

# **Dyslexia Association of Ireland (D.A.I)**

## **DYSLEXIA in the WORKPLACE**

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### **PART I**

#### **Introduction and case study**

The dyslexic worker presents a challenge to employers. First, most people who do not have a family member or friend who lives with this disability know very little about dyslexia or the emotional and psychological frustrations that come with it. Businesses and institutions would benefit from training programmes which would inform them about solutions that work. In this regard, I would like to tell you a success story about one such person who realised job satisfaction through a very specific programme put in place at IBM Corporation. It is a sound model which encourages communication between employer and employee, and fosters understanding and mutual cooperation, to the benefit of both.

Deborah's teachers didn't think she had the skills to graduate from school, let alone qualify for university. Even so, she was determined, and spent her afternoons with a tutor rather than with leisure activities. She not only qualified for university, but went on to earn a Master's Degree. She then successfully manoeuvred through a professional career in the corporate world, but it was a long and difficult road.

Her first work experience was disastrous. She had problems with reading, language, spelling, writing, numbers and recognizing social nuance (such as understanding jokes). She noticed other problems, such as getting lost in a building she worked in for five years, and being late for scheduled meetings. She had trouble with mechanical things, and misplaced items regularly, such as keys, which would lead to frantic and often exhausting efforts to focus on simple, everyday activities.

Deborah often felt inadequate, even stupid, and she was often berated by her superiors for her disabilities. Her saving grace was that through her intuitive insight and creativity, she managed to save the organisation huge amounts of money by instituting a number of innovative changes. After leaving that organisation, Deborah noted that the environment there discouraged open communication, and fostered fear rather than openness. As a result, sufferers from ADD and other non-obvious disabilities kept silent. There was no attempt to foster relationships between management and employees which would encourage people with disabilities to admit the problems or seek help for them. A “blame-and-shame” environment created tension and stress in the workplace.

Deborah applied for and won a position at IBM Corporation. IBM is a good example of a workplace that is positive, and one which fosters honest and open communication throughout the organisation worldwide. “We don’t hire disabled people because it is the nice thing to do, we do it because it’s the right thing to do from a business standpoint,” the Director, Jim Sinocchi, said in an interview with Workforce Management magazine.<sup>1</sup> Hiring the disabled has been a part of American law since the enactment of the Americans with Disabilities Act, 1990. Ireland has its own similar law, the Employment Equality Acts, 1998 – 2004.

IBM, however, embraced affirmative action for the disabled even prior to the enactment of the ADA law. It trains its managerial staff and Human Resources Department to first recognise and then create an environment which would accommodate a workplace that was AD/HD and LD (learning disabled) friendly. It has an even-handed four-point training session which covers the following areas:

1. Create a culture that values the disabled and understands their potential for promoting the well being of the organisation.
2. Recognise the characteristics of people with AD/HD or LD.

Management are trained by experts in the field, and employees, from new hires to senior executives undergo diversity training as well. They are

taught to recognise and understand the disabilities that affect their co-workers. This is designed to promote tolerance for diversity rather than frustration or hostility. They are taught to recognise the difference between ADD and dyslexia, which are often confused by laymen as depression, anxiety or substance abuse.

### 3. Orientation of new employees

New employees are encouraged to disclose their hidden disabilities, and to be honest about their strengths and weaknesses. Managers are taught to respond to a disclosure of ADD or dyslexia with encouragement. Mentors are provided to guide and coach new hires, and the mentor can be long term for those who need it. IBM takes the position that a mentor trained to understand and support a new hire lessens the chance of failure, and decreases expensive turn over.

Management, mentors and the Human Resources Department receive a special course which informs them that ADD/LD hires have reached adulthood after enduring numerous failures, particularly if they are either undiagnosed or lately diagnosed, and therefore they have spent a large portion of their life not being “understood.” Usually he/she has been subjected to a significant degree of self-doubt, embarrassment, confusion, anger and lack of confidence. Therefore, management are taught that a respectful, honest relationship that tends to be solution-oriented creates a climate for growth and productivity from the challenged employee.

4. Finally, management and employees are taught that conduct and discipline remains an elemental part of work life, and that ADD, dyslexia or other learning disabilities are not an excuse for inappropriate behaviour, and that the standards that apply to other employees apply equally to them. <sup>2</sup>

Now, back to Deborah. She struggled with her first job until she was hired by IBM. Let’s take a look at how she was accommodated at work. These were practices, by the way, which she successfully incorporated into her daily living. In her case she had to struggle through great quantities of invoices on a daily basis. At first she was permanently behind in her work.

After meeting with her mentor and the HR department, she was given a template which provided her coloured columns from which to work, although when printed, they printed in ordinary black and white. Even though she may work with a page of dense figures, with the various colours in each column, she can now quickly scan through the figures. Before long, even the non-afflicted employees in her department were asking for the coloured template. Before this simple adjustment for her disability, it would take hours for her to complete one invoice, having to separate each transaction painstakingly, constantly moving from task to task, and constantly changing numbers and making many errors. After her reorganisation, she was able to easily complete her work in the time available, raise her level of accuracy, and for the first time in her life, she experienced job satisfaction.

Typically, following the IBM model, work strategies can be outlined, breaking down jobs into a series of smaller tasks, and discovering how to make use of visual and creative strength. The employee is taught to make use of diaries and calendars, action lists, and how to plan each day's activity, and particularly how to organise his or her work space. Mentors are taught techniques to help in reading, such as using highlighted words, memory association and using visualisation and sound equipment, as well as the many computer programmes which are designed to help the learning disabled. Deborah was also taught relaxation techniques, assertiveness and self-confidence. All of these techniques helped her feel in control of her environment. The lack of control leads to stress, and once stressed, to panic.<sup>3</sup>

### Mediation

Disputes will invariably arise at work, and traditionally, if the problem is not confronted and dealt with early, the approach has been a win/lose situation. In the recent past, however, alternative dispute resolution, mediation, has become a more and more attractive method for finding resolution, and becomes a win/win situation. Problems in the workplace can cost organisations millions of dollars in

legal fees, lost productivity, recruitment, workers compensation and stress leave. Identifying problem areas before they arise, then, is a critical business strategy.

Mediation is a move to resolve workplace conflict in the shortest possible time and at the lowest possible level in an organisation. A successful mediation results in savings in cost and time, and an increase in employee morale and productivity.

The most common disputes are disagreements on the way work should be done, bullying and general harassment. They arise as a result of poor communication, unprofessional behaviour or work performance issues.

Mediation is a voluntary, confidential and independent process in which an impartial third party listens to both sides of the issue. It provides an opportunity to identify issues and explore options to reach a workable outcome before the problem grows to a larger one. It is not surprising that sometimes the issues are very small ones that can grow if not caught early, like, for instance a recent situation where a worker felt slighted because the supervisor failed to say good morning when she passed the employer's work station. The employee saw it as a breakdown of the work relationship between herself and her supervisor, but after a mediation session, the problem was easily resolved, and harmony was quickly brought back to the workplace.

Mediation is not about apportioning blame, but helps to provide clear solutions which work for all parties. It will prevent a dispute from become a disciplinary matter if resolution can be made early. The benefit to the employer is vast. The parties are able to return to an effective working relationship and the pressure and stress is relieved, improving the work environment.

## PART II

### The Irish Constitution

Article 40.1 of the Irish Constitution (*Bunreacht na hEireann*) provides that "all citizens are, as human persons, equal before the law".

This is qualified by the provision that the State may, “in its enactments have due regard to differences of capacity, physical and moral, and of social function”.

There is also a non-binding principle in Article 45.2.1, which refers to the equal right of men and women to earn a livelihood.<sup>4</sup>

### Legislation

Under the Employment Equality Act, 1998, employers were obliged to do all that was reasonably possible to accommodate the needs of disabled employees *unless this would give rise to a cost, other than a nominal cost to the employer*. There is a presumption that a person with a disability is fully capable and competent to do the job if appropriate measures could be used – “*reasonable accommodation*”. Once an employer is aware of the employee’s disability, it is expected the employer will ascertain the real implications for the employee’s ability to do the job by consulting with the employee, taking advice, and keeping an open mind as to what treatment and/or facilities could overcome the obstacle.

### Europe

There is even more protection provided by the EU Directive 2000/78.EC (establishing a general framework for equal treatment in employment and occupation), which states that “reasonable accommodation shall be provided”, which means that employers are to take measures where needed, “unless such measures would impose a disproportionate burden on the employer.”

Initially, the Supreme Court in referring to the Employment Equality Bill at the time stated that the idea of reasonable accommodation did not refer to costs of the employer in carrying this out. This was resolved in section 16 of the Act. The

reasonable cost is dependent on the employer, the turnover, the size of the business, the assistance and the support. Reasonable accommodation is provided for in relation to access, participation in the workplace, training, financial cost, financial resources and public funding. It would extend further to equipment, working time and training or resources.

### Employment Equality Acts, 1998- 2004

The Employment Equality Acts, 1998-2004, outlaws direct and indirect discrimination at work, and covers employment conditions on nine grounds, one of which is disability. The 2004 Act led to significant changes to both the Employment Equality Act, 1998, and the Equal Status Act, 2000. Some of these relate specifically to disability.

The law outlaws discrimination in all areas relevant to employment, discrimination by employers, by collective agreements, in the advertising of jobs, by employment agencies and by vocational bodies. Discrimination is defined as the treatment of one person in a less favourable way than another person is, has been or should be treated. Disability is defined as including total or partial absence of bodily or mental facilities, chronic disease, whether manifest or not, and learning and personality disorders. The definition of disability is the same under the Employment Equality Act, 1998, and the Equal Status Act, 2000.

The definition of disability under the Acts is where:

“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 of 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”.

An employer may not discriminate on grounds of disability, but that does not mean that the employer must recruit or promote someone who is not willing to do or fully capable of doing the job in question. However, a person with a disability may be capable of doing a job if special services or facilities are provided and, if this is so, the employer may not consider him/her incapable as long as the provision of those special services/facilities are not considered to be a disproportionate burden on the employer. Previous to the Employment Equality Act, 2004, an employer could refuse to provide facilities on the grounds that it gave rise to more than a nominal cost. The 2004 Act imposes a higher burden on employers than before.

#### Labour Court - Equality Tribunal

The employer should ensure that a positive enquiry is made of those who have had a disability, may be disabled, who are or who become disabled. The employer should ensure that potential employees go to a company doctor. Further, there should be consultation and information throughout the process with the employee. Appropriate measures should be taken together with

counselling and treatment if that is so required. The Labour Court and the Equality Tribunal use the purposive approach in that regard. An employer using a reactive approach in assessing individuals with a dyslexic problem is clearly incorrect where the matter should be considered keenly.

One relevant case is *A Computer Component Co. v A Worker* [ED/00/08, DET. NO 13]. The Labour Court held that terminating the complainant's employment because she suffered from epilepsy on its face constituted an act of discrimination on the ground of disability. It held that the company could only be relieved of liability if it could be shown that due to the disability, the Complainant was not fully competent and fully capable of performing the duties of her employment and further that her needs could not be accommodated reasonably. The court found that if the employer decided that she did not have the full capacity to perform her duties of employment, then the employer had made that decision too quickly without any assessment which could have set out any dangers to the employee in the working environment.

The 2004 Act incorporates a list of defining criteria used to determine what a disproportionate burden is. These are:

- \* The financial and other costs involved
- \* The scale and financial resources of the employer's business
- \* The number of persons who would benefit from the measures.
- \* Any disruption that would be caused by them
- \* The nature of any benefit or detriment experienced by any person likely to be affected by them
- \* the possibility of obtaining public funding or other assistance, any benefit that would accrue to the employer.

The 2004 Act also extends the provision of positive action, which allows employers to make additional efforts to recruit, employ and promote members of groups which may have been traditionally excluded, to all nine of the grounds

covered by the 1998-2004 Acts, whereas previously it only extended on grounds of gender. Further, the Act looks to whether there is a perception of discrimination in the workplace .

What about a situation arising where the treatment by the employer of an employee without a disability is more favourable? An interesting case on this point was that of *William Gorry v Manpower Ltd.* [DEC-E2001-017]. The Equality Officer considered section 6(g) of the Employment Equality Act which states that the discriminatory ground in respect of disability arises where one is a person with a disability and the other is not, or is a person with a different disability. The Equality Officer cited two European Court of Justice judgments providing that it is settled law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations. It follows therefore, that disability discrimination can arise in respect of the treatment of a person with a disability versus a person without a disability, the treatment of a person with a mental disability versus a person with a physical disability or the treatment of a person with another physical disability.

The objective justification that an employer can provide as a reason for discrimination only relates to a claim of indirect discrimination. In *Alzheimers Society v. A Worker, AGE/06/12 Det.No.75*, the complainant was a nurse manager in a day centre. She was forced to take sick leave because of a number of medical conditions. Before her entitlement to sick pay expired, she informed her employer that she was ready to return to work and that she was advised to do so. The medical officer of the employer confirmed her fitness to return. The employer told the complainant that she would not be in her managerial role but rather a nursing post with limited functions. The complainant identified an actual comparator being the CEO of the respondent. The Labour Court held that the treatment of an employee who was absent from work due to a disability must be compared to that of an actual or hypothetical comparator who is absent from work either because of a different disability or for a reason other than disability.

The employer contended the reason for this was due to restructuring. The Labour Court highlighted that it was clearly a case of direct discrimination and no defence applied. This is a case where the employer cannot rely on a business reason for not allowing a person return to his/ her contracted position especially where they are deemed medically fit to do so. There must be strong evidence to show on the balance of probabilities that the employee's past disability was no more than a minor issue.

*Nevin, Murphy, Flood v Portroe Stevedores* [2005] 16 IR 282 was referred to where it stated: "finally, it must be borne in mind that the proscribed reason need not be the sole or even the principle reason for the conduct impugned, it is enough that it is a contributing cause in the sense of being a significant influence". The court ordered compensation in favour of the complainant of the amount of €35,000.

It may be the case that it is necessary to treat those with a disability differently in order for them to be treated equally. This is an interesting concept and worthy of consideration. *A Government Department v A Worker AGE/05 19 Det No. 062* is relevant. The Labour Court stated that in certain situations it is necessary to treat one differently in order to keep the balance equal. The Labour Court addressed the question of the burden of proof. The Court stated that there was not an exhaustive list of factors which can give rise to an inference of discrimination. The Court highlighted the important point that the respondent must prove on the balance of probabilities that the rejection of the Complainant for promotion as in no way whatsoever related to his or her disability. The Court usefully pointed out that there is the possibility in the workplace of a person with a disability who may suffer discrimination not because they are disabled but because of their disability they are less capable than a person without a disability. Here, the employer did not perceive alcoholism as a disability and therefore ignored its duty under Article 5 and Section 16 to take appropriate measures. The Court awarded a sum of €6,000 in compensation for distress as a

result of being discriminated against and ordered the respondent to take immediate steps to ensure the process was conducted in an open way. Records should be kept and should be free from bias. The complainant was returned to the relevant grade immediately.

Discrimination can arise where different rules are applied to comparable situations and likewise where there is an application of the same rule to different situations. In the case of *A Government Department v A Worker*, ADE 05/4/Det No 612 the complainant stated that the respondent discriminated against him on illness grounds by not deferring a promotional competition for a short time until he could attend for interview. The complainant put forward that this was necessary under section 16(3). This case involved a date set aside for interview. In practical terms, the same rule was being applied to different situations which allowed for other candidates to be considered for the position and not the complainant. The complainant was not capable of attending on that date due to accessibility and requested another date which was refused. The Labour Court found that this Act by the respondent which did not afford the complainant a reasonable length of time necessary because of his disability was discriminatory and contrary to section 8 of the Act.

The litmus test for discrimination in relation to disability in the workplace is that of *Niamh Humphries v Westwood Fitness Club*. The Labour Court's determination was upheld in this case. It provides for the two-stage test that is required where (1) the employer must look to the facts regarding capability ie medical evidence and (2) if that person is not capable at the outset whether special treatment is necessary. In other words, the employer must have all the medical evidence and give the interview candidate or employee an opportunity to address those issues.

### Claims

If a person feels he or she has been discriminated against because of their disability, they may take a complaint to the Equality Tribunal. This is an independent statutory body whose principal role is the investigation and mediation of complaints of discrimination in relation to employment, and in relation to access to goods and services, disposal of property and certain aspects of education. Anyone who feels that they have been discriminated against under the Employment Equality Act or the Equal Status Act may lodge a complaint with the Equality Tribunal within six months of the occurrence of the act of discrimination.

Once a complaint is made, it will be addressed either through investigation and decision, or through mediation. An investigation is a quasi-judicial process carried out by a Tribunal Equality Officer, who will consider submissions from both parties before arranging a joint hearing or hearings of the case to enable him/her to reach a decision in the matter. Mediation is an alternative method of resolving complaints, seeking to arrive at a solution through agreement of the parties, rather than through an investigation and decision.<sup>5</sup>

It is possible to make a claim under the Unfair Dismissals Act, 1977-2007 as a result of a dismissal due to a disability. In such cases, it is possible to make a claim to the Employment Appeals Tribunal who have within their remit to award re-instatement, re-engagement and compensation of up to 104 weeks remuneration.

There is no exhaustive list of factors giving rise to discrimination. In *A Government Department v An Employee*, discrimination arose in the lack of transparency in the selection process at recruitment stage and the results of the assessment process. This was not considered by the employer.

In the UK, two recent employment appeal tribunal decisions discuss the meaning of disability. *Paterson v Commissioner of Police of the Metropolis*

concerned a chief inspector diagnosed with dyslexia. He claimed there was a failure to make reasonable adjustments in the examination process he was required to take for promotion to superintendent. The employment tribunal in the UK found that he did not satisfy the statutory definition of a disabled person because any adverse effects of his impairment on his normal day-to-day activities were minor. The tribunal accepted that dyslexia caused a substantial disadvantage in comparison with other colleagues with respect to taking the examination but it took the view that it was not a day-to-day activity. In other words, the effect must involve more than a trivial effect on his ability to undertake normal day-to-day activities.

In another UK Tribunal decision of *McDougall v Richmond Adult Community College*, the issue was the point of time at which the effect of an impairment is likely to last for at least 12 months. The complainant had a history of mental health problems. She was compulsorily admitted to hospital under the Mental Health Act, 1983. Subsequent to this, her offer as a database assistant was withdrawn since she did not get medical clearance. The tribunal initially found that she was not disabled. Ms McDougall appealed and it was allowed as the effect was a long term one.

In conclusion, the employer should ensure there is an occupational physician in place to address the medical situation and how best to assess the disability if it is in existence at all. It is only then that a specialist deals with any further matters or that an employee should be referred. The two-stage process in *Humphries v Westwood Fitness Club* should be considered and followed on behalf of the employer. Decisions from the Labour Court, Equality Tribunal and Circuit Court allow for the standard to be met if an individual establishes his case on its face and discrimination is presumed. Clear and accurate records should be kept both on behalf of the employer and the employee. Cogent evidence needs to be disclosed by the employer in the decision that was taken not to employ or

to discriminate together with the non-discriminatory reason and why the decision was made.

To sum up, I again wish to say I am pleased that an organisation such as the Dyslexia Association of Ireland (D.A.I) is here to enlighten the public about the nuance and complexity of dyslexia. It is only through affirmative action and education that parents, teachers, employers and co-workers can understand and work together to ensure that those with dyslexia and other hidden disabilities can truly reach the peak of their talents and abilities.

I thank you for inviting me here today, and now open the floor to any questions you may have.

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<sup>1</sup> Mullich, Joe, Workforce Management, June 2004

<sup>2</sup> IBM employee guidelines

<sup>3</sup> Bartlett & Moody, Dyslexia in the Workplace, "The Story of Deborah Brooks," Whurr Publishers, 2004

<sup>4</sup> Stewart, Ercus, and Nicola Dunleavy, Compensation on Dismissal: Employment Law and Practice, p 426. FirstLaw (2007).

<sup>5</sup> Citizens Information Board, "Employment Equality Act, 1998-2004"

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