

Significant Award for Discrimination on the Grounds of Disability

A recent Employment Relations Authority determination is a valuable lesson in just how difficult it can sometimes be to 'get it right' in the area of employment and in particular discrimination. An employee, Tamara Atley, was employed by the Southland District Health Board (SDHB) as a registered nurse. From July 2005 this role involved shift work, including rostered night shifts. The employee had some ten years previously been diagnosed with bipolar disorder. When she applied for employment in 2001 she did not mention her bipolar history in the pre-employment application form. In 2005, prior to her move to the emergency department ('ED'), she completed a more detailed form and answered 'no' to the question 'Do you have or have you had in the past mental health/stress related conditions?'

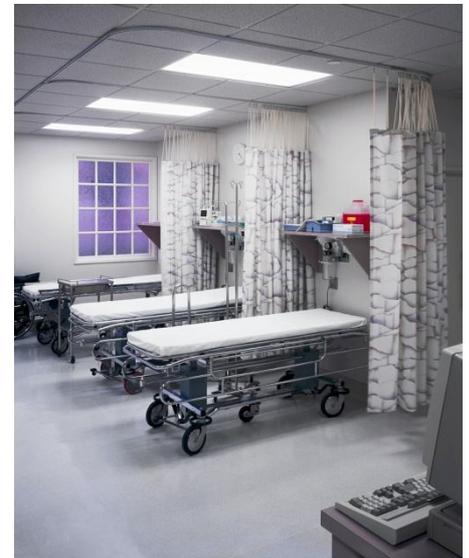
On 14 December 2007 the employee provided a medical certificate to her employer which stated: '*Tamara suffers from a medical condition and I would advise that she does not do night shifts because this makes her condition worse*'. Various meetings occurred, with the employer becoming aware in January 2008 that the specific condition suffered by the employee was bipolar disorder. The employee consulted with a psychiatrist who wrote to the SDHB on 12 February 2008 stating the employee had become destabilised by her attempt to include night shifts in her working routine and further stated: '*I think her condition is fundamentally incompatible with working intermittent night shifts*'. There were further meetings between the employee and the employer concerning the issues, particularly whether the employer could accommodate the employee and allow her to work only day and afternoon shifts, taking into account the specific policy introduced in 1998 requiring ED nurses to work all three shifts, including night shifts, on a rotating basis.

The rationale behind the policy was due to concerns that nurses permanently rostered onto nights became isolated from their peers and their nursing standard was seen to deteriorate. An additional reason for the policy was that if it was perceived not working night shifts was an option in general, many nurses would avoid doing so, which would lead to resentment by those nurses who were still required to work night shifts. The employee was then absent for some time on sick and other leave following which she had a graduated return to work between mid March and late April 2008. The SDHB's head of nursing wrote to the employee on 30 June 2008 and advised that the SDHB was not prepared to make an exception to the policy to allow the employee to only work morning and afternoon shifts; she was therefore required to continue working night shift.

Because of the risk to the employee's health associated with working night shift, she could not continue to work in the ED. The employee then undertook other casual, part-time and fixed term engagements in the SDHB which generally resulted in her remuneration being decreased from that which she would have received in her position in the ED. The employee raised a personal grievance that she had been discriminated against in her employment on the basis of her medical condition by the employer refusing to accommodate her by allowing her to only work day and afternoon shifts in the ED in exception to its policy. She also raised an additional unjustified disadvantage grievance.

Discrimination

Section 105 of the Employment Relations Act 2000 sets out the prohibited grounds of discrimination which includes disability.



The employee claimed she had been discriminated against in terms of section 104(1)(b). In order to establish discrimination under this section, the employee had to establish she had been subjected to detriment in circumstances in which other employees employed by that employer on work of that description are not or would not be subjected to such detriment.

Detriment is defined in the section as including anything which has a detrimental effect on the employee's employment, job performance, or job satisfaction. In determining whether detriment existed, the Authority had to consider whether it was appropriate to compare the employee's treatment with other ED nurses generally or with ED nurses who for a good reason other than an illness (or similar prohibited ground of discrimination) were not able to work night shifts.

The Authority determined the appropriate comparator group was ED nurses generally rather than ED nurses who could not work night shifts (hypothetically, as in reality there were none, in accordance with the ED policy on night shifts).

When the Authority compared the employee's treatment with that of other ED nurses, it found that there was a prima facie case of discrimination. This was on the basis that the employee had been subjected to different treatment compared with other ED nurses in not being able to work in ED and that the reason for the employer's decision was based on the employee's medical condition.

As with most rules, there are exceptions. The Human Rights Act 1993 (which contains the prohibited grounds of discrimination mirrored in the Employment Relations Act 2000) contains a number of such exceptions where treatment otherwise considered discriminatory, may be allowed. Of relevance in this case was section 29 of the Human Rights Act which permits different treatment if the environment in which the duties are to be performed or the nature of the duties (or some of them) is that the person could perform those duties only with a risk of harm to themselves or others, and it is not reasonable to take that risk.

A qualification to this exception is that it will not apply if the employer could, without unreasonable disruption, take reasonable steps to reduce the risks to a normal level. It was clear from the medical evidence that the nature of the duties of the employee, when night shifts were a part of such duties, would place the employee and others at risk of harm. However consideration was then given to whether the employer could reasonably minimise the risk in this regard. The Authority had particular regard to the fact that a number of nurses had offered to cover the employee's night shifts. In addition a group of other ED staff had supported accommodating the employee's disability.

On this basis the Authority held that the exception did not apply as deploying other ED nurses, with their agreement, to cover the employee's night shifts, could be defined as '*reasonable measures that SDHB could have taken to reduce the risk of harm to the employee to a normal level*'.

The application of the section 29 exception was also qualified by section 35 of the Human Rights Act which in effect said the exception could not apply where some of the duties of the employee which could place the employee at risk, could be performed by another employee without unreasonable disruption to the employer's activities.

The Authority concluded that the exceptions did not apply and the employee had been discriminated against in her employment on the basis of her disability in breach of section 104(1)(b). Further, on the basis of the Authority's determination the employee had also been subjected to detriment, the Authority also concluded that the employee had an unjustifiable disadvantage grievance. It concluded in this regard that the actions of SDHB were not those of a fair and reasonable employer.

The Authority determined the employee had been discriminated against and awarded her \$10,000 compensation in addition to reimbursement for lost remuneration. In this regard the employer had to calculate the difference between what the employee would have earned in her position in the ED and the part-time and fixed term positions she undertook following the employer's decision she could no longer work in the ED due to her medical condition.

The Authority then considered the extent to which the employee had contributed to the circumstances giving rise to the grievance and whether a reduction in remedies was appropriate due to any blameworthy conduct of the employee.

In particular it considered the fact the employee had failed to disclose her bipolar condition in 2005 prior to her appointment to the ED position, although this was considered an '*oversight*'. The Authority member accepted the evidence of the employer that had the employee answered the questions on the form in 2005 accurately, the employer would not have employed the employee in the ED without specialist advice and a management plan, or not at all if such advice had been consistent with that provided by the employee's psychiatrist on 12 February 2008. The Authority concluded that a decision not to transfer the employee to ED in 2005 had it been aware of her condition, could potentially have resulted in a discrimination claim and on that basis the majority of the responsibility for the discrimination rested with SDHB. The contribution was accordingly assessed at 25%, meaning the employee's compensation award was reduced to \$7,500 and the remuneration calculated would be reduced by 25% also.

This decision is of interest in terms of the relatively minimal weight accorded to the contribution of the employee in failing to disclose her medical condition on two separate occasions. The comments of the Authority suggest employers will need to proceed cautiously in potential discrimination claims and ensure that they assess whether they have taken reasonable steps to reduce any '*risks*' to a minimal level

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