DEC-E2014-069

EQUALITY OFFICER'S DECISION NO: DEC-E/2014/069

PARTIES

Mr John McDonald

(Represented by Thomas E. Honan & Co. Solicitors)

Vs

Road Safety Operations Ireland Ltd t/a go Safe

(Represented by Neil J. Breheny & Co. Solicitors)

FILE NO: EE/2012/197

DATE OF ISSUE: 3rd of October, 2014

1. Dispute

This dispute involves a claim by Mr John McDonald that he was discriminated against by Road Safety Operations Ireland Ltd t/a go Safe on the grounds of his disability in terms of section 6(2)(g) and contrary to section 8 of the Employment Equality Acts, 1998 and 2008 in relation to his dismissal and in relation to a failure to provide him with reasonable accommodation.

2. Background

2.1 The complainant referred a complaint against the above respondent under the Employment Equality Acts 1998 to 2008 to the Equality Tribunal on 28th of March, 2012.

2.2 In accordance with his powers under section 75 of the Employment Equality Acts, 1998-2008 the Director delegated the case on 2nd of July 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 10th of July, 2013.

3. Summary of complainant’s case

3.1 It is submitted that the complainant was employed by the respondent, from 12th of January, 2011 as a Speed Monitoring/Surveying Operator. He carried out his duties working alone in a mobile speed survey van. His duties involved monitoring the speed of vehicles on public roads.

3.2 On 13th of March, 2011 two individuals threw petrol over the van in which the complainant was working and set it alight, the van was destroyed in minutes. The complainant escaped without physical injury but suffered severe psychological injury: depression, anxiety sleep disturbance etc. He was unable to return to work because of the psychological difficulties and was on sick leave for several months. During his sick leave he was paid sick pay by the respondent and in turn forwarded his social welfare cheques in respect of illness benefit to the respondent.

3.3 The complainant was placed on medication and referred for counselling and psychotherapy by his GP Dr. B. His GP contacted the respondent and asked them to cover the cost of the psychotherapy which it agreed to do.

3.4 The complainant was dismissed on 24th of October, 2011. He appealed against his dismissal but it was confirmed by letter dated 7th of November, 2011.

3.5 The complainant was examined by Medmark Occupational Healthcare on the 27th of June 2011 and a report issued stating that it was too early to say whether the complainant would ever be able to return to his work as a monitoring operator. He was examined by Medmark again in October 2011.

3.6 The complainant wished to continue working with the respondent company and might have been able to do so had the respondent been willing to provide reasonable accommodation to enable him to do so.

3.7 There was no consultation with the complainant or his medical advisers regarding what reasonable accommodation might be possible.

4. Summary of respondent’s case

4.1 The respondent, agrees that the complainant was employed with them from 12th of January, 2011.

4.2 It is submitted that as a result of the criminal action of a number of parties on 13th of March , 2011 the vehicle from which the complainant was monitoring traffic was set on fire. The complainant escaped without physical injury but suffered psychological injury and was treated for this.

4.3 The complainant was examined by Medmark Occupational Healthcare on the 27th of June 20011 and subsequently on 10th of October, 2011. The report which issued following the October, 2011 review stated that the complainant was adamant that he would never go back working as a speed monitoring operator.

4.4 The complainant's employment was terminated solely due to his inability to work in the capacity for which he had been trained and employed.

4.5 There was no less favourable treatment as there was no position for which the complainant was trained or indeed no position within the organisation which would have been comparable. No comparable employee has been provided.

4.6 The assessment by the Occupational Therapist some seven months after the event are not disputed by the complainant and reflect the unhappy circumstance of the complainant's health.

4.7 It is clear from the occupational assessment undertaken that the complainant was not fully competent and capable for performing the duties for which he was employed.

4.8 After a full and adequate assessment of the employees ability to perform the work for which he was trained and employed the Employer made the regrettable decision to terminate his employment

4.9 It is submitted that there are no suitable vacancies for which the complainant is qualified and that there were no appropriate measures which the respondent could put in place which would accommodate the complainant's disability (assuming there is a disability).

5.1 Disability Ground and Notification of Disability

5.1.1 It is submitted that the respondent accepts that the complainant has a disability for the purposes of the act.

5.1.2 In the present case, it is submitted by the complainant that he 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".*

5.1.3 It is submitted that the complainant is suffering from Post Traumatic Stress following an incident where the vehicle in which he was working alone was covered in petrol and the set on fire. It is submitted that the complainant escaped without physical injury but suffered severe psychological injury: depression, anxiety sleep disturbance following the incident. The complainant was put on anti-depressants and had to undergo counselling. The complainant advised the hearing that he suffers from psychological problems since finding himself alone in the back of a van which was set on fire and from which he had to escape.

5.1.4 The complainant at the hearing stated that he attended his doctor the following day and was put on anti-depressants he also began attending a counsellor. The complainant sent in medical certificates to the respondent to cover his absence from work. His GP requested that the respondent pay for the counselling sessions and the respondent agreed to do so. The complainant was also referred by the respondent for medical assessment by Medmark on two separate occasions. The reports of these assessments were submitted to the Tribunal. The respondent advised the hearing that it accepts that the complainant has a disability for the purposes of the act. I am satisfied, from the totality of the evidence adduced on this matter, that the complainant is a person with a disability within the meaning of section 2 of the Employment Equality Acts 1998 to 2008 and that the respondent was aware of the complainant's disability.

6. Findings and Conclusions of the Equality Officer

6.1 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 the termination of his employment. In addition, I must consider whether the respondent failed to provide the complainant 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.

6.2 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 he 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".

6.3 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".*

6.4 Discriminatory Dismissal

6.4.1 The complainant has submitted that following the incident on 13th of March, 2011 where the van he was working in was set on fire he experienced problems with depression, anxiety, sleep disturbance following the incident. He advised the hearing that he was unable to return to work and that he was put on anti-depressants by his GP and had to undergo counselling. The complainant advised the hearing that he was unable to attend work following the incident. The complainant kept the respondent appraised of his condition through regular phone calls and also submitted medical certificates to the respondent first on a weekly, then fortnightly and finally on a monthly basis. The respondent has accepted that the complainant has a disability and the respondent paid for the complainant to undergo counselling following the incident.

6.4.2 The complainant advised the hearing that he was dismissed from his job with the respondent on 24th of October, 2011. The complainant advised the hearing that he was given 5 days within which to appeal this decision and he appealed it. The complainant attended an appeal meeting in Dublin Airport where three members of the respondent organisation were present. The appeal hearing lasted about 5 minutes after which the complainant received a letter stating that they agreed with the decision to terminate his employment. The reason given for termination of the complainant's employment was his health.

6.4.3 The respondent advised the hearing that the decision to terminate the complainant's employment was based on the Medmark Report of 10th of October 2011. The respondent went on to state that they had wanted the complainant to come back to work and were anxious to get him back to work and had contacted him on a number of occasions between March and October seeking his return to work. The complainant did not dispute this and stated that he had received about 8 or 9 phone calls asking how he was and asking when he thought he would be coming back. The respondent stated that the Medmark report of 10th of October, 2011 indicated that the complainant was adamant that that he would not return to work as a monitoring operator. The complainant, at the hearing, stated that he had said he couldn't face going back. The respondent advised the hearing that the complainant's position could not be kept open indefinitely and that the Medmark report clearly stated that the complainant was not fit to return to work as a monitoring operator, the position for which the complainant had been employed and trained. The complainant when questioned stated that possible changes or improvements were never discussed with him.

6.4.4 The respondent advised the hearing that they referred the complainant for medical assessment to Medmark Occupational Healthcare on the 27th of June 2011 and subsequently on 10th of October, 2011. The respondent advised the hearing that 2 reports were issued following these assessment and copies of the reports were provided to the complainant and the respondent.

6.4.5 It is evident from the submissions made and from the evidence adduced that the respondent was aware of the complainant's disability, after which a decision was made to dismiss the complainant. It is the respondent's position that the complainant's employment was terminated on grounds of health and due to the fact that the Medmark Report of 10th of October, 2011 stated that the complainant was adamant that he would never go back working as a speed monitoring operator. However, it has been established that the complainant in this case suffers from a disability and that the complainant was absent from work due to this disability. In addition, I am satisfied that the respondent in this case was aware of the complainant's disability.

6.4.6 Furthermore, although it is the respondent's contention that the complainant was dismissed due to his health and due to his inability to return to his position, it is clear that the complainant's absence and his inability to return to work were due to his disability it thus follows that the complainant's disability contributed to or was the reason for his dismissal. I am thus satisfied that the decision to dismiss the complainant was influenced by his disability in that it was influenced by his absence and by his inability to return to his position. Accordingly based on the totality of the evidence adduced on this issue I am satisfied that the complainant has established a prima facie case of less favourable treatment on grounds of disability in relation to his dismissal.

6.5 Reasonable accommodation

6.5.1 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].

6.5.2 The complainant in the present case was dismissed due to his absence from work on health grounds and due to his failure to return to his position. I am satisfied from the evidence adduced above that the complainant was a person with a disability for the purposes of the Act and that the respondent was aware of that disability. It is a fact that the complainant was notified of the decision to dismiss him on 24th of October, 2011 after he had notified the respondent of his disability. I have found that the decision to dismiss was influenced by his disability due to the fact that the complainant had been absent from work for a prolonged period and was unable to return to his position due to his disability.

6.5.3 It is the respondent's evidence that the decision to dismiss the complainant was made due to his health and due to the fact he could not return to work. I am satisfied from the evidence adduced that the respondent was aware, that the reason for this absence and inability to return to work was being attributed by the complainant to his disability. The respondent once armed with the knowledge that a contributory factor to the complainant's absence from and inability to return to work related to the complainant's 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.

6.5.4 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.

6.5.5 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 this defence, 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 in full possession of all the material facts concerning 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.*

6.5.6 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 where Dunne J.[3] found that an employer that has failed to go through the aforementioned process orientated approach will have breached the requirements of the Acts, even if the employer might reasonably have supposed, without checking further, that the disability is serious enough to render the employee not fully capable of undertaking their duties under section 16(1) of the Acts.

6.5.7 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, in this case, when faced with a situation where an employee was absent from work and unable to return to work due to his disability, did make enquiries to ascertain the extent of the employee's condition and referred the complainant for medical assessment by Medmark Occupational Healthcare in June 2011 and subsequently in October, 2011. The respondent, in this regard, did comply with its obligations under Section 16 (3) by making enquiries to ascertain the extent of the employee's condition and referring him for medical assessment.

6.5.8 I am of the view that the respondent, following the October 2011 Medmark Report, when it became aware that the complainant was unable to return to work , was then obliged upon to make further inquiries into what if any special measures could be taken to assist the complainant in returning to work.

6.5.9 The complainant in this case, according to the Medmark Report had stated that he would not be able to return to work as a monitoring operator. The respondent advised the hearing that it is based on this Medmark report that the respondent made its decision to terminate the employment of the complainant. The reason given by the respondent was that, it was due to the complainant's health issues and that it could not keep the position open indefinitely. The respondent when questioned at the hearing as to whether alternative roles had been looked at within the organisation which might be suitable for the complainant stated that it had looked at the alternatives. Witness for the respondent Mr. L advised the hearing that the respondent had considered cleaning jobs within the depot, as all servicing is outsourced and Administration is done in Listowel. Mr. L stated that the head office is in Listowel and stated that there were no other positions anywhere outside of its Listowel offices but that this would be too far for the complainant to travel to work. The respondent stated that it had not discussed this option with the complainant as it was based in Listowel some 300 km from the complainant's home and so would not be suitable for the complainant. The complainant advised the hearing that he was not at any point engaged in discussions or consultations about this or any other possible alternatives. *Mr. L stated that if anything suitable was available it would've been offered to the complainant.* Mr. L stated that alternatives were discussed internally though not with the complainant.

6.5.10 The respondent advised the hearing that huge improvements had been made to prevent an incident such as happened to the complainant happening to anyone else in the role of monitoring operator in the future. The respondent advised the hearing that CCTV cameras had been installed in

all vehicles to enable incumbents inside of the van to monitor activity outside and around the van. DVDR's have also been installed to record everything that happens as well as a speaker system on vans and warning beacons on the vehicles. The respondent stated that following the incident in which the complainant was involved a report was compiled and these significant improvements were made in order to avoid such an incident happening in the future.

6.5.11 The respondent when questioned as to whether the complainant had been consulted or involved in these discussions stated that he had not. These enhancements and improvements although deemed necessary by the respondent and useful to avoid such an incident happening in the future were not put in place for the complainant's benefit and did not form part of any enhancements or improvements for the purposes of enabling or facilitating the complainant in returning to work as he was not involved in discussions about, or made aware of many of these improvements. The respondent at the hearing agreed that the complainant was not consulted or involved in these improvements and the impetus for such improvements was to prevent the reoccurrence of such an event in the future happening to any other speed monitoring official. The respondent in its submission has stated that "it is apparent that the employee is not fully capable and that even if on the installation of special treatment or facilities he would not return to that type of work". The respondent came to this conclusion without consultation with the complainant and the complainant was never asked whether or to what extent special measures could be taken to enable him to return to work.

6.5.12 The respondent has submitted that there was no position within the compass of the employees training, or location which could have been considered. The respondent advised the hearing that alternative roles were considered but that none were deemed suitable for the complainant. The respondent upon questioning conceded that the complainant was not involved in or consulted in relation to any discussion of potential alternative roles. The respondent when questioned as to whether there was any documentation available in relation to the discussions of possible alternative roles for the complainant replied that there was none.

6.5.13 I am of the view that there was a clear obligation upon the respondent, when it became aware that the complainant was unable to return to his duties due to his disability to consult with him to look at suitable measures and accommodation which would enable the complainant to return to work, as well as to discuss with him and evaluate certain employment alternatives before concluding that there was no suitable alternative employment for him. The respondent was then obliged to inform the complainant that having concluded that there were no suitable measures or accommodation which would enable him to return to his position and as there was no suitable alternative employment for him, that he was now being considered for termination. It is clear that the respondent did not bring any of these issues to the attention of the complainant prior to taking the decision that it could no longer retain him in employment.

6.5.14 Consequently, the complainant was not afforded any opportunity to participate in or influence the decision making process that resulted in his dismissal. In doing so, the respondent, who did initiate the process orientated approach, as set out by the Labour Court in the aforementioned *A Health and Fitness Club -v- A Worker* case, by making appropriate enquiries to ascertain the extent of the employees condition, then however proceeded to evaluate alternatives and make a decision to dismiss, without involving the employee who was the subject of such a decision.

6.5.15 Having regard to the foregoing, I am satisfied that the respondent, in the present case did make appropriate enquiries to ascertain the extent of the employees condition, but failed to consult with or advise the complainant before coming to the conclusion that the complainant was incapable, on the grounds of his disability, of performing the duties for which he had been employed and therefore it cannot rely upon the defence available in section 16 (1)(b) of the Acts. In the circumstances, I find that the complainant's disability was a factor which contributed to the respondent's decision to dismiss him and that the respondent failed to provide him with reasonable accommodation within the meaning of section 16 of those Acts.

6.6 Article 37(3) -Exemption

6.61 The respondent has argued that it is entitled to rely on Section 37(3) of the Acts in the current circumstances. Section 37 (3) states

> *(3) It is an occupational requirement for employment in the Garda Síochána, prison service or any emergency service that persons employed therein are fully competent and available to undertake, and fully capable of undertaking, the range of functions that they may be called upon to perform so that the operational capacity of the Garda Síochána or the service concerned may be preserved.*

The respondent argues that once the Complainant cannot carry out the full range of duties due to an alleged disability and no reasonable accommodation can enable him to do so then the respondent is entitled to rely on the provision of Section 37(3) of the Acts as a complete defence to a complaint that they failed to provide appropriate measures to accommodate his disability within the meaning of Section 16(3). The respondent in advancing this argument referred to *Dept. Justice, Equality & Law Reform v William Kavanagh – EDA 1120* where it was found that the provision of alternative employment for a prison officer which would involve no contact with prisoners *"could not be deemed to come within the ... 'appropriate measures' as provided for in S.16, as it will not enable him to carry out the full range of his duties as a prison officer".*

In the present case I am satisfied that the respondent cannot rely on Section 37(3) in the first instance as the position of Monitoring Operator in the respondent company does not fall within the definition of *"employment in the Garda Síochána, prison service or any emergency service"* as provided for in Section 37(3).

7. DECISION OF THE EQUALITY OFFICER

7.1 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 -

(i) that the respondent dismissed the complainant in circumstances amounting to discrimination on grounds of his disability in terms of section 6(2)

of the Employment Equality Acts, 1998 -2008 and contrary to section 8 of those Acts and that it failed to provide him with reasonable accommodation within the meaning of section 16 of those Acts.

7.2 Section 82 of the Employment Equality Acts, 1998 to 2008 provides that I can make an order for the effects of the discrimination. In considering the redress in this case, I have to be aware that any award for compensation should be proportionate, effective and dissuasive. In making my award, I am mindful of the fact that the respondent, in this case, when faced with a situation where an employee was unfit for work did make appropriate enquiries to ascertain the extent of the employees condition, by referring the employee to its Occupational Health specialists on two occasions. The respondent then, however, failed to consult with or engage the complainant in evaluating alternatives or in considering what if any special measures could be taken to enable the employee to return to work and made a decision to dismiss without involving the complainant who was the subject of such a decision. Thus, the respondent failed to consult with, or involve the complainant before coming to the conclusion that the complainant was incapable, on the grounds of his disability.

7.3 Having taken the foregoing matters into consideration and having regard to the rate of remuneration which the complainant was in receipt of at the relevant time, I consider an award of compensation in the sum of €28,000 to be just and equitable.

.4 Therefore, in accordance with S. 82 of the Employment Equality Acts 1998 to 2008, I order that the respondent pay the complainant €28,000 in compensation for his discriminatory dismissal and the failure to provide him with reasonable accommodation. This award is in compensation for the distress experienced by the complainant in relation to the above matters, and is not in the nature of pay, and therefore not subject to tax.

Orla Jones

Equality Officer

3rd of October, 2014

'Footnotes'

[1] [2004] 15 ELR 296

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

[3] Humphreys -v- Westwood Fitness Club (2004) ELR 296