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NEWS REPORT

Country:	Ireland
Title:	A Sales Representative v A Books Wholesaler
Date:	4 November 2016
Expert:	Orlagh O'Farrell
<u>Context</u>	
Issue at stake:	Dismissal on the grounds of incapacity held to be discriminatory for lack of reasonable accommodation
Ground of discrimination:	Disability
Source:	National court decision
Field:	Employment
Applicable law:	S 16(1) and 16(3) Employment Equality Act 1998 - 2011

Content

Case: The Workplace Relations Commission (WRC) determined that while it is permissible to dismiss an employee on the grounds of incapacity, this can only be done where the employer has made sufficient enquiries as to the extent of the employee's condition of disability, and due consideration has been given to any reasonable accommodations that could be put in place to render the employee capable. The employee must also be informed that their dismissal is being considered due to their incapacity, and fair procedures must apply. A dismissal for incapacity disguised as a performance or disciplinary matter is not acceptable.

Background: The complainant was employed by a large wholesale book company based in the UK as a regional account manager in April 2013, the complainant being the company's sole employee in Ireland. He was ultimately dismissed in June 2013, ostensibly for performance and disciplinary issues, while still on probation with the company. The complainant brought a claim to the WRC on the basis that he had been subjected to a discriminatory dismissal on the grounds of disability.

The complainant went on sick leave a month into his employment with the company, and furnished a medical certificate indicating that he was suffering from stress. He returned to work after a week. The company did not have him medically assessed on his return. After the company learned that the complainant was suffering from depression and that he had been prescribed an anti-depressant, its attitude to and treatment of the complainant changed. After raising some relatively minor performance issues with the complainant and carrying out a perfunctory and inadequate disciplinary proceedings, the complainant was dismissed over the phone. The complainant appealed his dismissal internally and the appeal was heard over Skype some two months after his dismissal. He informed the manager hearing the appeal that he considered the company's attitude to him had changed following his period of sick leave. His appeal was unsuccessful.

Although the company did not in any manner call, or relate the complainant's dismissal to incapacity, the WRC stated that the reality indicated that this was the case. While the

complainant's sick leave and depression were not the only reason for his dismissal, his disability was nevertheless a significant factor in his dismissal.

Conclusions: The WRC noted that an individual may suffer discrimination not because they are disabled per se, but rather because they are perceived to be less capable or dependable than a person without a disability, because of their disability, and as such it was important to always be alert to the possibility of "*unconscious or inadvertent discrimination*." The WRC acknowledged that section s.16(1) of the Employment Equality Acts 1998 – 2011 provides that an employer is not obliged to retain an employee who is not fully competent and capable of doing the job he or she is required to do. However, this has to be read in conjunction with s.16(3) where it must be considered whether the person would be fully competent and capable if reasonable accommodation is provided for them. As such, there was an onus on the company to make full enquiries regarding all the material facts concerning the complainant's condition, and he should have been given fair notice that his dismissal for incapacity was being considered. Consideration should also have been given to any reasonable accommodation that could have been made available to help the complainant become fully capable. The company did not seek a report from the complainant's doctor or send him to an Occupational Health Specialist, even though they were on notice he was suffering from a psychiatric illness. No consideration was given to what accommodations could be provided – the WRC cited extending his probation as one possible option.

Decision of the Court: The WRC awarded the complainant the sum of €18,000, equivalent to six months' wages.

Key points of analysis: It is permissible to dismiss an employee on the grounds of incapacity, but only where the employer has made sufficient enquiries as to the extent of the employee's condition and due consideration has been given to any reasonable accommodations that could be put in place to render the employee capable. The employee must also be informed that their dismissal is being considered due to their incapacity. A dismissal for incapacity disguised as a performance or disciplinary matter is not justified.

Internet link source:

<https://www.workplacerelations.ie/en/Cases/2016/September/DEC-E2016-131.html>.