Our organisation has just become aware that one of our employees has a medical condition which we believe makes them unsuitable to work in our particular working environment. Our view is that we should terminate this employee’s contract. How do we handle it?

The first consideration for employers who face this type of situation is the potential for a disability discrimination claim, under the Employment Equality Acts 1998-2015, by an employee whose employment is terminated due to incapacity. Whilst section 16(1) of the Employment Equality Acts provides that an employer is not obliged to retain an employee who is not fully competent and capable of doing the job he or she is required to do, termination can only be justified where the employer has made sufficient enquiries as to the extent of the employee’s condition and due consideration has been given to any reasonable accommodations that could be put in place to render the employee capable. The employee must also be informed that their dismissal is being considered due to their incapacity.

As such, there is always an onus on employers to make full enquiries regarding all the material facts concerning an employee’s condition, and the employee should also be given fair notice that dismissal for incapacity is being considered. Consideration should also be given to any reasonable accommodation that could be made available to help the employee to become fully capable.

Therefore, an employer should, in the first instance, seek a report on the employee’s fitness for their role from their doctor and/or send the employee to an Occupational Health Specialist. Failure to do so can be fatal to the employer’s defence to any disability discrimination claim. When referring the employee for medical review, it is important to provide the medical advisor with a detailed description of the employee’s normal day to day duties. This may be very different from the job description which was originally drafted when the role was being filled. In order for a medical adviser to determine whether an employee is actually fit to carry out their role on a day-to-day basis, it is important for that medical adviser to know exactly what the person is required to do on a day-to-day basis.

It is also very important that employers ask the medical adviser the right questions. In that regard, some questions that are likely to be relevant in this scenario are as follows:

- Is the employee capable of performing the duties and discharging the responsibilities set out in list of duties?
- Is a consistent return to work achievable?
- Is this employee suffering from a condition which is likely to reoccur?
- Is this employee fit to work a normal working week associated with the role and to carry out workload of a full time person within those hours?
- Is this employee capable of having company policies and procedures applied?

Upon receipt of the medical report, employers must beware of the trap of being alleged to have improperly influenced the medical opinion. In that regard, employers who do not like the answer they have received from their medical adviser should not seek to influence the medical adviser to change their opinion. To mitigate against the risk of getting medical advice which is based on incomplete or inaccurate information, it is vital that the employer has given the medical adviser all relevant information in advance of the medical review to make sure that the medical report produced is based on accurate and complete information.

From a data protection perspective, employers must inform the employee of the purpose of the medical assessment in advance. It is very important for employers to be aware that any briefing letter, or documents provided, to the medical adviser will constitute personal data of the employee and the employer will be required to release that data under any subject
access request subsequently made by the employee under the data protection legislation.
Therefore, do not state anything in your briefing documentation to your medical advisor that
you would not be happy for your employee to read!

Once the medical report is received, the employer should provide the employee with copy of
the medical report and arrange a meeting with the employee to discuss the report. At the
meeting, the employer should involve the employee in the consideration of any reasonable
accommodations suggested by the medical advisor and should also invite suggestions as to
reasonable accommodations from the employee. Upon receipt of feedback from the
employee, the employer may need to revert to their medical adviser for further advice around
any reasonable accommodations suggested by the employee.

Throughout the entire process, the employer should write to or email employee regularly to
summarise steps taken. Constant and clear engagement is a key part of an employer’s
defence.

In terms of consideration of reasonable accommodations, Section 16 of the Employment
Equality legislation also obliges employers, subject to it not being a disproportionate burden,
to take appropriate measures to enable a disabled carry out their position. It is important to
note in this regard that the legislation does not require employers to retain a disabled
employee in a position where the employee is, despite such measures being taken, not “fully
competent to undertake and capable of undertaking” the duties of that position.

“Appropriate measures”, in relation to a person with a disability means:

a. effective and practical measures, where needed in a particular case, to adapt
the employer’s place of business to the disability concerned, and,
b. includes 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.

Some examples of reasonable accommodations are:

- Changes in communication
- Schedule modifications
- Job modifications
- Physical environment modifications
- Part time work
- Phased return to work

The issue of how far does an employer’s duty go to make reasonable accommodations is the
subject of a long running disability discrimination case, Daly v Nano Nagle, which was heard
before the Court of Appeal in February 2018 and which is currently in considered by the
Supreme Court on appeal. In the Court of Appeal, an employer’s statutory duty to reasonably
accommodate disabled employees and what this entails was clarified. The Court found
essentially that the obligation does not extend to requiring an employer to employ a person in
a position if they are not able to perform the essential duties of that position. Watch this
space, however, as the Supreme Court decision may further clarify an employer’s legal
obligations to provide reasonable accommodations to a disabled employee.

Employers should retain records of efforts to consider reasonable accommodation – reduced
hours, duties, working from home, alternative roles etc. It may also be that an employer should
carry out an ergonomic assessment. Employers should retain detailed evidence on the cost of
accommodation and the financial circumstances of the employer and should keep in mind the
UK Code of Practice in this area, which sets out that employers should spend at least as
much on reasonably accommodating a disabled employee as it would cost the employer to
recruit and train a replacement.

Where, in light of the medical advice received, termination is being considered, the employer
should write to the employee in advance of any meeting at which termination is to be
discussed, advising them this is something which is being considered and recapping on steps
taken. Employers should not make a decision on termination without having adjourned the
meeting to take time to consider and (if necessary carry out further enquiries into) the
employee’s suggestions. Employers should always provide right to appeal against any
termination decision.

Conclusion
It is important that employers follow the advice set out above when considering the
termination of employment of a person suffering from a medical condition which could
constitute a disability. It is also worth mentioning that the Workplace Relations Commission,
which hears cases of alleged discrimination under the Employment Equality legislation, has
also previously noted that an individual may suffer discrimination not because they are
disabled per se, but rather because they are perceived to be less capable or dependable
than a person without a disability, because of their disability, and as such it was important to
always be alert to the possibility of “unconscious or inadvertent discrimination.”

For more information on the content of this insight please contact: