



**The National Mental Health  
Stigma Reduction Partnership**

# **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](http://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.workplacerelations.ie>.



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## 1. Key Provision of the Employment Equality Act (EEA) 1998–2011

### 1.1 Introduction

Employees with mental health problems (which 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 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 that enable employees with mental health disabilities to participate fully in employment.<sup>1</sup>

The basis for these rights and obligations is the Employment Equality Act 1998–2011.<sup>2</sup> The EEA prohibits discrimination (including indirect discrimination and by imputation and association) on nine discriminatory grounds, one of which is disability. This ground is defined to potentially include the majority of mental health illnesses. The prohibition on discrimination is subject to a number of specified exemptions.

In addition the EEA imposes a significant obligation on employers to proactively make appropriate arrangements and measures to enable people with a wide range of disabilities (including mental health illnesses that come within the definition of disability) to participate fully in employment (unless the measures would impose a disproportionate burden on the employer).<sup>3</sup>

The EEA also prohibits sexual harassment, harassment (including harassment based on a mental disability) and victimisation. It allows employers to take positive action measures, across the nine grounds of discrimination to ensure full equality in practice for employees, including employees with mental health disabilities. (I included a change here before turning on the tracked changes)

### 1.2 Scope of the EEA

The scope of the EEA is very broad.<sup>4</sup> It covers all aspects of the working relationship, starting with the recruitment process, including selection arrangements, pre-employment medical screening and occupational health assessments, job adverts and the conduct of interviews.

The scope of the EEA also includes all of the terms and conditions and policies in employment, pay, collective agreements, overtime, shift work, transfers, promotion, grievance and disciplinary measures, counseling, work experience, training and vocational training. It also extends to layoffs, redundancies and dismissals.

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<sup>1</sup> This obligation is subject to a “disproportionate burden” limit. See section 3.

<sup>2</sup> Other relevant national and International provisions are set out in part 4.

<sup>3</sup> This obligation was introduced in the Equality Act 2004 in order to implement the requirements of the EU Framework Directive.

<sup>4</sup> Section 8 of the EEA.



### 1.3 Employees and Potential Employees

The EEA also applies to a very wide range of employees and potential employees in a wide range of employments including full-time, part-time and temporary employees, public and private sector employees.<sup>5</sup>

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, and even former employees are protected against post-employment discrimination in the form of victimisation, for example in relation to employment references.<sup>6</sup>

### 1.4 Work-related Disabilities and Non-work-related Disabilities

The disability does not have to have been acquired at work in order for an employee with a particular disability to come within the scope of the EEA. The employer has the same obligations under the EEA irrespective of the origin of the disability. It applies in relation to employees who had acquired a disability before they started work or who acquire a disability during employment.

### 1.5 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.<sup>7</sup> The grounds that are most relevant to mental health in the workplace are considered in part 2.

### 1.6 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.<sup>8</sup>

The nine discriminatory grounds include the disability ground, which 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".

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.<sup>9</sup> It may also arise if a person is treated less favourably

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<sup>5</sup> 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.

<sup>6</sup>– The ECJ in *Coote v Granada Hospitality Ltd* [1998] ECR I-5199 held that the protection extended to sex discrimination in the form of victimisation in the form of a refusal to provide a reference.

<sup>7</sup> Section 6(2) EEA.

<sup>8</sup> Section 6 EEA.

<sup>9</sup> An instruction to discriminate is also prohibited.



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 doesn't.

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 it is a material reason for the less favourable treatment.<sup>10</sup>

The Labour court stated in the case of *A Government Department and An Employee*<sup>11</sup> 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" ... Moreover, it appears to the Court that a complaint of discrimination will be made out where a causal connection is established between seemingly neutral grounds on which a person is disadvantaged and the disability from which he or she suffers.

Claims of discrimination are usually considered together with whether an employer has provided reasonable accommodation.

### 1.7 Employees with Different Disabilities

In *O v A Named Company*<sup>12</sup> the employee had been admitted to St John of God's, suffering from anxiety and depression. Following treatment over a number of weeks he 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 the arguments made for not allowing the Complainant 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): "Therefore I could only conclude that the Respondent discriminated against the Complainant by treating him less favourably than a former colleague with a different disability."

### 1.8 "Unconscious and inadvertent discrimination"

It is not necessary to establish that an employer intended to discriminate.<sup>13</sup> 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, in the absence of independent corroboration, must be approached with caution.<sup>14</sup>

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<sup>10</sup> *Wong v Igen Ltd and others* [2005] EWCA Civ 142.

<sup>11</sup> (*Ms B*) [EDA061].

<sup>12</sup> DEC-E2003-052.

<sup>13</sup> Though it may have some relevance in a claim of indirect discrimination.

<sup>14</sup> *A Technology Company v A Worker* (EDA0714).





### **1.9 Discrimination – Applying Different Treatment to People in the Same Circumstances or the Same Treatment to People in Different Circumstances**

Offering the exact same facilities to an employee with a disability as offered to employees without a disability may constitute discrimination. In *Gallagher v McCosker & Sons*<sup>15</sup> 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.

### **1.10 Knowledge of the Disability**

It may not be immediately obvious that an employee has a disability. This is especially true of mental health disabilities. Many disabled employees may prefer to keep the fact of their mental health issues private for a number of reasons. 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, implied or constructive knowledge of the employee’s disability, that there were no signs or indications that an employee had a disability, in order to defend a discrimination claim.

In *Connacht Gold-Coperative Society v A Worker*<sup>16</sup> the employee claimed that he had been subjected to discriminatory dismissal on grounds of disability when his employer had dismissed him, and that his employer had failed to have regard to any form of reasonable accommodation. The employer argued 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”. 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 that colleagues should not be made aware that he suffered from a mental illness. The Labour Court overturned the decision of the Equality Tribunal that the employer was aware of the depression, and found that the employer was not aware of the Claimant being diagnosed with depression. There was a direct conflict of evidence between the Respondent’s manager and the Claimant’s wife, who insisted that she had informed the manager. The Court noted that the evidence demonstrated that the Complainant, his wife and general practitioner had gone to some lengths to conceal the nature of his disability:

[H]aving gone to such lengths it is inexplicable why [the Complainant’s wife] should suddenly announce to her husband’s manager that he was suffering from a mental illness ... The Court is supported in this conclusion by 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 furthermore, there was no indications/signs to alert it to enquire about his need for “reasonable accommodation”.

However there was no reference to constructive knowledge in *Flynn v Emerald Facility Service*,<sup>17</sup> where the employer denied being informed that the employee had an alcohol

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<sup>15</sup> DEC-E2013-186.

<sup>16</sup> EDA0822.

<sup>17</sup> DEC-E2009-065.



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.

In *A Cleaning Operative v A Contract Cleaning Company*, the Respondent argued that it was not aware of the Claimant's disability because the medical certs she submitted did not specify the illness from which she suffered (high blood pressure).<sup>18</sup> 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 complainants request for a change from night to day shift was facilitated. I am satisfied therefore that the respondent was well aware that the complainant had a health problem.

In the recent UK EAT case of *Jennings v Barts and the London NHS Trust*,<sup>19</sup> the employer knew that the Claimant had a mental impairment. The diagnosis was unclear but he was said to be suffering from PTSD and panic attacks. He was absent for a long period and dismissed following the application of the employer's ill health absence policy. Following his dismissal he had major depression and paranoid personality disorder. The employer argued that they could not have reasonably have been expected to know of the depression and personality disorder, as they were diagnoses made with the benefit of hindsight. 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 did not affect the question of whether they ought reasonably to have been aware that he was disabled.

## Defenses and Exemptions

There are a number of general and specific exemptions that may be relied on by employers to defend a discrimination claim. Not all forms of discrimination are therefore covered by the EEA. Some of the exemptions apply to particular types of employment (e.g. the Guards, defense forces and employment by the State). Some exemptions apply to all kinds of employment (e.g. the genuine occupational requirement exemption<sup>20</sup>). There are exemptions in relation to particular grounds<sup>21</sup> and to provisions in other legislation. (A consideration of all the exemptions is beyond the scope of this review.)

### 1.11 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

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<sup>18</sup> DEC-E2010-089.

<sup>19</sup> [2013] EqLR 326.

<sup>20</sup> Difference in treatment is allowed that 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.

<sup>21</sup> There is an exemption on the age and disability ground in relation to the Defence Forces – section 37(5).



competent and capable of undertaking any duties, if the person would be so fully competent and capable on reasonable accommodation being provided by the employer.<sup>22</sup>

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. Much of the case law to date illustrates the failure of employers to adequately consider the accommodation duty as part of their decision-making process, particularly in relation to decisions to dismiss for lack of capacity (see part 3).

### 1.12 Health and Safety

There is no explicit exemption in relation to health and safety in the EEA.<sup>23</sup> 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.

The Equality Tribunal and the Labour Court take health and safety concerns very seriously, but generalised appeals to health and safety will not relieve employers from their obligations to provide reasonable accommodation.<sup>24</sup>

Even where there are accepted health and safety concerns, the reasonable accommodation duty may require employers to consider possible alternative positions within their employment. In *Bus Eireann v Mr C*,<sup>25</sup> 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 Court deferred to 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 it 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*<sup>26</sup> (the case was settled on appeal). The case is unusual in that the Tribunal held that the Complainant was dismissed because of his disability (from the determination, it would appear 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. Employees gave evidence in relation to their experience of working with the Complainant before he went on sick leave and two incidents that occurred while he was on leave. It was clear that the

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<sup>22</sup> Section 16.

<sup>23</sup> 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 measures to ensure full equality in practice between employees.

<sup>24</sup> In *McCorry 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.

<sup>25</sup> EDA0811.

<sup>26</sup> DEC-E2010-062.



Claimant was ill during these incidents. ("I accept that the Complainant did not appreciate that entering a room unannounced and silently staring at female colleagues would have such an effect on the other person.") There was also evidence given of aggressive behaviour and a threatening phone call from the Claimant to a work colleague where the Complainant initially did not identify himself and asked the witness to look out the window where she saw him sitting on his motorbike waving:

The above incidents have satisfied this Tribunal that the Respondent has a legitimate concern about the Complainant's future conduct. I am satisfied that this was not a situation where due to sometimes ignorance and stereotypical attitudes in our society concerning mental health issues, the Respondent presumed that because the Complainant suffers from mental health problems there would be a problem with the Complainant. 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 and noted the medical advice sought by the Respondent, which 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". 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.

### 1.13 Pre-employment Medical Exams

The operation of pre-employment medical examinations or assessments is not expressly prohibited by the EEA. In *Ms X v An Electronica Component Company*,<sup>27</sup> 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.

In some limited circumstances 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.

Employers should exercise caution when using the information obtained so as not to fall foul of employment equality legislation, as there are very few situations where questions about a person's health or disability need to be asked.

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.<sup>28</sup> An employer there can ask questions, though, in order 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

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<sup>27</sup> DEC-E2006-042.

<sup>28</sup> Section 60 of the UK Equality Act 2010.



disability. No one else, such as an occupational health practitioner, can ask these questions on their behalf either:

The purpose of Section 60 [of the UK Equality Act 2010] is to prevent disability or health information being used to sift out job applicants without first giving them the opportunity to show they have the skills to do the job.<sup>29</sup>

The UK Guidance advises that questions can be asked once the employer has made the job offer. At that stage they 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 to do the job.

## **1.14 Examples of Less Favourable Treatment in Cases Involving Mental Health**

### *Extension of probation*

In *A Prison Officer v The Minister for Justice Equality and Law Reform*,<sup>30</sup> the Claimant suffered from work-related stress and anxiety, was diagnosed as suffering from depression and reported that she was bullied at work. Her probationary period was extended because of prolonged absences due to sick leave. The Respondent said 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 extension of an employee's probationary period on two occasions while she was absent from work on sick leave was found to be less favourable treatment.<sup>31</sup>

### *Access to promotion*

The Labour Court upheld a finding of less favourable treatment on grounds of disability in the case of *A Government Department v An Employee*,<sup>32</sup> where the Respondent failed to promote the Claimant, a recovering alcoholic. 14 other candidates with equal ranking and assessment to the Claimant were deemed suitable for promotion when the Claimant was not. The Respondent was unable to demonstrate that the failure to deem the Claimant suitable for appointment was in any sense whatsoever on the grounds of his disability. 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".

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<sup>29</sup> *Pre-employment health questions: Guidance for employers on section 60 of the Equality Act 2010* – Equality and Human Rights Commission.

<sup>30</sup> DEC-E2007-025.

<sup>31</sup> 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.

<sup>32</sup> EDA062.





### *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.*<sup>33</sup> 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 Claimant 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.

### *Breach of confidentiality*

In *Mr L v A Manufacturing Co.*,<sup>34</sup> the Complainant, who had clinical depression, alleged that he was subjected to breaches of confidentiality that included a claim that the HR Manager discussed his medication with the Shop Steward.

The HR Manager agreed that she had a conversation with the Shop Steward in the Complainant's absence, but said she would not have discussed the Complainant's medication with him. The Shop Steward, in evidence, said that he had thought it strange when the HR Manager said to him "Do you know [the Complainant] has stopped taking his medication?" The Equality Officer stated:

[I]t 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.*,<sup>35</sup> while dealing with a physical disability (psoriatic arthritis), is of relevance to mental health issues. It concerned a failure by the Claimant's supervisor to adequately appraise the Claimant's work performance:

I have considered the evidence given by the assessor and it appears that he considered that there was an issue with the complainant's performance and he therefore gave him a poor rating for quality and quantity of work. He failed to approach the complainant in relation to his performance, as he would have been embarrassed. He submitted that he had spoken to other employees whose performance he considered was poor. He did not consider the complainant lazy and considered that the poor performance as he saw it might have been to do with his feet. In my view, it was unfair to the complainant for the assessor/manager to consider that there was an issue with his performance and fail to apprise 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

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<sup>33</sup> DEC-E2005-054.

<sup>34</sup> DEC-E2005-054.

<sup>35</sup> DEC-E2004-012.



others who he considered had performance issues. The assessor also submitted that he had not received any disability awareness training. I consider on the balance of probability that the reason that 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.

### 1.15 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 that 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 provision can be objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.<sup>36</sup>

The case of *Gorry v Office of the Civil Service Commission*<sup>37</sup> was taken under the un-amended 1998 EEA, and without reference to the obligation on reasonable accommodation in the Directive introduced into the 1998 EEA by the Equality Act 2004. The Claimant, who has dyslexia, contended that the application of the educational requirement to have a Leaving Certificate constituted indirect discrimination on grounds of disability. The Labour Court held that section 36(4) of the EEA, which allows for the requirement of a specified educational qualification, constituted a complete defence.

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.<sup>38</sup>

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<sup>36</sup> The case of *Thompson v Iarnrod Eireann* is a good example of the potential of the indirect discrimination provisions under the Equal Status Acts. The Claimant uses a DSFA Free Travel Pass on Irish rail and DART services. He was required to queue for a ticket each day and was prohibited from acquiring a ticket in advance. Customers who don't have a free travel pass can acquire a ticket in advance. The Equality Officer found that the Respondent had indirectly discriminated on the disability ground. The Respondent's justification that the requirement was necessary to safeguard against fraudulent activity was not accepted as the Claimant had outlined a number of alternative measures that the Respondent could take in order to circumvent the fraud.

<sup>37</sup> ADE/0521.

<sup>38</sup> Olivia Smith argues in *Side stepping Equality: Disability Discrimination and Generally Accepted Qualifications* ([2008] 15(1) DULJ 279) that the exemption in section 36 should be subject not just to the reasonable accommodation provisions but also to the substantive principles of indirect discrimination. She argues that section 36 is over broad: "It is not alive to the fact that job specifications can be tailored not only to require specific minimum qualifications for a job, but also in ways so as to exclude those who have capabilities which have been measured in alternative ways."



### 1.16 Discrimination by Association – Carers

The definition of discrimination in the EEA includes discrimination by association. This happens where a person associated with another person belonging to a specified ground (for example someone with a mental health disability) is treated less favourably because of that association.

The Court of Justice<sup>39</sup> found 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. An employee who cares for a person with a mental health disability may therefore come within the scope of the prohibition of discrimination by association. The family status ground in the EEA may also provide some protection for carers of people with disabilities.

### 1.17 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 situation 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*<sup>40</sup> the Complainant had been out on sick leave with a stress-related illness from January to March 2008. The Complainant was deemed fit by his doctor to resume work on 15 March 2008. When he contacted the Manager the following day 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 on 30 June 2008 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 in January 2009 he resigned his position.

The Equality Officer found that the Complainant had established facts that showed that the Respondent considered he was not fit to return to work due to a stress-related illness. In these circumstances he concluded that the Respondent imputed a disability to the Complainant. The Equality Officer considered it reasonable for the Complainant to resign, as they failed to allow him to return to work, and this amounted to discriminatory dismissal on the grounds of disability. He was awarded one year's pay as compensation (€17,524).<sup>41</sup>

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<sup>39</sup> *Coleman v Attridge* (C-303/06). The definition of discrimination in the Directive (unlike the Irish definition) does not explicitly refer to discrimination by association.

<sup>40</sup> DEC-E2011-229.

<sup>41</sup> In *Ms X v An Electronic Component Company*, the Claimant was dismissed for failing to disclose her "back problem" on a pre-employment medical questionnaire. The Claimant was adamant that she had no medical problem, she was heavy chested and the size of her breast was a cosmetic issue and not a medical problem. The Equality officer held that whether the Claimant actually had a disability at the time or whether the employer had imputed the same to her, the Claimant was covered by the definition. The Equality officer found that the Claimant's imputed disability was a significant factor in the decision to dismiss and held that the employer had acted in an impetuous manner and did not make adequate enquiries as to the actual fitness of the Claimant. In *A Health Service Employee v The HSE* (DEC-E2006-013), the Equality officer found that the employer had imputed a disability to the employee (who was obese) as a consequence of issues with her weight.





### 1.18 Harassment

Harassment has a specific meaning in the EEA and should not be confused with generalised bullying.<sup>42</sup> It is any form of unwanted conduct related to any of the discriminatory grounds.<sup>43</sup> It is conduct that has the purpose or effect of violating a person's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for the person. 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.

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.<sup>44</sup>

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).

Harassment of an employee is discrimination by the employer. 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).<sup>45</sup>

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.<sup>46</sup>

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

#### *Harassment – cases involving mental health*

In *Byrne v Sea and Shore Safety Services Ltd*<sup>47</sup> the Complainant had a phobia concerning rats. The Complainant submitted that she was harassed on 3 August 2010, when she was screamed at regarding the smell of dead rodents. During oral testimony, the Director stated that it was "not in his nature", but stated 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 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. (See further details of this case in the section on the definition of disability and also reasonable accommodation.)

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<sup>42</sup> Section 14 EEA.

<sup>43</sup> Sexual harassment is any form of unwanted verbal, nonverbal or physical conduct of a sexual nature.

<sup>44</sup> 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.

<sup>45</sup> This defence is not applicable where the harassment is the employer.

<sup>46</sup> The Equality Authority has published a Code of Practice on Sexual Harassment and Harassment at Work.

<sup>47</sup> ADE/13/22.



In *Mr L v A Manufacturing Co*<sup>48</sup> 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 to the effect that “you’ve had it” and “the HR manager is out to get you”. These taunts were allegedly accompanied by gestures of chopping, hanging and cutthroat gestures. The Equality Officer stated:

It appears clear that the complainant's work colleagues would have been aware of his absences and lates, simply from working on the shop floor with him. No doubt being taunted in the manner alleged could be very unpleasant, but 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. I note that he did not make a complaint regarding the alleged taunting, and in the circumstances I cannot find that the conduct constituted harassment of him by the respondent.

The UK case of *Stafford and Rural Homes Ltd v Hughes*<sup>49</sup> is a useful example of a successful disability harassment case. An employee, who suffered from an adjustment order with prolonged depression, had issued a grievance claim.<sup>50</sup> The employer initiated disciplinary proceedings in response and added additional allegations subsequent to the proceedings. The EAT found that the response of the employer to the grievance procedures amounted to harassment (and victimisation):

[T]he tone and content of the response constituted an act of harassment because [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.

Olivia Smith has welcomed the

[R]ecognition that an inappropriate response to difficulties endured by employees with mental impairments, which may be exacerbated by considerable workplace pressures, can result in the creation of a hostile and harassing work environment for the disabled individual. In short, it recognizes that the negative environment created by the attitudes of the employer actually created a hostile work environment for the disabled person.

### 1.19 Victimisation

It is unlawful for an employer to penalise an employee for taking action around the enforcement of the Employment Equality Acts 1998–2008 or the Equal Status Acts 2000–2008. Victimisation has a specific meaning in the EEA.<sup>51</sup> It occurs where the dismissal or other adverse treatment of an employee is a reaction by the employer to the employee making a complaint of discrimination to the employer, initiating proceedings under the EEA

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<sup>48</sup> DEC-E2005-054h.

<sup>49</sup> 2009 WL 592525 (EAT) (UK) and discussed in *Disability Discrimination Law* by Olivia Smith, pp.338–339

<sup>50</sup> 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.

<sup>51</sup> Section 74(2).



or giving notice of intending to do one of the protected acts listed in paras (a) to (g) of section 74(2).<sup>52</sup> The Equality Tribunal and the Labour Court take victimisation very seriously.

#### *Victimisation – case law involving mental health*

An employee in *Sea and Shore Safety Services Ltd v Byrne*<sup>53</sup> was successful in a victimisation claim in respect of her removal from the sick pay scheme and her redundancy after she had sought reasonable accommodation in relation to a phobia:

*She suffered from a phobia. She identified the reasonable accommodation she sought. The Company failed to engage with her to assess and or address her needs. Yet it nevertheless threatened to remove her income from her without providing her with any accommodation that would enable her to return to work ... Accordingly the Court finds that the actual removal of the Complainant from sick pay arrangement on 13 September 2010 is part of the failure of the Company to engage with the Complainant and was a device to compel her to return to work without any effort to assess or accommodate her disability. It was influenced by the letter the Complainant's Solicitor wrote to the Company on 2nd September. The Company did not write to or meet with the Complainant to outline the measures adopted by it to deal with the rodent problem. Instead it reacted to the letter from the Complainant's solicitors with silence until it discontinued her sick pay on 13 September. Accordingly the Court finds that the manner in which that decision was given effect to was influenced by the letter the Complainant's solicitors wrote to the Company on 2 September as it failed to follow through on the commitments set out in the letter of the 25th August despite the Complainant's willingness to engage on the matter.*

The Court also found that the Company decided to dismiss the Complainant as a means of dealing with the Employment Equality issues she was raising. It decided to take the opportunity presented by the Company's trading position to terminate the Complainant's employment. In this respect the Court found that this decision was influenced by the complaint she had made regarding the Company's failure to reasonably accommodate her disability. It awarded her €20,000.

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- <sup>52</sup> (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.

<sup>53</sup> EDA143: ADE/13/22.



The Complainant in *Buckley v BOM ST Joseph's Junior School*.<sup>54</sup> 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. 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 Claimant 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 Complainant had also alleged that he was required to show evidence and proof of attendance at medical appointments when no other member of staff was asked to do the same. The Complainant had indicated that these appointments (on a monthly basis) and the aftermath of treatment took most of the day. The Equality Officer also found that it was not unreasonable of the principal to require details of such appointments in advance.

### 1.20 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.

### 1.21 Remedies and Enforcement

Claims under the EEA are heard by the Equality Tribunal and, on appeal, the Labour Court.<sup>55</sup> The Equality Authority can provide information on claims and may at its discretion provide legal assistance to people who wish to bring claims. Claimants can represent themselves or be represented by a union, solicitor or advocacy group.<sup>56</sup>

#### *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

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<sup>54</sup> DEC-E2011-014.

<sup>55</sup> There is a further appeal on a point of law to the High Court – section 90 EEA.

<sup>56</sup> Section 67 EEA – A person may apply to the Equality Authority for assistance in bringing a claim but the Equality Authority does not provide representation in every case.



guaranteed.<sup>57</sup> For example the identity of the Claimant was concealed in *Ms M v HSE*,<sup>58</sup> as the investigation involved confidential medical information and 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 discrimination<sup>59</sup>. The six-month time limit can be extended up to 12 months by the Director of the Equality Tribunal if they consider there is a good reason to do so.

In *A Public Service Employer and a Worker*<sup>60</sup> the Court considered whether the time limit had expired. It 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 time from running against the Complainant.<sup>61</sup>

### *Remedies*

An order for compensation can be made of up to two years pay or €40,000 (whichever is the greatest), or €13,000 where the person was not in receipt of remuneration at the time of the referral of the claim.<sup>62</sup> An employee was awarded a years’ salary for constructive dismissal, in circumstances where his employer was found to have imputed a stress illness to him.<sup>63</sup>

### *Re-engagement/Reinstatement*

In addition the Tribunal can order reinstatement or re-engagement, but this occurs rarely. However the Labour Court has recently ordered an employer to reengage an employee from the date of the determination.<sup>64</sup> The employee had depression, had only recently accepted

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<sup>57</sup> However anonymity cannot be guaranteed, as it may be lost, for example if the case is subject to a judicial review.

<sup>58</sup> DEC-E2005-036.

<sup>59</sup> This does not apply in equal pay claims

<sup>60</sup> EDA1410.

<sup>61</sup> *Cast v Croyden College* [1998] IRLR318.

<sup>62</sup> The Tribunal can also award equal pay and up to three years’ arrears in an equal pay claim.

<sup>63</sup> *An Employee v A Retailer*, DEC-E2011-229.

<sup>64</sup> *An Employer and A Worker* ADE/12/64.



that he was an alcoholic and had taken steps to deal with it. The Complainant had a poor attendance record. He 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 out a case 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 training. In *An Employee v A Government Department*<sup>65</sup> the Equality Officer found that the employer had discriminated against the Complainant (who was a recovering alcoholic) on grounds of disability, when it failed to select him for promotion. 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. The Labour Court on appeal upheld the decision.

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.<sup>66</sup>

In *Mr O v A Named Company*<sup>67</sup> 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.

## **1.22 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.<sup>68</sup>

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<sup>65</sup> DEC-S2004-024.

<sup>66</sup> DEC-E2005-032 – *Boyle v Department of Social and Family Affairs*.

<sup>67</sup> DEC-E2003-052.

<sup>68</sup> 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, and will be considered below. However, mental health issues may arise in a number of circumstances in the workplace, and other discriminatory grounds may also have a relevance 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, or where an employee develops a disability during or after pregnancy.

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.<sup>69</sup> 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.

The grounds of gender and disability are likely to be involved in any claim in relation to gender identity disorder.<sup>70</sup>

### **2.2 The Meaning of Disability within the EEA**

There is a very broad definition of disability in the EEA. This means that the majority of conditions, including most mental health issues, will come within the protection provided by the legislation.<sup>71</sup> This is unlike other jurisdictions where employers regularly defend disability claims by challenging whether the condition comes within the definition of disability. Here it is often taken as a given that an employee's condition comes within the definition and it is a relatively common feature of case law that employers do not dispute that Complainants are protected by the legislation.<sup>72</sup> However there are a growing number of challenges as to whether a particular condition constitutes a disability for the purposes of the legislation. It is likely that there will be more challenges as new conditions feature in case law. The extent to which stress comes within the definition of disability is likely to feature more in case law.

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<sup>69</sup> The employee in *Feore v Alzheimer Society of Ireland* [DEC-E2006-010] had a back injury and reactive depression.

<sup>70</sup> 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.

<sup>71</sup> However tribunals do require medical evidence to verify the existence of the condition even though this is not actually explicitly required by the legislation.

<sup>72</sup> *Mr C v Iarnrod Eireann*, DEC-E2003/054 – depression.



### 2.3 The Definition of Disability

There are six different parts to the definition of disability in the EEA. If an employee/potential employee can bring their condition within any of the six aspects of the definition then the protection of the legislation will apply. Disability is defined to mean:

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

and which shall be taken to include a disability which 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.

Subparagraph (e) and the final part of the definition are the most relevant in relation to mental health issues, and will be considered later. There are a number of aspects to the definition worth noting.

The disability does not have to be work-related in order to come within the definition. No distinctions are made between disabilities in the definition based on the method of acquisition of the disability. The Equality Officer in *Mr O v A Named Co* held that the Complainant was correct in arguing 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 victimisation must be investigated in that context". It is irrelevant whether the disability was acquired at work or not.<sup>73</sup> A disability can be acquired during the working life.

#### *Severity and duration of the disability*

The EU Framework Directive does not itself contain a definition of disability. The ECJ in *Chacon Navas* held that a disability is a limitation that results in particular from physical, mental, or psychological impairments, and which hinders the participation of the person concerned in professional life.<sup>74</sup> It will be probable that it will last for a long time.

The definition in the EEA is broader in that there is no requisite threshold of severity or duration of disability that has to be met in the definition itself. While a disability does not necessarily have to be very substantial or long-term in order to come within the definition,

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<sup>73</sup> *Carroll v Dublin Bus*, DEC-E2005-051.

<sup>74</sup> [2006] ECR I-06467.





effects or symptoms that are present to an insignificant extent are likely to be disregarded by the Tribunal or Labour Court.

The Labour Court in *A Government Department v A Worker*<sup>75</sup> (the employee had a depressive illness) stated:

It is noteworthy that the definition is expressed in terms of the manifestations or symptoms produced by a particular condition, illness or disease rather than a taxonomy or label which is to be ascribed thereto. Further the definition does not refer to the extent to which the manifestations or symptoms must be present. However a de minimis rule must apply and effects of symptoms, which are present to an insignificant degree, would have to be disregarded. Moreover, the classification of a condition, illness or disease as a disability is not limited by its temporal affect on the sufferer. This is clear from the definition which provides that it: "shall be taken to include a disability which 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".

There have been a number of cases where a condition was found not to be a disability. In *Colgan v Boots Ireland Ltd*,<sup>76</sup> 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. He walked with a limp for three weeks but there was no ongoing disability. 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.

## 2.4 Severity and Duration of the Disability – Mental Health Issues –Depression

In *Stobart (Ireland) Ltd v Beashe*<sup>77</sup> the employee had depression. The employer argued that the Claimant was suffering from an illness as distinct from a disability and relied on the *Chacon Novas* case referred to above. The Respondent argued that the Claimant did not attend a medical practitioner regarding his "disability" other than on one occasion. It argued that the Claimant was not prescribed further medication and that he had therefore recovered from his "disability" in a very short time:

The Respondent, while aware that the Complainant was suffering from depression, made no enquiries to determine the likely prognosis for his condition. It was unaware as to whether the prognosis was that the condition might be long or short term. In his evidence to the Court the Complainant stated that he still suffers periods of depression. His partner in evidence stated that she experienced those periods of depression and that it had an ongoing effect on their lives and relationships. Both he and she noted that they have managed to deal with the matter without recourse to further medication.

On this basis the Court takes the view that the Respondent kept itself ignorant of the Complainant's prognosis. Having done so it cannot seek to rely on

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<sup>75</sup> EDA094.

<sup>76</sup> DEC-E2010-008.

<sup>77</sup> EDA1411.



subsequent events to excuse its failure to establish the Complainant's medical condition at the time it decided the issue. 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*,<sup>78</sup> 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 to give evidence, there was no explanation as to how "psychological scarring" is a disability. The outcome may have been different if the Complainant had provided medical evidence in this regard.

## 2.5 Conditions that have been Found to be Disabilities

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*<sup>79</sup> the employee had a reaction to an intravenous injection used to deal with her kidney infection, and 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.<sup>80</sup>

The following conditions that 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, downs syndrome low BMI, a number of digits missing from limbs, broken toe.

On occasion the disability is not identified in the determination, and this tends to apply in cases involving mental illness.

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<sup>78</sup> DEC-E2010-140.

<sup>79</sup> DEC-E2006-013.

<sup>80</sup> *A Civil Servant v Civil Service and Local Appointments Commission* DEC-E2004-029.



## 2.6 Depression, Anxiety and Stress and Work-related Stress

In *Ms A and A Charitable Organisation*<sup>81</sup> 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*<sup>82</sup> 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. The Equality Officer in *Mr O* had 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*, later medical reports revealed that Ms A was suffering from an adjustment disorder and depression and anxiety, and it was accepted that from the receipt of these reports, the Respondent had been notified of a disability.

The Complainant in *A Government Department v A Worker*<sup>83</sup> was a prison officer whose probationary period had been extended due to her level of sick leave. The certified reason for most of her absences was “work-related illness”. The Complainant contended that she suffered from a depressive illness, which is a disability within the meaning of the definition. The Respondent argued that her GP’s diagnosis of work-related depression/stress couldn’t amount to a disability.

The Court had heard evidence from psychiatrists who differed on whether the condition from which the Complainant suffered could be classified as an adjustment disorder or a depressive illness. Professor Casey, on behalf of the Respondent, told the Court that the Complainant suffered from a condition properly described as an adjustment disorder rather than a depressive illness, and that this condition represents a position midway between normal distress or unhappiness and clinical depression. This term is used to describe the overall reaction of individuals to situations or events that threaten to disrupt their physical or psychological wellbeing, referred to as stressors. She told the Court that the prognosis for adjustment disorder is excellent, since it resolves spontaneously when the stressor is removed. The medical witnesses agreed, however, that the symptoms of both could overlap, and in many respects are the same. The Court stated that:

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.

The Respondent had argued that a strict interpretation of the statutory definition would produce the result that mere unhappiness or ordinary stress or disappointment which 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

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<sup>81</sup> DEC-E2011-049.

<sup>82</sup> DEC-E2003-052.

<sup>83</sup> EDA094.



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

The employer also argued that work-related stress was not a disability in *Ms B v A Newsagents & Deli*.<sup>84</sup> The Complainant worked for four years in the shop, first as a sales assistant and then as an assistant manager. 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. She went on sick leave due to work-related stress on 2 March 2011.

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.

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.

## 2.7 Phobias

In *Sea and Shore Safety Services Ltd v Byrne*<sup>85</sup> it was accepted that 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 exposure to rodents at her place of work”. It stated that she found it difficult to sleep and that she washed her shoes when she went home each evening in case they were contaminated by rats. She was prescribed medication to assist her recovery. On the basis of the uncontested medical evidence before it the Court found that the Complainant had a disability within the meaning of section 2(e) of the Act.

There was no definitive finding in the decision that a phobia was in itself a disability for the purposes of the EEA. The Court had regard to medical evidence on the effects on the Complainant of the ongoing exposure to rats.

The Claimant in *D v A Local Authority*<sup>86</sup> had claustrophobia and agoraphobia, which led to severe anxiety and panic attacks confining her to her home. The discrimination claim concerned the provision of housing, and was brought under the Equal Status Act. The

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<sup>84</sup> DEC-E2013-149.

<sup>85</sup> EDA143.

<sup>86</sup> DEC-S2007-057, and unreported, Circuit Court, Judge Hunt, 15 April 2008.



Equality Officer was satisfied based on medical evidence that the Claimant had a phobic disorder.

## 2.8 Anorexia Nervosa/Bulimia

Judge Dunne in the Circuit Court judgement of *Humphries v Westwood Fitness Club*<sup>87</sup> affirmed the finding of the Labour Court that anorexia and bulimia are disabilities for the purposes of the EEA.

## 2.9 Alcoholism

The Claimant in *An Employee v A Government Department*<sup>88</sup> was a recovering alcoholic who received treatment for his condition in 1995, and who had not drunk alcohol since then. He was turned down for inclusion on a promotional panel in 2000, 2001, 2002, 2003 and 2005. The Respondent argued that alcoholism is not a disability and that he was not suffering from alcoholism because he had not drunk alcohol since 1995.

The Equality Officer referred to *A Complainant v Café Kylemore*,<sup>89</sup> where the Equality Officer cited an account of alcoholism from a number of medical resources and dictionaries, and from which the Equality Officer ultimately concluded:

It appears ... from the ... definition [cited] that alcoholism is an addictive disease and the consequences of that addiction leads to 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 Equality Officer found that the Respondent had discriminated against the Claimant on grounds of disability when it failed to select him for promotion on the basis of seniority in February 2002, and ordered that the Claimant be appointed to the relevant grade with immediate effect. The Officer also recommended that the Respondent take immediate steps to ensure that the promotions process was conducted in an open and transparent fashion, and that adequate records must be retained.

The Labour Court on appeal upheld the decision of the Equality Officer, and noted that para (e) of the definition refers to a condition, illness or disease that has an array of symptoms, including effects on a person's thought processes, perceptions of reality, emotions or judgement, or which results in disturbed behaviour. The Labour Court said it is a "notorious fact" that active alcoholism gives rise in varying degrees to each of these symptoms, and "in particular that it frequently results in disturbed behavior".

The Respondent argued that since the Claimant was no longer suffering from alcoholism at the material time, he was not entitled to maintain a complaint of discrimination on the disability ground. The Labour Court approved the conclusion of the Equality Officer to the effect that alcoholism is "an incurable condition and it could never be said that a person had fully recovered from that condition".

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<sup>87</sup> [2004] ELR 296.

<sup>88</sup> DEC-S2004-024.

<sup>89</sup> DEC-S2002-24.



In *A Worker v A Department Store*,<sup>90</sup> the Claimant had been drinking since 1.30pm on the day of the incident and had no recollection of events. The Respondent alleged that he 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 argued this was a discriminatory dismissal as he was an alcoholic. However the Equality Officer noted that the Claimant produced no evidence of his alcoholism, had never consulted a qualified professional about his disability or been assessed for alcoholism, and therefore found that he could not establish a prima facie case of discrimination on grounds of disability.

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<sup>90</sup> DEC-E2011-48.



### 3. Reasonable Accommodation

The duty to provide reasonable accommodation is often seen as the foundation of the protection of anti-discrimination law for many disabled people.

#### *Positive duty*

Article 5 of the Framework Employment Directive 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.

An employer's duty extends to implementing "appropriate measures" designed to ensure equal employment opportunity for disabled people at all stages of the employment relationship unless this would give rise to a disproportionate burden on the employer. This requirement is implemented in section 16(3) (b) of the EEA.

The Labour Court noted in *A Government Department v A Worker*<sup>91</sup> that:

This Article imposes a positive duty on employers to 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. A similar requirement is now incorporated in s 16(3) as amended.

The EEA attempts to provide statutory guidance on the substantive content of reasonable accommodation by describing what forms "appropriate measures" in relation to a person with a disability. "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), includes 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.<sup>92</sup>

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.

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".

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<sup>91</sup> EDA0612.

<sup>92</sup> Section 16(4) EEA.





### 3.1 Reasonable Accommodation as Effective and Appropriate Accommodation

While the EEA uses the term “reasonable”, it defines “accommodation” as an “appropriate measure”. The term “reasonable” is often understood as a means to reduce or limit the obligation. However there is an alternative approach to reasonable accommodation, which is particularly evident in the case law to date of the Tribunal and Labour Courts. This views reasonable accommodation as being an accommodation that is effective in enabling the person to carry out the job – that views reasonable accommodation as effective accommodation with the emphasis on what is effective rather than reasonable.

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 in *An Employer and A Worker*<sup>93</sup>:

The provision of special treatment is not an end in itself. It is a means to an end and that end is achieved when the person with a disability is placed in a position where they can have access to, or as the case may be, participate in, or advance in employment or to undergo training. 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 undertake certain tasks which others doing similar work are expected to perform.

#### *Proactive duty: procedural components and assessment of needs*

The duty on employers in relation to the provision of reasonable accommodation is a substantive duty, but 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.<sup>94</sup>

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.

The court referred to the UK EAT decision of *Mid Staffordshire General Hospitals NHS Trust v Cambridge*<sup>95</sup>:

A proper assessment of what is required to eliminate a disabled person’s disadvantage is a necessary part of the duty imposed by S.6(1), since that duty

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<sup>93</sup> [2005] ELR 159.

<sup>94</sup> [ADE/05/16] or is it *A Worker v A Hotel*.

<sup>95</sup> [2003] IRLR 566.





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 fulfilment of that duty and therefore part of it...

*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*<sup>96</sup> is the seminal case on the provision of reasonable accommodation and is consistently referred to in subsequent cases. In their determination the Labour Court put forward a two-prong approach to considering reasonable accommodation. The Labour Court stated that:

The nature and extent of the enquiries which an employer should make will depend on the circumstances of each case. 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.

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.<sup>97</sup>

The Tribunal in *Farrell v Kerry Group Services Ltd*<sup>98</sup> stated that the *Westwood Fitness Club* case:

interpreted section 16 of the Employment Equality Acts as a process-orientated approach which places an obligation upon an employer to embark upon a process of ascertaining the real implications for the employee's 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 for which

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<sup>96</sup> [2004] 15 ELR 296.

<sup>97</sup> Judge Dunne in the Circuit Court affirmed this determination on appeal.

<sup>98</sup> DEC-E2012-109.



s/he is otherwise competent and assessing the actual cost and practicality of providing that accommodation.

*Treatment after return to work*

In *Mr O v A Named Company*<sup>99</sup> 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). The nature of the Complainant's job was to undertake projects and complete them to set deadlines. The Complainant argued that he should have been afforded time to settle back into work and familiarise himself with computer programmes without assigning him projects.

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 and the monitoring of work*

In *Mr O* the Complainant was told on his return to 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 having 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 to work in an effort to find common ground which would have been acceptable to both parties.

*Remaining on sick pay*

In *Kennedy v Stresslite Tanks Ltd & Stresslite Floors Ltd* (DEC-E2009-078) the Respondent had paid the Complainant six months sick pay and had indicated to him that such payments

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<sup>99</sup> DEC-E2003-052.



would cease. In the medical reports provided to the Respondent, the consultant indicated 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. "I do not consider that this approach would have placed a disproportionate burden upon the Respondent."

#### *Onus to suggest accommodations*

*Mr A v A Government Department*<sup>100</sup> concerned the return to work of an employee following a back injury; the Equality Officer found that the requisite proactivity was missing on the part of the Respondent. The process of achieving the Complainant's return to work was marred by delays, which constituted a lack of reasonable accommodation and less favourable treatment. The employer only scheduled a meeting three and a half months after the employee was certified as fit to return to work. While some reasonable accommodation was afforded to the employee, 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 also found that the employer treated the employee less favourably by withdrawing tele-working arrangements from the Complainant that he had previously been approved for after he had experienced disablement. The Equality Officer awarded the Complainant €25,000 compensation for the distress and unnecessary hardship the Respondent's 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.

#### *Alternative attendance patterns and redistribution of tasks*

In *An Employer v A Telecommunications Company*,<sup>101</sup> the Respondent company argued that there were no reasonable accommodation measures that could have enabled the complaint 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 argued that he was fit to return to work in an adjusted capacity. The Complainant in this case had worked for the Respondent for approximately 36 years. While the Respondent provided a number of medical reports on the Complainant's ability to do the job, 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 appear to have been ad hoc and informed with no records of either contacts made or reasoned decisions recorded, and found that the Respondent failed to consider many possible alternatives. The Equality Officer was also satisfied the Respondent failed to establish that they were justified in its decision due to any disproportionate burden that may have arisen.

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<sup>100</sup> DEC-2008-023.

<sup>101</sup> DEC-E2009-073.



### *Adjusting attendance hours – working from home*

The Labour Court in *An Employer v A Worker* (ADE048), specifically held that “adjusting the person’s attendance hours or to allow them to work partially from home” were part of the provision of reasonable accommodation, in addition to the relieving of the disabled employee “of certain tasks which others doing similar work are expected to perform”.

### *Arrangement of accommodation*

In *A Worker v A Manufacturing Co*<sup>102</sup> the employer accepted that they wished for the Claimant to communicate his accommodation needs to his coworkers. The employee stated that he did not wish to do so, and the employer made no attempt to respond to his concerns or allay them in any way. The EO found that arranging the details of his reasonable accommodation was simply left to the Claimant (who had a visual impairment):

I also find 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 counselling 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 Equality Tribunal found that her discrimination claim was out of time. 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. Upon her return to work the Respondent sourced adult literacy classes for her. They facilitated Ms B’s attendance at counselling during work time and in 2004 the Complainant secured a different position with the Respondent with an increase in earnings.

In *Sea Shore Safety Services Ltd v Byrne* the employee had a severe phobia about rats. It was accepted that there was an increasing rodent problem, and the accommodation that the employee sought was for the company to develop and institute a coherent and effective plan to deal with the 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*

From *A Government Department v A 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

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<sup>102</sup> DEC-E2010-229.



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.

### *Disability/sick pay schemes*

It could be argued that an extension of a period of sick leave to allow a disabled person time to recuperate so as 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.<sup>103</sup> See also the *Stresslite* case referred to above.

### *Other cases on reasonable accommodation*

In *An Employee v An Employer*<sup>104</sup> options such as a phased return to work and a short trial period were rejected by the Equality Officer. It would appear that the medical evidence relied on by the Respondent concluded that owing to the Complainant's lack of insight, "there were no recommendations that could be made ... in relation to accommodations that it would be appropriate in managing future risk within the workplace". One significant aspect of the claim was that in the length of time between the Claimant becoming ill (2002) and his dismissal (2007) the case was settled on appeal.

The Complainant complained that the Respondent had not sought recommended therapeutic treatments that were not available for the Complainant through the health service. The Equality Officer also found that matters that related to clinical management of the Complainant did not constitute measures for the purposes of the Act.

### *A Nurse v HSE*<sup>105</sup>

The Complainant in this case was diagnosed with breast cancer for the second time, in 2002. She developed lymphoedema, affecting both her arms, following surgical intervention. She continued in her role in Unit A until she was informed she was being moved in September 2009. The Complainant believed that she was being moved because she had made a verbal complaint of bullying against the Assistant Director of Nursing. The Equality Officer considered that during the intervening years the Complainant was "provided with appropriate measures and that moving her from that accommodation was an ill-considered and an ill-thought out solution to an interpersonal staffing issue which existed there between

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<sup>103</sup> 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.

<sup>104</sup> DEC-E2010-62.

<sup>105</sup> DEC-E2003-11.



her and the Assistant Director of Nursing". The Equality Officer also found it "highly significant that the Complainant was moved out of a post which suited her needs in relation to her disability despite having medical evidence from their own Occupational Health Consultant to the contrary".

The Equality Officer stated: "There was no joined up thinking between the Occupational Health Division and the Employee Relations Division and in fact the opinions of the Respondent's own Occupational Health Consultant and the Complainant's Oncologist were disregarded". This was found to constitute a *prima facie* case of discrimination on the disability ground, which was not rebutted by the Respondent.

The Equality Officer found the testimony of the Employee Relations Manager contemptuous, disdainful and very defensive, including his response: "I don't want to know anything about a person's medical condition, it is not my business; it is for occupational health to decide." The Equality Officer went on to uphold discriminatory constructive dismissal:

I am cognisant of the irony of an organisation like the HSE, which is a very large and substantial employer within the State, having such an apathetic attitude to the provisions in the Employment Equality Acts in relation to disability and the provision of reasonable accommodation to employees who become disabled during their working lives.

The Complainant was awarded €85,000, equating to approximately two years' salary.





#### **4. Part 4: Guidance and Best Practice**

This section will highlight the content of any useful codes of practice, guidance and advice relevant to mental health in the workplace.

##### **4.1 The UK Equality and Human Rights Commission Guidance for Employers on Pre-employment Health Questions and on Section 60 of the UK Equality Act**

There is no equivalent section in the EEA to section 60 of the UK Act. However the following guidance on the UK section 60 is relevant. The advice includes the following:

- 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 under Section 60, especially on what they can and cannot do.
- Structure the recruitment exercise, so far as is possible, to focus objectively on relevant and necessary skills, knowledge, abilities and experience, avoiding reference to health and disability questions (that do not fall within legitimate Section 60 exceptions.)
- Ask questions about reasonable adjustments relating to the recruitment process at the appropriate stage, for example, in the job advert in relation to adjustments to completion of forms or CVs; or after shortlisting candidates in relation to adjustments to tests, interviews or assessments.
- Clearly explain why you believe it is necessary to ask disability or health-related questions.
- Take care to refer candidates to occupational health practitioners only after a job offer has been made.
- Provide instructions to occupational health practitioners that discourage adverse assumptions being made about disability, and enable proper consideration of reasonable adjustments, where required, resulting in appropriate recommendations.

##### **4.2 Disability Rights Commission Code of Practice, Employment and Occupation**

The former UK Disability Rights Commission Code of Practice on employment and occupation includes the following advice:

Understanding the social dimension of disability: It is as important to consider which aspects of employment and occupation create difficulties for a disabled person as it is to understand the particular nature of an individual's disability ...

Avoiding making assumptions ... Disabilities will often affect different people in different ways and their needs may be different as well. The following suggestions may help to avoid discrimination.

Do not assume that a person with a mental health problem cannot do a demanding job.

##### *Auditing policies and procedures*

It is a good idea for employers to keep all their policies 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.



An employer has a policy of having annual appraisal interviews for all employees. The policy says that during the interviews, disabled employees should be asked whether they need any (further) reasonable adjustments. This could equally apply to a large or small employer.

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

The UK DRC Code gives the following examples of possible accommodations which may be appropriate in certain circumstances

#### *Altering the person's hours of working or training*

This could include allowing a disabled person to work flexible hours to enable him to have additional breaks to overcome fatigue arising from his disability. It could also include permitting part-time working, or different working hours to avoid the need to travel in the rush hour if this is a problem related to an impairment. A phased return to work with a gradual build-up of hours might also be appropriate in some circumstances, as would allowing the person to be absent during working or training hours for rehabilitation, assessment or treatment

#### *Providing supervision or other support*

An employer provides a support worker, or arranges help from a colleague, in appropriate circumstances, for someone whose disability leads to uncertainty or lack of confidence.

It might be reasonable for employers to have to take other steps not given as examples in the Act. These steps could include:

- permitting flexible working
- allowing a disabled employee to take a period of leave
- employing a support worker to assist a disabled employee
- modifying disciplinary or grievance procedures
- adjusting redundancy selection criteria.

A disabled employee has been absent from work as a result of depression. Neither the employee nor his doctor is able to suggest any adjustments that could be made. Nevertheless the employer should still consider whether any adjustments, such as working from home for a time, would be reasonable.

A man applies for a job as an office assistant after several years of not working because of depression. He has been participating in a supported employment scheme where he saw the post advertised. As a reasonable adjustment, he asks the employer to let him make private phone calls during the working day to a support worker.

However, sometimes a reasonable adjustment will not work without the co-operation of other employees. In order to secure such co-operation, it may be necessary for the employer to tell one or more of a disabled person's colleagues (in confidence) about a disability that is not obvious. This may be limited to the disabled person's supervisor, or it may be appropriate to involve other colleagues, depending on the nature of the disability and the reason they need to know about it. In any event, an employer must not disclose confidential details about an employee without his consent. A disabled person's refusal to give such consent may





impact upon the effectiveness of the adjustments that the employer is able to make or its ability to make adjustments at all.

#### **4.3 The Australian Human Rights Commission – 2010 Workers with Mental Illness: A Practical Guide for Managers**

This is a very useful resource, even if Australian legal requirements differ from our own. It provides detailed examples of suggested reasonable adjustments to address the effects of a worker's mental illness. The Guide states that flexible working options are probably the most effective strategy for meeting the workplace needs of workers with mental illness.

Some examples are:

- variable start and finish times and days worked, provided core business hours are worked, the overall fortnightly or monthly hours are met and the essential business needs are achieved
- working from home, provided the allocated tasks are met and core meetings and events are attended
- 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 also suggests detailed strategies in a number of areas, including difficulties with:

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



## **5. A Statement of Guidance, Learning, Best Practice and Policy Recommendations**

This statement 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.)

### **5.1 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, so 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.

### **5.2 Auditing Policies and Procedures**

It is a good idea for employers to keep all their policies 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.

### **5.3 Discrimination**

The mental disability does not have to have been acquired at work in order for an employee to come within the scope of the EEA. The employer has the same obligations irrespective of the origin of the disability. It applies in relation to employees who had acquired a disability before they started work or who acquire a disability during employment.

Treating an employee with a mental illness less favourably than a colleague with a different disability may constitute discrimination.

Discrimination may also arise if the 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 doesn't.

An employee who cares for a person with a mental health disability may come within the scope of the prohibition of discrimination by association.



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.

Generalised concerns about health and safety do not relieve employers from their obligations to provide reasonable accommodation.

An employee may be capable and competent to do a job with reasonable accommodation.

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.

#### **5.4 Harassment**

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, and to provide the necessary training. Employers should review their policies and procedures to ensure that they comply with the Equality Authority Code of Practice on Sexual Harassment and Harassment at Work.

#### **5.5 Reasonable Accommodation**

Employers need to be proactive about their obligations to provide reasonable accommodations. They have to be alert for indications/signs or symptoms and enquire about the need for reasonable accommodation.

Employers need to have specific policies and procedures that deal with reasonable accommodation.

Reasonable accommodation means effective practical measures that will enable an employee with a mental illness to participate fully in employment.

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

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. A proper assessment of what is required to eliminate a disabled person's disadvantage is necessary. 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.

The employers may need to obtain appropriate comprehensive medical reports either from the employee or independently. On occasions, the employer may need to seek expert advice or to carry out a risk assessment.

It is essential to consult with the employee concerned at every stage of the process. The employee should be allowed to present relevant medical reports and submissions.

The employer needs to 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.



Even if the medical reports make no suggestions for accommodations, it would be advisable to discuss with an employee with a mental health issue any accommodations that may support their own strategies for coping. 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 arising as a result of mental illness or medication, and what to do about performance concerns.



## 6. Other National Instruments

The Equality Authority has published a code of practice on Sexual Harassment and Harassment at Work.<sup>106</sup> 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.

### *The Equal Status Act*

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.

### *The Disability Act 2005*

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 of people with disabilities.

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.

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<sup>106</sup> Employment Equality Act 1998 (Code of Practice) (Harassment) Order 2012 (SI No. 208 of 2012).



## 7. Relevant International Instruments

Council Directive 2000/78/EC of 27 November 2000 established a general framework for equal treatment in employment and occupation.<sup>107</sup> 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 include 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.<sup>108</sup> These Directives take precedence over Irish law, which should be read and interpreted having regard to the provisions of the Directives.

The ECJ in *HK Danmark, acting on behalf of Ring v Dansk Almennyttigt Boligselskab*<sup>109</sup> 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, as far as possible, so as to be consistent with the Convention on the Rights of Persons with Disabilities.

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<sup>107</sup> [2000] OJL 303/16.

<sup>108</sup> And was enacted to implement the provisions of a number of EU Anti-Discrimination directives.

<sup>109</sup> [2013] EqLR 528.