DISMISSAL DUE TO
EXCESSIVE ILL HEALTH ABSENTEEISM

by

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# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>SUMMARY</td>
<td>ii</td>
</tr>
<tr>
<td></td>
<td><strong>CHAPTER 1: INTRODUCTION</strong></td>
<td>1</td>
</tr>
<tr>
<td></td>
<td><strong>CHAPTER 2: DEFINING ILL HEALTH ABSENTEEISM AND ITS COMPONENTS</strong></td>
<td>5</td>
</tr>
<tr>
<td>2 1</td>
<td>Introduction</td>
<td>5</td>
</tr>
<tr>
<td>2 2</td>
<td>What is ill health absenteeism?</td>
<td>5</td>
</tr>
<tr>
<td>2 3</td>
<td>Categories of ill health absenteeism</td>
<td>6</td>
</tr>
<tr>
<td>2 3 1</td>
<td>Incapacity</td>
<td>6</td>
</tr>
<tr>
<td>2 3 1 1</td>
<td>Excessive absence</td>
<td>7</td>
</tr>
<tr>
<td>2 3 1 2</td>
<td>Inability</td>
<td>10</td>
</tr>
<tr>
<td>2 3 2</td>
<td>Misappropriation</td>
<td>11</td>
</tr>
<tr>
<td>2 3 3</td>
<td>Breach of contract</td>
<td>12</td>
</tr>
<tr>
<td>2 3 4</td>
<td>Disabling</td>
<td>13</td>
</tr>
<tr>
<td>2 4</td>
<td>Conclusion</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td><strong>CHAPTER 3: THE LEGAL POSITION IN SOUTH AFRICA IN RELATION TO</strong></td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>DISMISSAL FOR EXCESSIVE ILL HEALTH ABSENTEEISM</td>
<td></td>
</tr>
<tr>
<td>3 1</td>
<td>The importance of the categorization of ill health absence</td>
<td>17</td>
</tr>
<tr>
<td>3 2</td>
<td>Categories of dismissal</td>
<td>18</td>
</tr>
<tr>
<td>3 2 1</td>
<td>Misconduct</td>
<td>18</td>
</tr>
<tr>
<td>3 2 1 1</td>
<td>Abuse of sick leave</td>
<td>19</td>
</tr>
<tr>
<td>3 2 1 2</td>
<td>Genuineness of medical certificates</td>
<td>20</td>
</tr>
<tr>
<td>3 2 2</td>
<td>Incapacity: Ill health</td>
<td>21</td>
</tr>
<tr>
<td>3 2 2 1</td>
<td>Capability to perform the work</td>
<td>23</td>
</tr>
<tr>
<td>3 2 2 2</td>
<td>Accommodation</td>
<td>24</td>
</tr>
<tr>
<td>3 2 3</td>
<td>Incapacity: poor work performance</td>
<td>24</td>
</tr>
<tr>
<td>3 2 3 1</td>
<td>Absenteeism policies and performance standards</td>
<td>26</td>
</tr>
<tr>
<td>3 2 3 2</td>
<td>Ability to improve</td>
<td>27</td>
</tr>
<tr>
<td>3 3</td>
<td>Persistent absence</td>
<td>27</td>
</tr>
<tr>
<td>3 4</td>
<td>Disability</td>
<td>29</td>
</tr>
<tr>
<td>3 5</td>
<td>Appropriate charges related to ill health absenteeism</td>
<td>31</td>
</tr>
<tr>
<td>3 6</td>
<td>Conclusion</td>
<td>33</td>
</tr>
<tr>
<td></td>
<td><strong>CHAPTER 4: PERTINENT CASE LAW</strong></td>
<td>34</td>
</tr>
<tr>
<td>4 1</td>
<td><em>Hendricks v Mercantile &amp; General Reinsurance Co of SA Ltd</em></td>
<td>34</td>
</tr>
<tr>
<td>4 2</td>
<td><em>Mambalu v AECI Explosives Ltd (Zommerveld)</em></td>
<td>36</td>
</tr>
<tr>
<td>4 3</td>
<td><em>AECI Explosives Ltd v Mambalu</em></td>
<td>38</td>
</tr>
<tr>
<td>4 4</td>
<td><em>MTN Service Provider (Pty) Ltd v Matjino NO</em></td>
<td>39</td>
</tr>
<tr>
<td>4 5</td>
<td><em>Standard Bank of SA v Commission for Conciliation, Mediation &amp; Arbitration</em></td>
<td>41</td>
</tr>
<tr>
<td>4 6</td>
<td>Key learnings</td>
<td>43</td>
</tr>
<tr>
<td>4 6 1</td>
<td>The tension between misconduct and incapacity disputes</td>
<td>43</td>
</tr>
<tr>
<td>4 6 2</td>
<td>Persistent absenteeism: ill health incapacity or not?</td>
<td>44</td>
</tr>
<tr>
<td>4 6 3</td>
<td>Contractual entitlement</td>
<td>46</td>
</tr>
<tr>
<td>4 6 4</td>
<td>Attendance standard</td>
<td>47</td>
</tr>
</tbody>
</table>
SUMMARY

In a globally competitive marketplace companies strive to become as efficient as possible. Absenteeism is a worldwide problem as it impacts on company efficiency and cost effectiveness. A large portion of absenteeism can be attributed to ill health absences. Companies have prioritized the need to find ways of managing and reducing absenteeism. In South Africa such processes have to occur within the confines of a constitutional right to fair labour practices and other prescriptive labour legislation. The issue is somewhat complicated by the fact that employees have a right to paid time off due to illness. It is thus clear that not all ill health absenteeism can be deemed problematic. A balancing act needs to occur between the operational needs of the employer and the rights of employees. Ill health absenteeism becomes problematic once a threshold is reached at which point it becomes intolerable for the employer, thus deemed excessive. Excessive ill health absenteeism is not a difficult concept to understand, however it is not specifically defined. A universal concept of when absence is deemed to have reached the threshold of excessiveness does not exist and varies from one employer to the next. Excessive ill health absence is a multi-faceted concept (as a result of the various types of ill health absence) and thus a universal process cannot be adopted to deal with all types of excessive ill health absenteeism. In an attempt to deal with the different types of ill health absenteeism it is pertinent to categorize the issues. The author suggests various ways of dealing with ill health absenteeism, depending on the facts of each case. A misconduct process should only be applicable in instances where it can be proved that sick leave is used inappropriately or the reason for absence is unknown. Although case law suggests the prevalence of dealing with ill health absence as misconduct, especially in the case of persistent short term absence, these cases rarely prove that abuse is taking place. Suspicions regarding abuse without proper evidence to support such claims will not satisfy the substantive fairness requirements. In the event that illness is of a medium to long term nature, an ill health incapacity process may be the most appropriate process to apply, as in such instances a clearly distinguishable illness exists, which makes accommodation less problematic. Such a process is less suited to persistent short term absence as this can be the result of many illnesses or injuries. In the case of persistent short term absence, the individual may be fully capable of performing their duties upon returning to work, however their frequent absence causes unreliability and inefficiency. It is clear in this instance that accommodation cannot take place due to the unpredictable nature of the absences. The
concern with persistent short term absence is less with the illness or illnesses displayed and more with the absences itself. The author suggests that it may be appropriate to deal with such absences on the basis of incapacity due to poor work performance. This assertion is based on the fact that the concern is with frequent short term absence that causes the employee to be unreliable; however the illnesses are not of such a nature that it can warrant accommodation. If it is accepted that the employee is not malingering or if the malingering cannot be proved the employee has failed to meet a performance standard (attendance standard). It is suggested that as part of any incapacity investigation consideration should be given to whether the illness or injury can be deemed a disability. This is necessary as disabled individuals are afforded special protection and treatment. A dismissal of an incapacitated individual that is actually deemed “disabled” could be held to be automatically unfair and therefore it is pertinent that this is established at the outset.
CHAPTER 1
INTRODUCTION

Absenteeism is a worldwide problem for employers. It does not only affect the cost effectiveness of the business, but it can also disrupt its operations. In many cases frequent or pro-longed absenteeism is related to ill health concerns. The employer is required to find a midway between the employee’s contractual duty to provide a service and their failure to do so based on absenteeism related to ill health that is deemed excessive. What should be made clear is that not all absences related to ill health are considered problematic. The International Labour Organisation\(^1\) has, as early as 1927,\(^2\) recommended that a social insurance system be put in place to protect the livelihood of employees during times of illness to ensure a healthy and vigorous workforce for production. It is natural for employees to become ill during the scope of their employment. Companies have to operate their businesses in the most efficient way possible, so a balancing act occurs between the operational needs of the employer and the rights of the employee. Taking into consideration that certain minimum conditions of employment are established and that certain leave entitlements are afforded; at what point does absenteeism become problematic? Simply put, a threshold exists and at this point absenteeism is regarded as excessive and problematic. It is submitted that dismissals due to ill health absenteeism will increasingly become prevalent. Employers suffer great economic pressures to have a productive and profitable workforce. The disruptive effect that absenteeism has on an employer’s business is well documented. The importance of continuously providing services has become an integral part of our global economy as cost cutting and global competitiveness is the order of the day. Habitual absenteeism may have been tolerated or overlooked in the recent past, but it is not likely to continue during these strenuous times when employers will need to look at ways of reducing overhead costs.

In order for an employer to be able to deal with excessive ill health absenteeism effectively; the concept needs to be understood clearly. The concept of excessive ill health absenteeism is not a clearly defined and distinguished concept. The concept comprises of two parts; the first is what is deemed “excessive” and second is what is deemed “ill health absence”. The second

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\(^1\) Hereinafter referred to as “ILO”.

part is less problematic as ill health is universally understood, however it can be the result of one injury or illness or it can be the result of numerous illnesses. The predicament is establishing what level of ill health absence is excessive, especially taking into account that ill health absence can take many forms.

The research problem therefore relates to the question of what excessive ill health absenteeism entails and how it can be dealt with fairly. One of the most important issues that will be investigated is the concept of excessive ill health absenteeism and the lack of an appropriate definition of the concept. The next question revolves around questioning whether all types of ill health should be treated similarly. The issue regarding the validity of absences and the validity of medical certificates will also be looked at. Furthermore, the question of whether excessive absence is regarded as misconduct or incapacity must be investigated. The importance of establishing the ability to perform as part of an ill health absence enquiry will be highlighted. The question of whether ill health incapacity can be seen as a disability will be explored. If it can, a further issue is whether a greater onus is then placed on the employer. Case law suggests that various opinions exist regarding the treatment of ill health absenteeism. In the unreported case of Numsa obo Ncotoyi v Halberg Guss South Africa (Pty) Ltd\(^3\) the commissioner held that absences cannot just be lumped together and then, under the banner of excessive absence, be used to terminate the employment of employees. In Hendricks v Mercantile & General Reinsurance Co of SA Ltd\(^4\) the concept that an employee that is persistently absent may be dismissed was upheld.\(^5\) In the case of Mambalu v AECl Explosives Ltd (Zommerveld)\(^6\) it was held that the suspicion of abuse of sick leave is not a sufficient ground for dismissal and the misconduct actually needs to be proved.\(^7\) Various cases will be quoted that indicate that the concept of disability is not narrowly interpreted and includes more illnesses than the normal perception of physical or mental disability.

This paper hopes to investigate the different issues related to excessive ill health absenteeism and to explore and identify fair measures in dealing with such issues. The focus of this research is to systemize all information relating to the research problem. The assumption is that once all aspects of the problem have been highlighted a greater understanding can emerge.

\(^3\) ARB 11/03/2009 MEPE 1032 unreported. Hereinafter referred to as “Ncotoyi v Halberg”.
\(^4\) (1994) 15 ILJ 304 (LAC). Hereinafter referred to as “Hendricks”.
\(^5\) Supra 304.
\(^6\) (1995) 16 ILJ 960 (IC). Hereinafter referred to as “Mambalu”.
\(^7\) Supra 964.
as to where shortcomings in current legislation lie. A complete discussion of whether all instances of excessive ill health absenteeism can be treated as ill health incapacity will be investigated. The study will also provide some guidance to employers as to how the issues should be approached and dealt with. The motivation for this study can be found in the relevance the research topic has in industry. Industry-wide companies attempt to find ways to curb and manage absenteeism. These programmes, if unsuccessful in altering behaviour, will most certainly lead to the termination of employment. It is imperative in terms of the South African labour law system that any dismissal is both substantively and procedurally fair. Therefore any process followed, in such programmes need to comply with these fairness requirements. It becomes clear once case law is investigated, that much confusion exists regarding the proper treatment of ill health absenteeism. This makes the research problem very relevant and also very current with some interesting decisions emerging from the CCMA, Bargaining Councils, Labour Court and Labour Appeal Court.

The application of this research also lies in the grouping of different sources to build a complete and comprehensive description of the research problem, its legal background and its relevance in industry. Case law was collected and analysed so that each contribution individually and collectively adds to the discussion and also serves as a comparative value from which inferences can be drawn.

The chapter breakdown is as follows:

Chapter two deals with defining the concept of ill health absenteeism. In doing so, the lack of a clear and all encompassing definition will be highlighted. The various categories of ill health absenteeism will be discussed. This serves the purpose of building a clearer picture of the concept of ill health absence. The categories specifically investigate three broad themes. The first is whether the absences or the illnesses are regarded as genuine. The second issue is whether the person has the ability to perform their duties and, if they do not, whether the inability is physical or whether it is related to their physical absence at their place of work. The third is whether the inability can actually be deemed to be a disability.

Chapter three highlights the importance of categorizing the type of ill health absence in accordance with the divisions described in chapter two as this will influence the process that needs to be followed in dealing with the issue. Based on the three broad categories mentioned
in chapter two; the categories are then linked to dismissal processes for misconduct, incapacity related to ill health and incapacity related to poor work performance. Special consideration is given to the concept of disability (in the sense that certain incapacitating illnesses can be deemed to be disabling) and the greater onus that it places on an employer.

Chapter four deals with the most pertinent cases regarding the issues referred to in the previous chapters. These cases highlight the courts views on what is considered excessive ill health absence, when incapacity procedures are more suitable than misconduct procedures, the importance of the evaluation of the ability to perform and when incapacity is considered a disability and what is then expected of an employer.

Chapter five will provide a summary of the details discussed in the prior chapters as well as providing some recommendations regarding the research problem.
CHAPTER 2
DEFINING ILL HEALTH ABSENTEEISM AND ITS COMPONENTS

2.1 INTRODUCTION
The concept of ill health absenteeism seems self-evident, however, as will be investigated in this chapter a proper definition for it does not exist. The question that can be raised is why is it necessary to explain a concept that is not difficult to understand or to grasp? The answer, as will be highlighted in this chapter, lies in the fact that the concept although easy to understand is multi-facetted. The categories that form part of the concept are sometimes conflicting and this is what ultimately makes it difficult to deal with the issue at hand. Therefore, it is pertinent to define the concept of ill health absenteeism and its components in order to understand the notion as well as the issues related to it, in order deal with it properly.

2.2 WHAT IS ILL HEALTH ABSENTEEISM?
Absenteeism can be defined as, non-attendance by an employee at his or her place of work. Simplistically, ill health absenteeism therefore would be non-attendance at work caused by ill health or sickness.

Strydom et al define sickness as:

“… some physical or mental condition which disables an employee from fulfilling his or her duties either temporarily or permanently. It is a form of incapacity caused by a medical condition.”

The ILO Sick Insurance Convention becomes applicable if a person is rendered incapable of work by reason of an abnormal state of bodily or mental health. From the above, two important components may be accentuated; namely that the employee’s health is negatively affected and that this causes the inability either to attend work or to perform duties. Definitions as contained in the Sickness Insurance Convention serve as a guideline in terms of the distribution of benefits and the establishment of minimum conditions. The ILO realized

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9 ILO Convention 24 of 1927 Sickness Insurance (Industry) Convention http://www.ilo.org/ilolex/cgi-

lex/convde.pl?C024 (accessed 04/07/2009). Hereinafter referred to as the “Sickness Insurance Convention”.

10 Supra Article 3.
that it was necessary to adopt legislation to ensure that ill employees will receive some form of insurance when they become ill in order to ensure a healthy and productive workforce.\textsuperscript{11} The Basic Conditions of Employment Act 75 of 1997\textsuperscript{12} is South Africa’s primary legislative source regarding minimum conditions of employment. The BCEA provides guidelines in terms of the circumstances in which a person may be awarded paid time off due to incapacity. While the BCEA does not define sick leave or incapacity, it affords employees rights in terms of paid time off for ill health absenteeism. Section 22(2) of the BCEA states that:

“During every sick leave cycle, an employee is entitled to an amount of paid sick leave equal to the number of days the employee would normally work during a period of six weeks.”

The importance of establishing what is considered ill health and what entitlements are associated with ill health is a vital step in establishing, which absences may be construed as being problematic. To further unpack the concept of ill health absenteeism, its categories will be discussed hereunder.

\textbf{2.3 CATEGORIES OF ILL HEALTH ABSENTEEISM}

\textbf{2.3.1 Incapacity}

The concept of incapacity encompasses all forms of inability and essentially involves an employer’s loss of confidence in the ability of the employee to perform their duties in accordance with their contract of employment.\textsuperscript{13} The inability can be classified as either a mental or physical inability caused by the onset of an illness or the inherent mental or physical characteristics (not related to illness) of an individual which causes inability. The distinction between the concepts can be clarified somewhat once it is linked to the performance of duties which is of such a nature that it is below an appropriate standard.\textsuperscript{14} In the case of non-performance incapacity the appropriate standard does not change, even though the performance may with employer assistance. In the case of illness induced incapacity the appropriate standard itself may be altered, to ensure that based on new circumstances, that an appropriate standard is still achieved.

\textsuperscript{11} \textit{Supra} Sick Insurance Recommendation.
\textsuperscript{12} Hereinafter referred to as the “BCEA”.
\textsuperscript{13} Christianson “Incapacity and disability: A retrospective and prospective overview of the past 25 years” (2004) 25 ILJ 879.
\textsuperscript{14} Christianson “Incapacity and disability: A retrospective and prospective overview of the past 25 years” 882.
The above establishes that incapacity broadly refers to a state in which an individual’s ability to perform is undermined. Within the confines of ill health absenteeism the state of inability to perform duties can be caused either through the physical impairment that the illness causes or through the excessive amount of time that the illness causes the individual to be removed from their work environment, resulting in the employee being unable to perform their duties. This category clearly comprises these two elements, which will be discussed in greater detail below.

2 3 1 1 Excessive absence

It is accepted that a certain amount of ill health absenteeism is permissible based on contractual and legislative entitlements. Therefore, it is important to understand which ill health absenteeism is considered legitimate and which is deemed to be problematic. Seemingly it becomes problematic once the absenteeism due to ill health reaches a certain threshold of duration.

The Oxford dictionary defines “excessive” as: “exceeding of a proper or permitted limit”. From a statutory point of view, the only guideline that employers have is the limits prescribed by the BCEA or collective agreements relating to a sick leave entitlement. The question of when ill health reaches a threshold and is deemed persistent or excessive will be further investigated through case law.

In the Hendricks case the employee was away from work for a period of 182 days in a period of 3 years from 1989 until 1990. This case established that an employee may be dismissed due to persistent genuine illness if this causes the employee to be unable to perform his or her duties, assuming that a fair process is followed. Importantly, it was held that a contractual entitlement to a certain amount of sick leave does not mean that persistent absence may not be dismissible. The case of Steyn v SA Airways establishes that even though it could not be established to what extent the illness will continue in future, prolonged absence from one’s occupation (two year’s in this instance) amounted to persistent absence which the employer

16 Hendricks 306.
17 Supra 312.
18 Supra 314.
20 Supra 67.
could no longer operationally be expected to accommodate. In *Numsa obo Walton v Goodyear*, the applicant was dismissed for frequent absence from work due to his illnesses exceeding the leave permissible in terms of the respondent’s sick absence policy and the statutory limit. The case of *Croucamp v Le Carbonne SA (Pty) Ltd* showed that absence from work for a period of two months was seen as persistent absence. The employer in this instance was less lenient because the employee had only been employed for a couple of months when the onset of illness occurred. In the unreported case of *Numsa obo Gwadela v Halberg Guss South Africa (Pty) Ltd*, the disciplinary hearing had been triggered by the fact that Mr. Gwadela had exceeded 30 days of sick leave during his three year sick leave cycle. The employee’s representative questioned whether it was proper to investigate the absence prior to the entitlement being exceeded as it is not yet excessive, at such a point in time. The arbitrator held that an excessive number of days off work due to sickness resulted in the employee being incapable of performing his duties. The arbitrator also approved of an absenteeism policy which provides for counselling sessions to commence prior to the exhaustion of an employee’s sick leave entitlement. In contradiction to the previous case, in the case of *Numsa obo Thorne v Halberg Guss South Africa (Pty) Ltd*, the commissioner held that the dismissal was fair even though the employee’s absences were less than the statutory entitlement. This decision was based on the seniority of worker, thus implying that a worker that occupies a more senior position should “know better” and that consultation had taken place between the company and the employee and yet no improvement was noted.

In *Numsa obo Ivasen v Whirlpool SA (Pty) Ltd* excessive absence was described in the following manner by Owen A:

“The applicant has proved that he is unable to provide his employer with a satisfactory level of work performance. His ill health prevents him from attending work. If he does not attend work he is unable to perform properly …”

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21 *Supra* 70.
22 2000 (12) BALR 1416 (CCMA).
23 *Supra* 1416.
25 *Supra* 1223 – 1225.
26 ARB 31/03/2009 MEPE 879 unreported.
27 ARB 03/05/2009 MEPE 1081 unreported.
29 *Supra* 991.
In the *Hendricks* case Terbutt J said the following:

>“The test remains whether because of the employee's absences and incapacity, having regard to the frequency and duration of such absences and the effect they have on his co-workers' morale, the employer could in fairness have been expected to wait any further before considering dismissal.”*30*

These cases all show that excessive absence is deemed problematic, regardless of the fact that there is no uniform limit in terms of what is considered excessive. Importantly, the cases accentuate that persistent *absence*31 causes the employee to be unreliable and therefore unable to perform their duties. Once the employer deems the absence to be excessive and this determination is reasonable the employer cannot be expected to retain the services of such employees.

In contradiction to the cases above in the *MTN Service Provider (Pty) Ltd v Matjino NO*32 case the employer dismissed the employee based on persistent absence which amounted to 202 days within a period of three years.33 The court held that it was inappropriate to dismiss the individual based on persistent absence. Ngalwana AJ held the following in this instance:

>“It appears from all the evidence that the applicant's decision to dismiss her was based not so much on her incapacity as her long and persistent periods of absence from work due to ill-health.”*34*

In the unreported case of *NUMSA obo Ncotoyi v Halberg Guss*35 the commissioner held that because the applicant had submitted valid medical certificates for all absences and had used only two days in excess of his entitlement, excessiveness could not be established. Commissioner Koorts said the following:

>“A system where there is neither any standard of attendance or a number of set absences within which an employee will be counselled/summoned to an enquiry is in my view confusing and patently unfair.”

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30  *Supra Hendricks* 314.
31  Own emphasis.
33  *Supra* 2280.
34  *Supra* 2283.
35  *Supra Ncotoyi v Halberg Guss*. 
These cases show that even though absence can be regarded as excessive, the ability of the individual to perform their duties needs to be assessed or a proper standard of attendance needs to be implemented.

There is no specific number of days which are always regarded as excessive. The perception of what is deemed to be excessive is influenced by length of service, the negative impact on the employer’s operations, the level of seniority of the person, whether absence inhibits performance and whether various illnesses are prevalent. In most instances the determination of excessiveness occurs when the number of days is greater than the entitlement; however this is not always the case.

**2.3.1.2 Inability**

In *Food Workers Council of South Africa v SA Breweries Ltd*[^36] it was established that the extent of reduced performance must be evaluated as an employer cannot be expected to retain an employee that cannot perform their duties[^37]. However, as suggested in *Numsa obo Swanepoel v Oxyon Services CC*,[^38] a case cannot be made on a presumption that illness or injury would be permanent. Such a view should be supported by the proper medical evidence[^39]. In *Bennett v Mondipak*[^40] the extent of the inability goes as far as investigating whether the illness is work induced and, if it is, how the work circumstances can be changed[^41]. In instances where the inability is work induced, the duty placed on the employer to adapt the circumstances, is greater[^42]. A proper finding cannot be made in the absence of medical evidence by an occupational physician who has investigated the work environment and examined the employee[^43]. Mere speculation that an employee may not be able to carry out his duties is also not sufficient. In the *Spero v Elvey International (Pty) Ltd*[^44] case the employer alleged that an employee’s depression and a prior overdose of medication rendered him incapable of performing due to the unpredictability of his behaviour. This was not

[^36]: (1992) 13 *ILJ* 204 (IC).
[^37]: *Supra* 207.
[^39]: *Supra* 1140.
[^41]: *Supra* 584.
[^42]: *Tshaka and Vodacom (Pty) Ltd* (2005) 26 *ILJ* 568 (CCMA) 569.
[^43]: *NUMSA obo White v Lear Automotive Interiors (Pty) Ltd* (2005) 26 *ILJ* 1816 (BCA) 1817.
reflected in his psychologist reports and, therefore, there was not sufficient evidence to show that the employee was not capable of performing his duties.\textsuperscript{45}

The above cases all highlight one issue, namely that if performance is inhibited proper evidence of this must be presented. Some cases also reflect that if the inability is removed or reduced by work circumstance then the inability to perform is no longer inhibited.

\textbf{2.3.2 Misappropriation}

Misappropriation refers to instances where an employee has documentary proof that he or she is ill but, due to some form of inconsistency, the validity of their illness is questioned. This is usually referred to as abuse of sick leave. In the \textit{Mambalu} case the applicant was charged with abuse of sick leave because he had used 47 days of sick leave in two years and also because his absences frequently occurred prior to or after weekends.\textsuperscript{46}

Misuse of sick leave will be serious when there is an intention to misrepresent the reason for absence and to claim payment for something which a person is not entitled to. Charges related to misuse of sick leave contain an element of dishonesty. Dishonesty implies a willful act whereby the employee intends to secure an improper advantage or benefit for himself or another. It is important that as dishonesty occurs intentionally, the deceit needs to be proved.\textsuperscript{47}

Such ill intention is difficult to prove and although some cases mention the fact that there might be an element of misappropriation, the illnesses are usually regarded as genuine and then dealt with on the basis of excessiveness. Two such examples are the cases of \textit{Numsa obo Damons v Delta Motor Corporation}\textsuperscript{48} and \textit{SA Footplate Association obo Talbot v Spoornet}.\textsuperscript{49} In the \textit{Delta} case the employer alleged that the employee had taken more than his 36 days of sick leave entitlement.\textsuperscript{50} Although the dismissal was held to be unfair based on a technicality, the commissioner had the following to say:

\begin{footnotesize}
\textsuperscript{45} Supra 1214.
\textsuperscript{46} Supra Mambalu 963.
\textsuperscript{48} 2003 (2) BALR 180 (CCMA). Hereinafter referred to as “\textit{Delta}”.
\textsuperscript{49} ARB 19-10-1998 CAR1341 unreported. Hereinafter referred to as “\textit{Spoornet}”.
\textsuperscript{50} Supra Delta 181.
\end{footnotesize}
“The applicant’s absenteeism did not present a picture of legitimate and bona fide medical problems.”

In Spoornet the employer had an absence policy which stated that a certain procedure would be invoked in an instance where no single illness could be identified, and when absences occur in such a pattern that a tendency to manipulate the company sick and absence policies exists.51

In both these cases the issue did not revolve around whether the absences in isolation were genuine but rather whether the absences in totality were reasonable or excessive. In Mambalu it was held that abuse cannot take place when an employer accepts the validity of medical certificates even if suspicions exist regarding the absences.52

2 3 3 Breach of contract

According to Basson et al53 one of the contractual duties of an employee is to tender his or her services. A contract of employment is defined as:

“an agreement between two parties in terms of which one party (the employee) places his or her personal services or labour potential at the disposal and under the control of another party (the employer) in exchange for some form of remuneration.”54

From this definition it is clear that tendering a service is essential to the existence of an employment agreement. Under the common law, the failure by an employee to render services required, allowed employers to rely on common law remedies as the termination of contract, specific performance or a claim for damages, even if this was occasioned by illness or injury. A permanent or temporary, supervening impossibility of performance could amount to the termination of the contract.55 This would be based on common law principles, in terms of inability to perform to the required standard due to their illness, but the reason would be a breach of contract.56 The harshness of the common law in this regard has been recognised by

51 Supra Spoornet.
52 Supra Mambalu 965.
54 Ibid.
55 Christianson “Incacity and disability: A retrospective and prospective overview of the past 25 years” 880.
56 Ibid.
the legislature, hence the statutory entitlement of employees to sick leave. Absenteeism which qualifies as statutory sick leave is no longer a breach of contract.\(^{57}\)

The Industrial Court held in *NUM v Rustenburg Base Metals Refiners*\(^{58}\) that it is inappropriate to deal with a dismissal arising from ill health absenteeism as a contractual impossibility of performance and that it should rather be dealt with in terms of reasonableness. The court in this instance held that the dismissal was actually effected due to operational requirements as the employee was unable to fulfill his contractual obligations.

In the *Spoornet*\(^{59}\) case the following was said about contractual enforced work attendance:

> “Excessive absenteeism is inefficiency under the word's normal meaning, and only becomes "impossibility of performance" under very unusual conditions, which cannot be determined without conducting the most scrupulously fair procedures. The term impossibility of performance does not comfortably fit a person who is inefficient through frequent absence, yet who does in fact perform.”\(^{60}\)

In this case the arbitrator cautioned against using supervening impossibility of performance as a mechanism to terminate an employment contract as he believed it was inappropriate to do so. Many cases refer to the inability of an employee to fulfill their contractual obligations although this is mostly not treated as a breach anymore, rather as incapacity.\(^{61}\)

### 2.3.4 Disabling

The words disabling and incapacitating are used interchangeably, as can be seen in the definition of sickness mentioned earlier. Genuine illnesses are incapacitating to some extent, but not all illnesses are disabling. Disabling illnesses are usually more permanent in nature and can cause longer term reduced performance and absence. This can be contrasted with frequent short term absence due to multiple problems.

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\(^{57}\) Lexis Nexis *Labour law Beaumont Express* Vol 9 173.

\(^{58}\) (1993) 14 *ILJ* 1094 (IC).

\(^{59}\) *Supra Spoornet*.

\(^{60}\) Ibid.

\(^{61}\) See *Ncotayi v Halberg; Food Workers Council of SA v SA Breweries Ltd; Gwadela v Halberg*. 
According to the Code of Good Practice on people with disabilities, a disabled person must satisfy all of the following criteria in terms of their illness or injury in order for them to be deemed disabled:

(i) long-term or recurring illness or injury;
(ii) a physical or mental impairment;
(iii) which substantially limits prospects of employment or advancement.

Long term impairment relates to illness that lasts or is likely to last for twelve months. A recurring impairment is an impairment that is likely to happen on a frequent basis and is substantially limiting or a progressive condition which becomes disabling once it becomes substantially limiting.

Section 5.1.2 of the Code of Good Practice defines impairment as:

(ii) “Physical” impairment means a partial or total loss of a bodily function or part of the body. It includes sensory impairments such as being deaf, hearing impaired, or visually impaired and any combination of physical or mental impairments.

(iii) “Mental” impairment means a clinically recognised condition or illness that affects a person’s thought processes, judgment or emotions.

Substantially limiting means that a disabled person would be totally unable to do the job without reasonable accommodation. If medical treatment would control or correct the impairment so that adverse effects are prevented or removed it can no longer be regarded as being substantially limiting.

In the case of Wylie v Standard Executors & Trustees the question of incapacity in comparison to disability was raised. The applicant had multiple sclerosis and the
commissioner held that this condition rendered her disabled. The commissioner had the following to say about disability:

“I think the reason for this is that disability status is not to be considered only as a sword to claim special treatment under the affirmative action provisions in chapter II of the EEA; it should also be considered as a shield to protect a person who has a disability from being dismissed from employment for a reason related to that disability.”

The Wylie case highlights an important principle in that if a person is rendered disabled a greater onus rests on the employer to accommodate such an individual to ensure that they are capable of performing their job function. In the case of the Independent Municipal & Allied Workers Union & Another v City of Cape Town the court had to decide whether an applicant with Type 1 diabetes could be considered to be disabled. In this instance, based on the criteria of the Code of Good Practice, diabetes was held to be a long term physical impairment but held not to be substantially limiting because the impairment can be easily controlled or corrected. In National Education Health & Allied Workers Union obo Lucas v Department of Health (Western Cape), commissioner Christie held that the applicant was disabled based on the following reasons: the employee had an impairment, the physical impairment was in the form of a back injury, which was deemed to be a long term impairment in that it lasted for more than twelve months and that this injury substantially limited her options in terms of her employment. In Standard Bank of SA v Commission for Conciliation, Mediation & Arbitration case the employee had fibromyalgia and it was common cause that the employee was disabled. The court held that a disabled employee is part of the designated groups in terms of Employment Equity and as such is awarded greater protection. A person cannot be seen to no longer be disabled when their condition is mitigated through medicaction or equipment, as this would render any protection in terms of discrimination legislation useless. It will be unfair for an employer not to reasonably accommodate an employee with disabilities, except if such accommodation causes unjustified hardship.

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68 Supra 2212.
69 Supra 2218.
70 Supra 2220.
71 (2005) 26 ILJ 1404 (LC) 1408. Hereinafter referred to as the “City of Cape Town”.
72 Supra 1435.
74 Supra 2100.
76 Supra 20.
77 Supra 79.
78 Supra 69.
79 Supra 80.
In drawing a distinction between incapacity and disability, it may be helpful to explain the concepts as lying together along a continuum for the purposes of deciding whether a person is indeed capable of performing their work properly.80 Once an illness becomes serious enough to render the individual incapacitated, such an illness may also possibly be considered a disability (assuming that the illness meets the requirements of the Code of Good Practice). The above cases shed new light on which conditions may be deemed disabilities. An important consideration is that these illnesses are permanent in nature and may cause reduced ability and absence but due to their nature are afforded special protection and importantly special treatment.81

2.4 CONCLUSION

What is clear from the above is that the categories of ill health absenteeism are not mutually exclusive and overlapping does occur. The main focus is to understand at what point the threshold is reached ie at what point an employer can regard absence due to ill health to be such a hindrance to its operational requirements that it can longer allow an employee to continue in such a manner. Any action taken by the employer requires that it be done in the context of rights and obligations in terms of entitlements and accommodation. From the cases above it is clear that a distinction needs to be drawn between inability to perform due to ill health and inability to perform due to ill health absenteeism. It has also become clear that although the tendency is for employer largely not to be a lenient as in the past in terms of ill health absence for longer periods of time, a greater emphasis has been placed on accommodating individuals that suffer from one distinct illness or injury as this may be seen to be a disability within the broad sense of the word.

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80 Christianson “Incapacity and disability: A retrospective and prospective overview of the past 25 years” 878.
81 Discussed in greater detail in Chapter 3.
CHAPTER 3
THE LEGAL POSITION IN SOUTH AFRICA IN RELATION TO DISMISSAL FOR EXCESSIVE ILL HEALTH ABSENTEISM

3.1 THE IMPORTANCE OF THE CATEGORIZATION OF ILL HEALTH ABSENCE
The previous chapter highlighted that ill health absenteeism is a multi-faceted concept. South African labour law provides clear guidelines in terms of dealing with dismissals and disputes.\(^{82}\) Substantive and procedural fairness aspects differ depending on the precise nature of the dispute. In dealing with ill health absenteeism dismissals, it is of critical importance that the issue is categorized correctly, in order to ensure that the correct substantive and procedural requirements may be assessed.

The Labour Relations Act\(^{83}\) provides for three broad categories of dismissals; namely dismissal related to conduct or capacity or operational requirements.\(^{84}\) Dismissals can be placed within these categories depending upon whether there is any culpability on the part of the employee. If there is culpability on the part of the employee it would generally mean that the case would relate to misconduct,\(^{85}\) failing which an incapacity or operational requirements process may be more appropriate.

The importance of establishing the difference between misconduct and incapacity was highlighted in *Zililo v Maletswai Municipality*.\(^{86}\) It was held that if a person is dismissed for misconduct, but the charge and evidence points to incapacity, the dismissal cannot be held to be fair.\(^{87}\)

This chapter will discuss the legal requirements that have to be fulfilled in order for a dismissal to be deemed fair, taking into consideration that these requirements will differ substantially based upon the categorization of the dispute in question.

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82 Refer to the Labour Relations Act 66 of 1995 s186 “Meaning of dismissal and unfair labour practice”; s 187 “Automatically unfair dismissals”; s 191 “Disputes about unfair dismissals and unfair labour practices”. See also the Labour Relations Act Schedule 8, the Code of Good Practice: Dismissal.
83 66 of 1995. Hereinafter referred to as the “LRA”.
84 *Supra* s 188(1).
85 *Sun Couriers (Pty) Ltd v CCMA* (2002) 23 ILJ 189 (LC) 4-5.
87 *Supra* 33.
3 2 CATEGORIES OF DISMISSAL

3 2 1 Misconduct

Unsuitable or unsatisfactory behaviour will be regarded as misconduct if the employee willfully displays such behaviour so that blame can be placed at the door of such an employee. Willful absence from work constitutes a breach of contract. The categories of ill health absenteeism: misappropriation, contractual breach and certain forms of excessive absence (as discussed in chapter 2) may all be considered forms of misconduct.

The Code of Good Practice: Dismissal provides guidelines in terms of disciplinary procedures for dismissal based on misconduct. Item 7 holds that in order to prove substantive fairness in cases of misconduct the following elements must be established:

(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

(b) if a rule or standard was contravened, whether or not-
   i. the rule was a valid or reasonable rule or standard;
   ii. the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
   iii. the rule or standard has been consistently applied by the employer; and
   iv. dismissal was an appropriate sanction.

In misconduct cases charges mostly relate to abuse of sick leave, poor timekeeping or absenteeism. For absenteeism to occur, an employee must be absent from work during a time when they were contractually obliged to render a service. In addition, the employee must not have a reasonable excuse for his or her absence. An employee cannot be guilty of the charge of absenteeism if the person is on authorized leave, sick leave or maternity leave or if they are not contractually obliged to provide a service, unless it is apparent that abuse is taking place.

89 Schedule 8 of the LRA: Code of Good Practice on Dismissal of the LRA. Hereinafter referred to as the “Code of Good Practice”.
90 FAWU obo Giba v Parmalat SA ARB 25-11-2003 ECPE1814-03 unreported. Hereinafter referred to as “Parmalat”.
For this reason the employer must clearly establish wrongdoing on the part of the employee.\textsuperscript{91} This was noted in the case of \textit{Khulani Fidelity Services v CCMA}\textsuperscript{92} where the court held that short periods of absence without authorization may not constitute repudiation of the contract of employment, depending on the circumstances of the case.\textsuperscript{93}

\textbf{3 2 1 1 Abuse of sick leave}

In the case of \textit{Hunt v Rennies Distribution Services}\textsuperscript{94} the employee was charged with abuse of sick leave and poor work performance. It was held by the commissioner that even though the applicant used an excessive amount of sick leave, this did not necessarily amount to abuse. The commissioner further stated that in order for the charge of abuse to stand, evidence had to be led to show that the person used sick leave for an unintended purpose or that the illnesses were of such nature that it did not warrant the number of days leave that were taken. This, however, would need to be established by a medical practitioner. In the case of \textit{Parmalat}\textsuperscript{95} two important issues relating to abuse of sick leave were highlighted. Firstly, a vague idea that abuse is occurring (without proper evidence to substantiate this) will not be sufficient in establishing culpability. Secondly, if a person is not charged with abuse, a suspicion that abuse may be occurring should not influence the chairperson’s decision in the enquiry. In the \textit{Parmalat} case the employee was dismissed for abuse of sick leave, even though he was not charged with abuse of sick leave. In instances where suspicions regarding abuse exist, it is necessary that the employee is charged correctly and that such allegations are proved. In the \textit{Parmalat} case the employee was on authorized sick leave \textit{ie} a medical certificate was submitted. The employee was charged with misconduct relating to absence for a period of two days. As the employee submitted a valid medical certificate for the absence on this occasion and was not charged with abuse of sick leave, the commissioner could not find that this absence was willful.

In the case of \textit{OE Crause v Andrew Mentis}\textsuperscript{96} it was held that dismissal for misconduct based on intermittent absence is allowed if the following conditions are present: the employee does not provide adequate reasons for their absence, when the absence is related to a host of minor ailments and the employee’s attendance is of such a poor standard that it causes disruptions

\textsuperscript{91} Zililo \textit{v} Maletswhai Municipality [2009] JOL 23238 (LC) 34.
\textsuperscript{92} [2009] 7 BLLR 664 (LC).
\textsuperscript{93} Supra 16.
\textsuperscript{94} ARB 12-12-2005 case no KNDB14172-05 unreported.
\textsuperscript{95} Supra Parmalat.
\textsuperscript{96} ARB 12-04-2001 case no GA99971 unreported.
and inefficiency in the business of the employer. An interesting decision was taken in the case of *PSA obo Kraft v SARS*. The commissioner inferred that the applicant was abusing her sick leave based on the fact that her attendance would improve in instances where counseling or formal action was taken by the respondent. This led the commissioner to conclude that the applicant was not as ill as she made out to be because she was capable of improving her absenteeism record. In *Mambalu* the Industrial Court held that a charge of abuse of sick leave actually relates to dishonesty regarding sick leave.

Case law suggests that employer quickly suspect that abuse is taken place based on frequent short-term absences based on minor ailments, the ability to improve attendance, extended absences prior to weekends and other dishonesty regarding absence. Charges of abuse of sick leave based on suspicions without proper evidence should not be allowed.

### 3.2.1.2 Genuineness of medical certificates

A question remains as to whether it is fair to deem absence, whether excessive or not, as abuse if proper medical certificates are produced and the authenticity of these certificates are not questioned. This issue was investigated in *Mambalu*. The Industrial Court held that misconduct due to poor timekeeping as a result of sickness may be dismissible. The employer argued that the employee abused his sick leave due to the absences showing a trend towards weekends. The court held that it was unfair to dismiss the applicant when the employer accepted the genuineness of the illnesses. The Labour Appeal Court in *AECI Explosives v Mambalu* upheld the decision of the Industrial Court, however it noted the ambivalent attitude that the employer took regarding the respondent’s absence. The company accepted that the respondent was genuinely ill as it did not question the medical certificates and yet it implied that the applicant was malingering.

It is submitted that it would be difficult to dispute the authenticity of a medical certificate, except if there is an obvious error or omission or alteration. Assuming that it is investigated by a medical practitioner, it will occur after the fact. The state of health, at an earlier moment in time, cannot easily be assessed even if a full medical investigation is carried out again.

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97 ARB 21-09-2004 case no GA12595-04 unreported.
98 Supra Mambalu 964G.
99 Supra 963D.
100 Supra 9601-J.
101 Supra (1995) 16 ILJ 1505 (LAC). Hereinafter referred to as “*AECI v Mambalu*”.
102 Supra 1510.
3 2 1 3 Substantive fairness

In misconduct cases the establishment of rules and the process of establishing the transgression of such rules are very important. In the case of abuse of sick leave case law does not suggest that the transgression of the rule is always properly established. In most cases the charge is proved through excessive absence, patterns of absence that occur prior to or directly after a weekend or public holiday or the applicant displays a variety of minor illnesses. The problem with establishing that a rule has been transgressed in circumstances where medical certificates are produced is that the validity of the medical certificate would have to be questioned and as mentioned earlier this is not an easy task. In instances where medical certificates are not produced the charges should relate to unauthorized absence. In the instance of excessive absence, a standard of absence would have to be set to enable the employee to know what absence is deemed to be excessive. It then becomes questionable whether the issue should be dealt with in terms of misconduct or poor work performance.

3 2 2 Incapacity: ill health

According to the Code of Good Practice, ill health or injury may be temporary or permanent. When considering a dismissal due to ill health, alternatives short of dismissal should be investigated and should include a consideration of the following: the nature of the job, the period of absence, the seriousness of the illness or injury, the possibility of using a temporary replacement, the possibility of securing alternative employment, or the possibility of adapting the duties or work circumstances of the employee. When considering a dismissal related to ill health the employer has to establish the following in order to ensure substantive fairness:

(a) whether or not the employee is capable of performing the work; and
(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

103 Supra Code of Good Practice.
104 Supra s 10(1).
iii. the availability of any suitable alternative work.105

In the case of NUMSA obo Mqola v Aberdare Cables106 the company led evidence that the applicant was dismissed for incapacity due to his continued absence which resulted in the inability to fulfill his contractual obligations. The applicant was not charged with misconduct even though the employer alleged that the respondent’s frequent absences were related to his unwillingness to control his skin disorder. The company doctor said that the applicant was incapacitated because of his continual absence. The employee believed that he was incorrectly dismissed because he was able to do his job when he attended work and was therefore not incapacitated. The commissioner found that the accommodation that took place was not sufficient and that the individual’s disorder was directly related to his place of work. The dismissal was held to be unfair.

In the NEHAWU obo Gavadeen v University of Natal107 case the employee was effectively dismissed for excessive absenteeism although the procedure for ill health absenteeism was followed. A medical practitioner concluded that the individual could perform his duties. The employer asked the individual to make proposals on how to improve or remedy his sick absences. It was held that the applicant had treatable diseases and that these should not prevent him from attending work. The employer argued that the applicant’s excessive absence interrupted work productivity. The union official gathered that this meant that applicant was dismissed for poor work performance. The commissioner held that the employee was fairly dismissed based on ill health and that the issue did not relate to poor work performance.

In the case of MWU obo Van Staden v Telkom SA Ltd,108 the applicant was dismissed because of excessive absence as a result of his ill health. The applicant used an extraordinary number of days within a three year cycle. The employee alleged that his problem was not of a permanent nature. The commissioner held that the employee’s needs must be weighed against the operational needs of the employer. The commissioner was of the opinion that the employer treated the employee sympathetically and genuinely tried to accommodate him, but

105 Supra s 10(4).
106 ARB 30-09-2005 case no MEPE301 unreported.
107 ARB 22-10-2002 case no KN1076-02 unreported.
108 ARB Ltd 4-02-2003 case no GA 20184-02 unreported.
that further accommodation would place a great burden on the employer as it would be required to accept the lengthy and excessive absence of the employee.

In the *Hendricks* case it was held that an employer may dismiss an individual based on their incapacity as a result of persistent absence from work.\textsuperscript{109} An employer may dismiss an employee for his incapacity to perform his job where such incapacity is due to persistent absence from work because of genuine ill-health, provided the employer follows a fair procedure prior to dismissal. Other than the normal requirements of substantive fairness for ill health absence as per the Code of Good Practice,\textsuperscript{110} the following needs to be taken into account: the employer and employee interests, the nature of the incapacity; the cause of the incapacity; the likelihood of recovery, improvement or recurrence; the period of absence and its effect on the employer's operations; the effect of the employee's disability on other employees; and the employee's work record and length of service.\textsuperscript{111}

The two issues that are highlighted in ill health incapacity cases are whether the employee is capable of performing their duties and whether accommodation has taken place. These will be discussed below.

\textit{3.2.2.1 Capability to perform the work}

An issue that needs to be investigated relates to the question of whether the individual is still physically capable of performing their duties even though they are often ill. This requirement is the first requirement in establishing substantive fairness in ill health incapacity cases as per the Code of Good Practice.\textsuperscript{112} Individuals that are persistently absent may return to work and upon their return be fully competent to fulfill all of their job functions. From the above it is clear that the employees were dismissed based on an ill health incapacity process. However, it is less clear whether the issue relates to the illness itself or rather their absence. This begs the question whether excessive ill health absence\textsuperscript{113} in itself is enough to render a person incapable of performing their duties? Ill health causes absence and thus it is clear that the concepts are intertwined, however if a person is still capable of working it becomes difficult

\textsuperscript{109} *Hendricks* 304.

\textsuperscript{110} Supra Code of Good Practice.

\textsuperscript{111} *Hendricks* 305.

\textsuperscript{112} Supra Code of Good Practice.

\textsuperscript{113} Own emphasis.
to show that the illness or illnesses are incapacitating. The above cases suggest that excessive ill health absenteeism has been used as a measure to establish whether an employee is able to perform their duties, however it is questionable whether this approach is appropriate based on the aforementioned.

322 Accommodation
A further requirement is that the incapacitated employee be accommodated either in terms of adapted job duties or a suitable alternative position. If an employee is persistently absent due to various ailments but able to perform their duties once they return to work, accommodation is not really necessary. Persistent short-term absences are difficult to accommodate. Alternatively, if the illness is of a medium to long-term nature, accommodation is very important but should be less problematic.

323 Incapacity: poor work performance
When considering a dismissal relating to poor work performance the employer should perform an investigation to establish the reasons for the unsatisfactory performance and the employer should try to remedy the issue.

In determining whether a dismissal for poor work performance is substantively fair, one should consider the following:

(a) whether or not the employee failed to meet a performance standard; and

(b) if the employee did not meet a required performance standard whether or not-

   i. the employee was aware, or could reasonably be expected to have been aware, of the required performance standard;

114 Supra Code of Good Practice s 11. “Any person in 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.”
115 Supra s 11(b)(c).
116 In this instance persistent short term absence refers to absences that occur frequently for various reasons and does not amount to a significant number of consecutive days.
117 Medium to long-term illnesses are usually more thoroughly investigated and therefore the prognosis and absence from work will also be known.
118 Supra Code of Good Practice s 8(3).
ii. the employee was given a fair opportunity to meet the required performance standard; and

iii. dismissal was an appropriate sanction for not meeting the required performance standard.119

Incapacity is distinguished from misconduct in that in the former, the employee is not to blame for failing to attain the employer's performance standards. The employee proved incapable of doing so for a reason beyond their control. Incapacity is manifested by conduct which is neither intentional nor negligent in the legal sense.120

In the case of Hunt and Rennies Distribution Services121 the employee was charged with poor work performance. The charge related to the applicant’s continuous absence from work due to sick leave. The commissioner found that there was no evidence, based on the procedure set out in schedule 8 of the LRA, to suggest that applicant actually performed poorly. Therefore, in this instance, his inability to attend work was not seen as an inability to perform. In the case of Costa Vezi and Mintek122 the company relied on a belief that absence from work equates to poor work performance and that it was fair to dismiss the employee due to his poor absenteeism record, his unwillingness to change his behaviour and his poor work performance as a result of his absences. The commissioner agreed with these arguments and stated that the applicant had a long history of absenteeism, the employee was counseled and based on his position he should have acted more responsibly and improved his attendance.

In the case of NUMSA obo Cholani and Venture Otto SA123 the commissioner held that the applicant was dismissed for incapacity due to poor work performance, which occurred as a result of her poor attendance. The commissioner in this instance held that the employee failed to meet a performance standard which was based on the BCEA’s 30 day sick leave entitlement. The dismissal was deemed to be fair because the applicant was fully aware of the required standard in terms of absenteeism, because she was frequently counseled regarding her absence and given an appropriate period to improve.

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119 Supra s 9.
120 NUMSA obo Stofile v Trident Steel ARB 13-05-2007 case no MEPE655 unreported.
121 ARB 12-12-2005 case no KNDB14172-05 unreported.
122 ARB case no GA111637 unreported.
123 ARB 8-12-2005 case no MEPE391 unreported.
Dealing with excessive ill health absence in terms of poor work performance is contentious, especially in the case where the employee’s poor work performance is based on their inability as a result of ill health. If this is the case, is it not more appropriate to deal with the ill health or injury that causes the employee to be incapacitated? In order for such an approach to be effective an appropriate reason would have to exist to explain why the individual absence rather than the state of health is at issue. This will be discussed in greater detail in Chapter four. Furthermore, if it is established that a case based on poor work performance is the appropriate cause of action then a performance standard and the measures of establishing whether the standard has been met has to be determined.

3.2.3.1 Absenteeism policies and performance standards

An important part of any poor work performance process is the establishment and evaluation of a standard of performance. Many companies have absence policies to deal with absenteeism. These policies are implemented with the objective of managing sick leave and reducing absenteeism. These policies usually try to establish at what point an individual’s absences are deemed to be excessive enough for action to be taken against them. Therefore, it means that a number of days or occasions are specified, regardless of the reason for the leave being taken. Even though these policies are usually linked to a process of ill health incapacity, they amount to nothing more than a performance standard in terms of attendance. The reason for this contention is that the severity of a long-term illness cannot be defined through a system that keeps track of the number of days or occasions absent. Also a system that expects improvement, to the extend that absence of a certain number of days or occasions will not take place after consultation, seems to be contrary to an ill health incapacity process. This once again relates to the question of whether the illness or the absence is the cause of concern. A structured system of days or occasions cannot offer an explanation of when a person is deemed incapable of performing their job duties, as a result of an illness. Therefore, an investigation into whether the person is capable of performing their job duties is necessary. On the other hand, a system that is based on absences, does not ask whether the individual is capable of performing their duties rather whether they failed to meet a performance standard (attendance standard).
In the case of **NUMSA obo Mazantsi v Willard Batteries** the performance standard was linked to the BCEA sick leave entitlement and the commissioner held that the standard was reasonable based on the employer’s business, production process, industry norm and the adverse impact that these absences have on the business. The employer’s policy allowed for 30 days sick leave within a cycle of three years. It was disputed whether the policy is cycle bound or not, or whether counseling would start afresh once a new cycle starts. The employee had only utilized 12 days within his current cycle and no medical evidence suggested that the employee was not medically fit to work. The employer confirmed that the problem was less with the employee’s illness and rather with his absence. No investigation was undertaken to determine whether the employee was able to perform the work or not. The commissioner held in this regard that if it did not limit counseling to a cycle basis it would effectively “punish” the employee for things that occurred during the previous cycle which was believed to be inconsistent with the BCEA. I have to disagree with this view. In establishing true incapacity a person may have had ill health absences just prior to starting a new cycle. Should an investigation into the capacity of a worker be prolonged due to a prescribed cycle? For example, if the performance standard is 30 days for every three years an employee will be able to use just less than that amount and start with a clean slate every three years. In essence the standard of performance (attendance) should not be linked to any cycle rather it should be according to company policy in terms of the point at which it is deemed to be excessive and the period of improvement can be allowed for.

Case law has not established clearly whether a standard based on the BCEA entitlements are appropriate or not. Differing opinions will exist regarding the applicability of the BCEA in establishing whether an employee’s absence is regarded as excessive. Opinions may differ depending on a belief that an employee is somehow acting contrary to the spirit of the law in using their sick leave entitlement frequently (especially if it is for persistent short term illnesses).

### 3.2.3.2 Ability to improve

In a case of poor work performance, in order to establish substantive fairness the employer will be required to show that the employee was given a reasonable opportunity to meet the performance standard. There are four potential issues that arise with this approach towards ill health absence. The first is that if the employee shows remarkable improvement then the

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124 ARB 22-12-2004 case no ECPE1931-04 unreported. Hereinafter referred to as “Willard Batteries”.
likelihood exists that the employee was not as sick as he or she intended the employer to believe and therefore prior absences may have been indicative of abuse. Secondly, a specific performance standard would have to be given. Reliance on the fact that the employee is frequently absent and therefore unable to perform will, in my opinion, not be good enough in terms the requirements of the Code of Good Practice guidelines. Thirdly, a narrow interpretation of the performance standard in terms of occasions of absence may mean that ill health absence that may lead to an ill health incapacity dismissal may not be thoroughly canvassed. Fourthly, an assessment of whether improvement has taken place needs to be considered against absences during the same period of time. A system that expects no further absences only indicates that the absences were within the control of the employee. If absences are not assessed in this manner then the possibility exists that any further absences will just be added to the prior absences and that the totality of absences will remain unsatisfactory.

3.3 PERSISTENT ABSENCE

As discussed above in the case of Willard Batteries\textsuperscript{125} the employee was dismissed for incapacity due to the employee’s poor health. The weight of the evidence seemed to relate to the extent of the employee’s ill health absences and not necessarily to the illnesses themselves. In the case of Solidarity obo Mcdermid v Iliad Africa Tending (Pty) Ltd\textsuperscript{126} the applicant was dismissed for incapacity because of her persistent absence due to ill health. The terms regarding her illnesses were very vague. The company did not have a problem with the illness per se, but rather the effect it had on her ability to perform work due to the fact that she could not attend work. The employee’s work was deadline driven and, by her own admission, she was struggling to do her work and it placed a burden on her co-workers. She also believed that her illness would persist. In these circumstances the commissioner held that dismissal was justified.

In contradiction to the case above, in MTN\textsuperscript{127} the employee was dismissed based on incapacity. The commissioner held that the decision to dismiss was related more to persistent

\textsuperscript{125} Supra Willard Batteries.
\textsuperscript{126} ARB 03-08 2004 case no GA10629-04 unreported. Hereinafter referred to as “Iliad”.
\textsuperscript{127} Supra MTN.
absence and less on incapacity. This view was held to be incorrect as the test should be whether the employee at the time of considering dismissal is capable of rendering a service.\textsuperscript{128}

The three cases above accentuate the struggle between whether ill health is incapacitating or the absences caused by ill health cause the inability to perform. Two distinctions can be made in \textit{Willard Batteries} reliance is placed on the ability to meet a standard and in \textit{Iliad} and \textit{MTN} reliance is not placed on a standard rather the totality of absences that have become intolerable. In the latter two cases the ability to perform needed to be investigated.

It was established in \textit{Hendricks} that a contractual entitlement to sick leave does not change an employer’s right to consider dismissal due to persistent absence. It was held that such a decision based on the employer’s operational requirements stands apart from any contractual entitlement.\textsuperscript{129}

The question of what is considered excessive largely still remains unanswered and mostly relies on the operational requirements of the employer. In attempting to establish the threshold it is vital for the employer not only to take his operational requirements into account but very importantly also the contractual and legislative requirements afforded to employees.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{128} \textit{Supra 14.}
\item \textsuperscript{129} \textit{Supra Hendricks 305.}
\end{enumerate}
\end{footnotesize}
3 4 DISABILITY

It is becoming more difficult to make the distinction between which illnesses or injuries are considered to incapacitate an individual or render them disabled. Disabling illnesses or injuries (as discussed in chapter two) falls within the scope of the concept of ill health absenteeism. If the illness or injury is deemed to be a disability, a greater onus is placed on the employer than merely fulfilling the requirements of an ill health incapacity process. It is pertinent to make the distinction because special provisions relate to individuals that are rendered disabled. The difference between incapacitated individuals and disabled individuals are that in the former the employees are not able to perform the essential functions of the job and in the latter the persons are suitably qualified to perform the essential job functions with some form of accommodation.

The definition of people with disabilities in the Employment Equity Act\textsuperscript{131} states:

\begin{quote}
“people who have a long term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment.”\textsuperscript{132}
\end{quote}

The definition of people with disabilities is quite broad in that any physical or mental impairment could possibly be seen as a disability. From the definition it is clear that a condition will be evaluated in terms of whether it is deemed to be substantially limiting. If a condition can be treated in such a way that the impairment can be controlled or corrected and the adverse impacts are prevented or removed then the impairment can no longer be regarded as substantially limiting.\textsuperscript{133}

In \textit{Standard Bank} a different view was held regarding the treatment of impairments. It was held that it is incorrect to hold that a person can no longer be seen to be disabled when their condition is mitigated through medication or equipment as this would render any protection in terms of discrimination legislation useless.\textsuperscript{134}

\begin{thebibliography}{9}
\bibitem{130} Supra Wylie 2211.
\bibitem{131} 55 of 1998. Hereinafter referred to as “EEA”.
\bibitem{132} Supra s 1.
\bibitem{133} Supra City of Cape Town 89.
\bibitem{134} Supra Standard Bank 69.
\end{thebibliography}
Disabled individuals are not only protected against discriminatory behaviour, but also form part of a designated group in terms of affirmative action and therefore a positive obligation is placed upon an employer with regards to accommodation of disabled individuals.

The following conditions have been considered to be disabilities: fibromyalgia, back pain and multiple sclerosis. Diabetes was held to be a long-term impairment but the court found that it does not fall within the scope of the definition of people with disabilities as it could be controlled through medication and therefore is no longer substantially limiting. It is clear from the above cases that various illnesses or injuries fall within the scope of “people with disabilities”. As mentioned earlier, disabled individuals are offered special protection in terms of both dismissal and employment equity legislation, therefore it is imperative to investigate whether an illness or injury amounts to a disability.

The focus shifts somewhat in an incapacity investigation in that the first question that should be answered is whether the incapacitating illness or injury can be regarded as a disability as defined in s1 of the Employment Equity Act. If the answer is affirmative then greater emphasis must be placed on accommodation. The potential problem with not identifying disability was highlighted in the following two cases:

In Standard Bank the following was said:

“Despite reports, and notwithstanding her obvious disability which the bank acknowledged, and the resultant absenteeism, the bank evaluated Ferreira's performance as if she were a person of full capacity. It assessed her performance as poor, even though it did not know her to be a poor performer. It arrived at this assessment after Ferreira was unable to produce medical reports to prove that she was unfit for work.”

Similarly in Wylie it was held that the applicant was not treated as a disabled person but rather as a poor performer in comparison to her peers. An employer may evaluate work performance against the same standards as other individuals but the nature of disability may

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135 EEA s 6(1).
136 Supra Standard Bank.
137 Supra Department of Health.
138 Supra Wylie.
139 Supra City of Cape Town 89.
140 Supra Standard Bank 68.
141 Supra 20.
142 Supra Wylie 2211.
require an employer to adapt the way performance is measured. In light of the special protections afforded to “people with disabilities” as part of any incapacity investigation into either ill health or poor work performance, an investigation into whether the illness may amount to a disability will become necessary.

3.5 APPROPRIATE CHARGES RELATED TO ILL HEALTH ABSENTEEISM

All the preceding sections alluded to the importance of establishing the appropriate charge in terms of dismissal legislation. Case law suggests that charges related to ill health absenteeism often cause many problems in terms of the employer’s decision regarding what would be deemed the most appropriate charge. In the case of *Numsa obo Stofile v Trident Steel* the applicant was charged with both misconduct due to abuse of sick leave and incapacity due to excessive absence. The abuse of sick leave was based on the fact that a large proportion of the absences occurred without permission and showed a tendency to occur prior to or after a weekend. The incapacity charge was related to excessive absence which rendered the employee incapable of performing his contractual obligations. The commissioner found the applicant guilty of abuse of sick leave, because the applicant was counseled for abuse of sick leave and had numerous AWOL warnings. The applicant never gave an explanation with regard to his sick leave / AWOL pattern as well as his failure to communicate with the Respondent, specifically regarding his last absence of 10 days. The commissioner held that the ill health incapacity charge was incorrect because it was clearly a misconduct issue. The commissioner held that employees have a fundamental duty to render a service, and that their employers have a corresponding right to expect them to do so. Even though the incapacity charge was regarded as futile, the commissioner held that it would in any event not have been due to ill health rather poor work performance.

In the case of *PSA obo Kraft HC v SARS*, the uncertainty regarding misconduct and ill health incapacity was also raised. The commissioner had to decide whether persistent short term absence was a form of incapacity or misconduct or a combination of both. It was held that sick leave can only be taken for genuine medical reasons and should be punishable in instances where this is not the case. The applicant’s persistent absence was regarded as abuse of sick leave and her dismissal was upheld. Another indication of the misunderstanding

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143 Supra 2218.
144 ARB 13-05-2007 case no MEPE655 unreported.
145 ARB 21/09/2004 case no GA12595-04 unreported.
regarding misconduct and incapacity is found in the ruling of *FAWU obo Adams and Supreme Foods*. The company dismissed the employee for incapacity based on her abuse of sick leave. The commissioner held that in an incapacity enquiry it is not necessary to establish whether a person has abused there sick leave. In the case of *Hunt v Rennies Distribution Services* the applicant was dismissed based on both an incapacity and misconduct charge.

In *FAWU obo Madelein Constable Applicant v Tiger Food Brands Pty Limited*, the reason for dismissal was incapacity caused by excessive absence. The company argued that the employee was dismissed for incapacity due to excessive absenteeism as she was unable to fulfill her contractual obligations. The commissioner believed that the applicant was dismissed for a mixture of misconduct and incapacity and found that the company acted fairly towards the applicant based on both an incapacity and misconduct route. The employer in this case seemingly did not intend to charge the individual with absence without leave and therefore had a problem with the varying types of absence that it had to deal with.

It is easy to understand why the distinction between incapacity and misconduct processes sometimes becomes blurred. According to the Code of Good Practice on dismissal the courts have endorsed the concept of corrective or progressive discipline. The purpose of this approach is to get employees to understand what is required of them and also to correct behaviour through a system of graduated disciplinary measures such as counsellings and warnings. Initially an employee can be counseled for what seems to be excessive ill health absence. It may later become apparent that there is also a specific pattern related to the absence, which may then mean that the process may change from incapacity to misconduct. Case law suggests that excessive ill health absence can be treated on the basis of ill health incapacity, poor work performance incapacity or misconduct. If an ill health incapacity process is followed then the focus is on the illness and in terms of poor work performance, the focus is on attendance. In terms of a misconduct process, the persistent absence is linked with suspicions regarding abuse and absence without leave. The correct process will largely depend on the facts of the case.

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146 ARB 04/03/1998 case no WE6127 unreported.
147 ARB 12-12-2005 case no KNDB14172-05 unreported.
148 ARB 21-02-2006 case no WE5740-06 unreported.
3.6 CONCLUSION

Ill health absenteeism is a complex issue. It is evident that the correct process will largely depend on the particulars of each case. Case law suggests that there is a lot of confusion regarding the treatment of ill health absence. Companies find it difficult to establish whether persistent absence can be regarded as misconduct if a clear distinguishable illness is not evident but all illnesses are supported by medical evidence. Alternatively, the question has to be asked whether an employee’s persistent ill health absence if regarded as genuine (the authenticity of medical certificates are accepted) should not be treated based on an incapacity process (ill health or poor work performance). A factor that is of great importance in the investigation of this issue relates to the individual’s ability to perform their duties. This investigation may also not be without problems; for instance if the individual has the ability to perform their duties, but due to persistent absence, they are not at work to perform such duties. This critical question assists in deciding whether the illness or the absence is the concern. It also ensures that dealing with persistent/habitual absence is very difficult. The last issue that is of vital importance is whether an incapacitating illness can be regarded as a disability. If an individual is regarded to be disabled it places a greater duty on the employer to accommodate such disability. This means that it might become pertinent to establish (as part of any incapacity investigation) at the outset whether the illness/injury can be regarded as a disability.
The cases that will be discussed hereunder serve as the most important precedent regarding the issues of ill health absenteeism. The *Hendricks* case focuses on ill health incapacity, whilst the *Mambalu* case investigates the issue of abuse of sick leave and incapacity. The *MTN* case touches on both incapacity for ill health and incapacity based on poor work performance and the *Standard Bank* creates precedent in terms of an incapacitating illness or injury that is considered a disability. The facts of each of the cases as well as its outcomes will be clearly discussed and thereafter the key learnings from each of the cases will be investigated.

4.1  

**HENDRICKS v MERCANTILE & GENERAL REINSURANCE CO OF SA LTD**\(^{149}\)

The employee worked for the respondent for 28 years. The employee had continual stomach discomfort and heartburn after a peptic ulcer operation and later on developed back pain. In one year he was away from work for 16 days and the following year for 38 days.\(^{150}\) The following year the applicant was away from work for another 128 days due to a back operation and a broken leg. After consulting a health claims counselor, it became apparent that the applicant suffered from anxiety and depression and was very unhappy about the fact that he was not promoted and that he was reporting to individuals that were younger than him. He felt that he was being discriminated against.\(^{151}\) The applicant was unable to communicate his feelings with colleagues and tried to avoid causing disruptions or a fuss in the office environment. It was decided that the human resources executive should provide the applicant with personal counseling. The purpose was to improve his self esteem and try and diminish any feelings of being overlooked and unnoticed.\(^{152}\) The human resources executive had a couple of meetings with the applicant. However, he did not keep appointments and it seemed as if there was no improvement. It became clear that one of the other issues of concern was the applicant’s attitude towards his supervisors.\(^{153}\) During the next year he was off for a further 28 days.\(^{154}\) His absences caused friction between himself and his line manager as it was alleged that when he was off this created back logs and additional work for other

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\(^{149}\) (1994) 15 *ILJ* 304 (LAC).

\(^{150}\) *Supra* 305.

\(^{151}\) *Supra* 306.

\(^{152}\) *Ibid*.

\(^{153}\) *Ibid*.

\(^{154}\) *Supra* 307.
Further complications presented themselves when the merger of departments took place and the applicant and colleagues were required to attend training. This caused anxiety for the applicant because of his limited capabilities and resulted in a strained relationship with the training coordinator. The applicant was once again sent to the health claims counselor. It was believed that he should be moved to an area which was less stressful or that anxiety management and assertiveness training might help as an alternative to a transfer.

The applicant’s doctor booked him off due to stress. As the applicant’s absences were related to anxiety and depression, the company felt that it might be beneficial if the applicant was sent to a psychologist for an in-depth report. The psychologist referred him to a psychiatrist. The psychiatrist reported that his stresses seemed to relate mainly to his work situation and that his coping skills were very limited. He had feelings of helplessness and his anxiousness caused his depressive state. The human resources executive was once again asked to consult with the employee. She discussed his general capacity to continue working as a clerk based on his ill health, also that his absences created extra work for other individuals as well as the effect that the work situation was having on his health. The possibility of being transferred to a new position was discussed with the applicant. The position would be less stressful but would have no reduction in benefits. The applicant rejected the offer as he believed that it was a demotion and that his prospects of a promotion would be limited. He was also dissatisfied with the fact that he would be placed on a three month probationary period and was given no guarantee that he would be employed until retirement. The respondent was willing to waive the probationary period although it was standard practice, but could not offer a guarantee that he would be employed until retirement. The position was once again offered to the applicant, but it was rejected again. The applicant was dismissed after attending a disciplinary enquiry.

The following was evident: the employee was persistently absent, this caused additional work for the other employees and communication between the applicant and the other employees

155 Ibid.
156 Ibid.
157 Supra 308.
158 Ibid.
159 Supra 309.
160 Ibid.
161 Ibid.
162 Supra 309 & 310.
163 Supra 310.
was non-existent.¹⁶⁴ The applicant held that he was getting sicker as a result of the depressing circumstances in his job. He did not get along with his supervisors. One supervisor held that he was often abusive towards her. His absence made it impossible for him to perform his work properly. The applicant could not give any assurance that his health would improve if he remained in his department. The company tried to accommodate the employee by offering him another position in the company. As the employee refused the company had no other option as to terminate the applicant’s employment as he was not capable of performing his current duties.¹⁶⁵

The court held that the following would be considered a fair procedure:

“The substantive fairness of dismissal depends on the question whether the employer can fairly be expected to continue the employment relationship bearing in mind the interests of the employee and the employer and the equities of the case. Relevant factors would include inter alia the nature of the incapacity; the cause of the incapacity; the likelihood of recovery, improvement or recurrence; the period of absence and its effect on the employer’s operations; the effect of the employee's disability on the other employees; and the employee's work record and length of service.”¹⁶⁶

The other employees would have had to change their attitudes towards the employee and even then continued employment in that department would have likely exacerbated his condition.¹⁶⁷ As the employee rejected a reasonable offer of alternative employment and no other interventions seemed to help, the court held that the employer was left with no other option than to dismiss the individual.

4 2  MAMBALU v AECI EXPLOSIVES LTD (ZOMMERVELD)¹⁶⁸

This case was heard in the Industrial Council under the Labour Relations Act of 1956.¹⁶⁹ The applicant’s absence amounted to 47 days in a period of two years. It was also shown that the applicant had a habit of absenting himself or being ill shortly before or after weekends.¹⁷⁰ The applicant had a contractual entitlement of 15 days sick leave per annum. Any sick absence was treated on an unpaid basis once the entitlement was depleted; however the submission of a medical certificate was still required. The applicant provided authentic

¹⁶⁴ Supra 312.
¹⁶⁵ Supra 311.
¹⁶⁶ Ibid.
¹⁶⁷ Supra 315.
¹⁶⁹ Act 28 of 1956.
¹⁷⁰ Supra 963.
The employer contended that the applicant was dismissed due to a rule relating to ill health absenteeism that amounts to poor timekeeping.

The rule stated the following:

“All employee frequently absent through sickness is liable to have his services terminated on the grounds of unsatisfactory timekeeping.”

The evidence led by the respondent alluded to the fact that it believed that the applicant was not being completely honest in respect of his ill health absences especially with respect to the extension of weekends. This pattern seemed to suggest abuse, which greatly differed from the charge of poor timekeeping.

The ambivalence of the respondent’s attitude was clearly reflected in the outcome of the internal appeal hearing:

“Mr. Mambalu was dismissed because of his unacceptable sick leave record and the fact that he abused his sick leave.”

The applicant was dismissed as a result of persistent absence. The issue in dispute was whether the absence was regarded as legitimate and, if it was, whether such absence could lead to dismissal. The applicant did not dispute that he was off from work for 47 days or that most of his absences were near or towards weekends. His contention was that he was genuinely ill and that this was supported by his medical certificates, of which the authenticity was not questioned by management. The applicant contended that his ill health was caused by his working conditions. The court held that the applicant was dismissed for misconduct due to dishonesty regarding sick absences and that this amounted to abuse of sick leave. It further contended that in order to establish abuse, evidence of dishonesty must be provided. Based on this contention the court had to decide whether there was a valid reason for
dismissal as the company had conceded to the correctness of the medical certificates.\textsuperscript{179} The court accepted that the applicant was genuinely ill on each of the occasions that he was absent due to ill health and the provision of medical certificates proved this.\textsuperscript{180} Therefore, the court found that there was not a valid reason for the dismissal and that it was unfair.\textsuperscript{181}

Even though the court held that the applicant was not dismissed for persistent absence (as it accused the applicant of abuse of sick leave), it commented on the procedure required to effect such a dismissal. The court held that such a requirement is nothing more than an operational requirement as absenteeism will impact on the operational requirements of the employer.\textsuperscript{182} The court, however, stated in no uncertain terms that employers cannot treat employees as mere labour units and that the fairness of such a dismissal would have to be investigated.\textsuperscript{183} The court endorsed the explanation of fairness in \textit{Hendricks}, that various factors needed to be established such as; the nature and cause of the incapacity, the likelihood of recovery, the period of absence and its effect on the operations and other employees.\textsuperscript{184} The respondent argued that a duty to accommodate only exists when the illness is work related. The court disagreed with this and held that a view that employees can be dispensed of as mere labour units is unacceptable.\textsuperscript{185} The court held that the employer had a duty to consult with the employee regarding his illness and held that it did not do so. It only tried to blame the employee for his absences and did not realize that his attendance improved during the period prior to his dismissal.\textsuperscript{186}

\section*{4.3 \textit{AECI EXPLOSIVES LTD} v \textit{MAMBALU}\textsuperscript{187}}

The matter was referred to the Labour Appeal Court and the facts of the case were reiterated. As indicated above, the applicant had dismissed the respondent by relying on its rule regarding ill health absence that amounts to poor timekeeping. It also, in part, based its decision on the conduct of the employee in that it was believed that the respondent was abusing his sick leave.\textsuperscript{188} The employer did not question specific illnesses as the employee had medical certificates for all ill health absences; they based their belief of abuse on the fact that he was absent due to illness.

\begin{itemize}
  \item \textsuperscript{179} \textit{Supra} 964.
  \item \textsuperscript{180} \textit{Supra} 965.
  \item \textsuperscript{181} \textit{Supra} 968.
  \item \textsuperscript{182} \textit{Supra} 965.
  \item \textsuperscript{183} \textit{Ibid.}
  \item \textsuperscript{184} \textit{Supra} 967.
  \item \textsuperscript{185} \textit{Supra} 965.
  \item \textsuperscript{186} \textit{Supra} 967 & 968.
  \item \textsuperscript{187} (1995) 16 ILJ 1505 (LAC).
  \item \textsuperscript{188} \textit{Supra} 1507.
\end{itemize}
that there was a tendency to take ill towards weekends.\textsuperscript{189} The applicant held that his work circumstances caused his illness in that he was exposed to fumes, he was not given a dusk mask and he moved from hot to cold areas. All of these issues made him susceptible to influenza.\textsuperscript{190} Upon the submission of evidence it was shown that the respondent’s allegations were unfounded. The court commented on the ambivalent attitude that the employer took regarding the respondent’s absence. The company on one hand accepted that the respondent was genuinely ill as it did not question the medical certificates that stated that he suffered from influenza, but on the other hand, in describing his illness as abuse of sick leave, the company implied that the applicant was malingering.\textsuperscript{191} The court stated that in the former case the grounds for dismissal would be incapacity and in the later it would be misconduct. The judge found that the applicant was unfairly dismissed due to the conflicting nature of the evidence led and the fact that uncertainty existed regarding whether the applicant was genuinely ill or not. As a result, the decision of the Industrial Court was upheld. As the proper reason for dismissal was not properly established, uncertainty reigned regarding the need for the establishment of culpability.\textsuperscript{192}

\textbf{4 4} \textit{MTN SERVICE PROVIDER (PTY) LTD v MATJINO NO & OTHERS}\textsuperscript{193}

The respondent was employed for a period of three years until her dismissal.\textsuperscript{194} She did not attend work for 202 days during her employment with the applicant and exhausted her sick leave within her first year of employment.\textsuperscript{195} The applicant heard from the respondent during November of her first year of employment and further communication only occurred during April of the following year.\textsuperscript{196} The respondent claimed to be unfit due to a major depressive disorder. She had received various forms of counseling, hospitalization, occupational therapy and psychiatric medication. When the respondent returned to work during April she was met with a notification of suspension while her capacity was being investigated. Alexander Forbes was tasked to investigate the absences and they found that it seemed that legitimate absences were interspersed with what seemed to be abuse of sick leave.\textsuperscript{197} They also found that she had received treatment for all of her conditions and that her conditions did not

\begin{itemize}
  \item \textsuperscript{189} \textit{Supra} 1509.
  \item \textsuperscript{190} \textit{Ibid}.
  \item \textsuperscript{191} \textit{Supra} 1510.
  \item \textsuperscript{192} \textit{Supra} 1514.
  \item \textsuperscript{193} (2007) 28 \textit{ILJ} 2279 (LC).
  \item \textsuperscript{194} \textit{Supra} 4.
  \item \textsuperscript{195} \textit{Supra} 5.
  \item \textsuperscript{196} \textit{Ibid}.
  \item \textsuperscript{197} \textit{Supra} 7.
\end{itemize}
negatively impact on her functional ability and therefore she was found not to be eligible for disability benefits. The company also decided to obtain a report from a psychiatrist. The psychiatrist found that the individual was fit for duty in an environment away from the stressful pressure and recommend that she be transferred. The company dismissed the employee based on the grounds of incapacity. The case was referred to the CCMA and the commissioner held that it was substantively and procedurally unfair and re-instatement was ordered. The company referred the case to the Labour Court for review to substitute the award by declaring that the dismissal was fair or alternatively referring the case back to the CCMA to be reheard. The basis of the review was that the commissioner misconceived the nature of the dispute as he limited the nature of the dispute by omitting the words “due to habitual absenteeism caused by ill health” and that there was no factual basis for the commissioner’s finding that the applicant unilaterally decided what was best for the applicant.

The court said the following:

“It appears from all the evidence that the applicant's decision to dismiss her was based not so much on her incapacity as her long and persistent periods of absence from work due to ill-health. That is why the applicant insisted that the enquiry before the first respondent should have been formulated broader than it was to make reference to the 'habitual' and 'persistent absenteeism' of the third respondent. That is not the test. The test is whether the third respondent was at the time of dismissal capable of rendering her services to the applicant. She was never given a chance to prove that she was.”

It further held that the applicant did not discuss the possibility of alternative positions with the applicant, furthermore it did not consider the psychiatric report or the Alexander Forbes reports. The applicant was not given the opportunity to prove that she was capable of performing her duties when she returned. As the court stated

“she was charged with the very incapacity she was not permitted to disprove.”

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198 Ibid.
199 Supra 8.
200 Supra 9.
201 Supra 2.
202 Supra 3.
203 Supra 11.
204 Supra 14.
205 Supra 12.
206 Supra 16.
The review was dismissed and the decision of the commissioner upheld.207

4 5 STANDARD BANK OF SA v COMMISSION FOR CONCILIATION, MEDIATION & ARBITRATION & OTHERS208

The employee was employed as a mobile home consultant and as part of her duties she was required to visit clients away from the bank’s offices. The employee sustained injuries in a motor vehicle accident, which developed into severe back pain which was later diagnosed as fibromyalgia.209 After the accident she returned to work and continued with the same duties but found it difficult to fulfill her normal duties.210 The employee’s absenteeism became a problem. She was absent for 74 days in 2002, 116 days in 2003 and 59 days in 2004. Furthermore, she was mostly only capable of working a half day as her condition gradually became worse during the day.211 In investigating the employee’s incapacity the employee was required to consult numerous doctors. The medical reports did not declare that she was unfit for work, because she was partially able. She was declared fit for a half day position and a panel of orthopedic surgeons, declared her to be 40% disabled in her work situation.212 The bank’s retirement officer informed the employee that she was not permanently incapacitated and that her application for early retirement was declined.213 The doctors at the bank’s corporate health division advised on three different occasions that an occupational therapist report should be compiled, but an occupational report was never obtained.214 A panel of orthopedic surgeons recommended that her workstation should be adapted and that she should undergo posture training.215 It was also advised that the employee perform lighter duties. The employee was assigned new administrative tasks like filing and checking loan applications for errors. These tasks made her feel incompetent as she did not find it stimulating and she did not have enough work to keep her busy.216 Her duties were adapted to confirm the income of clients, which meant that she had to write whilst speaking on the telephone. This proved painful for her.217 Whilst helping out in another department the employee made use of a telephone headset, which resolved her problem with talking and

207 Supra 17.
209 Supra 2.
210 Supra 3 & 4.
211 Supra 16.
212 Supra 18.
213 Supra 19.
214 Supra 51 & 38.
215 Supra 23 & 24.
216 Supra 4 & 5.
217 Supra 6.
writing simultaneously. The headsets were incompatible with the telephones in her department. It was decided that her duties would be adapted to ensure that she would not be required to speak on the telephone. However, it was later decided to offer her a position of switchboard operator but she declined on the basis that it constituted a demotion. She was assigned to shredding papers, folding files, receiving and dispatching faxes. This physical work was painful and demoralizing. The employee could not cope with the stress of her old job; she could not lift heavy objects, raise her arms above a certain height, walk, stand or sit for long periods of time.

The employee was dismissed as a result of her high absenteeism and low productivity. The court held that employee was unfairly dismissed based on various reasons discussed hereafter. The company did not follow a proper procedure and this was inextricably connected to the dismissal which made it substantively unfair. The court held that the employee’s condition amounted to a disability and that the company failed to justify the dismissal. The court held that the employees admittance that she could no longer work must be seen in the light of the duties given to her and also her application for early retirement, that required her to be unfit for duty (applying for early retirement was not the employee’s preferred option). The company did not obtain an occupational therapist report which was at the core of investigating whether the individual would be able to perform once her duties were adapted. The company did not properly accommodate the individual. The bank was not willing to give the employee a headset because it was not cost effective and it was not medically recommended. The bank refused giving the employee her own computer and password. This decision was based on medical information that she could not lift her arms and should preferably not work on a computer. The bank did not buy her a suitable chair. She was left to her own devices to try to find a suitable chair within the organization. It was submitted that the employee would not be suitable in a job of income confirmation as she could not work a

218 Supra 7.
219 Supra 8.
220 Supra 12.
221 Supra 14.
222 Supra 13.
223 Supra 147.
224 Supra 106 & 115.
225 Supra 109.
226 Supra 45-46.
227 Supra 48.
228 Supra 54 – 56.
full day. She was also not entrusted with working on the computers because the company was of the opinion that her medication impaired her ability. All of these reasons provided by the company were held to be ill informed and led to her dismissal being declared unfair.

4.6  KEY LEARNINGS

4.6.1 The tension between misconduct and incapacity disputes

The relevance of the Mambalu case lies in the fact that it encapsulates the tension between misconduct and incapacity cases when the issue at the core of the dispute is related to ill health. Misconduct cases involve a measure of culpability. This means that in order for the offence to be considered misconduct, fault on the part of the employee has to be proved. A charge of abuse of sick leave is considered misconduct, therefore the absences occurred dishonestly i.e. the employee was not ill when he or she was booked off for ill health. Abuse of sick leave is usually suspected once an employee is ill on days that extend other periods of legitimate absence, like weekends or public holidays. Assuming that medical certificates are provided, and no alterations or irregularities are evident, the employer will find it difficult to prove abuse. As there is a measure of culpability it is pertinent that the misconduct needs to be proved.

This was the case in Mambalu because the employer accepted the authenticity of the medical certificates. The court actually went as far as to say that in such an instance the employer cannot rely on a charge of abuse of sick leave and only use on an incapacity process. The question is whether a charge of abuse of sick leave is still valid and relevant, based on this finding? A possible answer is that a charge of abuse of sick leave is often not appropriate. It becomes very difficult to prove abuse, assuming that medical certificates are provided for ill health absence. Suspicions of abuse without the proper proof to substantiate such claims will not be sufficient. Abuse of sick leave simplistically refers to a situation in which sick leave has been improperly obtained. This in turn means that the concept encapsulates an element of dishonesty. Therefore to prove abuse, the dishonest behaviour that led to the abuse will have to be proved. A charge related to dishonesty could be as appropriate and possibly even more appropriate in circumstances where medical certificates are fraudulent.

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229  Supra 48.
230  Supra 51 – 53.
231  Supra 1510.
Incapacity related to ill health absence is distinguished from this because here it is accepted that it is no fault of the employee and that the absences are legitimate.\textsuperscript{232} The focus shifts to investigating whether the employee is capable to render a service and, if they are not, how they can be helped to do so. The distinction is not easily made because in both instances exactly the same absences can lead to very different conclusions, based on whether medical certificates are produced or not.

If it is assumed that misconduct is not the best way to deal with ill health absenteeism it almost seems obvious that incapacity based on ill health absenteeism would be the best procedure. Three potential problems exist with this approach: the first is that the fairness requirements\textsuperscript{233} are more difficult to meet in the case of persistent short term absence, secondly that this approach does not provide an answer when an employee’s physical ability to do the work is not diminished but his or her absence is disruptive and thirdly certain incapacitating illnesses may be considered to be disabling.

### 4.6.2 Persistent absenteeism: ill health incapacity or not?

The concept of absence amounting to incapacity was endorsed by the Labour Appeal Court in Hendricks and Mambalu. The court in Hendricks held the following:

> “It should have dismissed him 'for his incapacity to perform his job where such incapacity [was] due to persistent absence from work because of genuine ill health.’”\textsuperscript{235}

The notion of persistent absence in comparison to pro-longed absence was considered by the Labour Appeal Court in the AEI Explosives v Mambalu\textsuperscript{236} judgment. The court held that persistent absence makes the employee unreliable, as the absence could occur on any day and it couldn’t be anticipated. This, the court held was very different from pro-longed illness in which the company was aware of the employee’s condition and the length of absence related to it.\textsuperscript{237}

\textsuperscript{232} “Legitimate” refers to absences which are either authorized leave or leave that is taken where no suspicions regarding abuse exist (the authenticity of the absence is accepted).

\textsuperscript{233} Supra Code of Good Practice.

\textsuperscript{234} Own emphasis.

\textsuperscript{235} Supra Hendricks 312.

\textsuperscript{236} (1995) 16 ILJ 1505 (LAC).

\textsuperscript{237} Supra 1510.
The Labour Appeal Court in *AECI Explosives v Mambalu* favourably quoted Anderman in *The Law of Unfair Dismissal (2nd ed)* at 180 which states that:

“Where an employee is dismissed for persistent but intermittent absence for ill health then guidelines for a reasonable procedure may be different from those that have been evolved for prolonged absence owing to long term illness. In the former type of cases the use of formal medical investigation and enquiries into the genuineness of the illness are not as useful a procedure for the employer as one which helps the employer determine whether in the circumstances of the employment the employee's record of absence constitutes sufficient grounds for dismissal.”

The *Mambalu* case is indicative of the fact that persistent short term absence and long term absence cannot be treated similarly. Long term absence clearly needs to be treated as ill health incapacity. In answering the question whether persistent absence amounts to ill health incapacity two schools of thought can be applied. The first being that the illness or illnesses cause physical incapacity therefore physical ability is diminished. The other relies on the fact that as long as a person is absent they are not able to perform and therefore “incapacitated”. The subtle difference is that in the one school of thought the focus is on the absence itself the absence causes the inability to work. In the other, the focus is on the illness causing the diminished ability.

Persistent absence can be seen as incapacitating by employers, generally as a result of the time spend away from work. The nature of the illness cannot be such that it warrants prolonged periods of absence and therefore persistent short term absence cannot be treated in the same manner. Medical investigations may not be very helpful in terms of handling the issue, due to the short term nature of the illnesses. This makes accommodation extremely difficult.

A clear difference exists between the *Mambalu* and *Hendricks* cases. The employees in both cases were persistently absent and their persistent absence was regarded as excessive. In *Hendricks* the company did everything that it could do to try and assist the employee and his illnesses were of a long term nature and in *Mambalu* the illnesses were frequent but not of a long term nature and the company did not try to accommodate the individual.

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238 *Supra* 1511.
239 Refer to note 234.
463 Contractual entitlement

The issue of what is considered excessive was discussed earlier in this work, but needs to be revisited in an attempt to answer the question of what is considered persistent absence. The issue of sick leave entitlement needs to be discussed. A contractual entitlement of 120 days sick leave per annum was raised as a defense by the applicant in the *Hendricks* case.240

The court said the following regarding illness and a contractual entitlement to leave:

“The decision to dismiss the employee because of such absences, based on the employer's operational requirements, stands apart from any contractual entitlement to sick leave. The two aspects are entirely separate and distinct entities. The 120-day entitlement is obviously to provide for major illnesses and health eventualities such as a heart attack or by-pass surgery… As far as dismissal for incapacity due to ill-health is concerned the test remains whether because of the employee's absences and incapacity, having regard to the frequency and duration of such absences and the effect they have on his co-workers’ morale, the employer could in fairness have been expected to wait any further before considering dismissal.”241

In the *AECI Explosives v Mambalu* case certain absences were excluded in the investigation of the individual’s absence record. It was unclear to the Labour Appeal Court why certain absences should be excluded from a calculation which is considering an unsatisfactory rate of sick leave absenteeism.242

An interesting contention is that if the employee is absent due ill health and their sick leave entitlement is depleted, the submission of medical certificates alone without a decision to grant unpaid sick leave could be considered a breach of contract (as a contractual service is not being provided). An employee is not entitled to unpaid sick leave; however it would most probably be unreasonable to refuse it. Absence beyond an entitlement to leave would in any event still be subjected to the normal dismissal fairness requirements.

As noted in Chapter 2 excessive absence cannot be defined and is based largely on the operational requirements of each employer (which explains the great disparity in terms of what is considered excessive by each). At the same token persistent absence will also differ from one employer to the next based on their perception of excessiveness and the frequency in which absence should take place. Even though a contractual sick leave entitlement is not

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240 *Supra Hendricks* 313.
241 *Supra* 314.
242 *AECI Explosives v Mambalu supra* 1517.
necessarily used as a measure to establish excessiveness, it has become more prevalent to use the BCEA sick leave entitlement to establish an acceptable standard of attendance.

### 4 6 4 Attendance standard

The Labour Appeal Court in *AECI Explosives v Mambalu* suggested that substance should be given to the word frequently. If the parameters are clearly set out then employees will know what is expected of them. The court said that if the employee knew the limits, he could have worked in instances where he was capable even though his health wasn’t completely up to scratch or if he was malingering then he would not exceed the bounds set by the company.\(^{243}\)

The court made much of the fact that clear guidelines were not established in terms of what was required of the employee. The company counseled the employee infrequently and when it did, it looked at the absences in its totality and not only the absence since the previous counseling.\(^{244}\) The problem with this is that the company did not realize that in terms of absenteeism, the last 6 months of employment was better than any other half period in the preceding three years.\(^{245}\) This clearly showed that the applicant had improved his attendance.

It is suggested that as part of the incapacity investigation it is necessary to establish whether there is a clearly distinguishable illness or illnesses that lends itself to accommodation. If this is not prevalent an ill health incapacity process can possibly not be implemented properly. The likelihood then also exists that the absences are of a persistent short term nature. Accommodation of short term illnesses that cause short term absence cannot be accommodated as the adaptation of the job or job duties will not have an effect, except if the job itself causes the short term absence. It is contended that such absences should be treated on the basis of incapacity based on poor work performance. This argument is supported by the fact that the issue in dispute is not the employee’s ill health rather the frequency of absences. As mentioned in Chapter 3 many absenteeism policies with rigid parameters in terms of the number of days or occasions absence amount to nothing more than an attendance standard.

The importance with following such a process is that a performance standard must be clearly established. As mentioned earlier the attendance standard does not necessarily have to be based on a contractual entitlement, however the prevalence of linking an attendance standard

\(^{243}\) *Supra* 1519.

\(^{244}\) *Supra* 1513.

\(^{245}\) *Supra* 1518.
to the BCEA entitlement has become prevalent. In *Numsa obo Gwadela v Halberg Guss South Africa (Pty) Ltd* the commissioner also held that it is appropriate to start the counselling process before the threshold has been reached.\textsuperscript{246}

### 4.6.5 The ability to perform

As alluded to earlier, one of the contentious issues regarding ill health absence is whether absence alone is sufficient to render a person incapable. The court in *MTN* found that the employee was dismissed based on her absence and that her ability to fulfill her job function was not assessed. This is a contentious issue purely because an employee may be completely capable of performing the work when at work, but when not at work clearly that person cannot perform their duties due to their absence. The court rightly assessed, that when an individual is dismissed on the basis of incapacity due to ill health, the fairness requirements need to be followed *ie* a determination must be made as to what extent the individual is capable of performing their duties. The *MTN* case serves as an example of a long term incapacitating illnesses.

From the above sections the following issues are accentuated: The first is that a distinction can be made between long term and short term illnesses; secondly an ill health incapacity approach is more suited to medium or long term illnesses; thirdly persistent absence should possibly be treated as poor work performance (inability to achieve a reasonable attendance standard); fourthly in a poor work performance incapacity related to attendance, the issue is not the employee’s ability to perform their duties when at work rather their non-ability as a result of their absence.

### 4.6.6 Incapacity or disability?

The first step in an ill health incapacity investigation is establishing whether the employee is able to fulfill their current duties. If the answer is yes, then there is no need for an enquiry. If the answer is no, then the extent to which the employee is capable of performing their duties must be investigated. It needs to be established whether the job can be adapted, thereafter if the duties can be adapted, thereafter whether any other suitable work is available.\textsuperscript{247}

\textsuperscript{246} ARB 31/03/2009 MEPE 879 unreported.

\textsuperscript{247} *Standard Bank supra* 72 – 75.
An important consideration when incapacity is investigated is whether the incapacity amounts to a disability. This would mean that the investigation would revolve around establishing whether the impairment amounts to: “a long term recurring physical or mental impairment that substantially limits prospects or entry or advancement in employment”.²⁴⁸ In the Standard Bank case disability was acknowledged,²⁴⁹ and a full scale investigation into whether the condition amounted to disability was not done. The importance of establishing whether an incapacitating illness amounts to disability lies in the fact that disabled individuals are afforded special protection in terms of the EEA and the LRA.

The court in Standard Bank held the following regarding the importance of establishing this:

“The Constitution and the EEA prohibit discrimination on the grounds of disability. Dismissal on a prohibited ground of discrimination is automatically unfair. It is further contended that if an employer fails reasonably to accommodate an employee with disabilities, the dismissal of that employee is not merely unfair but automatically unfair.”²⁵⁰

It is therefore prudent for the company to establish whether the impairment amounts to disability because the duty to accommodate goes further due to fact that it may be considered discrimination if proper accommodation does not take place.

The court said the following in this instance:

“Disability is not synonymous with incapacity. An employee is incapacitated if the employer cannot accommodate her or if she refuses an offer of reasonable accommodation. Dismissing an employee who is incapacitated in those circumstances is fair but dismissing an employee who is disabled but not incapacitated is unfair.”²⁵¹

The court also held that disability cannot be interpreted restrictively as the purpose of preventing discrimination may be defeated. ‘If a diabetic is not a person with disabilities because he mitigates his condition with medication, the protection against discrimination will be lost to many disabled people.”²⁵²

²⁴⁸ Supra 68.
²⁴⁹ Supra 14.
²⁵⁰ Supra 83.
²⁵¹ Supra 94.
²⁵² Supra 69.
4 6 7 Accommodation
As established earlier, implicit in both ill health incapacity and disability cases is the duty to accommodate. The purpose of accommodation in the sense of an incapacity investigation is to ensure that the employment of the impaired can continue. As with other no-fault dismissals, the ideal is to preserve employment. From a disability point of view, accommodation also serves to preserve employment; however the purpose is far greater. Individuals with disabilities are considered a vulnerable group with attributes different from mainstream society.\textsuperscript{253} As a result of this, integrating these individuals into mainstream society can ensure that their dignity is restored.\textsuperscript{254} It becomes very clear that the purposive treatment of disabled individuals affects not only the individuals but the ‘group’ that they represent in society. The accommodation in the case of disability serves to ensure substantive equality and therefore implicit in this accommodation is a duty not to discriminate.\textsuperscript{255} The court in \textit{Standard Bank} held that the only justification for not being able to accommodate is undue hardship. This is defined as an: “action that requires significant or considerable difficulty or expense”.\textsuperscript{256} If the employer can prove that it attempted to reasonably accommodate an employee and the employee rejects this then it would be considered to be fair.\textsuperscript{257}

4 6 8 Disability: poor work performance
Once an illness or injury is considered a disability, different rules apply in terms of assessing performance. This is why it is imperative to establish whether an incapacitating illness amounts to a disability.

In the \textit{Standard Bank} case the bank acknowledged the individual’s disability yet she was treated as if she was a person with full capabilities.\textsuperscript{258}

The court held:

“Having regard to [her] disability, the bank could not rationally or fairly measure her performance on the same standard as other employees.”\textsuperscript{259}

\textsuperscript{253} \textit{Supra 62}.
\textsuperscript{254} \textit{Supra 65}.
\textsuperscript{255} \textit{Supra 79}.
\textsuperscript{256} \textit{Supra 96}.
\textsuperscript{257} \textit{Supra 92}.
\textsuperscript{258} \textit{Supra 20}.
When an employee is considered disabled it may be necessary to adapt the way performance is measured. In the MTN case it was held that it needs to be proved that the individual is incapable of performing, the question remains whether a concept of an alternative performance appraisal is also applicable in an incapacity case? The answer provided by the Code of Good Practice is that the employee is assisted to achieve the performance standard, in the event that they cannot they are moved (if possible) to a position where they can meet the performance standard. Therefore, in a disability case the standard or the way the standard is evaluated may be adapted, in the case of incapacity the standard remains unaffected, but the employee is assisted in attaining the standard.

4.7 CONCLUSION

It is clear that when dealing with ill health absence, defining the parameters of impairment and the absences related to the impairment need to be clearly established in order to deal with the issue in a fair manner. It is evident from the above that doing so is a very difficult task.

Indeed, in AECI Explosives v Mambalu the court had the following to say about the different procedures for various types of dismissal:

“There has been a tendency in the development of our labour law to require more or less strict compliance with a procedure according to the category of dismissal involved (misconduct, incapacity, operational requirements). Separate sets of rules have been developed for each category of dismissal. While such developments have no doubt been of some benefit there is a danger that procedural rules developed and distinguished in this manner may become too rigid to be of useful...the dividing line between the category of misconduct and the category of incapacity is not easily and clearly drawn. Indeed many dismissal cases comprise elements from different categories.”

The issue relates to conflicting, competing interests. The employer engages the services of an individual and in exchange for money expects certain duties to be fulfilled. The individual is not merely a labour unit and has the right to be fairly treated and compensated even in instances where services are not provided ie sick leave, maternity leave, and annual leave.

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259 Supra 121.
260 Supra 86-89.
261 Supra Code of Good Practice s 9.
262 Supra AECI Explosives v Mambalu 1512.
The employer has certain operational requirements and assuming that these are not unrealistic or unreasonable the employee should fulfill them. If the employee is unable to fulfill these requirements, a dismissal can be warranted not on the operational requirements of the employer but on the inherent issue that faces the employee that renders him or her incapable of fulfilling the operational requirements of the employer. Even though the operational needs of the employer are affected by ill health absenteeism, the needs of the company come second to the needs of the incapacitated employee and accommodating the needs of such an employee within the operational needs of the employer is the issue. This accommodation is even greater once the incapacity is considered a disability. In order to manage the processes of ill health absenteeism, the employer needs to investigate the absences and the illnesses thoroughly in order to deal with the issue effectively.
CHAPTER 5
CONCLUSION

Excessive absence has become a major predicament for companies. A large proportion of absenteeism can be attributed to ill health absences. Labour costs for many companies amount to a significant portion of their total costs. Inefficiency and inflated labour costs as a result of absenteeism therefore has a significant impact on the viability of companies. Many companies have prioritised the need to find ways to manage or curb absenteeism. Ill health absenteeism is more difficult to manage than other types of absenteeism. Ill health absenteeism has an element of legitimacy; it being reasonable to expect employees to become ill at some point during their employment tenure. In South Africa a labour law imperative to act fairly towards employees is underpinned by a constitutional right to fair labour practices. It is within these confines that ill health absenteeism needs to be managed. The first issue that was raised in the text is an attempt to define ill health absence. This is necessary because it is admitted that not all ill health absences are problematic. To the contrary, from a social insurance point of view, ill health absences are seen as a legitimate reality, that employees should be offered protection against. In South African legislation regarding minimum conditions of employment, absence as a result of sickness is legitimized and employees are offered the benefit of protected income during times of ill health. It is thus established that a distinction must be made between legitimate absence and problematic absences.

Strydom et al define sickness as:

“… some physical or mental condition which disables an employee from fulfilling his or her duties either temporarily or permanently. It is a form of incapacity caused by a medical condition.”

Ill health absenteeism can therefore be seen as non-attendance at work due to a medical condition which causes the individual to be incapable of fulfilling their duties. Further to this, ill health absence can be categorized and these categories serve to highlight some of the problematic issues relating to ill health absenteeism.

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263 Supra Sick Insurance Recommendation.
264 BCEA s 22.
The first category is ill health absenteeism that is deemed incapacitating. Based on the definition of ill health absenteeism, all ill health absenteeism is incapacitating as it causes the employee’s functional ability at work to be diminished. Incapacitating illnesses comprise two elements; the first being that an inability to perform duties exists due to the physical impairment that the illness causes; the second is that an inability to perform duties stems from the amount of time that the illness causes the individual to be removed from their work environment. These elements are overlapping and not mutually exclusive. Even though ill health absenteeism that is deemed unproblematic comprises both of these elements, such absences only become problematic when it becomes intolerable to the employer. In instances where the problem relates to the inability of the individual as a result of the time spent away from work, the absences are usually frequent or very lengthy. The employer can no longer tolerate this and believes that a threshold has been reached where these absences are deemed excessive. Various cases were quoted to show the lack of a universal definition of what is deemed excessive absence. Case law suggests that a period ranging from less than the statutory sick leave entitlement to a period of 202 days absence can be seen as excessive. Excessive absenteeism cases can relate equally to situations where a clearly distinguishable illness exists and to situations where numerous illnesses present themselves. Illnesses that diminish the employee’s physical capacity to perform can, in a very general sense, be distinguished from excessive absence in that in certain instances even when the employee returns to work their performance is diminished and therefore an investigation into their ability to perform work whilst on duty is significant. This does not mean that the potential excessive nature of the absences is irrelevant, rather that a clearly distinguishable illness is causing significant impairment. The major difference between the two elements is that if the focus is on physical impairment it relies more heavily on an investigation of the illness.

The second category of ill health absenteeism is misappropriation. This relies on the concept that an entitlement to sick leave is being used inappropriately. Therefore, an employee may be using their sick leave when they are not genuinely sick, almost as an extension of their annual leave. Issues that are raised under the banner of misappropriation are abuse of sick leave and malingering. The concept of misappropriation includes an element of deceit or dishonesty. In this instance therefore the illness does not cause an ability not to perform duties and a corresponding entitlement to time off until their ability is restored. This type of absence is problematic for obvious reasons, however with the prevalence of submitting medical certificates, proving dishonesty is a very difficult task. Instances such as absences that extend
other periods of legitimate time off like public holidays or weekends have always been seen as indicative of abuse. Case law suggests that such generalized assumptions cannot be regarded as sufficient proof that abuse is taking place - especially in instances where medical certificates are provided.

The third category of ill health absence is breach of contract. From a contractual perspective an employee is paid in exchange for providing services. The tendering of services is an essential part of an employment contract. If the employee does not provide a service as per their contract of employment, it can be seen as a breach. The legislature has rectified this common law position through the statutory entitlement to sick leave. Employees now have a statutory right to take sick leave and such absences will no longer be seen as a breach. There is nothing to suggest that sick leave in excess of the statutory limit needs to be granted, therefore additional paid or unpaid sick leave does not need to be granted. However, if unpaid sick leave is not granted by the employer and the employee is absent for reasons of ill health, such absence could be considered a breach of contract. The employer’s decision not to allow unpaid sick leave will be scrutinized and may even be deemed unreasonable. A contractual entitlement may be used to establish the threshold of what is deemed “excessive”.

The fourth category is disabling illnesses. Even though the words “incapacitating” and “disabling” are often used interchangeably, disabling illnesses unlock a whole range of different requirements and protections. The Code of Good Practice provides guidance in terms of what is considered a disability. Case law suggests that the definition of what is deemed a disability should not be unnecessarily narrowly interpreted. Disabled individuals are seen as a marginalized group and are afforded special protection. Case law suggests that two opposite views exist regarding whether illnesses should be regarded as disabling if their adverse effects can be limited through medication or other means.

The categorization of the dispute is vitally important because it will largely influence the way in which the dispute will be dealt with. South African labour law is very descriptive in terms of the substantive and procedural requirements of dismissals. Dismissals are largely split between those issues where there is culpability on the part of the employee and those where there is not any culpability. In culpability dismissals a misconduct approach is applicable and

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266 *Supra* Code of Good Practice on Disabilities.
if there is no culpability then either an incapacity process or operational requirements process is suitable.

Misappropriation relates directly to a disciplinary enquiry based on misconduct. As alluded to earlier, this assumes an element of dishonesty and, therefore, culpability on the part of the employee. Culpability however needs to be proved and suspicions are not good enough to act substantively fair. Proof would have to be provided that the employee utilized their sick leave for purposes other than what it was intended for or the illnesses were of such a nature that it did not warrant the number of days that was taken. If medical certificates are produced it is very difficult to dispute the genuineness, after the fact.

If illnesses are considered genuine, then ill health absence can potentially be treated based on ill health incapacity or poor work performance incapacity. The Code of Good Practice provides guidance in terms of dealing with ill health absences as incapacity. Employees that are excessively absent due to ill health have in most cases been dismissed for ill health incapacity regardless of whether the absence relates to one or more illnesses. There are a limited amount of cases that support the view that persistent absence can be seen as a failure of an employee to meet a performance standard and the performance standard is related to their attendance at work.

Illnesses may not only be regarded as being incapacitating but also disabling. It has already been established that disabled individuals are afforded greater protection. Affirmative action measures may be used to provide these individuals with opportunities. This clearly shows that a greater duty exists in attempting to accommodate such individuals.

The pertinent case law offer valuable information regarding the research problem. The tension between treating ill health as misconduct or incapacity is highlighted. It is clear how confusion can exist as to what route is the most appropriate to follow. In both instances it is based on exactly the same absences and is largely influence by whether there is a belief that the illnesses are genuine or whether the individual was malingering. It has now been clearly established that if medical certificates are accepted as genuine that a misconduct route can no longer be followed. It has also been highlighted that a distinction must be made between

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267 Hunt and Rennies Distribution Services ARB 12-12-2005 case no KNDB14172-05 unreported.
268 Supra Code of Good Practice on Dismissal s 10.
longer term absence and persistent short term absence. In the case of short term absence the employee becomes unreliable due to their *ad hoc* short term absences that are very disruptive to the operations of the employer. The employer must define what type of frequent absence it would deem as problematic and make the employee aware of this. This amounts to nothing more than establishing a standard. The standard does not need to be influenced by any contractual leave arrangement. The employer needs to assess at what point absences become intolerable based on its operational needs. If an employee presents the employer with a bona fide long-term illness, the employee cannot be treated in the same manner as a person with persistent short term absences. These individuals should be treated as ill health incapacity cases and be given the necessary accommodation. It is imperative in the instance of long-term absence that it should be established whether the employee is capable of performing their duties. The establishment of whether disability exists also needs to be investigated, because of protection afforded to disabled individuals in terms of South African legislation. A greater duty exists for the employer to accommodate when an individual is disabled. In the instance of an ill health incapacity case it is necessary to establish whether the employee can still perform; in the case of disability, accommodation may even result in changing the way performance is measured.

**Recommendations**

The charge of abuse of sick leave is often irrelevant. In most instances employees provide medical certificates. These medical certificates cannot be disputed based purely on a suspicion that malingering is taking place. Even if it can be proved that medical certificates are fraudulent, a charge related to dishonesty is more appropriate than abuse of sick leave.

Frequent short term absence where no distinguishable illness exists should be treated on the basis of poor work performance. The support for such an argument lies in the fact that the issue in the dispute is not the employee’s ill health but rather the frequency of absences. Once it is accepted that such absences are genuine, reliance cannot be placed on misconduct. To do this is an outdated manner of dealing with ill health absence as the fairness requirements inevitably cannot be met. Assuming that there is no distinguishable illness it becomes virtually impossible for an employer to deal with the issue on the basis of ill health incapacity. The establishment of whether the illnesses are temporary or permanent cannot be determined.

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269 *AECI Explosives Ltd v Mambala* (1995) 16 ILJ 1505 (LAC) 1510.

270 *Supra Hendricks* 304.
In determining alternatives to dismissal, the nature of the job, the seriousness and the period of absence needs to be considered. It needs to be established whether the job itself can be adapted, thereafter whether the job duties can be adapted, and finally whether alternative employment is possible.\textsuperscript{271} If absence rather than illness is at the core of the dispute, it is evident that the types of accommodation required in ill health incapacity disputes will have no effect. Persistent absence due to illnesses that cause short-term absence cannot be accommodated. Accommodation of the job or duties will have no effect. The only accommodation that seems available is to accept the various short term illnesses and the resultant absences. This does not seem fair to the employer and will definitely not suit their operational requirements.

If incapacity due to poor work performance is considered the proper way of dealing with persistent absence, the issue that is more difficult to deal with is what will be considered a fair performance standard. The question in a poor work performance case does not relate to whether the person is able to perform their duties but rather whether they failed to meet a performance standard. Absenteeism policies that prescribe the amount of occasions or days that an employee may be absent, amounts to nothing more than a performance standard. Case law suggests that the statutory limits in terms of sick leave may serve as a guideline for determining the performance standard. In certain cases dismissal occurred prior to the statutory limit being exhausted.\textsuperscript{272} The opportunity to improve has to be provided to the employee prior to dismissal. Even though the genuineness of illnesses are accepted in such circumstances, the persistent short-term nature means that the employee must be made aware that their attendance is unreliable. Employees will have to manage the process of deciding when they are capable of performing at a slightly decreased rate or whether they are completely incapable of performing. This means that employees that are aware of their poor attendance record will not automatically decide to take time off for all ailments and decide to manage which ailments really require time off. A system that will require the employee not be absent at all, is unrealistic and if the employee is able to do this it may be indicative that he or she was not as sick as they led the employer to believe. The employer will be required to clearly stipulate the required standard and when time for improvement is given to the employee, any improvement would be noteworthy. The biggest problem with this approach is that ill health absence that will result in a longer term absence cannot be treated in the same

\textsuperscript{271} \textit{Supra Standard Bank} 72 – 75.

\textsuperscript{272} \textit{Supra Ncotoyi v Halberg Guss} ARB 11/03/2009 MEPE 1032 unreported.
manner and performance standards cannot be applicable in such instances, which may create double standards.

If it is established that the employee has an illness which results in longer term absence, the provisions of ill health incapacity become applicable. The focus in such a case is on the illness and not the resultant absence. The employee is not necessarily seen as unreliable, because the impairment is fully diagnosed and the employer may have the opportunity to evaluate whether it can accommodate the individual. The idea is to support the employee in an effort to sustain the employment relationship and reach consensus on the new relationship and expectations between the parties once accommodation has taken place. In the event that accommodation has failed, the employment relationship may terminate.

The most important reason for considering incapacity for poor work performance as the proper way of dealing with persistent ill health absence is that in many cases due to the fact that the employee suffers multiple short-term illnesses that are treated and then may or may not occur in future, the employee returns to work and their ability to perform is not diminished at all. In the case of an ill health incapacity investigation, the first question is whether the individual is capable of performing.\textsuperscript{273} If the answer is yes, then the investigation cannot continue.

As part of any ill health incapacity investigation it is prudent to establish whether the incapacity amounts to a disability. Recent case law suggests that considering whether incapacitating illnesses amount to disability has become prevalent. Special protection is afforded to individuals that are considered disabled and a greater onus exists to accommodate. It is imperative that in all incapacity cases that at least a consideration is given that the illness may amount to a disability.

The proper management of ill health absence is vitally important. Companies compete on a global scale and efficiency is what will distinguish companies from each other. In the process of managing ill health employees, they should not be prejudiced for exercising a right which has decades ago been established as an entitlement. Employees should not be treated like mere labour units that can be disregarded if they do not conform completely. However,

\textsuperscript{273} Supra Code of Good Practice s 11(b).
employees that follow a mentality that minor illnesses or ailments should automatically lead to time off because sick leave not taken is lost, is also inappropriate. Parties need to find a reasonable midway because at the end of the day what is good for the one is good for the other.
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<table>
<thead>
<tr>
<th>TABLE OF CASES</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>AECI Explosives Ltd v Mambalu</strong> (1995) 16 ILJ 1505 (LAC)</td>
</tr>
<tr>
<td><strong>Costa Vezi and Mintek</strong> ARB case no GA111637 Unreported</td>
</tr>
<tr>
<td><strong>Croucamp v Le Carbonne SA (Pty) Ltd</strong> (1995) 16 ILJ 1223 (IC)</td>
</tr>
<tr>
<td><strong>FAWU obo Adams and Supreme Foods</strong> ARB 04/03/1998 case no WE6127 Unreported</td>
</tr>
<tr>
<td><strong>FAWU obo Giba v Parmalat SA</strong> ARB 25-11-2003 ECPE1814-03 Unreported</td>
</tr>
<tr>
<td><strong>FAWU obo Madelein Constable Applicant v Tiger Food Brands Pty Limited</strong> ARB 21-02-2006 case no WE5740-06 Unreported</td>
</tr>
<tr>
<td><strong>Food Workers Council of SA &amp; Another v SA Breweries Ltd</strong> (1992) 13 ILJ 204 (IC)</td>
</tr>
<tr>
<td><strong>Khulani Fidelity Services v CCMA</strong> [2009] 7 BLLR 664 (LC)</td>
</tr>
<tr>
<td><strong>Hendricks v Mercantile &amp; General Reinsurance Co of SA Ltd</strong> (1994) 15 ILJ 304 (LAC)</td>
</tr>
<tr>
<td><strong>Hunt v Rennies Distribution Services</strong> ARB 12-12-2005 case no KNDB14172-05 Unreported</td>
</tr>
<tr>
<td><strong>Independent Municipal &amp; Allied Workers Union &amp; Another v City of Cape Town</strong> (2005) 26 ILJ 1404 (LC)</td>
</tr>
<tr>
<td><strong>Mambalu v AECI Explosives Ltd (Zomerveld)</strong> (1995) 16 ILJ 960 (IC)</td>
</tr>
<tr>
<td><strong>MTN Service Provider (Pty) Ltd v Matji NO &amp; Others</strong> (2007) 28 ILJ 2279 (LC)</td>
</tr>
<tr>
<td><strong>MWU obo Van Staden v Telkom SA Ltd</strong> ARB Ltd 4-02- 2003 case no GA 20184-02 Unreported</td>
</tr>
<tr>
<td><strong>National Education Health &amp; Allied Workers Union on behalf of Lucas and Department of Health (Western Cape)</strong> (2004) 25 ILJ 2091 (BCA)</td>
</tr>
<tr>
<td><strong>National Union of Metalworkers of SA on behalf of Ivasen and Whirlpool SA (Pty) Ltd</strong> (2005) 26 ILJ 985 (BCA)</td>
</tr>
<tr>
<td><strong>National Union of Mineworkers &amp; Another v Rustenburg Base Metals Refiners (Pty) Ltd</strong> (1993) 14 ILJ 1094 (IC)</td>
</tr>
<tr>
<td><strong>National Union of Metalworkers of SA on behalf of Swanepoel and Oxyon Services CC</strong> (2004) 25 ILJ 1136 (BCA)</td>
</tr>
<tr>
<td><strong>NEHAWU obo Gavadeen v University of Natal</strong> ARB 22-10-2002 case no KN1076-02 Unreported</td>
</tr>
<tr>
<td><strong>NUM &amp; another v Rusteburg Base Metals Refiners</strong> 1993 (14) ILJ 1094 (IC)</td>
</tr>
</tbody>
</table>
Numsa obo Cholani and Venture Otto SA ARB 8-12-2005 case no MEPE391 Unreported

Numsa obo Damons v Delta Motor Corporation & Another 2003 (2) BALR 180 (CCMA)

Numsa obo Gwadela v Halberg Guss South Africa (Pty) Ltd ARB 31/03/2009 MEPE 879 Unreported

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Numsa obo Ncotoyi v Halberg Guss South Africa (Pty) Ltd ARB 11/03/2009 MEPE 1032 Unreported

Numsa obo Stofile v Trident Steel ARB 13-05-2007 case no MEPE655 Unreported

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<table>
<thead>
<tr>
<th>Statute</th>
<th>Year</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basic Condition of South Africa Act 75 of 1997</td>
<td></td>
</tr>
<tr>
<td>Employment Equity Act 55 of 1998</td>
<td></td>
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<tr>
<td>Labour Relations Act 28 of 1965</td>
<td></td>
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<td>Labour Relations Act 66 of 1995</td>
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