

## ADJUDICATION OFFICER DECISION

Adjudication Reference: ADJ-00021727

### Parties:

Parties
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	Complainant	Respondent
<b>Anonymised Parties</b>	A shop assistant	A hardware and tool hire store
<b>Representatives</b>	Terry Gorry Terry Gorry & Co. Solicitors	Eileen Connolly-Crehan HR

### Complaint(s):

Act	Complaint/Dispute Reference No.	Date of Receipt
Complaint seeking adjudication by the Workplace Relations Commission under section 77 of the Employment Equality Act, 1998	CA-00028416-002	15/05/2019
Complaint seeking adjudication by the Workplace Relations Commission under Section 11 of the Minimum Notice & Terms of Employment Act, 1973	CA-00028506-001	20/05/2019

**Date of Adjudication Hearing:** 12/12/2019

**Workplace Relations Commission Adjudication Officer:** Marguerite Buckley

### Procedure:

In accordance with Section 41 of the Workplace Relations Act, 2015 and Section 79 of the Employment Equality Acts, 1998 – 2015 following the referral of the complaints to me by the Director General, I inquired into the complaints and gave the parties an opportunity to be heard by me and to present to me any evidence relevant to the complaints.

## **Background:**

The Complainant is a counter hand/shop assistant. He commenced working with the Respondent on the 2<sup>nd</sup> of June 2015. He worked a thirty-nine-hour week.

The Respondent terminated the Complainant's employment by letter dated the 20<sup>th</sup> of March 2019 with immediate effect by reason of the alleged failure by the Complainant to furnish a medical certificate in respect of his absence from work from the 1<sup>st</sup> of March 2019 until the date of the termination letter.

The fact of dismissal was agreed.

The Complainant withdrew his victimisation complaint at the hearing.

## **Summary of Complainant's Case:**

There was a workplace issue between the Complainant and a colleague in September 2018. It was a minor incident regarding a missing sales receipt. However, because of same, the Complainant felt ostracised in the workplace.

On the 21<sup>st</sup> of September 2018 the Complainant felt a tightness in his chest area, severe headache and nausea. He was certified unfit for work for one week. On the 1<sup>st</sup> of October 2018 he returned to work.

On his return he was advised that a colleague had made a complaint about him alleging that he had spoken in an aggressive or threatening manner towards her. The Complainant was advised that his colleague was pregnant.

On the 9<sup>th</sup> of October 2018 a HR consultant attended at the work place. She advised the Complainant that he had shouted at a manager. He was advised that this complaint was not from his colleague but by his manager. He was advised he would be in receipt of a written warning for this behaviour.

The Complainant was most surprised with this. There was no investigation or opportunity for him to put his version of events to the HR consultant. The Complainant was most unhappy with the way the meeting was conducted and the outcome. A grievance that the Complainant had raised with another company director was brought up at the meeting. The Complainant was asked did he intend to leave his job at Christmas. The Complainant advised that he would leave at Christmas if the bullying continued.

The Complainant went on sick leave and submitted a medical cert on the 16<sup>th</sup> of October 2018 which cited work place stress.

By letter of the 18<sup>th</sup> of October 2018 the Respondent's HR consultant wrote to the Complainant in the following terms

*"the company does not accept your absence as due to any work related stress and that you are using your absence to avoid a conversation with management. The facts are that your unacceptable behaviour is actually causing stress to other employees in the workplace who have had to seek medical advice, not the other way around. It is clear that "your stress" only appeared when one of your managers requested to talk to you regarding your behaviour."*

The letter went on to accuse the Complainant of a

*"complete lack of respect towards your employer".*

On the 4<sup>th</sup> of January 2019 the Complainant collapsed at home and was admitted to his local General Hospital. He was kept as an in-patient for three days. The Complainant explained that this was due to the stress and anxiety he was suffering because he was absent from the workplace and the financial repercussions due the loss of his salary.

The Respondent organised a medical examination at their nominated doctors. By letter of the 24<sup>th</sup> of January 2019 the Respondent's medical advisor wrote to the Respondent and confirmed that the Complainant

*"has been fully cooperative".*

The letter went on

*"It is evident there has been a significant interpersonal difficulty between the Complainant and a colleague at work which has been very difficult to resolve, given the complexity of his circumstances. I believe it may be helpful for him to engage with yourself directly, possibly on an offsite basis in order to review circumstances at work and plan a way forward. At present, I believe today he is not fit to participate in this, but I would be guardedly optimistic that in the weeks ahead that this will be possible. I have asked the Complainant to further reflect on this with his own GP and communicated with his own GP in this regard and hopefully may be able to progress with this in the coming weeks. I have left it with the Complainant that you might be in contact with him by phone to arrange an informal offsite follow up, trusting this is in order."*

The Respondent's medical practitioner wrote to the Complainant's GP confirming that

*"a significant level of stress and anxiety is evident and apparent."*

On the 7<sup>th</sup> of March 2019 the Respondent wrote to the Complainant stating that the

*"very serious allegation of bullying against one of the owners of the business. This is a very serious issue and demands to be addressed without delay and due to your total lack of cooperation cannot be fully investigated. The company requires you to make an appointment so that these issues can be discussed in detail".*

The Complainant noted that there was no mention in this letter of an outstanding medical sick cert.

The letter went on to request the Complainant to contact the HR consultant to arrange a mutually convenient time for this meeting within ten days of receipt of this letter.

By letter of the 20<sup>th</sup> of March 2019 the Respondent wrote to the Complainant to terminate his employment with immediate effect. This termination was three days after the expiry of the ten days referred to in the letter of the 7<sup>th</sup> of March 2019.

The Complainant submitted that under Section 16 of the Employment Equality Act 1998 an employer must make reasonable accommodation in respect of employees who have a disability. This is a positive obligation and the employer must look at ways of retaining the employee in its employment.

The Complainant submitted that the Respondent was on constructive notice of the Complainant's stress and anxiety from October 2018. The Respondent was sceptical of the medical certificates presented by the Complainant. Following the Respondent's own medical assessment of the 24<sup>th</sup> of January 2019, the Respondent was on express notice of the Complainant's stress and anxiety which the Complainant submitted was a disability.

Rather than making accommodation, reasonable or otherwise, the Respondent terminated the employment of the Complainant without notice when the Complainant was on certified sick leave by reason of his alleged failure to provide a sick cert for a short period of time. The time in question was eighteen days.

The Complainant submitted that the Respondent had failed to discharge its duties under the Employment Equality Act. He submitted that his summary dismissal was inexplicable and unjustified. The treatment of the Complainant by the Respondent indicated an inability or unwillingness on its part to accept that the Complainant was stressed and anxious and the reason for this arose in the workplace. The Complainant submitted there was a complete of absence in fair procedures in the way he was treated regarding the complaints against him and the adverse findings made against him. He submitted he was badgered unnecessarily when he was absent on work related stress leave. He had made an informal complaint of bullying which was escalated to a formal complaint without his consent. The Complainant submitted that he was hounded out of his employment and dismissed in a discriminatory manner.

The Complainant felt the registered letters from the Respondent were becoming more and more aggressive and made him feel worse. He found it very hard to read them. His priority was to get himself well and not engaged in a slagging match with the Respondent's HR consultant.

After he received the letters he felt worse and had to go to his GP as his blood pressure was raised. When he received the letter terminating his employment he was shocked. He felt the rug was pulled beneath him. He had sent in sick certs to his employer and submitted that there was no benefit for him not to send in the sick certs.

## Summary of Respondent's Case:

The Respondent agreed that the Complainant was suffering from a disability. It did not agree that he was treated less favourably or suffered victimisation or discriminatory dismissal.

The Respondent submitted that it appointed a HR consultant to review the company's needs in respect of HR.

On the 9<sup>th</sup> of October 2018 the HR consultant carried out a full HR audit of the Respondent. The consultant met with all the employees to introduce herself and to address any HR issues they may have had.

The HR consultant had a long meeting with the Complainant where a few issues were addressed and were fully documented in the minutes of the meeting dated the 9<sup>th</sup> of October 2018. The Respondent submitted that the Complainant was very defensive during the meeting.

The evidence presented was that the Complainant made an allegation of bullying against his manager and the co-owner. He was advised that this was a very serious allegation and he would have to follow company procedures as outlined in the employee handbook. A reprinted copy of the employee handbook was given to him during the meeting.

The HR consultant agreed to meet with the Complainant on the 16<sup>th</sup> of October 2018 which was one week later for the Complainant to put his allegations in writing and a full investigation could be held.

The Complainant worked the rest of the week but left early on the 12<sup>th</sup> of October 2018 advising he had a doctor's appointment.

The Complainant sent a text on the 15<sup>th</sup> of October 2018 to one of the company directors advising

*"I won't be in for the week due to work related stress. I will send you in the doctor's cert".*

On the 18<sup>th</sup> of October 2018 the Respondent sent the Complainant a letter by registered post requesting details of what was causing the alleged work-related stress in order that it could be addressed. A copy of the minutes of the meeting of the 9<sup>th</sup> of October 2018 were enclosed. The Respondent submitted that the Complainant did not respond to the request outlined in this letter.

The Respondent submitted that unfortunately as the Complainant had made no contact whatsoever with it, it decided that he should attend their appointed doctor. A registered letter was sent to the Respondent dated the 17<sup>th</sup> of January 2019 setting out the details of the doctor's appointment which was to take place one week later. The Complainant did not revert to the Respondent regarding the appointment. The HR consultant telephoned him and was advised by the Complainant's wife that no such letter had been delivered. It was later clarified that this letter had in fact been delivered.

The Respondent was advised by its medical doctor as to his assessment of the Complainant. This took place on the 24<sup>th</sup> of January 2019.

On the 6<sup>th</sup> of February 2019 the Respondent's HR consultant sent the Complainant a text message requesting a meeting at his convenience the following week. She texted him again on the 8<sup>th</sup> of February 2019.

The response received by the Respondent was a text setting out

*"just back from the doctors. I will be in touch in due course. It would be more beneficial to me if you apologised for accusing me of feigning illness."*

On the 11<sup>th</sup> of February 2019 the Respondent sent a further registered letter to the Complainant informing him that his last doctor's certificate had expired on the 25<sup>th</sup> of January 2019. In this letter it stated that it was unfortunate that the Complainant had taken the view that he had been accused of feigning illness and the Respondent had only followed normal HR practice regarding long term sick leave. The Complainant was invited to attend an offsite meeting and it was left to him to contact the Respondent's HR consultant to arrange such a meeting.

On the 7<sup>th</sup> of March 2019 a further letter was sent by registered post to the Complainant requesting him to contact the Respondent within ten days to address issues including his allegation of bullying against one of the owners of the company and also to inform the Respondent of what was the cause of his stress. The Complainant did not respond to this correspondence.

On the 20<sup>th</sup> of March 2019 a final letter was sent by registered post to the Complainant informing him that his employment was being terminated.

The Respondents position was that he had not submitted a doctor's certificate for 18 (eighteen) days and had not contacted the Respondent to offer any explanation for this. The Respondent submitted that it had exhausted all avenues to engage with the Complainant which he totally ignored. It was the conclusion of the Respondent that the Complainant had broken his terms of employment by making himself unavailable for work and for continually failing to submit doctor's certificates in accordance with his terms and conditions of employment.

One of the Respondent's directors attended the hearing and gave evidence. She said the accusation that she had bullied the Complainant had left her suffering from anxiety and she had been attending with her doctor for stress.

The Respondent denied that it was guilty of unreasonable behaviour. Its case was that it tried its best to engage with the Complainant and that it was exhausted in trying to make contact with the Complainant. The Respondent director said that she never had an incident in the work before or an argument with anyone at work. She felt that she and her co-director were fair employers. She only worked part time with the Respondent company. Her evidence was that she never thought this would escalate into the way it had.

### **Findings and Conclusions:**

Section 2 of the Employment Equality Act 1998 (as amended) defines disability as

disability” means—

- (a) the total or partial absence of a person's bodily or mental functions, including the absence of a part 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
  - (e) a condition, illness or disease which affects a person's thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour,
- and 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;

It is agreed by both parties that the Complainant's illness is covered by this section and he was suffering from a disability at the time of his dismissal. I accept that the Complainant's illness did hinder "the full and effective participation of the person concerned in professional life on an equal basis with other workers". *Jette Ring v Dansk (C-335/11)* and *Hickey v Houses of the Oireachtas* (11 June 2019, EDA 1918) Labour Court.

Section 85(A) of the Employment Equality Act sets out the burden of proof on the Complainant. This requires the Complainant to not only establish the primary facts upon which he relies but also that those facts are of sufficient significance to raise an inference of discrimination. *Southern Health Board v Mitchell DEE 1/2001* (reported at [2001] E.L.R. 201).

The Complainant submitted that he was not provided with reasonable accommodation by the Respondent. Briefly Section 16 of the Employment Equality Act sets out that an employer has a duty to take appropriate measures to enable a person with a disability to access, participate and advance in employment, unless such measures impose a disproportionate burden on the employer.

Section 6(1) of the Employment Equality Acts provides that discrimination shall be taken to occur, where on any of the discriminatory grounds, one person is treated less favourably than another is, has been or would be treated.

Based on the evidence presented to me I accept that the Complainant has reached this prima facie burden.

The Complainant was absent from the workplace on due to his disability when his employment was terminated. The reason for his dismissal was his failure to provide sick certificates. Had he not been absent from the workplace due to his disability, this reason would not have occurred.

It then fell to the Respondent to rebut the presumption of discrimination. I have considered the Respondent's evidence and find that it did not rebut that presumption.

Absence management is complex area of employment law and I was very taken aback by the Respondents attitude to the Complainant's absence from work due to his disability.

While the Respondent did carry out some of the required accepted processes in dealing with the absence of the Complainant, when it issued its letter of the 20<sup>th</sup> March 2019 it did not have evidence

from its own Occupational Health doctor that the Complainant was fit to return to work.

It was clear that the Respondent did not have a detailed policy governing absence management. I found that the decision makers in this case did not have sufficient knowledge or training of the legal procedures to be followed. I note that there is a short reference to absenteeism on page 21 of the Respondent's staff handbook. As regards unauthorised leave it states

*"We view as extremely serious any persistent unauthorised absence. Unauthorised absences will cause disciplinary action being taken up to and including dismissal for repeated offences. "*

The disciplinary procedure was set out in page 24 and 25 of the staff handbook. On page 25 it states that

*"If the staff member is found to have committed an act of gross misconduct, they will be dismissed without notice or payment in lieu".*

In dealing with absences, communication is key, and maintaining contact with an absent employee is crucial in this regard. I found the letters from the Respondent to the Complainant fell well below the standard of reasonable behaviour / communication between and employer and employee. There was no regard to the Respondent's own staff handbook and its disciplinary procedure. Aside from the above, the termination of the Complainant's employment was procedurally flawed and in breach of the provisions of the Code of Practice on Grievance and Disciplinary Procedure (S.I. No. 146 of 2000).

At a minimum before the decision to terminate the Complainant's employment took place, he should have been again assessed by the Respondent's doctor, to determine his fitness for work and whether his condition was likely to remain or reoccur in the foreseeable future. A return to work meeting should be arranged with the Complainant and the situation discussed with him. The situation should be kept under review and managed conservatively. It may ultimately have been the case that the Complainant did not have the capacity to undertake his role and dismissal may have occurred. However, any dismissal for incapacity needed to be examined in a structured way, relying heavily on medical advice and consultation with the employee. To be able to make a decision to terminate the Complainant's employment, the Respondent needed to be in "full possession of all the material facts" concerning the Complainant's condition. **See *Humphreys v Westwood Fitness Club* [2004] (ELR296, 300).**

The decision of the Respondent in this case was extremely heavy handed. To dismiss an employee on sick leave for a delay in providing a sick certificate for 18 days is most unreasonable behaviour from a Respondent. I do not accept that the Respondent had exhausted all avenues to engage with the Complainant. Having heard the evidence of both sides, I found the evidence of the Complainant to be credible and measured. I accept that he did submit regular medical certificates to the Respondent and attended with and cooperated with the Respondent's GP. I was furnished with a copy medical certificate at the hearing which covered the period 4<sup>th</sup> March 2019 to 4<sup>th</sup> April 2019. I accept his evidence that the correspondence from the Respondent added to his stress and impacted adversely on him.



I don't accept the Respondent's submission that the Complainant ignored them.

Overall, I find that the Respondent discriminated against the Complainant on grounds of his disability contrary to Employment Equality Act and the Respondent failed to adequately discharge the duties imposed upon it by the Act at Section 16.

CA-00028506-001

The Complainant was entitled to notice of his termination of employment.

In a claim under the Minimum Notice and Terms of Employment Act 1973, the loss sustained by the Complainant must be due to the Respondent's contravention of the Act.

The Employment Appeals Tribunal has held that, if notice had been given but the employee could not have worked out that notice because he or she was sick (see McLoughlin v DNU Ltd M 744/1987, Lehane v Feeney UD 868/1987 and McIntyre v Hendrik Haulage Ltd M2623/1992), there is no loss due to any such contravention.

### **Decision:**

Section 79 of the Employment Equality Acts, 1998 – 2015 requires that I make a decision in relation to the complaint in accordance with the relevant redress provisions under section 82 of the Act.

CA-00028416-002

I find that this complaint is well founded.

In considering redress, I find that compensation is the most appropriate form of redress in the circumstances of this case. In accordance with the case of Von Colson & Kamann v Land Nordrhein – Westfalen [1984] ECR 1891, I am mindful of the requirement that the sanction be "*effective, dissuasive and proportionate*." In accordance with my powers under section 82 of the Employment Equality Acts, I hereby award the Complainant €52,000 by way of compensation for breaches of the Act which represents two years' salary. The award is redress for the infringement of the complainant's statutory rights and therefore not subject to the taxation.

CA-00028506-001

I find the complaint not well founded.

**Dated:** 28<sup>th</sup> April 2020

**Workplace Relations Commission Adjudication Officer:** Marguerite Buckley

**Key Words:**

Discriminatory dismissal.