

Employment & Employee Benefits Group

Return to work after long term absence – issues for employers

Where an employee plans to return to work after long term absence, concerns arise to ensure that the employee is fit to do the job for which he or she was employed. Some recent cases give practical guidance for employers in considering the employee's proposed return to work.

Disability

There may be circumstances where an employee is not fit to carry out his or her role due to incapacity or where adjustments are required to working hours or arrangements to facilitate the return. There is a high standard to be met by any employer who seeks to terminate an employee's employment due to incapacity.

Disability is very widely defined in the Employment Equality Act 1998 to 2012; it includes both physical and mental conditions (permanent or temporary). Where an employee suffers from a disability, the employer must consider whether the employee could be assisted in becoming fit to do the job by the employer putting in place "appropriate measures" to accommodate the employee in the workplace.

Incapacity

In the case of *Stobart (Ireland) Limited v Richard Beashal* (2014), the Labour Court considered whether the employee had been dismissed by reason of a disability. The employee had depression and was dismissed by the employer because his absence exceeded tolerance levels for management. The Court found that the employer had not engaged with the employee, had not made any medical enquiries about the nature of his condition nor the frequency or extent to which it might impair his ability to work. The Court awarded €12,000 compensation (a reduction from the award made by the Equality Tribunal at first instance).

By contrast the case of *Eugenia Carroll v HJ Heinz* (2011) shows that, where an employer examines all options and educates itself, it may be able to justify a dismissal on grounds of incapacity. The employee was dismissed after 3 years of sick absence. The Equality Tribunal was satisfied that the employer examined all options having engaged with the employee, her medical advisers, the company doctor and the occupational health adviser throughout her absence. There were no appropriate measures that could be put in place which could accommodate the employee's disability and facilitate her return to work to perform the duties which she was employed to do. It was concluded that the employee was no longer capable of performing her duties and the dismissal was due to her incapacity because of her inability to perform the work she was employed to do.

What should an Employer do?

The steps for an employer in managing any return to work (or potential dismissal for incapacity) are:

- Become informed as to the employee's medical condition and prognosis.
- Seek advice from an independent medical advisor with particular emphasis on what, if any, measures could be put in place to facilitate a return to work.
- If the employee is not fully capable of carrying out his role, consider whether any adjustments or facilities may be put in place to allow the employee to continue in, or return to, their employment, and whether this accommodation is reasonable.
- Consider whether such measures would be a disproportionate burden on the business. Take into account the size and resources of the business.

- If dismissal on grounds of incapacity is being considered: ensure that due process is followed so that the employee is on notice that question of his/her dismissal for incapacity is being considered and is allowed an opportunity to influence the outcome of the decision.

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