being considered
 - Employee given opportunity to be heard.

Best Practice Tips

1. Have a detailed sickness absence management policy in place

2. Keep in contact with an absent employee as appropriate

3. Keep records

4. Conduct return to work interviews

Best Practice Tips

5. Exercise caution in considering terminating an employee's employment:

- Ensure you are in possession of all material facts and medical evidence
- Ensure that the employee is aware that the employer is considering the possibility of terminating his/her employment
- Give the employee an opportunity to be heard and to produce medical evidence
- Consider reasonable accommodation where the employee has a disability

Best Practice Tips

6. **Keep work pressures and work hours under review – are they appropriate?**

7. **Employee Assistance Programme**

8. **Deal with issues as they arise - do not ignore underperformance or signs indicating stress or mental illness and think that it will go away...**

Discussion and Q & A

- Questions, comments and issues arising
- Thank you

Michelle Ní Longáin

Partner

ByrneWallace

88 Harcourt Street

Dublin 2

mnilongain@byrnewallace.com

Tel: 00 353 1 6915258

BYRNE WALLACE

LAW FIRM



About ByrneWallace

ByrneWallace is one of Ireland's largest law firms. A forward thinking law firm, we are dedicated to the protection and promotion of our clients' interests through the provision of expert legal services. Our clients include leading, innovative and growing public and private enterprises active in all key industry sectors. For more information, visit www.byrnewallace.com