A–Z OF EMPLOYING

Incapacity

Our guide for Employers and Managers

SUPPORTING, FACILITATING & REPRESENTING BUSINESS

BusinessCentral

Incapacity

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Contents

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BusinessCentral

Incapacity

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Overview

Incapacity refers to an employee's inability to perform their contractual obligations and may be grounds for termination of employment. In terminating employment on the grounds of incapacity the Courts have laid down "rules" of procedural fairness. Failing to comply with the rules of procedural fairness may give rise to a personal grievance for unjustifiable dismissal.

Procedural fairness in the context of incapacity requires open communication, current and specialist opinion, notice of intentions, consultation and a weighing of all considerations so that the employer's decision to dismiss is based on a full and fair inquiry, and the decision is one that a fair and reasonable employer could have made in the circumstances.

Introduction

The issue of incapacity in the employment context arises more often than most people would think. The term is applicable to changes in an employee's ability to fulfil all, or a significant portion, of their contractual obligations. It does not necessarily mean permanent or total incapacitation.

The law recognises that an employment relationship should not have to endure incapacity in some circumstances; this **A-Z Guide** addresses what an employer's obligations are when faced with an employee's incapacity and how the situation should be managed. Case law is referred to as it provides authoritative guidance in this area. The information in this **A-Z Guide** can be supplemented by reading the following **A-Z Guides**:

- Disability
- Discrimination in Employment
- Frustration
- Medical Certificates
- Medical Examinations
- Occupational Overuse Syndrome
- Stress and Fatigue

Types of Incapacity

The term incapacity can apply to two distinct situations: intermittent incapacity and on-going incapacity. The procedural requirements for both forms of incapacity remain the same however intermittent incapacity can sometimes be harder to address than one single on-going period of incapacity.

Intermittent incapacity

An employee's incapacity can be intermittent because a single medical condition or injury keeps remerging (for example: asthma or a back injury) or the employee suffers several unrelated medical issues or injuries.

Where a medical condition results in an employee's absence from work on an intermittent basis the employer may still review the employee's on-going employment where the absences are affecting the operational requirements of the business.

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An employer should consider and ideally have up-to-date medical information about the employee's condition, how it will affect their on-going ability to attend work on a full time basis against the ability to accommodate those absences.

Where an employee's intermittent absence is **not** due to a medical condition the employer should address the matter and deal with the issue by applying the correct process that may fit.

Refer to the **A-Z Guide** on **Absenteeism** for further information.

On-going incapacity

On-going incapacity is the prolonged absence from work due to illness or injury and is usually in one single on-going period. An example of on-going incapacity might be where an employee requires surgery for a medical condition that will have a substantial recovery period.

Employers may become aware of on-going incapacity because an employee continues to bring in medical certificates to excuse their absence or the employer may be notified of an up-coming operation. In both instances, it is important that the employer discusses the incapacity with their employee and collects evidence as to how the employee's ability to do their duties will be affected.

Employer's Obligations

Although an employer may be entitled to terminate an employee's employment where the employee is incapacitated, it is important that the decision to terminate is both substantively and procedurally justified.

Duration of incapacity

The need to dismiss an employee on the basis of incapacity should be based on operational difficulties as a result of the absence and the need to replace the employee. There is no definitive guideline as to how long an employer should wait before terminating an employee's employment and the employee should be given a reasonable opportunity to return to work before considering termination. If an employee gives a future date on which they are likely to be fit to return, an employer is generally expected to accommodate the absence unless the employer has a genuine business reason why the absence cannot be accommodated to that date.

Whether or not it would be reasonable for an employer to consider termination should be based on all the circumstances. What is reasonable will depend on the individual circumstances of the case depending on the effect of the absence on the business and the ability to accommodate this. However, as an *indication*, in a small to medium sized enterprise, it would be reasonable for an employer to review the situation after six to eight weeks of absence. In a larger enterprise, a review at perhaps twelve weeks would be reasonable.

However, it has been acknowledged that there can come a point where an employer can "*fairly cry halt*".

In *Canterbury Clerical Workers IUOW v Andrews & Beavan Ltd* [1983] ACJ 875 the Court stated:

> *…it is well established in law that an employer is not bound to hold open a job for an employee who is sick or prevented from carrying out his duties for an indefinite period. This is particularly so when the business of that employer requires the presence of permanent staff.*

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Factors to consider

The Employment Relations Authority, in *Barnett v Order of St. John* (Unreported) [AA 176/03; 16 June 2003; K Raureti, stated that the factors to be considered alongside the obligation of the employer to be fair to an employee while balancing considerations of the overall impact on its business operations include:

- The terms of the agreement
- How long the employment was likely to last in the absence of an illness
- The nature of the employment
- The nature of the illness and how long it has already continued and the prospects of recovery
- The length of time the employee was absent before the dismissal
- Critical trading circumstances at the time of the dismissal
- The key nature of the employee's position
- The inability of the employer to cover the absence
- The likely length of absence or finite date for return.

It is also important for an employer to be able to show that all reasonable attempts were made to accommodate the employee's absence. This may include considering whether obtaining temporary or fixed term staff to cover the absence was a possibility. It would be prudent for an employer to document that it had considered all available options before concluding that terminating an employee's employment was necessary.

Procedural Fairness

Sample Procedure for Employers

The following is a generic guide for conducting an incapacity process in most circumstances. If there is an incapacity procedure set out in your policies, you should follow that procedure. As each situation is unique, the following procedure should be used as a guideline only and further advice and assistance should be obtained from Business Central.

- When an employee is sick or injured for a long period of time, the employer should stay in contact with the employee to ascertain how they are and when they might be expected to return to work.

- Unless there is reliable information to suggest that the employee will never be able to return to work, the employee should be given a reasonable opportunity to recover before their on-going employment with the company is assessed.

- A review of the employee's employment involves consulting with the employee and obtaining information about: the employee's true medical condition before any decision to dismiss the employee is made.

- Write a letter to the employee
  - expressing concern at the length of their absence

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  - asking them to provide medical information about their state of health, future prognosis and ability to do light duties or reduced hours.
  - informing them that the reason for obtaining medical information is so you can make a fair assessment of your ability to continue to accommodate the employees absence and assess the employee's on-going employment.
  - indicating that there is a possibility that the employee's employment could be terminated should they be unable to return to work on an on-going basis (however this should not be pre-decided on).

- The employee may not be legally obliged to provide medical information (depending on any contractual provisions contained in their employment agreement). However, the employer should stress to the employee the importance of providing the information so that they can make a fair assessment of the situation. If the employee fails (after reasonable opportunities have been given) to provide medical information the employer should advise the employee that they may have no choice but to make a decision based only on the information available to them.

- The employer can ask for the employee's permission to submit questions to the employee's medical practitioner in regards to the employee's condition as it relates specifically to their ability to perform the particular role. They can also offer to provide a medical assessment at the employer's expense.

- After medical information is collected and analysed. The employer should invite the employee and their representative to attend a meeting to discuss the issues in regards to their on-going absence.

- If the employee can return to work on a part-time basis or for light duties the employer should consider this option in good faith but there is no obligation to provide this if it is not sustainable.

- Discussion with the employee (and their representative) should cover matters such as:
  - The present state of the employee's health;
  - The future prognosis;
  - The estimated period of time for which the employee will be absent from the date of the interview;
  - The employer's position with respect to the need to replace, and if necessary, an indication from the employer that if the employee is unable to return to work within say a four week period, either:
    - The situation will be reviewed again, at which time the possibility of finding a replacement will be considered; or
    - The employer will not be able to keep the position open any longer and will have to terminate the employee's employment.

- The employer should consider what operational difficulties are caused by the employee's absence and how long the employer can fairly accommodate the absence. Any decision to terminate must be based on a business need to replace the employee due to operation difficulties as a result of the absence. The employer should consider whether it is reasonable to accommodate the employee's absence by taking on temporary staff, and any

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decision to terminate the employee's employment should be reasonable in light of the individual circumstances.

- If a decision to terminate the employee's employment is made, the reason for the termination should be stated as the inability of the employee to fulfil the requirements of their role, and not the illness or injury (as it is prohibited under the Human Rights Act to discriminate against employees due to disability which includes illness).

- Dismissal should be on notice as per the employee's employment agreement.

Open communication

The importance of open, direct, and even face to face communication lay in the process leading up to the decision to dismiss rather than the communication of that fait accompli. Both the employer and the employee need to be responsive and communicative to fulfil their good faith obligations and, in the event of incapacity, these obligations are especially pertinent.

An incapacitated employee should be asked to provide evidence as to their present and future prognosis so the employers decision whether or not to terminate their employment is based on all of the relevant facts.

Before the decision to dismiss is made, the employee should be given the opportunity to comment on the evidence that the employer will rely on to make their decision.

Supporting evidence

One of the steps in the consultation process is an inquiry into the true medical position of the employee, their present state of health, future prognosis and expected amount of time away. An employer is obliged to carry out a full and fair investigation before dismissing an employee and a part of the investigation is the gathering of information that is relevant to the decision to dismiss.

There are a few ways an employer can obtain information about an employee's medical condition. The first option is to ask the employee if they would consent to you speaking to their medical professionals directly. This consent will usually need to be obtained in writing and provided to the medical professional as proof that their patient consents to the release of medical information to you.

An alternative option is to provide the employee with a list of questions to have their medical professional answer and return to you. Within this letter, you should outline what the employee's duties are, their dates and times of work, available light duties and any other relevant considerations that the medical professional may want to take into account when determining whether an employee is fit for work. The letter can also include questions such as:

- What is the employee's current prognosis?
- What is the future prognosis?
- When will the employee be fit and able to return to light duties?
- When will the employee be fit and able to return to full duties?
- Will the employee be on any medication which may affect their ability to do their role?

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In *Barry v Wilson Parking NZ (1992)* Ltd [1998] 1 ERNZ 545, the Employment Court outlined its expectations of fairness in respect of supporting evidence:

> *What this [acting fairly] amounts to, speaking generally, is that the employer has to wait a reasonable time to give the injured employee an opportunity to recover (what is reasonable being a question of fact in each case) and after that it has to inquire in a fair and open-minded way whether the employee has any realistic prospects of returning to work within a further reasonable time. This necessarily has to include seeking information from the injured employee, making it known at the time that the information may be used for the purposes of a decision to discontinue the employment relationship. This is to ensure that the employee understands the seriousness of the issue and will have a motive for ensuring that the information is as full and accurate as he or she can make it be. It would not be reasonable to expect so diligent a response to a mere casual inquiry after the employee's health. Sometimes an employer can safely act on information volunteered by the employee such as periodic medical certificates but, in general, will need to inquire from the employee in case there have been any recent developments, especially if the information held is stale.*

Reverse medical certificates

There are circumstances where an employee may allege that they are fit and able to return to work after an illness or injury but, as their employer, you may still harbour concerns about their fitness or ability to return to the workplace.

An employer is within their rights to ask an employee, for health and safety reasons, to provide confirmation from a medical professional that they are fit and able to return to the workplace.

The Employment Court in *Radio New Zealand Ltd v Snowdon* (Unreported) WC 24A/03; 17 July 2003; Shaw J. found that Radio New Zealand was entitled to seek a medical examination to ascertain the genuineness of Ms Snowdon's sick leave, to enable it to assess her long-term illness or to consider whether her employment should be terminated. The question for the Court was whether the company could require Ms Snowdon to undergo a medical examination, to establish her fitness for work, before she returned to work. The Court stated:

> *Radio New Zealand is entitled to require medical examinations in certain limited circumstances and access to an employee's medical information at the rehabilitation phase. But that is not an unfettered entitlement, as already discussed. It is only contractually entitled to do this for particular reasons and, I would add, only when it is fair and reasonable for it to do so. The employment principles do not expressly entitle the employer to insist on an independent medical examination before an employee returns from sick leave. However, an employer in the circumstances of this case was entitled to considerably more information about its employee's medical status that was provided by Ms Snowdon in order for it to act fairly and appropriately to her when she returned, including consultation with her medical practitioners and specialists in terms of the employment principles. The fact that one of the medical reports suggested that she could only commence on a part time work trial was enough to set of warning bells…Radio New Zealand…was justified in not having Ms Snowdon back until it was in receipt of more information:*

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Notice of intentions

Procedural fairness demands, as it has been seen so far, open communication so that an employee can understand the full impact of the employer's inquiries as to the employee's health and prognosis. Through this process the employer is bound to disclose their intentions in respect of the employee's continued incapacity.

In *Northern Hotel etc IUOW v Southern Pacific Hotel Corporation* [1990] 2 NZILR 918 the Labour Court found the dismissal of a restaurant manager to be unjustified because it had failed to advise her of the options open to her (of alternative work) and that her continued employment might be in jeopardy should she not return to work at a specified and reasonable time. It stated on the duty to consult:

> *To extent that this is another statement of the duty of procedural fairness in relation to a dismissal arising from prolonged ill health, we agree that there is a duty upon an employer in circumstances such as these to disclose to an affected employee its views and intentions and to afford that employee an opportunity to make a response, whether by disabusing the employer as to the ability to resume work or resuming work as required by the employer.*

While a "warning", in the disciplinary sense of the term, is not issued in these circumstances, what the employer is alerting the employee to is its need to be reasonably informed of developments in the employee's recovery (or not) and its intention to consider termination of the employment unless the employee can advise the employer of either a return to work date or a date when the employee will return to an agreed level of fitness.

Employment agreements

Some employment agreements go so far as prescribing the employer's preferred process for dealing with issues such as incapacity. Where these exist the employer must be cognisant of their effect before undertaking any review of an employee's employment in this context. The failure to abide by the expressed process, if challenged, will generally attract liability as a breach of that agreement. This is almost certain where the failure prejudicially affects the employee to their disadvantage. In the absence of express terms, the implied term of trust, confidence and "fair dealing" may be breached where an employer fails to abide by the rules of procedural fairness as outlined in this guide in terminating the employment of an employee for incapacity.

Frustration

Only very rarely will the doctrine of frustration apply in respect of incapacity. The doctrine applies if, before the parties to the contact have been able to complete the performance of that contract, a supervening event beyond the control of either of the parties occurs, rendering further performance and completing of the contract impossible, or substantially impossible. Where the doctrine applies, and the contract is said to be frustrated, then the parties are released from their obligations under the contract to complete it. In *Barry v Wilson Parking* (below) the Court called the employer's inapt reference to medical incapacity as frustration "*a malapropism, commonly enough committed*". The contract had been terminated by the employer taking proactive steps to bring it to an end, so it was a fallacy to refer to frustration.

Refer to the **A-Z Guide** on **Frustration** for more information on its application to employment agreements.

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Conclusion

Incapacity in this **A-Z Guide** refers to an employee's inability to fulfil their contractual obligations either because of injury or illness; it does not necessarily mean that the employee is unable to work at all and will never work again. In the event that you are faced with an employee's incapacity you should begin a dialogue with your employee that facilitates open communication for the duration of the situation. You should keep in mind throughout this time that the employment relationship is between you and the employee and that the employee is the primary source of information about their health. However, recourse to medical advice should be a necessary part of any decision making in respect of that employee's ongoing employment.

If, at any time, in which an employee is incapacitated you consider that it is appropriate for the ongoing employment relationship to be reviewed, then you should afford your employee as much notice of your intentions and the factors you are weighing, as possible. Then the employee will be in a position to make informed representations on their behalf for your consideration. At all times, when faced with an employee's incapacity, you should be aware of any express contractual provisions that may apply, and, your mutual obligations towards each other to conduct yourselves in a manner that is not likely to destroy or seriously damage the relationship of confidence and trust between you. If you are having difficulty managing a situation involving incapacity, or possible incapacity, or would like individual advice based on your situation then contact the Business Central AdviceLine Team and/or your Advice Employment Relations Consultant.

You can contact one of our employer advisors for telephone advice and assistance: **0800 800 362;** or email the Business Central AdviceLine at advice@businesscentral.org.nz

Business Central Legal has developed a Practice Kit on Incapacity to assist employers who have to navigate this complicated area of employment law so they can reduce their risk of exposure to costly personal grievance claims. If you would like further information or wish to purchase a Practice Kit please call AdviceLine or email advice@businesscentral.org.nz

Remember:

- Always call AdviceLine to check you have the latest guide (refer to the publication date below).
- Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact situation.
- Use our AdviceLine employment advisors as a sounding board to test your views.
- Get one of our consultants to draft an agreement template that's tailor-made for your business.

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