

From Sick to Sacked (Disability Discrimination)

The largest number of complaints received under the Disability Discrimination Ordinance (DDO) is related to sick leave. Discriminatory acts can take many forms, including dismissal, poor performance review, limiting access to training opportunities, and refusal to grant salary increase.

◆ **The Complaint**

Steve, a property management assistant, had been off sick for two months last year due to colon cancer. After a series of medical treatments, he fully recovered and returned to work.

“I had been in my job for five years. My performance had never been a concern until I returned to work from sick leave,” said Steve, who found himself treated unfairly by his employer. “I found out my supervisor had rated me ‘satisfactory’ in my performance review, but higher up, the senior manager downgraded the rating without notifying me. As a consequence, I was not given a year-end bonus, and shortly afterwards, they even made me redundant.”

He continued, “They had no fair reason for treating me like this. What was more shocking was when I found out later that the only reason they lowered my rating was because of my long absence from work. Redundancy was the only excuse they could think of to get rid of me.” Steve lodged a complaint with the EOC against his employer for disability discrimination.

✓ **What the EOC did**

The EOC investigator looked into the complaint and explained to both parties the provisions of the anti-discrimination legislation.

Under the DDO, it is unlawful for an employer to discriminate against a person with a disability or sickness by dismissing that person. When an employee's disability hinders his/her capacity to perform the job duties, consideration of reasonable accommodation on the employer's part is warranted, unless that employee is unable to carry out the inherent requirements of the job even when provided with such accommodation, or if such accommodation would cause the employer unjustifiable hardship.

The employer admitted that Steve's appraisal score was adjusted downwards because of his lengthy sick leave, but they insisted that the dismissal was solely due to the realignment of work duties. However, the EOC's investigation revealed that the employer had hired someone else to replace Steve soon after he left.

The two parties agreed to proceed to conciliation in order to resolve the dispute. The matter was settled with the employer agreeing to give monetary payment and provide a good reference letter to Steve.

Points to Note:

- Disability-related absence is often required by employees in order to recuperate from illnesses and disabilities. Employers should balance between the accommodation of such needs and their operational requirements.
- At times, the provision of accommodations may cause the employer unjustifiable hardship. In determining what constitutes “unjustifiable hardship”, all relevant circumstances of the case will be taken into account, including the reasonableness of the accommodation sought and the financial resources of the employer vis-à-vis the estimated expenditure of the accommodation. The burden of proof is on the employer to make out this defence if so claimed.
- Training, recruitment, and redundancy exercises should be carried out fairly with the use of consistent and non-discriminatory criteria, with accompanying reasons for each selection.