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Disabilities and reasonable accommodation – Court of Appeal clarifies how far employers must go (IR)

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Summary

The Irish Court of Appeal recently clarified the obligations of employers towards employees with a disability.

The judgment suggests that an employer is not required to alter the duties of a position held by an employee with a disability in order to accommodate that employee's return to work if the duties, which the employee is no longer capable of performing, are considered essential to the employee's position.

Facts

Background

The employer, Nano Nagle School, is a school for children with various levels of physical and intellectual disability. The employee, Ms Daly was employed as a Special Needs Assistant ('SNA'). Ms Daly also worked as a part-time secretary at the school. Following an accident, Ms Daly was paralysed from the waist down and required a wheelchair. She was one of 27 SNAs working at the school. An occupational health specialist engaged by the school determined that Ms Daly was unable to perform seven of the 16 tasks associated with the job of an SNA. The seven tasks in question were the most physically demanding.

Ultimately, the school dismissed Ms Daly on the basis that she lacked the capacity to carry out the full extent of an SNA's duties. The school did not consult with either Ms Daly, or with the other SNAs as to what other options might be available to accommodate her in the workplace with the duties she was able to undertake. Neither did the school address whether Ms Daly could be engaged on a part-time basis. The school also failed to consider whether Ms Daly could continue in her role as a part time secretary with the school.

The law

Irish law stipulates that an employer is not required to "*retain an individual in a position…if the individual –*

a. *will not undertake (or, as the case may be, continue to undertake) the duties attached to that position or will not accept (or, as the case may be, continue to accept) the conditions under which those duties are, or may be required to be, performed, or*
b. *is not (or, as the case may be, is no longer) fully competent and available to undertake, and fully capable of undertaking, the duties attached to that position, having regard to the conditions under which those duties are, or may be required to be, performed."* (Section 16(1), Employment Equality Acts 1998 to 2015)

However, an employer is required to "*take appropriate measures, where needed in a particular case, to enable a person who has a disability –*

i. *to have access to employment*,
ii. *to participate or advance in employment, or*
iii. *to undergo training*,

unless the measures would impose a disproportionate burden on the employer." (Section 16(3), Employment Equality Acts 1998 to 2015)

Appropriate measures is defined as "*…effective and practical measures, where needed in a particular case, to adapt the employer's place of business to the disability concerned*" which can include "*the adaptation of premises and equipment, patterns of working time, distribution of tasks or the provision of training or integration resources, but does not include any treatment, facility or thing that the person might ordinarily or reasonably provide for himself or herself*" (Section 16(4), Employment Equality Acts 1998 to 2015)

Ms Daly claimed that the school had failed in its duty under section 16.

Earlier decisions

Ms Daly's claim initially came before the Equality Tribunal (whose function has since been subsumed into the

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Workplace Relations Commission). The Equality Tribunal found, based on medical evidence, that Ms Daly was no longer fully competent and available to undertake, and fully capable of undertaking, the duties attached to the position to which she was recruited. The Equality Tribunal also found that the school had given consideration to the provision of appropriate measures to enable Ms Daly to return to work but that these measures gave "*rise to a cost other than a nominal cost*" (i.e. the measures would impose a disproportionate burden on the school). For those reasons, the Equality Tribunal found against Ms Daly.

Ms Daly appealed to the Labour Court which held that the school *had* failed to discharge its duty to take appropriate measures to provide Ms Daly with reasonable accommodation so as to allow her to continue in employment. In its decision, the Labour Court had regard to Recitals 17 and 20 of Directive 2000/78/EC in interpreting the purpose of Section 16(3).

Recital 17 provides: "*[t]his Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities*".

While Recital 20 provides: "*[a]ppropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.*"

The Labour Court found that the school: "*construed its duty too narrowly and took a mistaken view of what the law required in the prevailing circumstances. The school had a duty to fully consider the viability of a reorganisation of work and a redistribution of tasks among all of the SNAs so as to relieve Ms Daly of those duties that she was unable to perform*". The Labour Court awarded Ms Daly € 40,000 compensation.

The Labour Court's decision was appealed to the High Court, which upheld the decision. It held that the school's initial position that Ms Daly must perform all of the SNA duties was incorrect. It was accepted that reasonable accommodation extended to altering the hours of work and the distribution of tasks, provided it did not impose a disproportionate burden on the employer. It was further noted that this included a reduction of the particular tasks required of the employee. The High Court held that the school had failed to give full and proper consideration to all the possibilities, and it was that failure which rendered the school in breach of section 16 of the Employment Equality Acts 1998 to 2015.

Judgment

The decision was appealed to the Court of Appeal, which overturned the previous Labour Court and High Court decisions.

The Labour Court and High Court had taken the view that there had been no proper consideration of the redistribution of Ms Daly's tasks. The Court of Appeal disagreed. It said: "*The point is a simple one: the statutory duty is objectively concerned with whether the employer complied with the obligation to make reasonable accommodation. If no reasonable adjustments can be made for a disabled employee, the employer is not liable for failing to consider the matter or for not consulting. It is not a matter of review of process but of practical compliance. If reasonable adjustments cannot be made, as objectively evaluated the fact that the process of decision is flawed does not avail the employee.*"

The Court of Appeal found that Ms Daly was unable to perform the essential tasks of an SNA in her particular school and that no amount of accommodation could change this. The Court of Appeal went on to state that there is no legal requirement on an employer to strip away essential tasks of a position which an employee can no longer perform or to redistribute these tasks to other employees. It followed that if there was no requirement on the school to redistribute some of Ms Daly's tasks to other employees, the school could be under no obligation to consider doing so.

Commentary

The Court of Appeal decision confirms that employers are not obliged to create a new role for a disabled employee. It suggests that an employer is not required to alter the duties of a position held by an employee with a disability in order to accommodate that employee's return to work if the duties, which the employee is no longer capable of performing, are considered essential to the employee's position. In this case, there was no dispute as to the sixteen core duties of an SNA in the school, or that Ms Daly was incapable of performing seven of those duties, even if the school took appropriate measures.

The Court of Appeal did signal, however, that if challenged, an employer may have to justify the inclusion of a duty which an employee with a disability is incapable of performing, regardless of any appropriate measures, as one of the essential functions or duties of the position concerned.

Going forward, employers should still properly consider the facts of each case. Where there are non-essential tasks which the employee can no longer carry out, these should be redistributed where possible. However, where an employee can no longer carry out tasks fundamental

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to their role, this case suggests that this may be grounds for dismissal.

Comments from other jurisdictions

Denmark (Christian K. Clasen, Norrbom Vinding): According to case law from the Danish Supreme Court, employers are obliged to investigate and, if possible, test available adjustments when it is established that an employee is disabled within the meaning of Directive 2000/78. Possible adjustments also apply to part-time work.

The ECJ decided in the *HK Danmark* cases (C-335/11 and C-337/11) that offering part-time work may be one of the adjustments provided under Directive 2000/78. Both cases were referred to the ECJ by Danish courts. The ECJ established that *"a reduction in working hours may constitute one of the accommodation measures referred to in that article."* And, in addition, *"it is for the national court to assess whether, in the circumstances of the main proceedings, a reduction in working hours, as an accommodation measure, represents a disproportionate burden on the employer."*

Two judgments by the Danish Supreme Court of 11 August 2015 and 13 April 2016 specifically concerned cases regarding whether a reduction in working hours would be a disproportionate burden for the employer. The cases had different outcomes.

In the judgment of 11 August 2015, the possibility of offering the employee part-time employment was not considered by the employer and, as the manager explained in his testimony in court, it would probably have been possible to create a part-time position for the employee. Consequently, the Danish Supreme Court found that the employer had not satisfied the burden of proof that reasonable adjustments had been made.

In the judgment of 13 April 2016, there was a dialogue between the employer and employee about whether it was possible to offer the employee (an engineer employed in an organisation with only four engineers) a part-time position while hiring another part-time employee to work the number of hours by which the disabled employee's position would be reduced. The employer's reasons for rejecting this arrangement were deemed reasonable, taking into account the way in which the work in the particular department was organised.

It seems there is a similar approach in Ireland and Denmark regarding the assessment of the duty to make reasonable adjustments for disabled employees. The decisive factor is what adjustments are available. It would not be held against an employer in Denmark if it did not consider or offer adjustments if they were not relevant to the situation or not possible within the scope of the employment relationship.

Finland (Janne Nurminen, Roschier Attorneys Ltd.): In Finland, a disability affecting an employee is regarded as a proper and significant reason to terminate an employment relationship if it substantially reduces the working capacity of the employee for such a long time that it would be unreasonable to require the employer to continue the contractual relationship. However, there is no legislation or case law in Finland as to what 'reasonable accommodation' the employer must undertake before terminating the employment contract in order to comply with Employment Contracts Act (55/2001) and the Non-Discrimination Act (1325/2014).

According to well-established case law, before terminating the employment contract of a permanently disabled employee, the employer must assess whether the work can be made suitable for the employee, for example, by changing working methods or arrangements. Even though the employer is not obliged to create a new job or duties for the employee, reasonable measures must be taken to organise the existing duties in a different way. Based on these principles the outcome of the case would probably have been different in Finland.

Italy (Caterina Rucci, Fieldfisher): Before terminating an employee who has become partially disabled, it is always wise to propose adjustments to allow the employee to continue to use his or her remaining abilities. In addition, under Italian law, the employee may have a sufficient disability percentage to allow him or her to be counted as part of the mandatory percentage of disabled employees in the workforce.

United Kingdom (Bethan Carney, Lewis Silkin LLP): Courts in the UK have reached slightly different conclusions on the extent of an employer's duty to take measures necessary to enable a disabled employee to remain in work. Under the UK Equality Act 2010, an employer has a duty to make 'reasonable adjustments', when a disabled employee is placed at a substantial disadvantage by the application of a 'provision, criterion or practice' (PCP), by a physical feature or by the non-provision of an auxiliary aid. The duty is only to make such adjustments as it is reasonable to take to avoid the disadvantage. This might include making some changes to job duties (such as reallocating duties to other employees), but only if it is reasonable to do so. It would not generally be considered reasonable to create a whole new role for a disabled employee. However, the 'reasonableness' of the employer's decision would be considered in light of the employer's financial and other resources. A very well resourced employer with many workers would have to go further in considering the reallocation of duties amongst other staff members.

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