

EQUALITY OFFICER'S DECISION NO: DEC-E/2014/005

PARTIES

Siobhan Connell
(Represented by the National Advocacy Service)
Vs

ERGO Services Limited
(Represented by Beauchamp's Solicitors)

FILE NO: EE/2011/437

Date of issue: 10th of February, 2014

1. Dispute

1.1 This dispute involves a claim by Ms. Siobhan Connell, that she was discriminated against by ERGO Services Limited on grounds of disability in terms of section 6 of the Employment Equality Acts, 1998 to 2008 and contrary to section 8 of those Acts, in relation to her conditions of employment and dismissal, and in relation to the respondent's failure to provide her with reasonable accommodation.

2. Background

2.1 The complainant referred a complaint under the Employment Equality Acts 1998 to 2008 to the Equality Tribunal on the 13th of May, 2011 alleging that the respondent had discriminated against her on grounds of disability when she was dismissed from her job. The complainant also submits that the respondent failed to provide her with reasonable accommodation for her generalised anxiety disorder.

2.2 In accordance with his powers under section 75 of the Employment Equality Acts, 1998-2008 the Director delegated the case, on 12th of September, 2013 to me, Orla Jones, an Equality Officer, for investigation, hearing and decision and for the exercise of other relevant functions of the Director under Part VII of those Acts. This is the date I commenced my investigation. Written submissions were received from both parties. As required by Section 79(1) of the Acts and as part of my investigation I proceeded to a Hearing on the 10th of October, 2013.

3. Summary of complainant's case

3.1 The complainant submits that she was employed by the respondent from 21st of June, 2010 to 7th of April, 2011.

3.2 It is submitted that the complainant suffers from a generalised anxiety disorder and that she notified the respondent of this following her commencement of employment in June 2010.

3.3 The complainant submits that she was initially afforded certain accommodations by the respondent such as being allowed flexibility with her start time which was later revoked.

3.4 The complainant had also requested that she be accommodated in respect of cigarette breaks and Facebook time and later with short periods of meditation.

3.5 The complainant submits that her problems.. began when she was assigned a new manager in October 2010.

3.6 It is submitted that the complainant when she commenced employment was subjected to a six month probation period which was due to end in December, 2010 but which was extended for another 3 months to March, 2011 following a meeting with her manager on 21st of December 2010 in relation to her performance.

3.7 The complainant submits that her work was monitored to a higher degree than any other team member and that she was advised that management were unhappy with her style of work.

3.8 The complainant was dismissed on 21st of March 2011.

3.9 The complainant submits that the reason for her dismissal was due to her disability and that this amounts to discrimination.

4. Summary of Respondent's case

4.1 The complainant was employed by the respondent from 21st of June, 2010 to 7th of April, 2011 as a Software Developer. Her employment was subject to an initial probation period of 6 months.

4.2 The respondent submits that it was notified of the complainant's anxiety disorder following her induction with Ms.. H, HR Officer on 21st of June, 2010 during her signing of relevant paperwork.

4.3 The respondent submits that the complainant was referred to Medmark the respondent's occupational health specialists to determine what if any accommodations would be required.

4.4 Following the Medmark report accommodations were discussed and agreed with the complainant.

4.5 On 18th of October, 2010 Mr. S assumed the role of Product Delivery Manager and the complainant was assigned her first piece of substantial work. The respondent following this began to see issues with the complainant's performance. The complainant had undergone 1 month and 3 month review meetings prior to this.

4.6 On 21st of December 2010 a meeting took place between Mr. S and the complainant where her performance was discussed. A decision was taken to extend the complainant's probationary period for a further 3 months until March, 2011. It was agreed that regular review meetings would take place in the interim.

4.7 A review meeting took place in January, 2011 with further meeting in February 2011 to review the complainant's performance and progress.

4.8 On 21st of March 2011 a meeting took place between the complainant, her manager and the HR manager. The complainant was advised at this meeting that she would not be made permanent. The complainant was offered a further 2 months employment to give her a chance to secure another job and to finish off the work she had been doing.

4.9 The complainant was advised that she could appeal the decision and stated that she did not want to appeal it.

4.10 The complainant on 4th of April, advised Mr. S that she had found a new job and left the respondents employment on 7th of April, 2011.

4.11 The respondent submits that it is entitled to rely on the defence under Section 16(1)(b) of the Employment Equality Acts, as it had formed the view that the complainant was not fully capable, of performing the duties for which she been employed.

5. Conclusions of the Equality Officer

5.1 The issue for decision by me now is whether or not the respondent discriminated against the complainant on grounds of disability, in terms of section 6 and contrary to section 8 of the Employment Equality Acts, 1998 to 2008 in relation to her conditions of employment and in relation to her dismissal and whether the respondent failed to provide her with reasonable accommodation.

In reaching my Decision I have taken into account all of the submissions, oral and written, made to me in the course of my investigation as well as the evidence at the Hearing.

5.2 Section 6(1) of the Employment Equality Acts, 1998 to 2008 provides that discrimination shall be taken to occur where “*a person is treated less favourably than another person is, has been or would be treated in a comparable situation on any of the grounds specified in subsection (2).....*” Section 6(2)(g) of the Acts defines the discriminatory ground of disability as follows – “*as between any 2 persons, ... that one is a person with a disability and the other is not or is a person with a different disability*”.

5.3 Section 85A of the Employment Equality Acts sets out the burden of proof which applies in a claim of discrimination. It requires the complainant to establish, in the first instance, facts from which it may be presumed that there has been discrimination. If she succeeds in doing so, then, and only then, is it for the respondent to prove the contrary. The Labour Court elaborated on the interpretation of section 85A in *Melbury v. Valpeters* EDA/0917 where it stated that section 85A: “places the burden of establishing the primary facts fairly and squarely on the Complainant and the language of this provision admits of no exceptions to that evidential rule”.

5.4 Disability Ground

5.4.1 In the present case, it is submitted by the complainant that she is a person with a disability, within the meaning of section 2 of the Employment Equality Acts.

Disability” is defined in Section 2 of the Acts as meaning –

- “(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”.

5.4.2 At the hearing, the complainant, when questioned about her disability submitted that she suffered from a generalised anxiety disorder.

5.4.3 The Respondent at the hearing did not dispute this and submitted that it became aware of the complainants anxiety disorder on 21st of June, 2010 following her induction with Ms. H. The complainant provided the tribunal with details of her disability along with medical evidence in support of same.

5.4.4 I am satisfied based on the totality of the evidence presented that the complainant is a person with a disability within the meaning of section 2 of the Employment Equality Acts 1998 to 2008.

5.5 Reasonable accommodation

5.5.1 The complainant at the hearing stated that she advised the respondent of her disability after commencing employment with them in June 2010. The complainant stated that initially, the only accommodation she requested was that she be allowed time off to attend a 2 hourly doctor’s appointment once a month. The complainant advised the hearing that she was permitted such time off once she gave notice of the appointments. The complainant advised the hearing that the only other accommodation she required to manage her condition was to be able to take cigarette breaks as needed, as these helped to reduce her levels of anxiety. The complainant stated that the respondent did not object to her taking

these cigarette breaks but stated that she was on one occasion asked by her manager to be a bit more discreet when taking these breaks due to upper management perception.

5.5.2 The respondent advised the hearing that the complainant notified Ms. H, HR Officer of her anxiety disorder in June 2010. Following notification of her disability the respondent in discussion with the complainant arranged an appointment for the complainant with Medmark Occupational Health Specialists in order to confirm that she was medically fit to work in the role for which she was employed, and in order to ascertain what if any reasonable accommodation's would be necessary to manage her condition. The Medmark assessment took place on 12th of August 2010. The report issued by Medmark indicated that the complainant was at the time fit for work in her role as Software Developer but that she should not be placed in any position with high levels of stress or which included working to deadlines. The report stated that her condition could become unstable under stress resulting in absences from work.

5.5.3 The complainant advised the hearing that she disagreed with the Medmark report as she stated that she had no issues with working under pressure or to tight deadlines. The respondent at the hearing stated that the complainant had not prior to the hearing given any indication that she disagreed with the report and had in fact fully engaged in discussions about the report with the respondent. The respondent advised the hearing that such discussions sought to ascertain the complainant's input on making such accommodations as were necessary in order to avoid any adverse impact on her health. The respondent advised the hearing that had the complainant objected to the Medmark Report they would have arranged for her to be assessed by someone else.

5.5.4 The complainant advised the hearing that one of the accommodations which she was permitted was flexibility around her start time. The complainant stated that she was permitted to start any time up to 10 am even though the usual start time was 9 am. In addition the complainant stated that she required regular cigarette breaks in order to manage her anxiety. The complainant also requested that she be emailed in advance of any meetings outlining what was to be discussed at the meeting. This, the complainant stated was due to the fact that she had difficulty with confrontational face to face conversations. The complainant also advised the hearing that she used Facebook as a means of relaxing and reducing her anxiety at work and so had requested and had been granted permission to access

face book at work as a means of reducing her anxiety. The complainant stated that she had also used short periods of meditation as a means of reducing her anxiety at work.

5.5.5 The complainant advised the hearing that she was initially granted these accommodations and stated that such accommodations were adequately meeting her needs but added that they were later reduced and or revoked by the respondent. The complainant stated that her time keeping was raised with her as a performance issue and that issues were also raised regarding the number of cigarette breaks she was taking as well as the amount of time she spent on face book.

5.5.6 The complainant advised the hearing that these accommodations were reduced when Mr. S became her Manager and stated that prior to this she had no problems at work. The complainant advised the hearing that once Mr. S became her manager she was required to be in work at 9.45 am. She also stated that issues were raised in relation to the number of cigarette breaks she took and in relation to the amount of time she spent on Facebook. The respondent advised the hearing that it had been very accommodating in terms of allowances granted to the complainant. The respondent stated that it was in fact the complainant's previous manager Mr. C who had spoken to her about her cigarette breaks but stated that he had not asked her to reduce the number of breaks as he was aware that she found them necessary to manage her anxiety, but stated that he had asked that she be more discreet when taking them. The complainant conceded that this was the case. The respondent stated that it didn't look good in front of other staff or senior management when the complainant came in to work at 10 am and then went for her first cigarette break shortly after that.

5.5.7 The respondent advised the hearing that it had agreed to the accommodations outlined by the complainant however, as regards the start time, the respondent's understanding was that this would be up to 10 am on occasions where the complainant was experiencing difficulty due to her condition and that it was not intended that this would be the complainant's every day start time. The respondent advised the hearing that on certain days team meetings were held early in the morning and so it was necessary for all team members to be in for these meetings where possible. The respondent stated that the flexible start time was intended to allow the complainant flexibility on occasions when she had difficulty coming into work for 9 am due to her condition. The respondent added that it was not possible to afford a late start to the complainant on a full time basis due to team meetings and

due to the tight deadlines which had to be met by the complainant as part of the Software Development team. It was thus agreed that the complainant would try to be in work by 9.45 am and if she was going to be any later than that, she would contact her manager. The complainant did not dispute this.

5.5.8 The complainant agreed that there was no issue when she needed time off for medical appointments and that she was also permitted to work from home on occasion upon request.

5.6 Performance issues

5.6.1 The complainant advised the hearing that she was dismissed due to her disability. She stated that she had been afforded a number of accommodations by the respondent but that these accommodations were later revoked and used against her as allowances made were then viewed as problems, or as issues with her performance. The complainant also stated that Ms. R, HR Manager had advised her that she would be better off working somewhere else given her health problems. The respondent denies that any reference was made to the complainant's health problems when terminating her employment. Ms. R advised the hearing that she made no reference to the complainant's health as it had no bearing on the decision to terminate her employment and also stated that, having worked in HR for many years she would know better than to say something like that. Ms. R also advised the hearing that she is on the respondent's Equality Committee and has an awareness of equality matters. The complainant at the hearing did not respond to this.

5.6.2 The complainant advised the hearing that there had been no issues with her performance until Mr. S took over as her manager. It emerged at the hearing that 1 month and 3 month review meetings had taken place (documentation submitted to the Tribunal) between the complainant and Ms. R. It is clear from the 1 month review that the complainant was happy in her role but had concerns regarding the accommodations being granted to her due to her disability and whether the respondent company was happy with her 'slightly unusual approach' to work. The complainant was assured by Ms. R that the respondent was at this point happy with her and her productivity. The three month review form indicates that the complainant was still happy in her role but that she had concerns in relation to her flexible start time and how it was perceived by others as more favourable treatment. She suggested that the flexible start time should be incorporated into a more structured flexible

working hour's policy. The review form indicates that the meeting was quite positive. The respondent submitted that the complainant had in the first few months of her employment been given very minor pieces of work to do and acknowledged that these had been done well.

5.6.3 The respondent advised the hearing that Mr. S became the complainant's manager in October 2010, around which time the complainant was given her first substantial piece of work. The respondent submitted that it was at this time that issues began to come to light in respect of the complainant's performance. The respondent advised the hearing that there were issues with the quality of the complainant's work and the respondent stated that she had on occasion turned in code which did not work and which had cost the team a large amount of work the following day. The respondent stated that the complainant had on another occasion failed to check in a block of code and had not turned up for work the next day thereby delaying the delivery of the project as a whole. The complainant's response to this at the hearing was that another team member had made a similar mistake previously. The respondent replied that the complainant's error had been at a time when the team were working to an external deadline and it could have cost the company a lot.

5.6.4 The respondent advised the hearing that there was also an issue with the complainant's interactions with other team members and that she had conflicted with Ms. O Product Analyst, who was responsible for quality assurance, following a request by Ms. O for a report on work to be completed. The respondent stated that the complainant had also conflicted with Mr. M regarding her being late checking in code and thus delaying the work of other developers. The complainant stated that the conflict with Ms. O had occurred due to the fact that the complainant felt that Ms. O had requested a report from her in a format which was not requested of other team members. The complainant advised Ms. O that she did not have time to complete the report as requested and advised the hearing that Ms. O had responded to her via what she considered to be an extremely rude email. The respondent advised the hearing that Ms. O had emailed all team members with the same request (copy emails submitted) and stated that the complainant was the only one who refused to co-operate stating that she 'didn't have the time'. The respondent stated that it was vital for team members to work well together given that the work is team based and each member is relying on the next team member to produce and check in their respective blocks of code within a given timeframe and to a certain standard, and so all members must work well together to meet the deadlines. The respondent added that conflict amongst team members was rare but

stated that the complainant had conflicted with two team members in a short time which was very unusual.

5.6.5 The respondent also stated that the complainant had a very high level of absenteeism and that she had incurred 14 sick days during a short time many of which were only confirmed as sick days the day after they had occurred. The respondent added that some of the reasons given for absences were quite strange. The respondent stated that the complainant's level of absenteeism increased at times when the pressure was on and deadlines were approaching. The respondent advised the hearing that although attempts were made to minimise the level of stress incurred by the complainant, Software Development is inevitably a stressful and time bound job with deadlines. In addition, the respondent advised the hearing that, notwithstanding the flexibility granted in relation to her start time, the complainant had issues with timeliness and was coming into work later and later each day, often after 10 am, and was impacting on the team as a whole and on the timely completion of work.

5.6.6 The complainant advised the hearing that her 6 months probationary period was due to end on 21st of December 2010 and stated that, on this date, a meeting took place between the complainant and her manager, where she was advised that her probationary period was being extended for a further three months, due to issues with her performance, which it was hoped could be improved upon over the next three months. The respondent at this time identified 3 areas for improvement, Attention to detail, Time keeping and Team Interaction/relationship building. The respondent submits that this extension was granted in order to give the complainant an opportunity to improve her performance and it was agreed, that her performance and work would be reviewed regularly over this time period. Mr. S met with the complainant every 2-3 weeks over this period to monitor her performance. The respondent advised the hearing that over the extended period there were some occasions where the complainant showed improvement in certain areas but stated that her attention to detail and her time keeping did not improve overall. The respondent also advised the hearing that during this period it had become necessary to redistribute a body of work from the complainant to another team member as an important external deadline would have been missed if it had been left with the complainant. The respondent stated that this was due to problems with the quality of the complainant's work and due to her high level of absenteeism during periods of high pressure.

5.6.7 The complainant has claimed that these regular reviews of her performance amount to discrimination. She submitted that her work was monitored to a far higher degree than any other team member. The complainant at the hearing, stated that, following her probationary meeting of 21st of December, 2010 she was now required to report to three separate people and to have her work reviewed. The respondent advised the hearing that the complainant was given additional support in the form of formal code reviews with the respondent's Technical Architect and her work was monitored and reviewed regularly during the extended probation period, in order to assist her in improving her performance and fulfilling her role. I am satisfied from the totality of the evidence adduced in relation to this matter that the complainant was not discriminated against on grounds of disability in relation to this matter.

5.6.8 The complainant advised the hearing that she submitted a Doctor's letter to the respondent on 2nd of March, 2011 seeking clarification in respect of the reasonable accommodation being afforded to her in respect of her disability. The complainant advised the hearing that the accommodations afforded to her had never been clarified in writing and stated that this added to her anxiety. The respondent advised the hearing that the accommodations had never been sought in writing and stated that it was happy to allow the arrangement to be flexible as the complainant's requirements in respect of accommodations did change from time to time. The letter from the complainant's doctor dated 2nd of March, 2011 did not specify that clarification in writing was being requested. A meeting was scheduled with Ms. R the HR manager to discuss this letter and this took place on 14th of March, 2011. The respondent advised the hearing that the complainant, at this meeting had stated that she was concerned that senior management were unhappy with the amount of smoke breaks she was taking and with the amount of time she spent on the internet. She stated that these helped with her anxiety and suggested that senior management be advised of this. Ms. R undertook to discuss the matter with the complainant's manager and find out what had been agreed. The respondent advised the hearing that the complainant became upset at this stage and the meeting ended. On 16th of March the complainant wrote to Mr. C and Mr. S indicating that she appreciated all of the accommodations being made for her (email submitted).

5.6.9 The respondent advised the hearing that the three month extension to the complainant's probation period was due to expire on the 21st of March, 2010. The complainant stated that she was advised, at this meeting that she was not being made permanent. The complainant stated that she was advised that she could appeal this decision and stated that she did not appeal as she couldn't go to those who had already discriminated against her. The respondent advised the hearing that complainant was advised, at the 21st of March meeting, that she was not working out in the role despite the accommodations being made and the reasons for this were explained to her, she was then advised that the respondent was of the view that it should not make her role permanent. The respondent advised the hearing that the complainant, at that meeting, agreed that she had come to the same conclusion and that it was not working out for her (minutes of meeting submitted). The respondent advised the hearing that the complainant had at that point stated that she had always worked for smaller companies where the pressure isn't as bad and the timelines are less intense. The respondent also advised the hearing that they had at that meeting advised the complainant that they could have extended her probation for a further two months but the complainant agreed that there was no point. It was then agreed that the complainant could have an extra two months within which she would be granted time off for interviews and to facilitate her in finding another job. The complainant at the hearing did not dispute these matters.

5.6.10 The respondent submits that the complainant was dismissed due to her incapacity to carry out the role for which she was employed. The respondent stated that absenteeism was a big problem for the respondent due to the fact that Software Developers had to work to tight deadlines and there were serious consequences when deadlines were missed. The respondent stated that the complainant had been entitled to 4 days paid sick leave during her probationary period but stated that she had in fact incurred 14 sick days during that period for which she was paid. The respondent stated that many of these days were only notified to them as sick days the day after she had been absent.

5.6.11 In addition, the respondent stated that the problems. with the complainant's attendance and with the quality of her work always seemed to worsen when there was an important deadline looming and the pressure was on the Software Development team to meet these deadlines. This, the respondent states was in agreement with what the Medmark report had stated although the complainant, at the hearing stated that she disagreed with the

Medmark report on this issue. The respondent stated that it had tried to reduce the stress on the complainant by reallocating certain work but stated that in the long run it was not possible to employ a Software Developer who could not work to tight deadlines and who could not be expected to handle stress, for fear that it would cause her anxiety and result in absenteeism from work. The respondent at the hearing stated that it had hoped that by making allowances and accommodations for the complainant she would be able to continue working in her role as a Software Developer, but the reality was, that she still experienced a worsening of her anxiety at times of stress and deadlines, and the quality of her work and her attention to detail as well as her attendance at work, suffered at such times.

5.6.12 The respondent stated that every effort was made to accommodate the complainant including extending her probationary period for a further 3 months. In addition the respondent offered the complainant a further 2 months in employment during which time she was permitted to take time out for interviews and to seek alternative employment.

5.7 Section 16 obligations and Dismissal

5.7.1 Section 16(3) of the Acts, sets out the obligations and requirements on employers to take appropriate measures, where needed in a particular case, to enable a person with a disability have access to, participate in or advance in employment. It requires an employer to make a proper and adequate assessment of the situation before taking a decision which is to the detriment of an employee with a disability (*my emphasis*) – this approach was endorsed in *Humphries v Westwood Fitness Club*¹.

5.7.2 Section 16(1)(b) of the Employment Equality Acts provides an employer with a complete defence to a claim of discrimination on the disability ground if it can be shown that the employer formed a bona fide belief that the complainant is not fully capable, within the meaning of the section, of performing the duties for which they have been employed.

5.7.3 The respondent submits that the complainant in the present case was dismissed, following the extension of her probation period, due to issues with her performance. The respondent has advised the hearing that the complainant was, in practice,

¹ [2004] 15 ELR 296

unable to work to deadlines, and the stress of such deadlines appeared to have a negative effect on her anxiety disorder, thereby resulting in increased levels of absenteeism by the complainant during busy periods. The respondent submits that as a member of a Software Development team there is a requirement to work to tight deadlines and there are high levels of stress which had a negative effect on the complainant's condition. The respondent referred to the Medmark report which stated that the complainant should not be placed in a position with high levels of stress and that her condition could be aggravated by such stress. The respondent submits that it made all possible allowances for the complainant but, stated that, despite such allowances, she was not capable of performing the role for which she was employed. The respondent added that it had been more than generous in allowing the complainant a two month period, within which to secure another job and during which she was permitted to take time out for interviews. The complainant did not dispute this. The respondent also added that the complainant had been fully supported by the respondent when she wished to take time off for interviews and had advised them on 4th of April, 2010 that she had found another job with more suitable conditions among which she had referred to the fact that there was 'no pressure on developers'. The complainant's manager Mr. S had congratulated her on this and had wished her well. The tone of these communications (copies submitted) was friendly and in no way hostile. The complainant at the hearing did not dispute this.

5.7.4 In the case of *A Health and Fitness Club -v- A Worker*² the Labour Court set out the approach that should be taken in order that an employer can rely upon the defence set out in Section 16(1)(b) of the Acts, namely:

"if it can be shown that the employer formed the bona fide belief that the complainant is not fully capable, within the meaning of the section, of performing the duties for which they are employed. However, before coming to that view the employer would normally be required to make adequate enquiries so as to establish fully the factual position in relation to the employee's capacity.

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

² Labour Court Determination No. EED037 - *A Health and Fitness Club -v- A Worker* (case upheld on appeal to the Circuit Court)

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. The Section requires that the cost of such special treatment or facilities must also be considered. Here, what constitutes nominal cost will depend on the size of the organisation and its financial resources.

5.7.5 In this case the Labour Court 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 s/he is otherwise competent and assessing the actual cost and practicality of providing that accommodation. This decision was also upheld on appeal to the Circuit Court.

5.7.6 It is the respondent's evidence that the decision to dismiss the complainant was made due to her inability to work to deadlines and due to her high level of absenteeism during busy periods. It is acknowledged by the respondent that the complainant suffers from a generalised anxiety disorder. In applying the Labour Court ruling in 'A Health and Fitness Club Vs A Worker' referenced above, it is clear that there was an obligation upon the respondent, in the first instance, to ascertain the level and extent of the complainant's disability. The respondent once armed with the knowledge that the complainant suffered from a disability was at this point obliged as per Section 16(3) of the Acts to make a proper and adequate assessment of the situation before taking the decision to dismiss the

complainant. The respondent in this case acted accordingly and referred the complainant to Medmark, their Occupational Health Specialists for assessment.

5.7.7 The respondent was then obliged to look at suitable measures and accommodation which would enable the complainant to perform the role for which she was employed. It is clear from the totality of the evidence adduced above that the respondent following receipt of the Medmark report and in consultation with the complainant then put in place measures (detailed above) to accommodate the complainant and to enable her to fulfil her role as a Software Developer.

5.7.8 The respondent has advised the hearing that, despite these accommodations, the complainant was unable to meet the requirements of the role during her probationary 6 months. The respondent at that stage then extended the complainant's probationary period for a further 3 months with regular performance reviews during that period. The respondent has stated that the complainant's performance did not show significant improvement during the extended probationary period, after which the complainant was advised that she was not being made permanent due to performance issues.

5.7.9 Having regard to the foregoing, I am satisfied that the respondent, did make appropriate enquiries to ascertain the extent of the employees condition and following receipt of the Medmark report and in consultation with the complainant, did put in place special measures to enable the complainant to perform the duties for which she had been employed. In the present case it is clear that despite the putting in place of reasonable accommodation measures it became evident the complainant was, despite these measures, unable to fulfil the role for which she was employed by the respondent. In addition, the respondent in this case advised the complainant after 6 months that it was considering not making her permanent but then extended her probation for a further 3 months over which time her performance was regularly reviewed. It is clear from the totality of the evidence adduced here that the respondent in this case complied with its obligations under Section 16(3) by carrying out the process orientated approach, as set out by the Labour Court in the aforementioned *A Health and Fitness Club -v- A Worker* case, before making the decision to dismiss the complainant.

5.7.10 Accordingly, it is clear to me from the totality of the evidence adduced in relation to this matter that the complainant was dismissed in accordance with section 16 (1)

of the Acts because she was not *'fully capable of undertaking the duties attached to that position'*. Thus I find that the dismissal was not carried out in a discriminatory manner.

5.7.11 In addition, I am satisfied based on the totality of the evidence adduced, that the respondent in this case did not discriminate against the complainant on the disability ground in relation to the provision of reasonable accommodation within the meaning of section 16 of the Acts.

5.8 Section 15 - Equality policy

5.8.1 The respondent advised the hearing that it has in place an Equality Policy which the complainant failed to invoke. The respondent raised this matter at the hearing and submitted that in this regard it is entitled to rely on the defence set out in Section 15(3) of the Acts. The respondent submitted its Equality Policy, to the Tribunal as evidence in this regard. Although nothing turns in it, I note that the policy states that complaints can be submitted in writing and raised with an employee's Line Manager/Business Unit Manager in the first instance who will then arrange for the HR manager to investigate the matter. The complainant at the hearing stated that she was not aware of this policy before adding that she was not going to submit a complaint to those whom she felt had discriminated against her.

6. DECISION OF THE EQUALITY OFFICER.

6.1 I have completed my investigation of this complaint and in accordance with section 79(6) of the Employment Equality Acts, 1998 - 2008 I issue the following decision. I find that

(i) the respondent did not discriminate against the complainant on grounds of disability, in terms of section 6(2) of the Employment Equality Acts, 1998-2008 and contrary to section 8 of those Acts in relation to her conditions of employment

(ii) the respondent did not discriminate against the complainant on grounds of disability, in terms of section 6(2) of the Employment Equality Acts, 1998-2008 and contrary to section 8 of those Acts in relation to her dismissal

(iii) the respondent did not discriminate against the complainant on grounds of disability, in terms of section 6(2) of the Employment Equality Acts, 1998-2008 and contrary to section 8 of those Acts in relation to the provision of reasonable accommodation within the meaning of section 16 of the Acts.

Orla Jones
Equality Officer
10 February, 2014