A-Z Guide

INCAPACITY

Contents

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Overview

Incapacity refers to an employee's inability to perform their contractual obligations. It may be grounds for termination of employment. The Courts have laid down rules of procedural fairness for terminating employment on this basis. Failing to comply with these rules 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 weighing all considerations. This will ensure the employer's decision to dismiss is based on a full and fair inquiry, and one that a fair and reasonable employer could have made in the circumstances.

Introduction

Incapacity in the context of employment arises more often than most people would think. It includes changes in an employee's ability to fulfil their contractual obligations, or a significant portion. It is not necessarily 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 the basis of authoritative information on this topic. The information in this **A-Z Guide** can be supplemented by reading the following other **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 ongoing incapacity. The procedural requirements for both forms of incapacity remain the same, however, intermittent incapacity can sometimes be harder to address than one single ongoing 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 ongoing employment, where the absences are affecting the operational requirements of the business.

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

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Where an employee's intermittent absence is not due to a medical condition, the employer should use the correct process to handle it instead. Refer to the **A-Z Guide** on **Absenteeism** for further information.

Ongoing incapacity

Ongoing incapacity is the prolonged absence from work due to illness or injury and is usually in one single ongoing period. An example might be where an employee requires surgery for a medical condition, with a substantial recovery period.

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

Employer's Obligations

An employer may be entitled to terminate an employee's employment, where the employee is incapacitated. However, it is important that a decision to do so is 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 employment. 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 it 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 is based on all the circumstances. What is reasonable will depend on the individual circumstances of the case, like 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. Nevertheless, there will ultimately 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:

> *... 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 gave factors to be considered in the employer's obligation to be fair to an employee, while balancing considerations of the overall impact on its business operations. These come from *Barnett v Order of St. John* AA 176/03 (16 June 2003) and 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, 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 to consider hiring temporary or fixed term staff to cover the absence. 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. Further advice and assistance should be obtained by calling the AdviceLine team on 0800 300 362.

Gathering information

- 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 ongoing 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.
    - 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 ongoing 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 ongoing basis (however, this should not be predetermined).

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Incapacity

- The employee may not be legally obliged to provide medical information (subject to any contractual provisions 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 on the employee's condition, specifically how it relates to their ability to perform the particular role. They can also offer to provide a medical assessment at the employer's expense.

Holding a meeting

- After medical information is collected and analysed, the employer should invite the employee and their representative to attend a meeting, to discuss the issues coming from their ongoing 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. 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, from the date of the interview, for which the employee will be absent
    - The employer's position on the need to replace the employee, and if necessary, an indication from the employer that if the employee is unable to return to work within e.g. a four-week period, either:
        - The situation will be reviewed again, at which time the possibility of finding a replacement will be reconsidered; or
        - The employer will not be able to keep the position open any longer and have to terminate 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 decision to terminate the employee's employment should be reasonable in light of the individual circumstances.

Termination

- 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. This is because 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

Open, direct, and possibly face to face communication is important not just on the anticipated outcome, but also the process leading up to the decision to dismiss. Both the employer and the employee need to be responsive and communicative to fulfil their good faith obligation. In incapacity these obligations are especially important.

An incapacitated employee should be asked to provide evidence as to their present and future prognosis, so the employer's 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.

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Supporting evidence

Consultation involves 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. A part of that investigation is gathering 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 for the employee to consent to you speaking to their medical professionals directly. This consent will usually need to be in writing and provided to the medical professional, as proof that their patient consents to the release of medical information to you.

Another option is to provide the employee with a list of questions for their medical professional to 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?

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 [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.*

Medical certificates proving fitness for work

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 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* WC 24A/03 (17 July 2003) 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 Court had to consider 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:

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> *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 off warning bells... Radio New Zealand...was justified in not having Ms Snowdon back until it was in receipt of more information.*

Notice of intentions

As seen so far, procedural fairness demands open communication, so that an employee can understand the full impact of the employer's inquiries into the employee's health and prognosis. Through this process, the employer is bound by case law to disclose their intentions regarding 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 their options 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 disciplinary-style "warning" is not issued, the employer alerts the employee to 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 dates for a return to work, or when the employee will return to an agreed level of fitness.

Employment agreements

Some employment agreements prescribe the employer's preferred process for dealing with issues such as incapacity. The employer must be cognizant of their existence and effect before undertaking any review of an employee's employment. The failure to abide by the expressed process will generally breach the agreement. This is almost certain in situations where the failure prejudicially affects the employee to their disadvantage.

Where there are not 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).

Frustration

Only very rarely will the doctrine of frustration apply in respect of incapacity. The doctrine applies if, before the parties to the contract 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.

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In *Barry v Wilson Parking* (below) the Court called the employer's inappropriate conflating of medical incapacity and frustration "*a malapropism, commonly enough committed*". The contract had been terminated by the employer taking proactive steps to bring it to an end, which was not frustration.

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

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, referring to medical advice is a necessary part of any decision-making on 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 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, possible incapacity, or would like individual advice based on your situation, contact the AdviceLine Team on 0800 300 362.

The EMA Legal team has also developed a **Practice Kit** on **Incapacity**, to assist employers navigating this complicated area of employment law to 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 on 0800 300 362.

Remember

- **Always call AdviceLine on 0800 300 362 to check you have the latest guide.**
- **Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your 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.**

This guide is not comprehensive and should not be used as a substitute for professional advice.

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Published: **July 2024**

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