

1.3 DISMISSAL BASED ON ILL HEALTH OR INJURY (MEDICAL INCAPACITY)

It often happens that an employee is unable to perform his/her work properly or at all due to ill health or injury – caused by the work situation or an incident outside the work situation. Incapacity on the grounds of ill health or injury may be temporary or permanent.

1.3.1. What are the signs of medical incapacity?

The employer becomes aware of the employee's incapacity where it a result of an injury due to an accident. The employee may submit a medical certificate to the employer stating the employee's injury or illness. The less obvious signs are poor work performance, repeated absenteeism and signs of alcohol and/or drug abuse. In the latter instances it would be sensible of the employer to take the initiative in investigating the matter before it becomes a major problem.

1.3.2. The procedure to follow in case of medical incapacity

If an employee is temporarily unable to work due to ill health or injury, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.

During the process of investigation, the employee should be allowed the opportunity to state a case in response to and be assisted by a trade union representative or fellow employee.

1.3.3. Considerations of fairness

The Act refers to certain considerations that are relevant to the fairness of a dismissal for incapacity. These are:

- ❖ the **degree** of incapacity (i.e. how seriously it affects the employee's ability to do his/her job);
- ❖ the **cause** of the incapacity (i.e. the extent to which the employee was responsible for the incapacity);
- ❖ the **nature** of the incapacity (e.g. in the cases of alcoholism or drug abuse, counseling or rehabilitation may be appropriate steps for an employer to consider);
- ❖ **where** the problem arose (i.e. where an employee has been injured at work or has contracted a work-related illness, the duty on the employer to accommodate the employee is more onerous).

1.3.4. Guidelines in cases of dismissal arising from ill health or injury

Any person determining whether a dismissal arising from ill health or injury is unfair should consider:

- (a) whether or not the employee is capable of performing the work;
- (b) if the employee is not capable -
 - (i) the extent to which the employee is able to perform the work.
 - (ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and
 - (iii) the availability of any suitably alternative work.

1.3.5. Confidentiality

An employee's medical condition is private and must be kept confidential. An employee's consent is therefore required for the release of the medical report from the medical practitioner. The information that is disclosed during the investigation must also be kept strictly confidential and not be made known to outsiders.