EQUALITY OFFICER DECISION NO: DEC-E/2014/012

PARTIES

O'SULLIVAN
(REPRESENTED BY MR. BRENDAN FOLEY BL
INSTRUCTED BY HENNESSY AND PEROZZI - SOLICITORS)

-V-

EASTERN REGIONAL AMBULANCE SERVICE
(REPRESENTED BY BYRNE WALLACE - SOLICITORS)

File No: EE/2010/311 & EE/2012/511

Date of issue: 28February, 2014

Headnotes: *Employment Equality Acts 1998- 2008 - sections 6,8 and 77 – discriminatory treatment – conditions of employment- disability- timelimits- out of time*

1. DISPUTE

This dispute involves a claim by Mr. David O' Sullivan ("the complainant") that he was (i) discriminated against by the Eastern Regional Ambulance Service ("the respondent") on grounds of disability in terms of section 6(2) of the Employment Equality Acts and contrary to section 8 of those Acts in relation to his conditions of employment, (ii) harassed by the respondent on grounds of disability, in terms of section 6(2) of the Employment Equality Acts and contrary to section 14A of those Acts and (iii) victimised by the respondent in terms of section 74(2) of the Acts. The complainant also alleges that the respondent failed to provide him with reasonable accommodation in terms of section 16(3) of the Acts. The respondent rejects the complainant's assertions in their entirety.

2. BACKGROUND

2.1 The complainant commenced employment with the respondent as an Emergency Medical Technician ("EMT") in September 1999. He states that he was diagnosed with Depression in June, 2003 and his condition necessitated a number of absences from work thereafter. He adds that in July, 2004 he agreed an action plan with the respondent to address his absences record, an element of which was a provision restricting the complainant in the amount of overtime shifts he could work each week. The complainant adds that as part of this action plan he was regularly reviewed by the respondent's Occupational Health Department and after several meetings and assessments with Management and medical staff the review process formally concluded in September, 2006 and he was restored to full overtime duties. The complainant states that his employment was uneventful until November, 2009 when he was referred to the respondent's Occupational Health Department by Mr. D, the respondent's Assistant Chief Ambulance Officer (at that time) and he was again withdrawn from the overtime roster. He was restored to the roster in December, 2009 and it is submitted on his behalf that the respondent's actions amount to less favourable treatment of him on grounds of disability contrary to the Acts.

2.2 The complainant referred a complaint under the Employment Equality Acts, 1998-2008 to the Equality Tribunal on 27 April, 2010. In accordance with his powers under the Acts the Director delegated the complaint to the undersigned - Vivian Jackson, Equality Officer - for investigation and decision and for the exercise of other relevant functions under Part VII of the Acts. My investigation of the complaint commenced on 13 July, 2012 - the date the complaint was

delegated to me. Submissions were filed and exchanged and a Hearing on the complaint took place on 27 September, 2012. At the Hearing Counsel for the complainant advised that he intended to raise alleged incidents of unlawful treatment which occurred after the first complaint was referred to the Tribunal – in particular events which occurred on 26 October, 2010 and resulted in the complainant being placed on suspension, with pay, until July, 2011 – when he returned to full duties. The Equality Officer brought the Determinations of the Labour Court in *Hurley v Cork* VEC[1] and *A School v A Worker*[2] to the parties' attention and sought comments on the relevance of same to the instant case. Counsel for the complainant subsequently agreed that the Labour Court Determinations precluded his client from seeking redress in respect of alleged incidents which post-dated the date of referral of the complaint but noted that the Tribunal could take evidence on the issue and afford them appropriate probative value in terms of the alleged incidents encompassed by the original complaint. Counsel advised that the incidents detailed in the complainant's original submission which pre-date November, 2009 were not being pursued as part of the complaint but were included by way of background to the alleged November, 2009 incident. The respondent's representative concurred with Counsel's analysis of the Labour Court Determinations but submitted that she was not in a position to address the issues which were alleged to have occurred from October, 2010 onward and sought an adjournment in those circumstances. Counsel for the complainant did not object to the application and stated that he would take his client's instructions on the question of whether or not he wished to refer a new complaint to the Tribunal in respect of the alleged incidents of discrimination from October, 2010 onwards. In the circumstances the Hearing was adjourned.

2.3 The complainant's solicitors referred a second complaint on behalf of its client under Employment Equality Acts, 1998-2011 to the Equality Tribunal on 1 October, 2012. This complaint made similar allegations to the first one referred (except the allegation that the respondent failed to provide him with reasonable accommodation) and indicated that the first occurrence of alleged unlawful treatment encompassed by the complaint was 26 October, 2010 and was ongoing. In accordance with his powers under the Acts the Director delegated the complaint to the undersigned - Vivian Jackson, Equality Officer - for investigation and decision and for the exercise of other relevant functions under Part VII of the Acts. My investigation of the complaint commenced on 2 October, 2012 - the date the complaint was delegated to me. Submissions were filed and exchanged and a Hearing on both complaints took place on 25 January, 2013. At this Hearing Counsel for the complainant withdrew the allegations of harassment, victimisation and a

[1] EDA 1124
[2] EDA 122

failure to provide reasonable accommodation referred under the first complaint. He also withdrew the allegation of victimisation referred under the second complaint. The respondent's representative stated, notwithstanding that the complainant's allegations were rejected; her client was arguing that the second complaint was out of time. A second day of Hearing took place on 6 March, 2013. At the outset of this Hearing Counsel for the complainant withdrew the harassment element of his client's second complaint. A number of issues arose at the Hearing which required further clarification and gave rise to correspondence between the Equality Officer and the parties. This process concluded in early August, 2013.

3. SUMMARY OF COMPLAINANT'S CASE

3.1 The complainant rejects the respondent's argument that his second complaint is out of time pursuant to section 77(5) of the Acts. He states his complaint is that the respondent suspended him from duty following an altercation between him and colleagues on 26 October, 2010 and that this amounts to less favourable treatment of him on grounds of disability. He contends that the respondent invoked its Disciplinary Process against him as a result of this altercation and submits that this process also amounts to less favourable treatment of him on the same ground contrary to the Acts. It is submitted on his behalf that this act of discrimination continued until 27 September, 2012 when the respondent advised, in the course of the Hearing before this Tribunal, that the complainant was not the subject of investigation under its Disciplinary Process in respect of the events of 26 October, 2010. It is submitted on the complainant's behalf that the alleged discrimination of him was ongoing until that date and the Tribunal is urged to reject the respondent's arguments that the last possible date of discrimination was on, or around, 18 August, 2010 – when his period of suspension terminated.

3.2 The complainant accepts that he did not pursue clarification of the status of any investigation against him with the same vigour as he had during his suspension after he returned to work, but it is submitted that he should not be required to continuously seek clarification of same and that any failure in that regard does not render his complaint out of time. The complainant states that until 27 September, 2012 he believed he was subject to an investigation in respect of the events of 26 October, 2010. In this regard the complainant relies on (i) a letter to him from Mr. D dated 26 October, 2010 advising that he was "stood down" from duty; (ii) several pieces of correspondence from his solicitor to the respondent's solicitor between 6 December, 2010 and 9 August, 2011 wherein, *inter alia*, it raises issues about the investigation process commenced against the complainant on foot of the events of 26 October, 2010 and to which the respondent's solicitor

failed to reply, in any substantive fashion to same; (iii) comments which he alleges were made by Mr. B (HR Manager) in the course of a meeting on 25 November, 2010 that a "Grade IV" investigation was being undertaken as a result of the incident and (iv) comments which he alleges were made by Mr. M (Assistant Chief Ambulance Officer) in the course of a "Return to Duty Meeting" in July, 2011 in response to a question as to the status of the Grade IV investigation was that "the matter was still with HR". It is therefore submitted on behalf of the complainant that his second complaint is in time in terms of section 77(5) of the Acts.

3.3 The complainant states that he commenced employment with the respondent as an Emergency Medical Technician ("EMT") in September 1999. He adds that he was diagnosed with Depression in June, 2003 and his condition necessitated a number of absences from work thereafter. He further states that in July, 2004 he agreed an action plan with the respondent to address his absences record, an element of which was a provision restricting the number of overtime shifts he could work each week. The complainant adds that as part of this action plan he was regularly reviewed by the respondent's Occupational Health Department and after several meetings and assessments with Management and medical staff the review process formally concluded in September, 2006 and he was restored to full overtime duties. The complainant states that his employment was uneventful until November, 2009 when he was referred to the respondent's Occupational Health Department by Mr. D, the respondent's Assistant Chief Ambulance Officer (at that time) and he was again withdrawn from the overtime roster.

3.4 The complainant states that he experienced chest pain on 2 November, 2009 and attended his GP. He adds that he was diagnosed with anxiety and certified as unfit for duty. He further states that he contacted Mr. C (the person who had been appointed his Peer Support Person previously) and informed him that he (the complainant) had been diagnosed with anxiety and had been advised to see a Specialist. The complainant states that he considered this conversation to be confidential – previous conversations between them had enjoyed that privilege – and when Mr. C asked him what he should tell the complainant's Line Manager (Mr. K) as to the reason for his absence, he told him to say that he (the complainant) was suffering from low mood and he would be back to work in a few days. In the course of the Hearing the complainant stated that he did not mention the word depression to Mr. C and cannot explain how the submission filed on his (the complainant's) behalf indicates he was suffering from depression at the time and informed Mr. C of same. The complainant states that when he returned to duty on 5 November, 2009 he was called into the Office by Mr. K as part of the respondent's "Return to Duty" process. He adds that

in the course of this discussion Mr. K made reference to the complainant's depression and indicated he had concerns as the complainant had access to drugs in his role as an EMT. The complainant adds that Mr. K also requested a list of any medication he (the complainant) was taking but he refused to disclose same. The complainant accepts that he signed the "Return to Duty Form" but did so under protest as it was the subject of industrial relations discussion between the trade union and Management at the time. He adds that he left the Office and commenced his shift – as far as he was concerned the matter was concluded.

3.5 The complainant states that the following day he attended a meeting with Mr. D and Mr. K. He adds that in the course of this meeting Mr. D informed him that he (Mr. D) had contacted the Occupational Health Department and following receipt of advice from same he (the complainant) was being removed from overtime with immediate effect and that an appointment had been made for the complainant to attend the Occupational Health Department for medical review on 13 November, 2009. He adds that Mr. D did not disclose the nature of this advice and he also requested a list of the complainant's medication, but he (the complainant) refused to give it to him – these details were with the Occupational Health Department and he did not consider it appropriate or necessary to furnish them to Mr. D. The complainant states that the medical assessment did not go ahead on 13 November, 2009 because he was unavailable and that it proceeded on 3 December, 2009 instead. He rejects the assertion contained in Mr. D's purported note of the meeting of 6 November, 2009 (submitted by the respondent) that he (Mr. D) informed the complainant "he would prefer if he [the complainant] did not do any structured overtime which he [the complainant] was happy to agree to".

3.6 The complainant states that he spoke with Mr. K again on 9 November, 2009 and he (Mr. K) re-stated the complainant's overtime had been withdrawn on the advice of Dr. E from the Occupational Health Department. The complainant submits that this is untrue – at the time he had not been assessed by Dr. E and it would be inappropriate for him to make such a suggestion in those circumstances. Moreover, the complainant states that he had a good relationship with Dr. E and he (the complainant) subsequently asked him if he had provided such advice to the respondent and he vehemently denied the assertion. He rejects the assertion made by the respondent that in the course of the discussions between Mr. K and him he informed Mr. K that he (the complainant) was on the highest level of medication – he restated that he refused to discuss his medication with him at all. The complainant states that following his assessment by Dr. E on 3 December, 2009 he (Dr. E) wrote to the respondent (Mr. D) on 9 December, 2009 advising that he was "quite happy

with him [the complainant] at the moment" and that he was "happy for him [the complainant] to continue in all his normal work duties without reservation". The complainant states that he was returned to full overtime just before Christmas 2009 – he believes it was 22 December, 2009. He asserts that the respondent would not have returned him to full overtime access only it was Christmas and it needed shifts to be covered due to annual leave. It is submitted on the complainant's behalf that the alleged treatment of him amounts to discrimination on grounds of disability contrary to the Acts. In this regard he contends that another EMT (Mr. X) was treated differently in similar circumstances although the complainant was unable to elaborate on the nature of the difference in treatment involved.

4. SUMMARY OF RESPONDENT'S CASE

4.1 The respondent submits that the complainant's second complaint is out of time as it was referred to the Tribunal outside of the timelimits prescribed at section 77(5) of the Employment Equality Acts, 1998-2011. It accepts that the complainant was suspended with pay following an incident involving him and two colleagues on 26 October, 2010 but rejects his assertion that he was subjected to the respondent's Disciplinary Process on foot of same. It adds that the complaint was "stood down" from duty because the respondent (Mr. D – at this time he was Chief Ambulance Officer) was of the view that the complainant displayed excessive levels of aggression and irrational behaviour on the day and he (Mr. D) had genuine concerns about his (the complainant's) ability to perform his role safely. The respondent accepts that the complainant was subjected to its Occupational Health Department during his suspension but states that this was an attempt by it to ascertain his medical status and rejects that this can amount to discrimination as it must ensure the safety of the complainant, his colleague and patients, particularly in the context of the onerous frontline duties carried out by EMT's. The respondent adds that the complainant was returned to full duty in August, 2011 and rejects the complainant's assertion that he had, at any time during his suspension or subsequently, been the subject of its Disciplinary Process. It adds that at no stage did it issue the complainant with any notification, written or otherwise that the Disciplinary Process had been invoked against him. It further states the complainant did not raise, at any of the meetings with Management preceding his resumption, that he believed the Disciplinary Process had been invoked against him and was still extant. It adds that if he held such a belief then he should have raised the matter at that time, or at some time subsequent and neither he, nor his legal representative did so. However, in the course of the Hearing the respondent accepted that the complainant's representative wrote to its representative on several occasions between December, 2010 and August, 2011 and that it made no substantive reply to the

correspondence – it was unable to offer any plausible explanation for this failure. The respondent also rejected the comments attributed to two members of staff in the course of meetings in November, 2010 and July, 2011. It is submitted on behalf of the respondent that in all the aforementioned circumstances, it is not credible the complainant believed (in September/October, 2012) that he was the subject of an existing investigation under the Disciplinary Process. It is further submitted that the last possible date of discrimination in respect of the second complaint was on or around 18 August, 2011, when he resumed work and consequently this complaint is out of time in terms of section 77(5) of the Acts as it was not referred to the Tribunal until 1 October, 2012.

4.2 The respondent states that complainant had a poor attendance record during the period 2004-2006 which involved the implementation of an agreed action plan to address his absences record, an element of which was a provision restricting the number of overtime shifts he could work each week. The respondent adds that this restriction arose as a result of a report from its Occupational Health Department on the complainant which identified "excessive overtime" as a contributory factor to his absences. The respondent states that the complainant was the subject of regular review by its Occupational Health Department and that the process formally concluded in September, 2006 and he was restored to full overtime duties. The respondent states that the complainant's attendance remained acceptable for some time however, from October, 2008 a pattern of absences (both certified and uncertified) began to emerge – the complainant was absent on nine separate occasions between October, 2008 and October, 2009. It adds that on 2 November, 2009 the complainant contacted Mr. C and advised him he was unfit for duty. The respondent (Mr. C) states that he spoke with the complainant that day and he (the complainant) asked him to contact Mr. K and inform him he was ill and would be absent from work for a few days. The respondent (Mr. C) adds that the complainant told him he had attended his GP and was suffering from chest pains and anxiety and was advised to see a Psychologist. Mr. C was unable to say whether or not the complainant used the word depression and stated that he recalled asking the complainant what he should say to Mr. K but was unable to say what the complainant's response was, but the reasons stated by the complainant at the Hearing could be correct. Mr. C adds that he most likely passed that information onto Mr. K immediately.

4.3 The respondent states that the meeting between the complainant and Mr. K on 5 November, 2009 was part of a "Return to Duty" mechanism under the respondent's "Managing Attendance Policy" which had been in operation for about a year. It adds that in the course of this discussion the

complainant advised Mr. K that he (the complainant) was on medication for depression and had been referred to a Specialist in Beaumont Hospital. A copy of the "Return to Duty Form" signed by both the complainant and Mr. K was furnished to the Tribunal although Mr. K did not attend the Hearing. The respondent (Mr. D) states that Mr. K immediately informed him of the contents of his conversation with the complainant and he (Mr. D) has some concerns over the level of medication the complainant was taking for his condition and whether or not this could impact on his ability to perform his duties. Mr. D adds that in addition, he was aware that on the previous occasion the complainant had felt stressed and anxious his condition had been exacerbated by "excessive overtime". He states that in the circumstances he spoke with Dr. E on the phone and it was his suggestion that the complainant should avoid overtime in the immediate term. Mr. D states that he agreed with this proposition and that he and Mr. K met with the complainant on 6 November, 2009. He adds that he has a duty of care to his staff to ensure that they are competent and capable of discharging the full range of duties required of an EMT as well as a duty of care to the public they serve. He states that it was in that context that he advised the complainant (in the course of this meeting on 6 November, 2009) that he (Mr. D) was referring him to the Occupational Health Department and in light of his concerns about the complainant following his conversation with Mr. K the previous day, he would prefer if the complainant did not do any structured overtime (with immediate effect) and the complainant was happy to agree to this.

4.4 The respondent (Mr. D) states that he referred the complainant to the Occupational Health Department for assessment and a consultation was arranged for 13 November, 2009 but this did not proceed. The respondent was unable to comment on the alleged conversation between the complainant and Mr. K on 9 November, 2009 but states that it was seeking clarification of the medication (and dosages) which the complaint had been prescribed for his depression and it was in that regard that Mr. K wrote to the complainant on 13 November, 2009 seeking those details. The respondent (Mr. D) states that he would have sought such details from any employee in similar circumstances to the complainant (where his/her ability to carry out his/her duties was at issue) although he was not aware of any other employee having such a request made of him/her. The respondent states that the complainant attended at its Occupational Health Department for assessment on 3 December, 2009 and Dr. E issued his report on 9 December, 2009. The respondent (Mr. D) accepts that the report states the complainant was fit "to continue in all his work duties, without reservation" and the complainant was subsequently restored to full overtime duties at the earliest opportunity. The respondent (Mr. D) rejects the complainant's assertion that

he would not have been placed back on the overtime roster had Christmas not occurred and the respondent needed shifts covered.

4.5 The respondent rejects the complainant's assertion that it treated him less favourably on grounds of disability contrary to the Acts in respect of the events of 5 November, 2009 and the subsequent consequences of same. It states that as an emergency service it has a high duty of care to its staff and to the public and it must ensure that the health and safety of these groups are protected to the fullest extent. It submits that it was entitled to refer the complainant to its Occupational Health Department for assessment in circumstances where (after events in early November, 2009) it had genuine concerns about his medical fitness to carry out his contracted duties. It further submits that as excessive overtime had been previously identified as a cause of difficulty to the complaint, it was entirely reasonable for it to take the precautionary decision to temporarily withdraw his structured overtime until such time as he was deemed fit to perform such overtime. It argues therefore that it did not discriminate against the complainant in its actions in late 2009.

5. CONCLUSIONS OF THE EQUALITY OFFICER

5.1 The issues for decision by me are (i) whether or not the complainant's second complaint was referred within the timelimits prescribed at section 77(5) of the Employment Equality Acts, 1998-2011 and is therefore properly before this Tribunal for investigation; (ii) is so, whether or not the respondent discriminated against the complainant on grounds of disability, in terms of section 6(2) of the Employment Equality Acts 1998-2011 and contrary to section 8 of those Acts; and (iii) whether or not the respondent discriminated 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 respect of events between November - December, 2009. In reaching my decision I have taken into consideration all of the submissions, both written and oral, submitted to the Tribunal as well as evidence advanced at the Hearing.

5.2 The first issue I must examine is whether or not the complainant's second complaint was referred to this Tribunal within the timelimits prescribed at section 77(5) of the Employment Equality Acts, 1998-2011. That section provides that a complaint must be referred to this Tribunal no later than ***"6 months from the date of occurrence of the discrimination or victimisation to which the case relates or, as the case may be, the date of its most recent occurrence."***. The section therefore encompasses a situation where there is a series of separate acts which are sufficiently connected so as to form a continuum. Section 77(6A) provides-

"For the purposes of this section-

(a) discrimination or victimisation occurs-

(i) if the act constituting it extends over a period, at the end of the period.".

In *Hurley v Cork* VEC[3] the Labour Court stated that this provision encompassed a situation where an employer maintains and keeps in force a discriminatory rule, regime, practice or principle which has a clear and adverse effect on the complainant and gave useful guidance on what might comprise such a situation.

5.3 In the instant case there are two separate but interlinked issues advanced by the complainant. The first is his suspension from duty immediately following the incident on 26 October, 2010 and the second is the alleged application (by the respondent) of its Disciplinary Process against him in respect of the incident. It is common case that the respondent (Mr. D) decided to suspend or "stand down" the complainant from duty on 26 October, 2010. This suspension continued until August, 2011 when, following a series of referrals to the respondent's Occupational Health Department, which also involved consultations with an external Consultant Psychiatrist, Mr. D permitted the complainant to resume duty. It is immaterial whether the treatment of the complainant amounts to a single act of discrimination (Mr. D's decision to suspend him on 26 October, 2010) with continuing consequences or a chain of separate acts of discrimination as I find that any unlawful treatment of the complainant ceased on or around 18 August, 2011 when he was returned to duty. The complainant referred his complaint to the Tribunal on 1 October, 2012. This is beyond the six month timelimit prescribed at section 77(5)(a) of the Acts and it is also beyond the maximum extended period of twelve months prescribed at section 77(5)(b) of the Acts and consequently, I find that this element of the complaint is out of time and is not properly before the Tribunal for investigation.

5.4 The second element of the complainant's claim is that the respondent invoked its Disciplinary Process against him in respect of the incident on 26 October, 2010. He adds that he was informed so by staff of the respondent (Mr. B and Mr. M) and operated on the belief that this was the position until the Hearing in this Tribunal on 27 September, 2012 when the respondent advised that this was not the case. The respondent rejects this assertion and states that the complainant was never the subject of its Disciplinary Process. I have evaluated the evidence adduced on this matter (both oral and written) by the parties and I am satisfied, on balance, that it was reasonable for the complainant to hold the belief he did during his period of suspension. The respondent's actions at

[3] EDA 1124

the time, particularly in respect of its failure to respond to the correspondence issued on behalf of the complainant between December, 2010 and July, 2011, in my view falls well below best practice as detailed in the LRC Code of Practice on Grievance and Disciplinary Procedures[4]. It was open to the respondent at any time during this period to clarify the position to the complainant yet inexplicably, it failed to do so. Had it responded at the time it might well have saved itself (and the complainant) the time and expense of the current proceedings before this Tribunal.

5.5 The complainant contends that the actions of the respondent amount to ongoing discrimination of him until 27 September, 2012 and consequently, his complaint is referred within the statutory timelimits. However, I cannot accept that proposition. Once the complainant returned to duty in August, 2011 he never pursued the matter further. This is in stark contrast to his actions during the period when he was "stood down". During this period he actively pursued the respondent (personally, through his trade union and through his legal representative) seeking clarification of the status of any investigation. Moreover, the respondent did not at any stage subsequent to the complainant's return to duty, behave in a way that would lead the complainant to conclude that he was subject to the Disciplinary Process. Whilst he had received copies of witness statements to the incident on 26 October, 2010 (on 25 November, 2010) and given the opportunity to reply to same (which he did), the respondent never wrote to him requesting his attendance at a formal disciplinary hearing (as required by section 3 of its Disciplinary Code in operation at the time). In the course of the Hearing (with this Tribunal) the complainant confirmed that he was aware of the respondent's Disciplinary Code. Consequently, I am satisfied that he was aware (at all times subsequent to his return to work), or at least should reasonably have been aware, that the Disciplinary Process (in terms of a Grade IV investigation) had not been invoked against him, even in the absence of any confirmation from the respondent. Again, the actions (or lack of action) by the respondent in bringing a conclusion to the confusion is inexplicable. On an evaluation of the evidence adduced as part of my investigation, it appears to me that there was little communication between Senior Management at local level and HR, who are the custodians of the Disciplinary Process and assist local Senior Management with its implementation. It is also clear that once the complainant had resumed duty and was no longer pressing for answers, the respondent did nothing to conclude whatever process had commenced with the complainant's suspension in October, 2010. In light of my comments above and in all of the circumstances I find that the actions of the respondent (however inadequate they may have been in terms of best

[4] SI 146 of 2000

practice) do not amount to a continuous act, or a chain of connected acts, which could amount to discrimination of the complainant until 27 September, 2012. I am satisfied that any possible unlawful treatment of the complainant expired on his return to work in or around 18 August, 2011. The complainant referred his complaint to the Tribunal on 1 October, 2012. This is beyond the six month timelimit prescribed at section 77(5)(a) of the Acts and it is also beyond the maximum extended period of twelve months prescribed at section 77(5)(b) of the Acts. Moreover, I am satisfied that the actions of the respondent do not amount to circumstances encompassed by section 77(6A) of the Acts (as detailed by the Labour Court in *Hurley v Cork* VEC[5]. Consequently, I find that this element of the complaint is out of time and is not properly before the Tribunal for investigation. In light of my comments in this and the preceding two paragraphs I find that the complainant's second complaint was referred to this Tribunal outside of the timelimits as prescribed in the relevant provisions of section 77 of the Employment Equality Acts, 1998-2011 and I have no jurisdiction to deal any further with the matter.

5.6 I shall now look at the complainant's first complaint - that he was discriminated against by the complainant on grounds of disability in respect of the events between 5 November, 2009 and the end of December of that year. Section 85A of the Employment Equality Acts 1998-2008 sets out the burden of proof which applies to claims of discrimination. It requires the complainant to establish, in the first instance, facts upon which he can rely in asserting that he suffered discriminatory treatment on the grounds specified. It is well settled in a line of decisions from both this Tribunal and the Labour Court that the type or range of facts which may be relied upon by a complainant can vary from case to case. The law provides that the probative burden shifts where a complainant proves facts from which it may be presumed that discrimination has occurred. The language used indicates that where the primary facts alleged are proved it remains for this Tribunal to decide if the inference or presumption contended can be properly drawn from those facts. This entails a consideration of the range of conclusions which may appropriately be drawn from a fact, or range of facts, which have been proved in evidence. At the initial stage the complainant is merely seeking to establish a *prima facie* case. Therefore it is not necessary for him to establish that the conclusion of discrimination is the only, or indeed the most likely, explanation which can be drawn from the proved facts. It is sufficient that the presumption is within the range of inferences which can reasonably be drawn from those facts[6]. Where such a *prima facie* case is established it falls to the respondent to prove the absence of discrimination. This requires the respondent to demonstrate a complete dissonance between the protected

[5] EDA 1124
[6] See EDA 082

characteristic (in this case disability) and the impugned acts alleged to constitute discrimination. In this regard the Tribunal should expect cogent evidence showing that the complainant's disability was nothing more than a trivial influence on the impugned treatment of him, since the facts necessary to prove a non-discriminatory explanation would normally be in the possession of the respondent.

5.7 It is common case that the complainant was subject to an agreed action plan to address his absence from work due to illness from July, 2006 until September, 2006. It is also common case that both Mr. D and Mr. K were involved in that process and were aware the complainant suffered from depression. In the course of the Hearing the complainant accepted that he had been absent on nine separate occasions between 29 October, 2008 and 3 October, 2009 and therefore the absence at issue in these proceedings (from 2 November, 2009-5 November, 2009) was his tenth absence in just over twelve months. I note that the first four absences are explained by a "right ankle fracture" and are all certified by a medical practitioner. The next four are all uncertified, three comprise single day absences and no reason for the absence is provided. The last of these absences occurred on 31 July, 2009. The ninth absence is also uncertified (for two days) and it is explained by "reaction to a flu injection". I note from Mr. D's letter of 6 November, 2009 referring the complainant to the Occupational Health Department states that "in recent months [the complainant] has been absent on numerous occasions, both certified and uncertified, which can be seen in the table below". The letter goes on to say "I also wish to note that following discussions with [Mr. K] [the complainant] informed him that he is currently on medication for depression and has been referred to a specialist.". In the penultimate paragraph Mr. D states "Given his high level of absenteeism and his recent discussions with [Mr. K], we feel an urgent appointment is necessary to establish the extent and seriousness of any problems [the complainant] has and to ensure he is receiving the necessary treatment so that he can continue to carry out his contracted duties.".

5.8 The respondent submits that its actions were premised on a duty of care to the complainant (as a member of staff) and to the public at large, whom it serves. It further submits that against that backdrop it was perfectly reasonable for it to refer the complainant to its Occupational Health Department and that its actions were consistent with its "Managing Attendance Policy". On careful examination of the evidence I cannot fully accept this proposition. The purpose of the Attendance Policy is "to identify scope for improvement in attendance levels and to find workable solutions to illness absence issues where they exist". One of the key features of the Policy is "the

principle of early intervention: early and successful addressing of issues with employees which might reduce employees having problems with attendance.". The Policy also sets out the roles of the various participants (Employees, Line Managers, Human Resources and the Occupational Health Department) and requires Line Managers to hold a return-to-work discussion with an employee on resumption of duty following illness. Consequently, Mr. K was entitled to conduct the meeting with the complainant on 5 November, 2009. The Policy further provides that an employee can be referred to the Occupational Health Department for review for frequent absence due to illness. The term "frequent" is defined as "an absence from work by reason of illness on three occasions over a rolling three month period. The complainant was absent on five separate occasions between 15 May, 2009 - 2 October, 2009. Three of these absences were uncertified and there was no reason given for the absence. If the respondent was vigorously applying its Attendance Policy then it should have intervened at latest 31 July, 2009 when the fourth absence occurred and referred the complainant to the Occupational Health Department. However, it did not do so at the time. It did however, refer the complainant to the Occupational Health Department on 6 November, 2009, following his absence of a few days, which ended on 5 November, 2009. Consequently, I am satisfied that it was the complainant's absence on between 2 November, 2009 – 5 November, 2009 which triggered the respondent's actions in this regard.

5.9 There is conflict between the parties as to whether or not the complainant informed the respondent that he was suffering from depression in early November, 2009. I note that the "Return to Duty" form completed in respect of the complainant's absence from 2 November, 2009-5 November, 2009 states "chest pain" as the reason for the absence. This is consistent with the evidence of the complainant and Mr. C. However, the form also includes the following comment "following discussion with David he informed me that he is on medication for depression and is been referred to a Dr. in B/mont". The complainant states that he signed this form under protest, but no such annotation is made on the form – and given the complainant's comment that the form was the subject of industrial relations negotiations at the time, one might have expected such an annotation. In addition, it is common case that the respondent actively pursued the complainant for full details of the medication he was on at the time. In my view, this would not have been an issue had the respondent not formed some opinion that there was a possible issue with the complainant's mental health at that time. Furthermore, both Mr. K and Mr. D had been involved in the previous occasion (2004-2006) when the complainant had mental health issues. In the circumstances I am satisfied the respondent formed the view that the complainant's absence was

connected with his depression – this is clear from Mr. D's letter of 6 November, 2009 to Dr. E referring the complainant to the Occupational Health Department.

5.10 The question arises therefore as to whether or not the actions of the respondent amount to discrimination of the complainant on grounds of disability. Section 6 of the Acts provides that discrimination shall be taken to occur ***"where a person is treated less favourably than another person, is, has or would be treated in a comparable situation on any of the grounds specified … in this Act referred to as the 'discriminatory grounds.'"***. The complainant asserts that a colleague (Mr. X) was treated differently to him in similar circumstances but was unable to furnish the Tribunal with any details of this difference in treatment. The respondent submits that it was entitled to refer the complainant to its Occupational Health Department for assessment in circumstances where it had genuine concerns about his medical fitness to carry out his contracted duties. Having carefully considered the totality of the evidence adduced by the parties on this matter, I find that the actions of the respondent are reasonable in the circumstances. In reaching this conclusion I am particularly cognisant of the nature of the work that the complainant performs and the stressful environment in which he is likely to operate on a daily basis. In addition, I am satisfied, on balance, that the respondent would not have treated another employee engaged as an EMT, who had a different disability to the complainant and with whom it had similar concerns as regards his/her capability to perform the duties attached to the position, any differently to the complainant. Accordingly, I find that the respondent did not discriminate against the complainant on grounds of disability contrary to the Acts when it referred him to its Occupational Health Department for assessment in November, 2009.

5.11 However, the respondent went further than referring the complainant to its Occupational Health Department. The complainant was contemporaneously removed from the structured overtime roster. The respondent states that this was not imposed on the complainant; rather it was agreed with him at the meeting with Mr. D and Mr. K on 6 November, 2009. It adds (Mr. D) that he informed the complainant he (Mr. D) would prefer if the complainant did not do any structured overtime (with immediate effect) and the complainant was happy to agree to this. Mr. D states that he had formed this view following discussions with Dr. E (who suggested that the complainant should avoid overtime in the immediate term) and the fact that on the previous occasion the complainant had felt stressed and anxious (2004-2006) his condition had been exacerbated by "excessive overtime". The complainant rejects the assertion he agreed to his removal from the overtime roster and states that he was informed by Dr. E that he never made

such a suggestion to Mr. D. The respondent furnished no documentary evidence that Dr. E had made the suggestion attributed to him and he did not attend the Hearing to give evidence in the matter. In the course of the Hearing Mr. D stated in evidence that his file record of the meeting on 6 November, 2009, which was opened to the Tribunal, was composed on the day. This file record makes no reference to any discussion between him and Dr. E. This is a significant omission given the complainant's history. I note the complainant states that Mr. D made reference (at the meeting) to seeking advice from Dr. E but that he refused to disclose the nature of that advice. I further note the statement made on behalf of the respondent to the Tribunal in a letter dated 15 July, 2013 "that it was entirely reasonable for it to take the precautionary decision to temporarily withdraw his structured overtime" at the time. Having carefully considered the evidence adduced by the parties on this matter I find, on balance, that the respondent unilaterally removed the complainant from the structured overtime roster and that this decision was taken by Mr. D without the benefit of any medical advice from Dr. E or any other person in its Occupational Health Department.

5.12 The respondent also submits its decision in this regard was informed by the knowledge that on the previous occasion the complainant had felt stressed and anxious (2004-2006) his condition had been exacerbated by "excessive overtime". The respondent is incorrect in this. What Dr. E's report (dated 15 February, 2005) opined was that "extensive overtime" had created some difficulty for him. These are distinct situations. "Excessive" means exceeding the normal or permitted limits, "extensive" means widespread or to a large degree. In my view overtime can be extensive, in that it can be regular and occur over a long period, without it being excessive. Moreover, the respondent's actions in 2005 was not to remove the complainant from the overtime roster entirely but to permit him perform two overtime shifts per week with certain conditions attached. The respondent could have adopted a similar approach in November, 2009 but instead it immediately removed the complainant from the roster. Having carefully considered this matter I am satisfied, on balance, that the respondent would not have another employee engaged as an EMT, who had no disability or a different disability to the complainant in the same manner. Consequently, I find that the respondent treated the complainant less favourably on grounds of disability contrary to the Acts and this element of his complaint succeeds.

6. DECISION OF THE EQUALITY OFFICER.

6.1 I have completed my investigation of this complaint and make the following Decision in accordance with section 79(6) of the Employment Equality Acts, 1998-2011. I find that -

(i) the respondent discriminated 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 respect of his conditions of employment when it removed him from the overtime roster in November, 2009 and

(ii) the complainant's second complaint (which was referred to this Tribunal on 1 October, 2012) was referred to this Tribunal outside of the timelimits as prescribed in the relevant provisions of section 77 of the Employment Equality Acts, 1998-2011 and I have no jurisdiction to deal with the matter.

6.2 In accordance with my powers under section 82(1) of the Employment Equality Acts, 1998-2011 I order that the respondent pay the complainant the sum of €2,800 by way of loss of earnings in respect of the structured overtime he was denied between 5 November, 2009 and 22 December, 2009 as a result of the discriminatory treatment of him. As this award constitutes remuneration it is subject to PAYE/ PRSI at the appropriate rates. I further order that the respondent pay the complainant the sum of €12,000 by way of compensation for the distress suffered by him as a result of the discrimination. This amount is not in the form of remuneration and is therefore not subject to the PAYE/PRSI Code.

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Vivian Jackson
Equality Officer
28 February, 2014