DISMISSAL FOR MEDICAL INCAPACITY

by

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SUMMARY

Labour law in South Africa has evolved over the past century at an ever increasing pace. The establishment of a democratic government in 1995 has been the trigger for a large number of labour law statutes being promulgated, particularly with reference to the laws governing the employment relationship and dismissal.

From very humble and employer biased dispute resolution application under the common law of contract, labour law in this country has evolved through the various acts culminating in a labour law system which is highly regulated and codified.

Dismissal for medical incapacity in this treatise is reviewed with regard to the applicable statutes and the various codes of good practice as the law has evolved and developed from the period covered by the common law through that covered by the 1995 LRA up to and including the current period.

Particular attention is paid to both substantive and procedural requirements as well as the remedies applicable under the different legal regimes and the pertinent tribunals and courts.

Regard is also given to the duration and causes of incapacity and the effect this may have on the applicable remedy applied by these tribunals.

It will become apparent that the medically incapacitated employee occupied a relatively weak and vulnerable position under the common law as opposed to the current position under the 1995 LRA. The influence of the remedies applied by the tribunals under the 1956 LRA are clearly evident in the current regulations and codes under the 1995 LRA which contain specific statutory provisions for employees not to be unfairly dismissed.

Distinctions are drawn between permissible and impermissible dismissals, with medical incapacity falling under the former.
Furthermore, a distinction is drawn statutorily between permanent and temporary ill-health/injury incapacity with detailed guidelines for substantive and procedural fairness requirements to be met by employers.

The powers of the specialist tribunals (CCMA, Bargaining Councils and Labour Courts) are regulated by statutory provisions and deal with appropriate remedies (reinstatement and/or compensation) awardable in appropriate circumstances.

Certain specific areas nonetheless still remain problematic for these tribunals and hence questions that require clear direction from the drafters of our law are:

1. How to distinguish misconduct in alcohol and drug abuse cases?

2. What degree of intermittent absenteeism is required before dismissal would be warranted?

In certain other areas the tribunals have been fairly consistent and prescriptive in their approach and remedies awarded. Included here would be permanent incapacity, HIV cases and misconduct.

It will emerge, however, that under the 1995 LRA the position of employees and the protections afforded them have been greatly increased.
CHAPTER 1

INTRODUCTION

The law relating to dismissal for medical incapacity is rather complicated and reference to a number of applicable laws, rules, regulations and procedures is necessary, often placing the employer in a dilemma as to which course of action to follow.

The recent promulgation of the Code of Good Practice “Key Aspects of Disability in the Workplace”\(^1\) is an attempt to provide some guidance on the procedure to be followed.

Owing to the very complex nature of a human being and how the body reacts to different illnesses and diseases and the varying levels of intensity of the symptoms, the impact on an employee and the ability to cope in the work situation often leads to a subjective decision by the employer and its medical consultants as to the future employability of the medically incapacitated employee.\(^2\)

Moreover, an insurer which may be liable to insure and pay the disability income to the employee more often than not attempts with the assistance of contracted medical specialists and carefully worded clauses in the rules of the applicable disability scheme, to delay or defer for as long as possible the acceptance of the total or temporary disability application.\(^3\)

Often the opinions of the occupational medical advisors of the employers are in conflict with opinions of the contracted insurance company medical specialists and advisers. The employer is accordingly often left in a quandary as to what process to follow considering the plight of the (loyal) employee whose services are to be terminated through (usually) no fault of his own.

\(^{1}\) Employment Equity Act 55 of 1998: Code of Good Practice on Key Aspects of Disability in the Workplace.

\(^{2}\) Practical Experience Gained in the Workplace.

\(^{3}\) Supra.
This work examines the various statutory requirements and relevant case law in the fair dismissal of an employee for medical incapacity.

The conclusion will be to try to postulate and recommend a process to be followed by employers so as to ensure that substantive and procedural fairness principles are adhered to throughout the process of the investigation into the incapacity and its eventual decision and outcome.

The main objective of this investigation is to attempt to find a fair solution for the three affected parties, ie the employer, the employee and the insurer, bearing in mind that the employee is by far the most vulnerable party in this “triad”.
CHAPTER 2

DISMISSAL FOR MEDICAL INCAPACITY UNDER THE COMMON LAW OF CONTRACT

2.1 THE NATURE OF THE EMPLOYMENT CONTRACT UNDER THE COMMON LAW

The conventional analysis of the individual employment relationship is that it is founded on contract, yet the law of contract has seldom been regarded as an entirely adequate instrument for regulation of the relationship.⁴

In South Africa the superior courts have consistently classified the relationship between employer and employee as a type of “locatio conductio”.⁵

“As regards the underlying principles of the contracts, no difference (exists) between the letting of services and the letting of lands or any other thing capable of being hired or leased”.⁶

By viewing the employment relationship as a simple market transaction analogous to agreements of lease, the law presents a picture of that relationship as an abstract impersonal thing requiring only a limited commitment from either party.

Freedland has shown that the contract of employment has a two-tiered structure.⁷ It consists of an exchange of work for remuneration as well as an exchange of mutual obligations for future performances.

It is this rational aspect of employment that provides the relationship with continuity and stability.⁸

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⁵ Boyd v Stuttaford & Co 1910 AD 101; Smit v Workmans Compensation Commissioner 1979 (1) SA 51 (A).
⁶ Boyd v Stuttaford & Co 1910 AD 101.
⁷ Freedland supra 19-21.
This approach to the contractual model is premised upon voluntary arms length bargaining and the equality of the contracting parties.

Not evident in this model is the fact that the employee is at a decided disadvantage and generally has a weaker bargaining position which is evident from the latter’s dependence on the employer for wages and/or benefits and for his continued employment with the employer.9

Further, according to this model, the content of the relationship is placed outside the domain of public policy and beyond the reach of the courts.10

Traditionally, the employment relationship has been regulated in four main areas;

- It is the source of the employer’s powers of supervision and control by virtue of the employees implied duty of obedience.

- It is a source of rights and obligations, such as the employee’s duty of good faith and the employer’s duty to provide safe working conditions.

- A source of remedies.

- It operates as a conceptual framework for statutory regulation of the employment relationship.11

Jordaan contends that common law has not entirely been superseded by the legislation as the employer’s implied duties of remuneration and provision of safe working conditions are catered for statutorily, but not the employee’s common law duties. According to Pons,12 the rights and duties of employees are initially founded on the common law. The common law of contract of employment comes into

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9 When employment is no longer possible due to the employee’s disability, the quid pro quo content of this two-tiered relationship becomes impossible, in terms of the above model. The employee is unable to provide the work required by the employer.

10 Haysom and Thompson (1986) 7 ILJ 222.


existence when an individual agrees that he/she will work for an employer for a
certain period, to perform a defined function for which he/she will be remunerated. Therefore once agreement is reached that an employee will work for the employer a contract of employment exists, whether tacitly, verbally, or in writing. As a result of this contract, both parties develop certain rights and duties as defined in the common law.

Because an employer hires an employee to satisfy operational requirements, it follows that there is a commercial rationale which underlies the employment relationship. Should this rationale be diluted, through illness or injury for instance, the employer could question the continuance of this relationship.

If an employer hires an employee but does not state a definite rate of pay and/or other terms of employment, the common law would provide some protection to the employee in that the employer would be expected to pay him on the grounds of common practice as it relates to the performing of that type of work. The employer’s duties under common law are to:¹³

1. provide work for the employee;
2. take reasonable precautions to provide a safe and healthy working environment;
3. pay an employee the agreed wage/salary and fulfil any other agreed terms and conditions of employment.

The duties of the employee on the other hand are:

1. to tender full performance;
2. to follow reasonable instructions;
3. to act with confidentiality and in good faith;

¹³ Pons supra.
4. to deal honestly with the property of the employer;

5. subordination to the employers lawful commands.

Due to the inadequacies and lack of protection afforded to employees under the common law labour legislation as we know it today has developed to establish reasonable parameters to regulate relationships in business and to provide minimum protective conditions of employment.

From the above brief review of some aspects of contract law, it is apparent that under common law an employee’s contract of service ceases to exist at the point when the employee becomes unable to fulfil the obligations of the master-servant relationship.

Similarly, medical incapacity, under the common law, would have the same result as the employer is not obliged to pay for a service the employee is unable to provide due to his /her impairment.14

2.2 GROUNDS FOR TERMINATION OF CONTRACT UNDER THE COMMON LAW

The general principles of contract according to Brassey15 are summarised as follows:

(a) For obvious reasons the law will not try to force people to do the impossible, nor, in general, will it hold them liable for their failure to do it. By operation of law, therefore, a debtor (employee) is relieved of an obligation whose

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14 Brassey The Effect of Supervening Impossibility of Performance on a Contract of Employment (1998). This principle is explained in the following extracts: “The law will not try to force people to do the impossible; nor, in general, will it hold them liable for their failure to do it. By operation of law, therefore, a debtor is relieved of an obligation whose performance has become impossible for so long as the impossibility endures. When counter-performance by the creditor is conditional on performance first being made by the debtor, the creditor will have no duty to perform until the debtor has performed or is willing and able to perform. That the debtor is unable to perform because performance is impossible (due to incapacity for example) will not alter this principle. When the inability to perform is total, the contract terminates automatically; where it is partial or temporary, the contract is terminable at the election of the creditor – and Act 66 of 1995, referred to as LRA below.”

performance has become impossible for so long as the impossibility endures. This is the principle rule.

(b) The principle rule will not apply if the impossibility is attributable to the fault of the debtor (employee) or if the debtor has assumed the risk of non-performance.

In these cases, the debtor remains bound to perform the obligation: its non-performance is thus a breach of the contract for which damages are claimable.

(c) When counter-performance by the creditor is conditional on performance first (or simultaneously) being made by the debtor, the creditor will have no duty to perform until the debtor has performed or is willing and able to perform. That the debtor is unable to perform because performance is impossible will not alter this principle.

(d) Where the inability to perform is total, the contract terminates automatically; where it is partial or temporary, the contract is terminable at the election of the creditor, and possible of the debtor too, provided the deficiency in performance is material.

Whilst these principles appear simple enough in the abstract, they can be difficult to apply in practice. To understand the way the courts do this can lead to a better understanding of what constitutes –

(a) operative impossibility of performance;
(b) the effect on obligations and counter obligations;
(c) the extent to which the contract is terminable as a result of the impossibility.
2.3 SUPERVENING IMPOSSIBILITY OF PERFORMANCE

Supervening impossibility of performance occurs when performance of the obligation is prevented by superior force. This superior force would comprise those events that could not have been reasonably guarded against.

Superior force may make performance physically impossible and this would include for example the destruction of the employer’s enterprise by fire or flood, or the illness or death of the employee; acts of the state (imprisonment, internment) or conscription of the employee; and finally the acts of third parties, such as strikers that make it impossible to get to work or prevent the employer from providing it.

Finally, superior force may also make performance legally impossible by prohibiting it, for it is not possible in law to do what the law forbids.

Brassey refers to a number of rules applicable when superior force will not have an effect on the contract.

The first rule says that the impossibility of performance must be absolute, not merely personal. A party will not be absolved from performance if others could perform where he or she cannot.

This means that an employer cannot plead impossibility of performance as a defence if it consists only in his or her impecuniosity: there is no true impossibility the contract

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17 Innes in New Harriot Gold Mining Co v Union Government 1916 AD 415 said that the term *casus fortuitus* included “all direct acts of nature”, the violence of which could not reasonably have been foreseen or guarded against (at 433). The question then arises whether a storm of the nature should be regarded as amounting to *casus fortuitus*, or *vis major*, whether it was so violent that the respondent could not reasonably have been expected to provide against it (at 438).
18 *Boyd v Stuttaford & Co* 1910 AD 101; *Weyl v United Restaurants* 1903 TH 161 at 164; *Pinnoch v Ginginhlovu School Committee* 1907 28 NLR 350; *Fairclough v Buchland* 1913 SR 186 at 187. In *R v Masuku* 1912 EDL 221 an accused charged with failing to work under the Master and Servant Act 15 of 1911 was acquitted when he proved that his eyesight was so poor as to make performance of the contract impossible.
20 *Supra.*
of service (is) entered into upon the supposition that the employer (will) remain solvent and carry on his business during the full period agreed upon.\textsuperscript{21}

Conventional wisdom has it that impossibility will not be operative if it is relative.\textsuperscript{22} Mere difficulty in performance must be total, so that the debtor is left with no choice but to submit. No doubt, this is what was meant in the strict sense of the word, but the requirement is plainly not as exacting as this.

Even though a sick employee may be able to stagger back to work, his obligation is surely to return only when substantially recovered.\textsuperscript{23}

The second rule says that the impossibility must not be attributed to the fault of either party. If one or the other is at fault there is a culpable breach of contract that falls to be dealt with accordingly: if the breach is that of the debtor, he or she falls into \textit{mora debitoris} and is not relieved from performance; if it is the creditors, then the debtor need not perform, not because of supervening impossibility of performance, but because the principles of \textit{mora creditoris} provide an excuse for not doing so.\textsuperscript{24}

The final rule holds that impossibility to perform will not be operative if the debtor has assumed the risk of its occurrence.\textsuperscript{25} If there is agreement to perform, come what may, performance must be made or the debtor will have to pay damages for breach of contract.

Medical incapacity is regarded as impossibility of performance and may be either of a temporary or permanent nature.

\textsuperscript{21}Clark \textit{v} Denny (1884) 4 EDC 300 at 301. See also \textit{MacDuff \& Co v Johannesburg Consolidated Investment Co} 1924 AD 573 at 605-6 and \textit{Stevenson \& Morum Bros} 1926 EDL 406.

\textsuperscript{22}Christie \textit{The Law of Contract in South Africa} (1981) 82 as read with 465.

\textsuperscript{23}In \textit{Jumpers Deep v Van der Merwe} 1902 TS 201 and 209, the employee was unable to attend work due to hostilities, the Court held that he need not resume work the very moment resumption became a physical possibility, but could return when there was no longer any risk of injury.

\textsuperscript{24}\textit{NUTW v Jaguar Shoes} (n 16), citing De Wet and Van Wyk (n 3) 158-9.

\textsuperscript{25}\textit{North Western Hotel v Rolfs, Nebelt \& Co} 334-6; \textit{Hansmen v Shapiro \& Co} 1926 TPD 367 at 45.
The latter is usually more obvious and would result in the termination of the contract if the impossibility was permanent of nature. Examples here are the death of the employee, the total destruction of employer’s business or the total and permanent disability of the employee. In the aforesaid the contract terminate automatically. The obligation to make specific performance becomes by the intervention of the law, not just unenforceable (a matter of remedy) but non-existent (a matter of substance).\textsuperscript{26}

Temporary impossibility of performance results in the suspension of the obligation to perform in accordance with the contract. The implication here is that the performance is suspended for as long as the impossibility endures.\textsuperscript{27}

Thus a sick employee is excused from the performance of his duties only for as long as his illness prevents him from going to work and carrying on his duties.

It should be noted that the circumstances of the impossibility excuse the performance only of those obligations that cannot be performed, this clearly means that an employee who cannot perform one obligation is not relieved of his obligation to perform the others.\textsuperscript{28}

\begin{quote}
“It is important to appreciate that suspension occurs by operation of law, not by implication in the contract. The law lays down that a party is relieved of an obligation which is impossible to perform; the contract and the circumstances surrounding its conclusion are looked at only to discover to what extent this legal consequence is varied. In this, our law differs from the English law; ‘In our law, you look to the rule in the civil law … and then to the contract, to see how that rule should be applied in regard to the specific facts of the particular contract involved, whereas in English law you start with the contract and remain with the contract throughout, looking entirely and solely at it to see what the effect of any supervening conditions should be in law.’ “\textsuperscript{29}
\end{quote}

When the employee is temporarily medically incapacitated through illness, he or she is relieved of the obligation to perform. The obligation is said to be suspended and

\textsuperscript{26} Brassey \textit{Suspension by Operation of Law} (1998) SF1 at 4.
\textsuperscript{27} Brassey \textit{supra} SF1 at 5.
\textsuperscript{28} An example of this would be where a right handed employee sustains an injury to his left hand. Whilst being unable to use the left hand he may well be able to continue his supervisory and/or administrative functions. Thus the performance of those duties requiring both hands is suspended for as long as the left hand remains injured. The remainder of his obligations must still be performed in terms of the contractual obligations.
\textsuperscript{29} \textit{Cf Mountstephens and Collins v Ohlson’s Cape Breweries} 1907 TH 56 at 59.
not terminated as the obligation remains due in law, but by law its performance is lifted from the employee temporarily.\(^{30}\)

Similarly in terms of the leave provisions in a contract of employment the obligation to work is not suspended but rather provide for an employee to be paid whilst not being required to tender his/her services.

In concluding this section and from the afore going it is apparent that when superior force is operative, the obligation made impossible to perform is suspended; the debtor need not perform, or even try to perform while the impossibility endures and the failure to perform is not a culpable breach of contract.\(^{31}\)

In all other respects, however, the contract remains in force. Impossibility that does not totally frustrate the performance of an obligation may be described as either temporary or partial.\(^{32}\) Partial impossibility discharges the obligation *pro tante*, while temporary impossibility postpones it *pro tempore*. The practical significance of the distinction is that the debtor need never perform that part of an obligation partially suspended, but must still perform an obligation temporarily suspended, though at a later date. In all other respects they are to be treated the same.\(^{33}\)

### 2.4 WHEN IS AN EMPLOYEE REGARDED AS MEDICALLY INCAPACITATED UNDER THE COMMON LAW

According to Grogan\(^{34}\) under common law the sole source of the rights and obligations of employees and their employers was the terms and conditions of the individual contract into which they had entered. Subject only to the requirements of the law and good morals, the parties were free to agree to any terms and conditions they wished. Should a dispute have arisen while the contract was in force, the rules

\(^{30}\) At common law there is high authority that it suspends the employee’s duty to work; *Boyd v Stuttaford & Co supra*; the principle is reaffirmed in both the Basic Conditions of Employment Act 75 of 1997 Ch 3 ss (20) and the many wage regulating measures that confer a right to paid sick leave.

\(^{31}\) *Landmark v Van der Walt* (1884) 3 SC 300 at 305, *Mnyanda v Mnyanda* 1964 (1) SA 418 at 425.


according to which it was resolved were derived from the agreement and the common law. Once the terms of the agreement were fixed by consensus, neither party could change them unilaterally.

2.4.1 WHAT DEGREE OF INCAPACITY IS REQUIRED BEFORE A CONTRACT CAN BE TERMINATED UNDER THE COMMON LAW?

Inherent deficiencies in the common law include *inter alia*:

(a) that there is an inherent inequality in bargaining power between the parties;

(b) the common law pays no regard to the enduring nature of the employment relationship; and

(c) the common law does not provide effective protection to the job security of employees.³⁵

The maxim *lex non cogit impossibilia* applies also to contracts of employment. If either party becomes permanently unable to perform his or her obligations under the contract, or is unable to perform his obligations for a period which is unreasonable as far as the other is concerned, the other party is entitled to terminate the contract on the grounds of such non-performance.³⁶ Although sickness or disability may relieve the employee of the duty to tender service for a limited period, neither constitutes a valid ground at common law for the employer to terminate the contract unless it endures for an unreasonable period.³⁷

Who or what determines the reasonable period is open to debate and the whim of the courts. One month may be too long for a small company or a critical post whereas on the other hand for a large company this may not present a problem. Similarly a large employer may well be able to accommodate disabled employees and the cost

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³⁵ At common law, an employer is free to terminate the contract at any stage, for any reason or indeed for no reason or the worst possible reason, provided only that the requisite notice is given. The common law courts will not intervene merely because the dismissal was unfair. See Brassey *The New Labour Law* (1987) 2-9.

³⁶ *Schlengemann v Meyer, Bridgens & Co* 1920 CPD 494.

³⁷ Grogan *supra* 80.
of adaptation of the job or facilities whilst the smaller employer or an employer who is in financial difficulties may not. The interpretation is thus open to the courts judgment which may not be the competent body to make this assessment.

### 2.4.2 DOES THE DURATION OF THE INCAPACITY PLAY A ROLE IN THE TERMINATION OF CONTRACT UNDER THE COMMON LAW?

Clarifying what is reasonable or unreasonable regarding the duration of the illness or injury is left up to the interpretation of the courts and the merits of each case.\(^{38}\)

Under the Basic Conditions of Employment Act, employees are entitled as of right to the period of sick leave prescribed by the Act, subject only to proper medical certification.\(^{39}\) Only once this statutory entitlement is exhausted will the common law apply.

This in effect means that the employer may terminate the contract of employment under common law once that point is reached where the absence becomes unreasonably long considering the employer’s legitimate expectation of service.

In *Hendricks v Mercantile & General Reinsurance Co of SA Ltd*\(^ {40}\) the court stated the general test as follows:

> “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 (not) been expected to wait any further before considering dismissal.”

From what has been said it should be clear that the contract to a large extent determines when obligations can be suspended and to what extent.\(^ {41}\)

The effect of an absence in excess of the statutory period is analogous to a suspension of the contract unless the employer elects to cancel.

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38 \*Boyd v Stuttaford & Co* supra.
39 Chapter 2 s 2.
40 (1994) 15 *ILJ* 304 (LAC) at 313-4.
41 Brassey *supra* s F1:5.
It has been suggested that employees may be dismissed for absence from work due to sickness or disability even if they have not yet exhausted their statutory sick leave entitlement.\(^{42}\)

### 2.4.3 DOES THE CAUSE OF THE INCAPACITY PLAY ANY ROLE UNDER THE COMMON LAW?

The answer to this question is clearly “yes”. If a party who seeks to terminate the contract on the grounds of his or her inability to perform has wilfully brought about that impossibility, the doctrine of fictional fulfilment may be applied.\(^{43}\) The law will, in certain circumstances, deem the condition to be fulfilled when its non-fulfilment is the result of some action or inaction on the part of the employer.\(^{44}\)

Supervening impossibility of performance occurs and leads to the suspension of obligations when the performance of an obligation is prevented by superior force \textit{vis major} and \textit{casus fortuitus}.\(^{45}\)

The latter refers to an accidental happening whilst \textit{vis major} refers to superior force and comprises those events that could not be reasonably have been foreseen or guarded against.

Illness of the employee is the most commonly encountered incident within the employment contract. At common law there is high authority that it suspends the employee’s duty to work.\(^{46}\) Also acts of the state and third parties can also have this effect – violent strikes which result in factory premises being heavily and violently picketed would also result in supervening impossibility of performance.

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\(^{42}\) \textit{Meyers v Sieradzki} 1910 TPD 869.

\(^{43}\) \textit{Yodiaken v Angehrn & Piel} 1914 TPD 254.

\(^{44}\) \textit{Bob’s Shoe Centre v Heneways Freight Services (Pty) Ltd} 1995 (2) SA 421 (A) at 431C-E; \textit{Benjamin v Myers} 1946 CPD 655 at 662; \textit{SA Crushers (Pty) Ltd v Ramdass} 1951 (2) SA 543 (N) at 546H-547G; \textit{Grobbelaar NO v Bosch} 1964 (3) SA 687 (E) at 691.

\(^{45}\) Brassey supra F1:7.

\(^{46}\) \textit{Boyd v Stuttaford & Co} 1910 AD 101. See too \textit{R v Masuhi} 1912 EDL 221 an accused charged with failing to work under the Master and Servants Act 15 of 1911 was acquitted when he proved that his eyesight was so poor as to make performance of the contract impossible. Also \textit{Thorne Stuttaford & Co v McNally} (1891) 8 SC 144; \textit{Dalton v Henderson} 1908 ORC 11. The death of the employee, being final, brings the contract to an end. See \textit{Smit v Workmens Compensation Commissioner} 1979 (1) SA 57 (A) at 56, 51.
Some authorities suggest that impossibility will be inoperative if it results from any intentional act of the debtor, even a non-culpable one.\textsuperscript{47}

\section*{2.5 REMEDIES FOR BREACHES UNDER THE COMMON LAW}

What remedies were available to an employee where the employer had breached any applicable common law rules regarding a common law termination of the employment contract for medical incapacity?

In \textit{Venter v Livni}\textsuperscript{48} the Full Bench of this division laid down that an employer cannot unilaterally terminate a contract of employment and that it is always upon the servant to hold the employer to the contract.\textsuperscript{49}

As a general rule a party to a contract which has been wrongfully rescinded by the other party can hold the other party to the contract if he so elects. There is in my view, no reason why this general rule should not also be applicable to contracts of employment.\textsuperscript{50}

In the \textit{Schierhout v Minister of Justice}\textsuperscript{51} a leading case, Innes CJ had the following to say:

"Now, it is a well-established rule in English law that the only remedy open to an ordinary servant who has been wrongfully dismissed is an action for damages. The courts will not decree specific performance against the employer, nor will they order the payment of the servant’s wages for the remainder of his term. Macdonell J\textsuperscript{52} however, points out that equity-courts did at one time issue decrees for specific performance. But the practice has long been abandoned, and for two reasons, the inadvisability of compelling one person to employ another whom he does not trust in a position which imports a close relationship; and the absence of mutuality, for no court could by its order compel a servant to perform his work faithfully and diligently. The same practice has been adopted by South African courts, and probably for the same reason. No case was quoted to us where a master has been compelled to retain the

\textsuperscript{47} \textit{Benjamin v Myers} supra at 622, citing Wessels \textit{Law of Contracts in South Africa} (1937) II 2669, 2680. The converse opinion can also be read at Kerr \textit{The Principles of the Law of Contract} (1989) 4\textsuperscript{th} ed 411, who says "[t]he act need not be wrongful".

\textsuperscript{48} 1950 (1) SA 524 (T) at 528.

\textsuperscript{49} \textit{Kahn Contract and Mercantile Law} (1988) 2\textsuperscript{nd} ed Vol 1 at 780.

\textsuperscript{50} \textit{National Union of Textile Workers & Others v Stag Packings (Pty) Ltd & Another} 1982 (4) SA 151 (T).

\textsuperscript{51} 1926 AD 99.

\textsuperscript{52} \textit{Master and Servant} (1926) 2\textsuperscript{nd} ed162.
services of an employee wrongly dismissed, or to pay him his wages as such, and 't' know of none. The remedy has always been damages."  

The above case was widely referred to, yet was later also criticised by Van Dijkhorst J in National Union of Textile Workers & Others v Stag Packings (Pty) Ltd & Another. Van Dijkhorst had the following to say:

"[T]he unilateral repudiation of an employment contract by one party thereto, which is not accepted by the other party, is ineffective, the distinction drawn by the learned Chief Justice between ordinary employees and civil servants is, in my respectful view, one without a difference."

In our law the grant of specific performance does not rest upon any special jurisdiction. It is an ordinary remedy to which in a proper case an applicant is entitled. The court has however, a discretion whether to grant the order or not. Generally speaking specific performance will be refused where it would be inequitable in all circumstances or where from a change of circumstances or otherwise it would be "unconscientious" to enforce a contract specifically.

Under common law specific performance (reinstatement or the compensation of retrospective wages) would not be easily applied. The courts may well have decided on an order as to damages in the event of the breach being proven.

From the above it is clearly apparent that there was little or no protection of the employee’s rights to security of employment under the common law of contract. The scale was heavily biased in favour of the employer who could dismiss at will without fear of an order as to specific performance.

The employee on the other hand could only hope for an order as to damages (if he could afford the litigation).

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53 Kahn supra 774.
54 See also Field v South African Railways and Harbour 1921 CPD 620; Brandow v Union Government 1920 41 NLR 140; Stoop v Lichtenburg Town Council 1952 (2) SA 72 (T) at 75; Rogers v Durban Corporation 1950 (1) SA 65 (D) at 69-70; Lekhethoa v Director of Education 1947 (2) SA 1171 (T) at 1183; Van Coller v Administrator, Transvaal 1960 (1) SA 110 (T) at 115.
55 Supra at 156.
56 R v Milne and Erleigh 1951 (1) SA 791 (A) at 873G.
57 Schierhout v Minister of Justice supra.
CHAPTER 3

MEDICAL INCAPACITY DISMISSAL UNDER THE 1956 LRA

The main purpose of the Labour Relations Act 28 of 1956 was to give expression to the right to collective bargaining and the freedom to strike without criminal prosecution. This Act defined the right to freedom of association and encouraged the registration of trade unions and employer federations and provided the machinery for collective bargaining and various methods of dispute resolution.

The Act also defined unfair labour practices and established Industrial Courts to deal with disputes which arose out of the employment relationship.\textsuperscript{58}

3.1 ABSENCE OF STATUTORY DEFINITIONS FOR DISMISSAL AND INCAPACITY

Despite the above unfair labour practice definition there appeared to be no statutory definition of either a dismissal nor the issue regarding incapacity. After the amendment of the Act\textsuperscript{59} all dismissals were tested under the very broad unfair labour practice definition of the Act, which stated that an “unfair labour practice” means any act or omission which in an unfair manner infringes or impairs the labour relations between an employer and employee and shall include the following. What then followed was a list of 15 items (“a” to “o”) of possible unfair practices.\textsuperscript{60}

\textsuperscript{58} Labour Relations Act 28 of 1956.
\textsuperscript{59} Labour Relations Amendment Act 83 of 1988.
\textsuperscript{60} The list of possible unfair labour practices may be referenced in the Labour Relations Amendment Act 83 of 1988. Further amendments (Act 9 of 1991) essentially saw a return to the pre-September 1988 definition. The removal of the partial codification of unfair labour practices conferred a wider jurisdiction on the Industrial Court to interpret and fashion what constituted an unfair labour practice based on the facts of each case. The potential danger of applying a mechanical approach to the process of determining unfair labour practices was thus removed. The 1988 provisions and the body of laws that evolved from them will continue to act as useful guidelines as to what is fair and what is not. The full list of amendments to this Act are as follows:

This change in definition of the unfair labour practice was a radical innovation in that it was an attempt by legislators to codify situations which would be unfair labour practices.

The removal of this codification\(^{61}\) saw a return to the pre-September 1988 type of definition.

### 3.2 DEFINITION OF THE UNFAIR LABOUR PRACTICE UNDER THE 1956 LRA

The new definition introduced by the 1991 Amendment Act read as follows:

> "Unfair labour practice means any act or omission other than a strike or lock-out which has or may have the effect that –

(i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardised thereby;

(ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;

(iii) labour unrest is or may be created or promoted thereby;

(iv) the labour relationship between employer and employee is or may be detrimentally affected thereby.\(^{62}\)

Absent from the above definition where the words physical, economic, moral and social welfare. The National Manpower Commission was of the opinion that these words could have been interpreted too widely. Similarly specific reference to dismissal was not made in the definition.\(^{63}\)

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\(^{62}\) S 1 of the principal Act as amended by s 1(a) of the amending Act.

3.3 CASE LAW AND DEVELOPMENT OF THE REQUIREMENTS FOR PROCEDURAL AND SUBSTANTIVE FAIRNESS – A BRIEF CONSIDERATION

3.3.1 SUBSTANTIVE FAIRNESS REQUIREMENTS UNDER THE 1956 LRA

Under this Act the substantive fairness of dismissal for poor work performance or incompetence depended on “whether the employer can fairly be expected to continue with the relationship, bearing in mind its own interests and those of the employee, and the circumstances of the case.”

To establish this, the employer was generally required to conduct an appraisal of the employee’s performance. The courts emphasised that it is up to the employer to set required performance standards and assess whether those standards have been met. The court should not substitute its own assessment for that of the employer unless the employer’s judgment is shown to have been clearly unreasonable in the circumstances pertaining to a particular industry and work situation.

Tebbutt had the following to say about the test for substantive fairness:

“The substantive fairness of a dismissal depends on the question whether the employer can be fairly 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.”

In AECL Explosives Ltd (Zomerveld) v Mambalu the majority of the Labour Appeal Court (per Myburgh and Pretorius) held that the following substantive reasons satisfied the requirements for a fair dismissal:

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64 Labour Relations Act 28 of 1956.
68 (1995) 6(9) SALLR 1 (LAC).
1. The applicant’s condition (influenza) was not caused by the applicant’s working conditions, and as the applicant could not be treated nor his working conditions altered, to avoid future illness, it was unlikely that the applicant’s attendance at work would improve.

2. The company could not rely on the applicant to arrive at work on any given day.

3. Unlike the case of the employee with a prolonged illness, the company could not anticipate when the applicant would be off sick and so make alternative arrangements.

4. Inevitably it must have meant that productivity was affected and an unfair burden was placed on the applicant’s fellow employees.

5. The applicant’s work record was bad.

The court was of the opinion that the company had adopted an ambivalent attitude towards the employee’s conduct.

On the one hand, by relying on rule 14, which had dealt with the situation of an employee frequently absent through sickness, the company had seemed to accept that the applicant was genuinely ill when he alleged he suffered from influenza. Consistent with that attitude, the company had not challenged the opinions expressed in the medical certificates which the applicant had produced on each occasion.

On the other hand, by describing the applicant’s conduct as abuse of sick leave being taken just before a weekend, the company had been implying that the

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69 See Davies v Clean Deale Garden Services (1991) 2(1) SALLR 11 (IC) where De Kock SM laid down the following guidelines: “There is a greater duty to accommodate the employee where the disablement is caused by work-related injury or illness.” In such cases the employer bears a greater onus to, consult, investigate, find alternatives, adopt jobs, obtain medical and specialised advice as well as involving the employee and his representative in the process.

70 (1995) SALLR Vol 6 Part 9 at 2H. See also National Union of Mineworkers and Monareng v Rustenburg Base Metals Refineries (Pty) Ltd (1993) 4(6) SALLR 26 (IC) which also dealt with excessive absenteeism due to a variety of illnesses.
applicant had been malingering.

In the former case, the grounds for dismissal would be incapacity while, in the latter case, the grounds for dismissal would be misconduct. The court stated that, in its opinion, the company had been entitled to dismiss the applicant, “... for his incapacity to perform his job where such incapacity (was) due to persistent absence from work because of genuine ill health ...”.

The court *a quo* stated that in considering the substantive fairness of a dismissal for incapacity due to ill health the court and the employer must in the first instance ascertain whether the employee because of his illness (or feigned illness) is or is not capable of performing the work for which he or she was employed.

Other relevant factors to be ascertained and assessed according to Myburgh would include:

(a) the nature of the incapacity;

(b) the likelihood of recovery;

(c) improvement or recurrence;

(d) the frequency and duration of absences and their effect on the employer’s operations;

(e) the effect of the employee’s disability on the other employees.

From the above “other relevant factors” it is clear that points (a), (b) and (c) would require expert opinion in the form of a medical practitioner or specialist which in itself

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72 See *Davies v Clean Deale CC* (1991) 2(1) SALLR 11 (IC); (1992) 13 ILJ 1230 (IC) at 1232G-H; *National Union of Mineworkers and Nongalo v Libanon Gold Mining Co Ltd* (1994) 5(1) SALLR 26 (LAC); (1994) 15 ILJ 585 (LAC) at 589C.

73 *Hendricks v Mercantile and General Insurance Company of SA Limited* supra at 313A-C, 314B.
raises further issues such as

- who would be liable for costs?

- would the employee be permitted to make use of his own doctor?

- would the employee representative be allowed to be present and privy to the test results?

In the event of differing opinion between medical specialist (company appointed and employee’s doctor) whose opinion would be accepted?

These and other similar questions remain unanswered even today under the new Labour Relations Act.\(^\text{74}\) See also the Code of Good Practice: Key Aspects on the Employment of People with Disabilities.\(^\text{75}\)

According to Tebbutt in the *Hendricks*-case the test for substantive fairness 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 according to Tebbutt would include *inter alia*:

\(\text{(i) the nature of the incapacity;}\)
\(\text{(ii) the cause of the incapacity;}\)
\(\text{(iii) the likelihood of recovery, improvement or recurrence.}\)
\(\text{(iv) the period of absence and its effect on the employer’s operations;}\)
\(\text{(v) the effect of the employee’s disability on the other employees; and}\)
\(\text{(vi) the employee’s work record and length of service.}\)

In *Carr v Fisons Pharmaceuticals*,\(^\text{76}\) Schoeman found reinstatement an inappropriate

\(\text{75}\) The above-stated Code of Good Practice: Key Aspects on the Employment of People with Disabilities was issued by the Minister of Labour on the advice of the Commission for Employment Equity in terms of s 54(1)(a) of the Employment Equity Act 55 of 1998.
\(\text{76}\) (1994) 5(5) SALLR 14 (IC).
remedy where the employee was found to be medically unfit to occupy her previous position and in the event of no alternative position being available to her. Where the dismissal is substantively fair but procedurally unfair, the court may award as relief compensation in an amount equivalent to the period the court estimates would have been necessary to effect a fair procedure. 77

It is apparent that prior to the 1995 Act the courts treated the awarding of compensation in a haphazard manner with little consistency or clarity. In the Farmec-case78 the Labour Appeal Court found that the employer’s conduct constituted an unfair labour practice and yet did not award any compensation to the employee. The court reasoned that the employee would in any case have been dismissed and had, accordingly, not sustained any damages.

Conversely in the Shezi-case79 the court held that the employee had the right to exhaust her remedies, including the right to be heard. Denial of this right according to the court was tantamount to an unfair labour practice and awarded compensation in an amount of three months wages. 80

In those decisions of the Labour Appeal Court dealing with the retrenchment dismissals, wherein the no-difference principle was rejected, there is similarly a lack of clarity as to what is to be done by the court in such an instance – thus, for instance, in Mohamedy’s v Commercial Catering & Allied Workers Union of SA81 the court, without clear motivation, reduced the compensation awarded to one months pay per retrenched employee and, in NUMSA v Atlantis Diesel Engines (Pty) Ltd82 the court directed that the matter of relief be sent back to the parties for negotiation.83

The lack of consistency and clarity by the courts was viewed by industry and most individuals as an unacceptable situation which begged a remedy.

77 Supra at 96.
78 Farmec (Edms) Bpk t/a Transvaal Toyota v Els (1993) 4(1) SALLR 21 (LAC).
79 Foodpiper CC t/a Kentucky Fried Chicken v Shezi (1993) 3(11) SALLR 1 (LAC).
80 See also Libanon Gold Mining-case supra, where the court held that consultation envisages more than merely the opportunity to remonstrate after a decision had been taken.
81 (1992) 3(8) SALLR 37 (LAC).
3.3.2 PROCEDURAL FAIRNESS REQUIREMENTS UNDER 1956 LRA

Anderman\textsuperscript{84} 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 to determine whether in the circumstances of the employment, the employees record of absence constitutes sufficient grounds for dismissal. For even if the absence is due to genuine medical reasons it may still be regarded as sufficiently incompatible with the needs of the organisation.\textsuperscript{85}

In \textit{International Sports Company Limited v Thomson}\textsuperscript{86} the employee who was absent for 25 per cent of the time was dismissed for persistent absenteeism. Mr Justice Waterhouse had the following to say:

“What is required, in our judgement, is, firstly, that there should be a fair review by the employer of the attendance record and the reasons for it, and secondly, appropriate warnings, after the employee has been given an opportunity to make representations. If then there is no adequate improvement in the attendance record, it is likely that in most cases the employer will be justified in treating the persistent absence as a sufficient reason for dismissing the employee.”

In effect the above treatment would fall under a misconduct dismissal and not under the “no-fault” category of the incapacity dismissal. In the above case the employee had numerous and varied reasons for the poor attendance and it was quite apparent to the court that despite some instances being genuine there was sufficient grounds to dismiss.

3.4 CONCLUSION

The tendency of our labour law to develop fairly rigid guidelines with regard to

\textsuperscript{84} \textit{The Law of Unfair Dismissal} (1985) 2\textsuperscript{nd} ed at 180.
\textsuperscript{85} (1995) SALLR 6(9) 1 (LAC) at J.
\textsuperscript{86} (1980) IRLR 340 EAT.
procedural requirements for various categories of dismissal (misconduct, incapacity, operational requirements) tends to place in a “box” each separate category with different rules applicable to each. 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 application.

This can be clearly illustrated in cases in which the dividing line between misconduct and/or incapacity is not easily discernible. In fact in the majority of cases (excluding serious lay term illness) elements of both categories appear in either type of case. The most important common denominator is that the employee should always have a fair opportunity to meet the particular case against him/her. The question as to what a fair procedure should be is dependent on the particular facts and the merits of the individual case.

Myburgh\textsuperscript{87} summarises it very succinctly when he states “in my view the fairness or otherwise of the decision (to dismiss) cannot be divorced from the process by which it was arrived at. It is through fair process that fair decisions are generally reached.

Under this Act\textsuperscript{88} the courts developed many of the rules and regulations contained in the codes of conduct as defined in the current labour law Acts applicable today.\textsuperscript{89}

\textsuperscript{87} AECI Explosives supra.
\textsuperscript{88} LRA 28 of 1956.
CHAPTER 4

MEDICAL INCAPACITY DISMISSAL UNDER THE 1995 LRA:
APPLICABLE LEGAL PROVISIONS

4.1 INTRODUCTION

Unfair dismissal and unfair labour practice is covered under Chapter VIII of the Labour Relations Act. This chapter gives to all employees the right not to be unfairly dismissed or to be subjected to an unfair labour practice and thus gives effect to rights enshrined in the Constitution.

This chapter distinguishes between dismissals which are deemed to be automatically unfair, based on the reason for the dismissal, and other unfair dismissals. Generally, an employer must have a fair reason to terminate an employee’s services based on that employee’s conduct or capacity\(^{90}\) or on the employer’s operational requirements and furthermore the employer must follow a fair procedure. If a fair reason or a fair procedure is lacking then the dismissal will be unfair.

This chapter should be read in conjunction with the Code of Good Practice: Dismissal which forms a schedule to the Act and which sets out the guidelines in regard to fair reasons and fair procedure as well as subsequently promulgated Codes of Good Practice such as the Code of Good Practice on the Employment of People with Disabilities\(^{91}\) which we will discuss in detail below.

4.2 CODIFICATION OF LABOUR LAW PRINCIPLES UNDER THE 1995 ACT\(^{92}\)

The Act has seen significant codification of the labour law principles in various areas, including the area of dismissal. This is a more extensive codification than was previously seen under the old 1956 LRA as discussed in Chapter 3 above.\(^{93}\)

\(^{90}\) Capacity will for the purposes of this treatise be the focal point of discussion.

\(^{91}\) Employment Equity Act 55 of 1998.


\(^{93}\) Labour Relations Act 28 of 1956.
This codification has entailed the statutory regulation of, *inter alia*, the following issues pertinent to the topic under discussion.

### 4.2.1 THE CONCEPT OF DISMISSAL (s 186)

Dismissals are now defined in section 186 of the 1995 LRA. Section 186 attempts to codify the meaning of dismissal and unfair labour practices.

1. Dismissal under this Act means that —

   (a) an employer has terminated a contract of employment with or without notice. In terms of the common law and the law of contract this dismissal may be permissible, however in terms of the Labour Relations Act the reasons for dismissal must be fair, and a fair procedure needs to be followed.

   (b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it.

   (c) an employer refused to allow an employee to resume work after she—

      (i) took maternity leave in terms of any law, collective agreement or contract of employment; or

      (ii) was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date, of the birth of her child. These conditions are also contained in the Basic Conditions of Employment Act, sections 25 and 26.\(^{94}\)

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\(^{94}\) 75 of 1997 as amended by Act 11 of 2002. S 26 covers the minimum maternity leave that an employee is entitled to. S 26 covers the protection of employees before and after the birth of a child. This section guarantees the security of employment after the birth.
(d) an employer who dismissed a number of employees for the same or similar reasons has offered to re-employ one or more of them but has refused to re-employ another. This circumstance is often referred to as selective re-employment and is not relevant to the topic of this treatise.

(e) an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee. Commonly known as “constructive dismissal” this type of dismissal could easily be associated with a disability in the workplace.

(f) not relevant to the subject of this treatise.

2. Definition of unfair labour practice under the Act\footnote{LRA supra.} means “any unfair act or omission that arises between an employer and an employee involving –

(a) unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee;

(b)-(d) are not relevant to the treatise topic but may be referenced in the Act.\footnote{S 186(2)(b), (c), (d).}

It is apparent from the above definition of unfair labour practice that the termination of employment of an employee whether for misconduct or incapacity could fall foul of these provisions due to the very broad nature of the definition.

4.2.2 THE CONCEPT OF PERMISSIBLE DISMISSALS (s 185)

Section 188 of the Act\footnote{1995 LRA supra.} states that “a dismissal that is not automatically unfair,\footnote{S 187 of the Act supra lays out the grounds for automatically unfair dismissals. The reasons for automatically unfair dismissals are (1) anything that amounts to the impingement of the employment relationship, and (2) anything that amounts to the impingement of the employment relationship. A dismissal is automatically unfair if the employer makes a fundamental change in the terms and conditions of employment or if the employer dismisses an employee for a reason that is not a justifiable reason.} is

\footnote{A term commonly used in CCMA cases where a dispute is raised relating to an unfair labour practice.}
unfair if the employer fails to prove –

“(a) that the reason for the dismissal is a fair reason.”

It is submitted that fair reasons are determined by (a) proven facts of a case and (b) appropriateness of the penalty.

“(a) (i) is related to the employees conduct or capacity or
(ii) that the dismissal was effected in accordance with a fair procedure.”

The three grounds thus on which a termination of employment might be legitimate are:

- the conduct of the employee;
- the capacity of the employee;
- the operational requirements of the employer.

4.2.3 SUBSTANTIVE AND PROCEDURAL FAIRNESS WHEN DEALING WITH INCAPACITY DISMISSALS

4.2.3.1 POOR WORK PERFORMANCE INCAPACITY VS ILL-HEALTH/INJURY INCAPACITY

Incapacity can be either poor work performance resulting from misconduct or ill-health or injury. The substantive and procedural requirements to be met in the case of a dismissal on the grounds of ill-health/injury incapacity (medical incapacity) are set out in items 10-11 of schedule 8 of the 1995 LRA and are set out below.

10. Incapacity: Ill-health or injury

(1) Incapacity on the grounds of ill-health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the fundamental rights of employees and trade unions; (2) dismissal for participation in a lawful strike; (3) dismissal because of pregnancy related issues; and (4) any discriminatory type dismissals.

Code of Good Practice: Dismissal Items 10 and 11.
illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee’s disability.

(2) In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.

(3) The degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.

(4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances.

11. Guidelines in cases of dismissal from ill-health or injury

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

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

(iii) the availability of any suitable alternative work.”

When considering a dismissal for poor work performance incapacity, due regard should be had to the relevant provisions contained in Schedule 8 of the 1995 LRA. Item 9, read with Item 8, deals with requirements for a fair dismissal based on poor work performance incapacity.

Substantive criteria

The provisions of the Code require compliance with the following:

- Did the employee fail to meet a performance standard?

101 Guidelines in Cases of Dismissal for Poor Work Performance supra.

102 Incapacity; Poor Work Performance supra.

103 Item 9(a) supra.
• Was the employee aware of the required performance standard?\textsuperscript{104}

• Was the employee given a fair opportunity to meet the required performance standard,\textsuperscript{105} in conjunction with Item 8(2) which requires appropriate evaluation, instruction, training, guidance or counselling, as well as a reasonable period of time for improvement.

• Was the dismissal an appropriate sanction for not meeting the required performance standard?\textsuperscript{106}

The Labour Court has further determined that the issue of consistency also be considered.\textsuperscript{107} When an employee fails to satisfy the requirements of the employer a non-conformance is identified. Performance standards are generally within the prerogative of the employer. The question now arises is this a case of misconduct or incapacity?

The fact that there is such a positive obligation on the employer to establish the reasons for the failure to perform, is also important for the purpose of distinguishing between misconduct type of failures and incapacity types of failures.

Once it has been established that the employee has failed to meet the required work standard the employer is obliged to take certain further steps before deciding if the employee should/could be fairly dismissed.

\textit{Procedural requirements}

The employer must give the employee an opportunity to “state a case” (in the case of probationers) or conduct a hearing (in the case of other employees), although a

\textsuperscript{104} Item 9(b)(i) \textit{supra.}  
\textsuperscript{105} Item 9(b)(ii) \textit{supra.}  
\textsuperscript{106} Item 9(b)(iii) read with Item 8(3) requiring that the procedure leading to dismissal should include an investigation to establish the reasons for the unsatisfactory performance and employers should consider other ways short of dismissal.  
\textsuperscript{107} Despite the absence of a reference to inconsistency in Item 8 and 9 the Labour Court required an investigation into whether or not the employer had consistently and equally required the performance standard to be met by all employees. See Grogan “Death of a Sales Person Act 11” (2002) Volume 18 Part 3 \textit{EL} 4.
formal hearing is not required. The employee has the right to respond to the poor work performance allegations. All the usual requirements for a fair hearing should apply; in particular, details of the allegation and sufficient time to prepare a response.\textsuperscript{108} Further the employee has a right to be represented at the hearing.\textsuperscript{109}

The provisions of this Code, are however guidelines and may be departed from in appropriate circumstances.

4.2.3.2 THE DISTINCTION BETWEEN PERMANENT AND TEMPORARY ILL-HEALTH/INJURY INCAPACITY

The first step suggested by the Code is for the employer to determine whether the employee’s incapacity is temporary or permanent.\textsuperscript{110} This investigation would in all likelihood involve the expert opinion of medical doctors and/or specialists. Should the prognosis be that incapacity will continue for an unreasonably long time, the absence may be treated as akin to permanent incapacity.\textsuperscript{111}

Temporary incapacity on the grounds of ill-health/injury requires:\textsuperscript{112}

- the employer to investigate the extent of the incapacity/injury;
- the employer may dismiss an employee, who is likely to be absent for a time that is unreasonably long in the circumstances;
- the employer must consider alternatives short of dismissal.

Permanent incapacity requires the following considerations by the employer:\textsuperscript{113}

- whether the employee is capable of performing the normal work;

\textsuperscript{108} \textit{De Villiers v Fisons Pharmaceuticals (Pty) Ltd} (1991) 12 ILJ 7 (IC).
\textsuperscript{109} Schedule 8 Item 8(1) \textit{supra}.
\textsuperscript{110} Refer Schedule 8 Item 10 \textit{supra}.
\textsuperscript{111} Du Toit \textit{et al} \textit{supra} 376.
\textsuperscript{112} Item 10(1) \textit{supra}.
\textsuperscript{113} Item 10(1) \textit{supra}.
• the extent to which the employee is able to perform the normal work;

• the extent to which the employee’s work circumstances might be adapted;

• the availability of any suitable alternative work;

• the extent to which the employee’s work circumstances might be adapted to accommodate the disability.

The investigations and deliberations will allow an employee the opportunity to state a case, also in response, and to be assisted by a trade union representative or fellow employee. 114

The employer may arrange for counselling and rehabilitation, at the employee’s expense, in cases of alcoholism or drug abuse. 115 The employer should also make the utmost efforts to accommodate employees who are injured at work or who are incapacitated by a work-related illness. 116

It is submitted that the difference between permanent and temporary is a “time weighted difference” and could vary according to the operational requirements of the employer. Generally it can be accepted that permanent incapacity means that the employee will not in the foreseeable future be able to do his job or a related job. Permanent incapacity examples could include blindness, paralysis, loss of limbs etc.

Whereas temporary incapacity envisages a fairly short recovery period where the employee is able to resume his or her work or a related type of work.

114 Item 10(2) supra.
115 Item 10(3) supra.
116 Item 10(4) supra.
4.2.3.3 ANALYSIS OF THE SUBSTANTIVE AND PROCEDURAL FAIRNESS REQUIREMENTS FOR ILL-HEALTH/INJURY INCAPACITY DISMISSAL (SCHEDULE 8)

Incapacity arising from ill-health or injury is recognised as a legitimate reason for terminating the employment relationship, provided as always, it is done fairly.\(^\text{117}\)

Schedule 8, Item 11\(^\text{118}\) encourages all persons (including the courts, commissioners, arbitrators) to consider the following factors when determining if a dismissal arising from ill-health/injury is fair:

- Whether or not the employee is capable of performing the work.\(^\text{119}\)

- If the employee is not capable:\(^\text{120}\)

  - the extent to which the employee is able to perform the work;

  - the extent to which the employee’s work circumstances may be adapted to accommodate the disability;

  - the extent to which the duties might be adapted to accommodate the disability;

  - the availability of suitable alternative employment.

Item 10 further elaborates on the above as follows:

“(1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employee should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the

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\(^{117}\) Grogan Workplace Law supra.

\(^{118}\) Code of Good Practice: Dismissal.

\(^{119}\) Item 11(a).

\(^{120}\) Item 11(b).
possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee’s disability.

(2) In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.

(3) The degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.

(4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances.”

The above Code has once again reflected the guidelines laid down by the Labour Courts over the past decade.121

Investigating the extent of the incapacity clearly obliges the employer to review both the extent of the illness/injury as well as possible ways of adapting the employee’s work to accommodate such disability. This investigation would require the employer to consult with the employee (and his representative) on examination of the impact of the disability on the employee’s performance.122

The seriousness of the incapacity is highlighted by the Code123 in terms of time weighted considerations and draws a distinction between temporary absences due to illness or injury and those that endure for a time that is “unreasonably long in the circumstances”.

It would appear that dismissal would be accepted if the employer can prove that the absence was unreasonably long. What may be deemed to be unreasonably long appears to be dependent on the circumstances which should be evaluated according to the following factors:

- strategic importance of the employee’s job to the employer;

121 See Davies v Clean Deale CC (1992) 13 ILJ 1230 (IC) also at 1232G-1233B.
122 Davies v Clean Deale CC supra at 35; AECI Explosives Ltd v Mambalu supra n 2 at 1515; National Union of Mineworkers v Libanon Gold Mining Co Ltd supra 10 at 589C.
123 Item 10(1) supra.
• length of service;
• case of finding a replacement for the disabled person;
• financial capacity of the employer;
• prospect of recovery of the employee;
• effect of the absence on other employees.

Problems may arise where repeated absence of short durations occur. The courts have upheld dismissals for habitual absenteeism (malingering) even if for medical reasons.\(^\text{124}\)

The nature of the incapacity should emanate from illness or injury and as such any physical disability will qualify to be considered under this item of the Code. It is suggested in the Code\(^\text{125}\) that special consideration must be given to work related sickness or injury. Special mention is also made of employees who are addicted to drugs or alcohol, the employer in such cases being advised to consider counselling and rehabilitation.\(^\text{126}\)

The Code does not indicate at who’s cost this counselling and rehabilitation should be and therefore one can safely assume that it would be for the employee’s own cost.

It should also be noted that all sectoral determinations as well as the provisions of the Basic Conditions of Employment Act must be taken into account in all the above considerations. While it has been held that an employee may be dismissed for incapacity despite not having exhausted the sick leave entitlement\(^\text{127}\) it should be noted that dismissals should only be considered when abuse of sick leave is  

\(^{124}\) In AECI Explosives Ltd (Zomerveld) v Mambalu supra n 2 the court warned that both forms of dismissal must be treated in the same way, in that both forms of incapacity require counselling and consultation.
\(^{125}\) Item 10(4) supra.
\(^{126}\) On the approach to be adopted when an employee is incapacitated by medication taken to alleviate psychological stress, see Spero v Elvey International (Pty) Ltd (1995) 16 ILJ 1210 (IC).
\(^{127}\) Basic Conditions of Employment Act supra Chapter 3 Item 22.
apparent or when the employee’s illness will clearly exceed the statutory or contractual entitlement.\textsuperscript{128}

With regard to possible alternatives and/or adoption of the environment the Code\textsuperscript{129} recommends that these be given serious consideration as possible alternatives to dismissal, providing reasonable assistance and/or equipment to help the employee cope with the disability. Alternatively, alternative work should be found which would be suitable for the disabled employee.

In terms of Item 10(2) of the Code the employee is entitled to be counselled and may “state a case”. This right puts to rest all the arguments as to whether a hearing is necessary or required before dismissing an employee for incapacity. The inquiry need not be a type of disciplinary enquiry, rather an investigative type of enquiry so as to attempt to find alternatives and explore all possible scenarios.

It is submitted that it will only be fair to execute a dismissal of a disabled employee when there is no prospect of their recuperation or the period of recuperation would cause irreparable harm to the employer through significant losses as a result of the employee’s absence.

It is in this respect that dismissal for ill-health or injury is similar to an operational requirements dismissal.\textsuperscript{130} Both fall under the category of no-fault dismissals.

\textsuperscript{128} In Hendricks v Mercantile & General Reinsurance Co of SA Ltd supra the following test was suggested “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 (not) have been expected to wait any further before considering dismissal”. The court found that test may be applied even before the employee has exhausted his/her contractual sick leave. See also Croucamp v Le Carbonne (SA) (Pty) Ltd(1995) 16 ILJ 1223 (IC).

\textsuperscript{129} Item 11(b) supra.

\textsuperscript{130} National Union of Mineworkers v Rustenburg Base Metals Refineries (Pty) Ltd (1993) 14 ILJ 1094 (IC) where the court found that an incapacity dismissal could be treated as a form of redundancy.
4.3 ROLE OF THE CODE OF GOOD PRACTICE: KEY ASPECTS ON THE EMPLOYMENT OF PEOPLE WITH DISABILITIES

The above-mentioned Code was issued by the Minister of Labour on the advice of the Commission for Employment Equity in terms of s 54(1)(a) of the Employment Equity Act 55 of 1998.

The aims of the Code\(^\text{131}\) are, *inter alia*, as follows:

(a) To act as a guide for employers and employees on promoting equal opportunities and fair treatment for people with disabilities as required by the Employment Equity Act.\(^\text{132}\)

(b) To help employers and employees understand their rights and obligations, promote certainty and reduce disputes to ensure that people with disabilities can enjoy and exercise their rights at work.

(c) To help create awareness of the contributions people with disabilities can make and to encourage employers to use the skills of such persons fully.

4.3.1 LEGAL STATUS OF THE CODE\(^\text{133}\)

The following of note is stated regards the status of the Code:

- the Code is not an authoritative summary of the law;

- the Code does not create additional rights and obligations;

- failure to observe the Code does not, by itself render a person liable in any proceedings;

\(^{131}\) Item 2 of the Code *supra.*

\(^{132}\) *Supra.*

\(^{133}\) Item 3 of the Code.
• nevertheless, when the courts and tribunals interpret and apply the Employment Equity Act, they must consider the Code.

The legal framework in terms of Item 4 of the Code, states that the Code is issued in terms of section 54(1)(a) of the Employment Equity Act and is based on the constitutional principle that no-one may unfairly discriminate against a person on the grounds of disability.

Definition of people with disabilities.134

Section 1 of the Employment Equity Act defines people with disabilities as "people with disabilities are people who have a long-term or recurring physical or mental impairment, which substantially limits their prospects of entry into, or advancement in employment".

The Code135 provides an insight into what is to be understood under the constituent elements of the above Code. In this regard, the Code breaks the definition down into three distinct elements and further states that people are considered as persons with disabilities who satisfy all the criteria in the definition (my emphasis):

(a) having a physical or mental impairment;
(b) which is long-term or recurring; and
(c) which substantially limits their prospects of entry into, or advancement in employment.

Item 5.1.1 then further clarifies the elements above:

“(a) Impairment

(i) An impairment may be either physical or mental or a combination of both.

(ii) ‘Physical’ impairment means 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.

134 Item 5 of the Code supra.
135 Item 5 supra.
(iii) Mental impairment means a clinically recognised condition or illness that effects a person’s though processes, judgements or emotions.

(b) Long-term or recurring

(i) ‘Long-term’ means the impairment has lasted or is likely to last for at least 12 months.

(ii) ‘Recurring impairment’ is one that is likely to happen again and to be substantially limiting. It includes a constant chronic condition, even if its effects on a person fluctuate.

(iii) ‘Progressive conditions’ are those that are likely to develop or change or recur. People living with progressive conditions or illnesses are considered as people with disabilities once the impairment starts to be substantially limiting.

(c) Substantially limiting

(i) An impairment is substantially limiting if, in its nature, duration or effects, it substantially limits the person’s ability to perform the essential functions of the job for which they are being employed.

(ii) Some impairments are so easily controlled, corrected or lessened that they have no limiting effects (eg spectacles).

(iii) An assessment to determine whether the effects of an impairment are substantially limiting must consider if medical treatment or other devices would control the impairment so that its adverse effects are prevented or removed.

(iv) For reasons of public policy, certain conditions or impairments may not be considered disabilities.

(aa) Sexual behaviour disorders.

(bb) Self-imposed body adornments.

(cc) Compulsive disorders such as gambling etc.

(dd) Disorders caused by current use of drugs or alcohol, unless the person is participating in a recognised programme of treatment.

(ee) Normal physical deviations such as height, weight etc.

(v) An assessment may be done by a suitably qualified person if there is uncertainty as to whether an impairment may be substantially limiting.”

Reasonable accommodation for people with disabilities\(^{136}\)

Section 1 of the Employment Equity Act defines reasonable accommodation as “any modification or adjustment to a job or the working environment that will enable a person from a designated group to have reasonable access to or participate or advance in employment.

\(^{136}\) Item 6 of the Code supra.
Various factors are dealt with under Item 6 and regard here will only be given to those factors associated with the treatise topic, for brevity’s sake:

“6.1 The aim of accommodation is to reduce the impact of the impairment of the person’s capacity to fulfil the essential functions of a job.

6.2 Employers should adapt the most cost effective means to remove barriers.

6.3 Reasonable accommodation applies to applicants and employees with disabilities who are suitably qualified for the job and may be required –

(i) during the recruitment and selection process;
(ii) in the working environment;
(iii) in the way work is usually done, evaluated and rewarded; and
(iv) in the benefits and privileges of employment.”

Items 6.4 to 6.8 of the Code:

“obligation arises when voluntary disclosure by employee or disability is reasonably self-evident to employer or when environment changes or the impairment varies, the employer should consult the employee and technical experts, the particular accommodation will depend on the individual degree and nature of the impairment, which may be temporary or permanent depending on the extent and nature of the disability.”

Item 6.9 of the Code:

“describes what reasonable accommodation may include. The list (i) – (vii) includes various methods of making the job easier and more accessible to people with disabilities. This list is not exhaustive, the Code uses the phrase ‘not limited to’.”

Item 6.10 of the Code:

“permits an employer to evaluate work performance against normally required standards.”

Item 6.11 of the Code:

“the employer need not make accommodation if this should impose unjustified hardship on the business.”

Item 6.12 of the Code:

“defines unjustified hardship as action that requires significant or considerable difficulty or expense.”
Item 6.13 of the Code:

“Our accommodation that imposes an unjustified hardship may vary according to the employer and timing.”

Item 8 of the Code: medical and psychological testing and other similar assessments.

Section 7 of the Employment Equity Act stipulates:

“In (1) Medical testing of an employee is prohibited unless:

(a) legislation permits or requires the testing; or

(b) it is justified in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job.

7(2) Testing of an employee to determine that employee’s HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court in terms of section 50(4) of this Act.”

Item 8 of the Code deals with the following issues:

(a) medical testing;
(b) testing after illness or injury;
(c) health screening and safety;
(d) pre-benefit medical examinations.

Key aspects of the above are covered in the Code and include the following:

(i) Tests must comply with sections 7 and 8 of the Employment Equity Act and must be relevant.

(ii) Tests to establish the health of the applicant or employee should be distinguished from tests that assess the ability to perform essential job functions or duties.

(iii) Health status tests should only be carried out after an employer or applicant is found to be competent.
(iv) An employer who requires tests must bear the cost of such tests.

Item 8.2 of the Code: testing after illness or injury. In this regard the Code states the following of note:

(i) If an employee has been ill or injured and it appears that the employee is not able to perform the job, the employer may require the employee to agree to a functional determination of disability.

(ii) Such medical or other appropriate tests shall be used to

   (a) determine if the employee can safely perform the job; or
   (b) to identify reasonable accommodation required for the employee.

Item 11 of the Code: retraining people with disabilities. The following is stipulated by Item 11:

(i) Employees who become disabled during employment should, where reasonable be re-integrated into work. Employers should seek to minimise the impact of the disability on employees.

(ii) If an employee becomes disabled, the employer should consult the employee to assess if the disability can be reasonably accommodated.

(iii) If an employee becomes disabled, the employer should maintain contact with the employee and where reasonable encourage early return to work. This may require vocational rehabilitation, transitional work programmes and, where appropriate, temporary or permanent flexible working time.

(iv) If an employee is frequently absent from work for reason of illness or injury, the employer should consult the employee to assess if the reason for absence is a disability that requires reasonable accommodation.
(v) If reasonable, employers should explore the possibility of offering alternative work, reduced work or flexible work placement, so that employees are not compelled or encouraged to terminate their employment.

Item 12 of the Code: termination of employment. The Code states the following of note:

(i) If the employer is unable to retain the employee in employment in terms of Item 11, then the employer may terminate the employment relationship.

(ii) When employees who have disabilities are dismissed for operational requirements, the employer should ensure that any selection criteria used do not directly or indirectly unfairly discriminate against people with disabilities.

(iii) Employers who provide disability benefits should ensure that employees are appropriately advised before they apply for the benefits available and before resigning from employment because of a medical condition.

Item 14 of the Code: confidentiality and disclosure of disability. This Item deals with the duty of the employer to keep confidential all information pertaining to employees’ disabilities.

Item 15 of the Code: employee benefits. Benefits in the Code refer to, fringe benefits, medical benefits, group disability benefits, retirement schemes and life assurance schemes. Item 15 determines, inter alia that:

(i) An employer who provides or arranges for occupational insurance or other benefit plans directly or through a separate benefit scheme or fund, must ensure that they do not unfairly discriminate, either directly or indirectly against people with disabilities.

(ii) Employees with disabilities may not be refused membership of a benefit scheme only because they have a disability.
Commenting on the above Code is in most cases not warranted as the Code is mostly fairly explicit, clear and easily understood.

Areas of concern must surely be the areas left broadly defined or not defined at all in the Code. Below follows a list of issues left unanswered by the Code:

(a) “Long-term” is defined as lasting at least 12 months. Does it then follow that less than 12 months is short term?  

(b) “Substantially limiting” is not defined as to what is substantially in terms of percentage productivity in the job. One could ask would 50% be acceptable as substantially limiting?

(c) Reasonable accommodation is not defined as to who would be liable for the costs of this accommodation, and what would be considered to be reasonable.

(d) Item 6.9 provides a list of what “reasonable” accommodations could be, this list is left open by the phrase “not limited to”. This leaves the definition open ended and liable to some extraordinary awards as to what could be included.

Finally, the use of the word “reasonable” is used in almost all of the Items of the Code. It is also true that what may be reasonable to one employer may surely be impossible to another through various circumstances such as size of organisations, profitability etc. It may well be a real bone of contention once disputes are settled under this Code by the CCMA and the courts.

It remains to be reiterated that this Code is regarded as a guide and has no force of law.

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137 Item 5.1.1(b) of the Code *supra*. 
4.3.2 THE APPROACH TAKEN BY THE CCMA AND THE COURTS IN DEALING WITH THE CODES OF GOOD PRACTICE

The Act requires any person who is considering whether a dismissal was for a fair reason and in accordance with a fair procedure to take into account “any relevant Code of Good Practice issued in terms of this Act”.¹³⁸

The principal Codes are those dealing with dismissal generally, dismissal for operational requirements, and sexual harassment. These Codes are merely guidelines and do not give rise to substantive rights.

A groundbreaking judgment was issued by the Labour Court in a case where a company, Joy Mining Machinery,¹³⁹ obtained leave to test its employees for HIV under certain conditions. It is important to understand that this order was granted in a situation in which the parties, the union and the company, had agreed that the order should be granted.

The court placed heavy reliance on the Code of Good Practice: Key Aspects of HIV/AIDS and Employment¹⁴⁰ which makes it clear that no employer may require an employee or an applicant for employment to undertake an HIV test in order to ascertain that employee’s HIV status. Employers may however apply to the Labour Court to obtain authorisation for testing. Section 7, read with section 50 of the Act¹⁴¹ does not require the consent of employees before application may be made for testing. This view was also confirmed in Hoffman v SA Airways (CC)¹⁴² in that refusing employment to a prospective cabin attendant on account of HIV status constitutes discrimination and is contrary to the provisions of the Constitution.

In Marais v Firestone SA (Pty) Ltd¹⁴³ the CCMA appears to have had regard to the state of the employee’s capacity, or lack thereof both at the time of the dismissal and

¹³⁸ Labour Relations Act supra.
¹⁴⁰ The Code should be read in conjunction with all Acts applicable in labour law but especially with the Constitution of South Africa.
¹⁴¹ Labour Relations Act supra.
¹⁴³ (1996) 7(8) SALLR 18 (CCMA) 26A-26F.
at the time of the arbitration hearing. In a private arbitration matter *National Union of Mineworkers obo Fillisen v Eskom*\(^{144}\) the arbitrator appears to have relied on the Code of Good Practice: Dismissal\(^{145}\) to a large degree in the test he applied in determining whether the employee was incapacitated or not.

“In the case of operational requirements dismissals the courts have on numerous occasions, stressed the correlative duties of the parties to the consultative process, that is, the notion that not only is there a duty on the employer to consult properly in a retrenchment but also a duty on the union to participate fully and properly. Failure to do this may lead to a forfeiture of relief.”\(^{146}\)

It is submitted that when assessing compliance with a Code, arbitrators and the courts need to guard against a checklist type approach, in the sense that should an employer fail to comply with one of the elements required by [that] Code will not automatically qualify them for an unfair dismissal.

The test should be whether there has been substantial compliance with the requirements of the Code.\(^{147}\)

In the *Mjaji v Creative Signs*\(^{148}\) a small employer’s failure to comply with the procedural requirements of the Code was excused in circumstances where there was incontrovertible evidence of the misconduct and little possibility of a suitable explanation being put forward by the employee.\(^{149}\)

In *Enterprise Foods (Pty) Ltd and FAWU*\(^{150}\) the arbitrator found against the employer because it had followed the misconduct procedure while its actual charge related to incompetence.

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\(^{144}\) (2002) 13(1) SALLR (ARB).

\(^{145}\) Item 11 of the Code *supra*.

\(^{146}\) See *Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union* (1998) 9(1) SALLR 1 (LAC). Commentary from SALLR 9(1).

\(^{147}\) In *Cornelius v Howden Africa Ltd t/a M & B Pumps* (1998) 3 BALR 270 (CCMA) the arbitrator stressed that the different elements of procedural fairness must not be considered as independent requirement. CCMA arbitrators have given effect to the less formalistic procedures of the Code. See *Mjaji v Creative Signs* (1997) 3 BLLR 632 (CCMA); *Muller v Trucool CC* (1997) 4 BLLR 462 (CCMA).

\(^{148}\) *Supra*.

\(^{149}\) See also *ECCAWUSA obo Nkosi v Wimpy Kempton City* (1998) 3 BALLR 278 (CCMA).

\(^{150}\) (1997) 1 CCMA 7.3.6.
§ 5.1 INTRODUCTION

Research into cases dealing with ill-health/injury incapacity dismissals has uncovered that the majority of cases appear to fall into one or the other of the following categories:

1. excessive (intermittent) absenteeism;
2. alcohol and/or drug abuse;
3. serious long term absence caused by injury/illness.

Excessive intermittent absenteeism is often viewed by employers as an abuse of sick leave privileges. This absenteeism is often covered by a sick note with a variety of illnesses usually to cover periods preceding or after weekends or public holidays. In those circumstances the dismissal procedure would follow a misconduct procedure rather than an incapacity procedure. In rare cases intermittent illness and absence for short periods can be excused by genuine illness.

Alcohol and drug abuse cases are also very frequent in industry and often follow similar patterns of absenteeism as the malingering employee who merely intends to abuse the sick leave system. Cases representative of these two categories of dismissal have been researched and will be used to illustrate the interpretation of the CCMA and courts with regard to the requirements for a fair dismissal as contained in the Labour Relations Act and the Codes of Good Practice.

Section 192(1) of the Labour Relations Act provides that in any proceedings concerning any dismissal, the employee must establish the existence of the

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151 This would exclude long term genuine illness or injury.
152 66 of 1995.
dismissal. Section 192(2)\textsuperscript{153} provides that if the existence of the dismissal is established, the employer must prove that the dismissal was fair.

In terms of Schedule 8 of the Code of Good Practice a dismissal is unfair if it is not effected for a fair reason\textsuperscript{154} and in accordance with a fair procedure.\textsuperscript{155}

Whether or not a dismissal is for a fair reason is determined by the facts of the case and the appropriateness of dismissal as a sanction. The Labour Relations Act recognises three grounds on which an employment contract may be terminated.\textsuperscript{156} These are the employees misconduct, the employees incapacity and/or operational requirements.

Item 10(1) of Schedule 8\textsuperscript{157} provides that the procedure leading to dismissal for medical incapacity should include an investigation to establish the extent of the incapacity or injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all possible alternatives short of dismissal.

In cases of permanent incapacity the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee’s disability.

Item 11(a) and (b) of Schedule 8\textsuperscript{158} states that any person determining whether a dismissal arising from ill-health or injury is unfair should consider –

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

(b) if the employee is not capable-

\textsuperscript{153} Supra.
\textsuperscript{154} Substantive fairness.
\textsuperscript{155} Procedural fairness.
\textsuperscript{156} S 188 supra.
\textsuperscript{157} Code of Good Practice supra.
\textsuperscript{158} Supra.
(i) the extent to which the employee is able to perform the work;

(ii) the extent to which the employee’s work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee’s duties might be adapted; and

(iii) the availability of any suitable alternative work.

5.2 SUBSTANTIVE AND PROCEDURAL FAIRNESS REQUIREMENTS AND THE INTERPRETATION OF THE CCMA AND THE COURTS IN CASES OF ILL-HEALTH/INJURY INCAPACITY DISMISSALS

5.2.1 EXCESSIVE INTERMITTENT ABSENTEEISM

In National Union of Metalworkers of SA obo Coto v Eveready South Africa (Pty) Ltd\(^{159}\) Grogan had the following to say:

“Both the civil and labour courts have long recognised that an employment contract can be terminated for protracted absence caused by illness or injury. This approach is confirmed by the Act, which recognises ‘incapacity’ of an employee as one of three permissible grounds for dismissal. The underlying rationale for this principle is that it is unreasonable to expect an employer to continue paying an employee who is incapable of rendering proper service in terms of the contract. ... it is also clear that not any absence caused by illness or injury justifies the dismissal of an employee: the absence must endure for a period which is unreasonably long given the needs of the employer.”\(^{160}\)

In this particular case\(^{161}\) the employee had been absent through illness, frequently for short periods of time on an “intermittent” basis.

Grogan adapted the approach that the intermittent nature of the absences did not preclude the employer from terminating the contract when such absences became unreasonable.\(^{162}\)

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\(^{159}\) (1997) 8(4) SALLR 8 (CCMA).

\(^{160}\) Myers v Sieradyki 1910 TPD 869.

\(^{161}\) NUMSA v Eveready supra.

In the *Hendricks-case*\(^{163}\) the Labour Appeal Court observed that, “the substantive fairness of a dismissal (for persistent illness) 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 or length of service”.

In this case the employee had been absent for 16 days in the first year and 38 days in the second year. In the *Mambalu v AECI case*\(^ {164}\) the employee had been absent on 75 days over a three year period.

In both the aforegoing cases the courts held that the length of absence justified the sanction of dismissal.

In the *Eveready-case*\(^ {165}\) the employee had taken 49 days’ sick leave in less than two years, similarly Grogan held that the employee had exceeded what the courts consider reasonable. The court effectively rejected the reasoning of the applicants representative that the employer may only put an employee to terms for excessive absence after he or she has been absent for 30 days in a three year cycle as per the statutory entitlement.

Grogan\(^ {166}\) reasoned that “if, in addition the employer is required to counsel and caution the employee, to observe the pattern of his attendance, to encourage him to seek medical assistance, and so on, the chances are that the employee’s next leave cycle will have commenced, by which time the employer will be forced to wait it out while the employee exercises his statutory entitlement to the next 30 day’s sick

\(^{163}\) Supra.
\(^{164}\) Supra.
\(^{165}\) Supra.
\(^{166}\) Supra.
leave. This he adds could not have been the intention of the drafters of the Labour Relations Act or the Basic Conditions of Employment Act".\textsuperscript{167}

In Grogan’s opinion\textsuperscript{168} “an employee is said to be incapable of performing the work which he is contractually obliged to perform if he is away for a single period of lengthy duration or repeated periods of short duration …”.

Similarly in the \textit{Rian van Rensburg v Leeudoorn Gold Mine}\textsuperscript{169} the arbitrator, Mr Boissie Mbha upheld the dismissal of the applicant who had been off sick for a period of 40 days suffering from an undisputed case of asthmatic bronchitis. Medical certificates had been produced and accepted by the employer. The arbitrator stated that he was satisfied that the applicant’s service were properly terminated in view of his medical condition.

\textbf{5.2.2 ALCOHOL AND DRUG ABUSE}

In item 3(5) of Schedule 8\textsuperscript{170} reference is made to the “nature of the job” as being a factor which must be considered when determining whether or not a dismissal is fair or appropriate in the circumstances.\textsuperscript{171}

In \textit{Tanker Services (Pty) Ltd v Magudulela}\textsuperscript{172} Conradie had the following to say “whether an employee is by reason of the consumption of intoxicating liquor, unable to perform a task entrusted to him by an employer must depend on the nature of the task. A farm labourer may still be able to work in the fields although he is too drunk to operate the tractor. Consumption of alcohol would make an airline pilot unfit for his job long before it made him unfit to ride a bicycle”.

In \textit{Le Roy v SA Express Airways}\textsuperscript{173} Commissioner Loveday held that intoxication was a matter of degree and that an individual could only be said to be under the influence

\begin{itemize}
  \item Basic Conditions of Employment Act 3 of 1983 as replaced by Act 75 of 1997.
  \item Grogan \textit{supra}.
  \item Case No GA 86689 CCMA Johannesburg.
  \item \textit{Supra}.
  \item See \textit{Standard Bank of SA Ltd v The CCMA, Seedat NO, Mashishi NO and SA Commercial Catering and Allied Workers Union} (1998) 9(5) SALLR 96 (LC).
  \item (1998) 9(7) SALLR 6 (LAC).
\end{itemize}
of alcohol if he was no longer able to perform the tasks entrusted to him with the skill expected of a sober person and further held that this would be dependant on the nature of the task.\textsuperscript{174} It was also held \textit{in casu} that not every finding of an employee’s being under the influence of alcohol would necessarily mean that dismissal was an appropriate sanction.

In \textit{Tanker Services} the court held that “the degree of intoxication had to be judged more conservatively than an employee with a less responsible function to perform. The importance of evaluating the seriousness of alcohol use and employment in terms of the nature of the particular employment was also dealt with in number of Industrial Court and CCMA awards.\textsuperscript{175}

In \textit{Naiker and Reutech Defence Industries}\textsuperscript{176} the arbitrator concluded that dismissal was too harsh a penalty in the light of the employee’s length of service and clean disciplinary record. Due to those compelling mitigating factors the arbitrator awarded reinstatement conditional on the employee accepting a final written warning, coupled with a period of unpaid suspension.

The latter case appears to distinguishable from the \textit{Le Roy v SA Express Airways}-case\textsuperscript{177} in that the applicant, who was a pilot did not have long service – he only had ± 2½ years service as compared to the former with 16 years service. Additionally his record was blemished having admitted to three previous counselling sessions relating to injudicious use of alcohol.

What is paramount however was the fact that the nature of the employee’s job, in the \textit{Naiker}-case was not comparable to the demands of the technical skill and expertise required to fly a passenger aircraft.

\begin{flushright}
\textsuperscript{173} (1998) 9(6) SALLR 1 (CCMA).
\textsuperscript{174} See \textit{Tanker Services (Pty) Ltd v Magudulela} (1997) 12 BLLR 1552 (LAC).
\textsuperscript{175} See \textit{Rosenberg v Mega Plastics} (1984) ICD (1) 108; Ethwaroo and \textit{Bakers Biscuits} case KN 6506; \textit{Keyser, Gordon and Department of Correctional Services} Case EC 5171.
\textsuperscript{176} Case KN 1718.
\textsuperscript{177} Supra.
\end{flushright}
It can be concluded that the nature of the employee’s job is a major consideration in the CCMA’s determination as to the fairness of the sanction.\textsuperscript{178}

With reference to the wording of Item 10(3) of Schedule 8,\textsuperscript{179} which deals with ill-health/injury incapacity dismissals and which states that the cause of the incapacity may be relevant in determining whether or not the dismissal in question was fair and that alcohol and drug abuse might necessitate the employers embarking on a route of counselling and rehabilitation, it appears that, under the 1995 Labour Relations Act, it was envisaged that alcohol abuse could either give rise to a misconduct dismissal or an incapacity dismissal. The question that arises is, which test is to be used to determine which route to follow in an alcohol related case.\textsuperscript{180}

The approach of the CCMA in \textit{Le Roy v SA Express Airways}\textsuperscript{181} was that in the event that the employee denies that he has a “drinking problem”, the employer is then justified in treating the alcohol abuse situation as a misconduct situation and therefore was not obliged to follow the mere onerous incapacity route of investigation of alternatives, counselling and rehabilitation.

In \textit{Sivalingun Govender v General Chemicals Coastal Ltd t/a Genkem}\textsuperscript{182} the Industrial Court, per Freemantle, drew a similar distinction between drinking alcohol, on the one hand, and being under the influence of alcohol on the other hand.\textsuperscript{183}

Evaluating the seriousness of alcohol use and the nature of the job is an important consideration as can be seen in \textit{Rosenburg v Mega Plastics}\textsuperscript{184} where Erasmus found that the driver of a heavy duty truck is more culpable than a loader, where both had been guilty of consuming alcohol while on duty. He rationalised that a heavy duty

\textsuperscript{178} Refer \textit{Standard Bank of SA Ltd v The CCMA} (1998) 9(5) SALLR 96 (LC).
\textsuperscript{179} Supra.
\textsuperscript{180} See \textit{Paper Printing Wood and Allied Workers Union v Nampak Corrugated Containers} (1996) 7(9) SALLR 1 (CCMA).
\textsuperscript{181} Supra.
\textsuperscript{182} (1992) 3(12) SALLR 1 (IC).
\textsuperscript{183} The court said that despite being found guilty of being “under the influence of alcohol whilst on duty”, and that in all probability had drunk alcohol that day, no evidence had been produced to show that the applicant had been “influenced by what he drank, or that his performance was impaired by it”. The court’s ratio was thus that the applicant had not been shown to be guilty of the offence of being under the influence of alcohol.
\textsuperscript{184} (1984) ICD (1) 108.
vehicle driver not only risked severe damage to the employer’s vehicle but also endangered the lives of the users of the road as well as the two loaders.

An award which appears to support the above ratio is found in *Ethwaroo and Bakers Biscuits*\(^{185}\) where the arbitrator found that dismissal was appropriate for an employee whose breathalyser test proved positive while on shift operating high-speed machinery which required high levels of alertness as to inherent dangers in the workplace.

In *Keyser, Gordon and Department of Correctional Services*\(^{186}\) the arbitrator similarly found that the nature and responsibilities were such that dismissal was warranted. In this matter the employee had been a correctional officer in charge of escorting a prisoner to court at the time of his being found in an intoxicated state.

The test laid down by the Labour Appeal Court for determining whether or not it could be said that an employee was under the influence of alcohol was whether the employee concerned was no longer able to perform the tasks that had been entrusted to him in consequence of his consumption of alcohol.\(^{187}\)

The court stresses that in applying the test, the nature of the employee’s task/job will play a pivotal role, the greater the difficulty or potentially dangerous the job of the employee, the more easily will the court conclude that, in consequence of the employee’s consumption of alcohol, he was unable to perform his tasks properly and, hence, was correctly held to be guilty of the offence of being under the influence of alcohol.\(^{188}\)

The Commissioner in *Naik v Telkom*\(^{189}\) observed the alcoholism and drug abuse was a disease which should be dealt with like any other species of incapacity, and that further, it was not appropriate to dismiss an employee for displaying symptoms of alcoholism or drug dependence. The Commission adds that the employer should

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\(^{185}\) Supra.

\(^{186}\) Supra.

\(^{187}\) Tanker Services (Pty) Ltd v Magudulela supra.

\(^{188}\) Supra; also see *Keyser v Department of Correctional Services* (1998) 9(7) SALLR 16 (CCMA).

\(^{189}\) Supra.
consider the nature of the job; the extent to which the illness incapacitates the employee; the length of time required for rehabilitation and the possibility of securing a temporary replacement.

In *Spero v Elvey International (Pty) Ltd*\(^{190}\) the court expressed the view that special attention should be paid to employees who are addicted to drugs or alcohol. The employer is encouraged to consider counselling and rehabilitation.\(^{191}\)

In the *Motha-case*\(^{192}\) the employee had been tested positive for abusing mind-altering substances on three occasions in a period of 20 days. The Commissioner's opinion was that this fact indicated that the applicant was in fact a drug addict with a definite drug problem and that the employer should have adapted a more sympathetic approach.

It appears from the above that the approach of the CCMA as to the “test” to be applied as to whether the matter should be treated as misconduct or incapacity is simply: does the employee have a drug problem? Is the employee addicted? If the answer to these questions is in the affirmative then the matter should be dealt with as an ill-health/injury incapacity matter rather than as a misconduct matter.\(^{193}\)

Given the material differences in the substantive and procedural fairness requirements under the 1995 Labour Relations Act, for rendering misconduct dismissals and ill-health/injury incapacity dismissals fair, \(^{194}\) it is apparent that should an employer wrongly treat a drug abuse case as a misconduct, rather than an ill-health/injury incapacity matter, the employer could be faced with a very strong probability that the dismissal would be held to be unfair in the circumstances.

\(^{190}\) (1995) 16 ILJ 1210 (IC).

\(^{191}\) See *National Union of Mineworkers obo Motha v Sherringhuizen Open Cast Mining* (2002) 13(6) SALLR (CCMA). Where Commissioner Matlala similarly found the dismissal of the applicant (Mr Motha) to be unfair. The employer was also enjoined to arrange rehabilitation after his (Motha’s) re-employment. The employer was not held liable for the costs of treatment nor salary while on rehabilitation.

\(^{192}\) *Supra.*

\(^{193}\) See *Niak v Telkom* *supra* where a similar conclusion was arrived at by the CCMA in that case, which was alcohol related; *Paper Printing Wood and Allied Workers Union v Nampak Corrugated Containers* *supra.*

\(^{194}\) Schedule 8 Item 10 and 11.
5.2.3 HIV INCAPACITY

In *Hoffman v SA Airways* 195 Hussain found that there is a need to subject aspirant cabin attendants to medical testing, and that SAA’s policy did not discriminate against HIV sufferers, because it was applied uniformly to all infected persons and further that the policy was aimed at identifying any disabilities or diseases that made applicants unsuitable for the position of flight attendant, as the airline was merely trying to protect passengers, which was a “worthy and important societal goal”.

This judgment was later overturned by the Constitutional Court who rejected all of the following factual findings, except for the first, made by the High Court: 196


HIV infection follows four stages over a period of eight to ten years; the first, occurring at about four to eight weeks after infection, consisting of a bout of flu-like illness; the second, a “clinically silent” period in which the victim is unaware of any illness; the third, a progressive depression of the immune system, during which the victim may still be unaware that anything is amiss; the fourth, the spread of a “vast amount” of the virus into the bloodstream, followed by death. Ngcabo J concluded that “an asymptomatic HIV positive person can perform the work of a cabin attendant competently. Any hazards to which an immuno-competent cabin attendant can be exposed can be managed by counselling, monitoring, vaccination and the administration of appropriate antibiotic prophylaxis if necessary. Similarly the risk to passengers and other third parties are inconsequential …” 197

196 Supra.

197 Supra.

198 “HIV Discrimination: Defending the Infected” BLLR CA 6 FW 1 (Internet sources article).


The Constitutional Court also rejected arguments based on “public perception” and general economic interest. 198 The court gave short shrift to the contention that the employment of HIV positive people could frighten off customers. With regard to the general economic interest argument the court’s ratio was that “the policy choice that considerations of profit must give way to the recognition of the inherent dignity of every human being, which is a far higher societal interest than economic expedience based on stereotyping and prejudice”.

In the *Woolworths*-case 199 the Labour Appeal Court warned that “if the Labour Courts were to make the decisions entirely indifferent to profitability, the consequences for our society would be disastrous.
Willis J reasoned that if an employer was not permitted to reject an applicant for employment because he or she has a terminal disease that will in time, render him or her permanently unfit for duty, it will surely not be permissible to reject an applicant merely because she will be temporarily unfit because of pregnancy.

The court found, in essence, that it is neither fair nor justifiable to exclude a person from employment because of a medical condition that will certainly render a person unfit for duty at some future uncertain date.  

The Constitutional Court held that, “unless infection can be shown to be relevant to assessing whether the applicant’s ability to perform in the short to medium term, his or her exclusion on the basis of HIV status is impermissible”.

Much the same approach was taken by the Namibian Labour Court in a case concerning a prospective soldier who was HIV positive.

The court a quo found that because the defence force was unable to persuade the court that the applicant would not be able to function effectively as a soldier at the time of his application, and also because many Namibian soldiers are already infected and are not subjected to tasks, there was no basis for excluding the applicant.

The Employment Equity Act prohibits all medical testing unless such testing is permitted by legislation, or unless the Labour Court authorises testing “in the light of medical facts, employment conditions, social policy, the fair distribution of employees benefits or the inherent requirements of the job”.

Due to the nature of the HIV infection and its affects on employees, the employer will in all likelihood treat any potential dismissal on the basis of either

- excessive intermittent absenteeism; or

200 “Defending the Infected” supra.
• serious long-term absence through illness.

The above choice of cause of action would depend on the rate of infection of the employee and the employer would in those circumstances be well advised to follow the ill-health/injury incapacity route should dismissal be considered for operational reasons.

5.2.4 REMEDIES AND RELIEF AWARDED BY THE CCMA AND COURTS

Types of relief awarded by the CCMA and courts is to an extent varied and inconsistent.

Cases in which dismissals were upheld in the CCMA were invariably cases which contained elements of a “gross” or excessive nature, some examples are listed below.

In Le Roy v SA Express Airways, the employee had been found guilty of being under the influence of alcohol whilst on duty as a pilot of a passenger aircraft. In Kayser v Department of Correctional Services, the employee, a jail warder had become intoxicated whilst guarding a prisoner (who was also under the influence) on duty.

In the Tanker Services-case the Labour Appeal Court overturned an Industrial Court decision and held that, the nature of the job, in this case, driving a heavy duty vehicle loaded with caustic soda whilst under the influence of alcohol presented not only a danger to the employer’s property but a serious threat to public lives.

With regard to excessive absenteeism the CCMA upheld the dismissal of the applicant in the Eveready-case for being absent on 49 days in a two year period.

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203 Supra.
204 Supra.
205 Supra.
206 Supra.
Similarly, in the Labour Appeal Court the cases of *Mambalu v AECI*\(^{207}\) and *Hendricks v Mercantile & General Reinsurance*\(^{208}\) the court held that “the substantive fairness of a dismissal [for persistent illness] depends on the question of 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”.

With regard to cases in which the CCMA and courts have granted relief the following types of relief are reported.

In *Naik v Telkom*\(^{209}\) the applicant had 17 years service with no previous alcohol related problems and the CCMA considered alcoholism as a disease which was treatable in the short term. Also the CCMA found that the applicant should only have been dismissed in “the event that all reasonable alternative placements were refused or totally impossible”. The Commissioner ordered reinstatement retrospectively for three months, there was also no directive to reinstate on a permanent basis into his former position or a directive that he should be placed in some other position but rather in paragraph 3 of the order “a strong recommendation that the parties enter into consultation regarding a reasonable alternative position for the applicant”.

Similarly in the *Nampak Corrugated Containers-case*\(^{210}\) the CCMA (Prof Cowling) awarded reinstatement but added the rider that “reinstatement may, in appropriate circumstances, not be open-ended but be subject to conditions such as, for example, imposition of a final written warning, valid for a period of 12 months”. The applicant was also required to submit himself to the respondent’s medical clinic for treatment if necessary. No award was made as to back pay in respect to time he had not worked.

In *Naiker v Reutech Defence Industries*\(^{211}\) the applicant was reinstated however again as reported above the retrospective aspect was not made part of the award. It

\(^{207}\) Supra.
\(^{208}\) Supra.
\(^{209}\) Supra.
\(^{210}\) Supra.
\(^{211}\) Supra.
is noteworthy that the primary reason for the reinstatement appears to be the length of service of the employee (± 16 years) and his clean disciplinary record.\textsuperscript{212}

In \textit{National Union of Mineworkers obo Motha v Sharrighuizen Open Cast Mining}\textsuperscript{213} the CCMA ordered “re-employment” as opposed to reinstatement with the equivalent of three months pay to compensate for lost earnings. Further the respondent was enjoined to arrange for Motha to undergo rehabilitation for drug dependence. The respondent was not held responsible for the costs of such rehabilitation or for his salary whilst undergoing the rehabilitative programme.

\textsuperscript{212} See also similar awards in \textit{Ethwaroo v Bakers Biscuits supra. (2002) 13(6) SALLR (CCMA).}
CHAPTER 6

MEDICAL ABSENCE AS MISCONDUCT RATHER THAN ILL-HEALTH/INCAPACITY

Medical absence as misconduct rather than ill-health/incapacity. Issues to be discussed:

1. When will illness-related absence be treated as misconduct rather than incapacity.

2. What are the substantive and procedural fairness requirements for dealing with misconduct illness related absence.

DEFINITIONS

Work attendance is defined as “the employee being at the work station, when required”.

Work attendance is affected by:

- all forms of statutory and contractual leave;
- all forms of absence from the workplace;
- all forms of absence from the workstation.

Absence from the workplace is defined as “not present at the required workstation or workplace, when contractually expected to be there”:

- Not at the workplace due to non-permissible absence with a potentially acceptable reason (eg imprisonment).
- Not at the workplace due to non-permissible absence without a valid reason.
• Not at the workplace due to permissible absence: sick leave, family responsibility leave, maternity leave, study and training leave, trade union duty leave, IOD/OD leave, short-time work leave, “special leave”.

• Not at the workstation due to non-permissible absence with a potentially acceptable reason.

• Not at the workstation due to non-permissible absence without a valid reason (eg late coming, abscondment).

• Not at the workstation due to permissible absence: first aid, shop-steward or H&S meetings.

The reason for the absence is immaterial in the definition (this is referred to as “no-fault” absenteeism): permissible and non-permissible absence.

Absenteeism is defined as a sub-group of absence: it is the absence of an employee, who was expected to be at the workplace or workstation. This definition carries with it the notion of “non-conformance”.

Hence all forms of pre-arranged permissible absence are not part of absenteeism: Pre-arranged permissible absence.

Permissible absence is defined as statutorily or contractually agreed absence: it is part of the employment deal and as such an employee-right and an employer-duty. Where such permissible absence occurs without prior arrangement, it will disrupt the employer’s business (eg acute illness): this absence is included in sick absenteeism. Where such permissible absence occurs with prior arrangement, it is not part of absenteeism (eg paternity leave).

6.1 INTRODUCTION: WORK ATTENDANCE

In terms of the employment relationship, an employee has the primary duties to:
Employers require employees to be punctual and reliable in time management.

Work attendance is thus an inherent part of the employment contract and, when breached, may lead to:

- loss of remuneration; and/or
- breach of contract; and/or
- dismissal.

Communication of absence is essential for good governance. Most companies include in their rules and regulations a notification period in the event of absence by the employee.

Employment practices have statutory attendance requirements. Similarly, modern employment practices have operational attendance requirements. In these instances, punctual attendance becomes an inherent requirement of the job.

### 6.2 LIMITATIONS TO ATTENDANCE

Work attendance is a common law duty with statutory and contractual limitations:

- Statutory restrictions on work attendance, in the form of:

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214 For instance, s 8(2)(i) of the Occupational Health and Safety Act determines that an employer must “ensure that work is performed under the general supervision of a trained person”. Hence, the direct consequence of the unannounced and/or unscheduled absence of this “supervisor” on other employees: they may not work for the duration of the absence of this responsible person.

215 Late-coming or no-show of a commercial air-line pilot, will delay a multitude of other persons’ schedules.
- maximum hours of work;\textsuperscript{216}
- availability of transport for night shift workers;\textsuperscript{217}
- public holidays;\textsuperscript{218}
- annual leave;
- maternity leave;
- sick leave;
- family responsibility leave.

• Non-attendance, in the form of leave, may also be included in the contract of employment as:

- additional benefits on statutory leave;

- service leave: additional annual leave days, granted in terms of certain conditions;

- over-time leave: overtime worked may be paid totally or partially in time-off;\textsuperscript{219}

- study and training leave;

- trade union study and duty leave;\textsuperscript{220}

- trade Union office-bearer leave;\textsuperscript{221}

- IOD/OD leave;\textsuperscript{222}

- short-time work leave: if it becomes necessary for an employer to reduce normal working time due to operational requirements;

\textsuperscript{216} Basic Conditions of Employment Act: Chapter 2.
\textsuperscript{217} Basic Conditions of Employment Act: s 17.
\textsuperscript{218} Basic Conditions of Employment Act: Chapter 3.
\textsuperscript{219} BCEA: s 10.
\textsuperscript{220} LRA: s 14(5).
\textsuperscript{221} LRA: s 15.
\textsuperscript{222} Compensation for Occupational Injuries and Diseases Act: s 47.
o sports leave.

6.3 EMPLOYER POLICIES

Where non-attendance occurs, it will be characterized by a regulatory process in terms of the employer’s policies, with respect to:

- the permissibility of non-attendance;
- the payment for time not worked;
- the application for the granting of leave;
- the certification of leave, where required;
- maximum benefits.

6.4 SICK LEAVE

6.4.1 THE BASIC CONDITIONS OF EMPLOYMENT ACT

Sick leave is regulated by section 22 of the BCEA and is determined as a conditional right to absence and to paid absence.\textsuperscript{223} Conditions are set as to:

- the number of days the employee may be absent on sick leave;
- the number of days the employer must pay the wages to a sick employee;
- the proof of incapacity by virtue of a sick certificate.\textsuperscript{224}

\textsuperscript{223} BCEA: s 22. Sick leave:

(1) In this Chapter, “sick leave cycle” means the period of 36 months’ employment with the same employer immediately following:

(a) an employee’s commencement of employment; or

(b) the completion of that employee’s prior sick leave cycle.

(2) During every sick leave cycle, an employee is entitled to paid sick leave equal to the number of days the employee would normally work during six weeks.

\textsuperscript{224} BCEA: s 23. Proof of incapacity:

(1) An employer is not required to pay an employee in terms of s 22 if the employee has been absent from work for more than two consecutive days or on more than two occasions during an eight week period and, on request by the employer, does not produce a medical certificate stating that the employee was unable to work for the duration of the employee’s absence on account of sickness or injury.
Grogan\textsuperscript{225} is of the opinion that the employee rights in terms of the BCEA, sectoral determinations and collective agreements are “employee rights to a particular amount of sick leave, and it seems that, like those [employees] on maternity leave, [employees] should be protected against dismissal during that period, \textit{provided that they are genuinely incapacitated}.

Does the right to a defined amount of sick absence, as per the BCEA, prevent the employer from penalizing an employee for taking sick leave to which he is entitled by law?

This matter was analysed by Grogan in his capacity as Presiding Officer in \textit{NUMSA v Eveready South Africa (Pty) Ltd.}\textsuperscript{226} The commission states:\textsuperscript{227}

\begin{quote}
“Mr Fataar (for the dismissed employee) raised that ... an employee cannot be penalized for taking sick leave to which he is entitled by law.

If Mr Fataar’s reasoning is correct, an employer may only put an employee to terms for excessive absence after he has been absent for 30 days in a three-year cycle ...

This could not have been the intention of the drafters of the LRA or the BCEA.”
\end{quote}

This case clearly rejects the notion that the exhaustion of sick leave entitlement is a prerequisite for rendering a dismissal fair.

Similarly, in \textit{AECI Explosive Ltd (Zomerveld) v Mambubalu},\textsuperscript{228} the court acknowledges that the employee was entitled to 16 days’ paid sick leave per year and that in one of the years in question, he had only taken those 16 days. This, however, did not deter the court from holding that the dismissal was fair.

\begin{itemize}
\item[(2)] The medical certificate must be issued and signed by a medical practitioner or person who is certified to diagnose and treat patients and who is registered with a professional council.
\item[(3)] If it is not reasonably practicable for an employee who lives on the employer’s premises to obtain a medical certificate, the employer may not withhold payment in terms of ss (1) unless the employer provides reasonable assistance to the employee to obtain the certificate.
\end{itemize}

\textsuperscript{225} Grogan \textit{Workplace Law} (2001) 6\textsuperscript{th} ed 183.
\textsuperscript{226} (1997) 8 (4) SALLR 8 (CCMA).
\textsuperscript{227} At 13F-I.
\textsuperscript{228} (1995) 16 ILJ 15050 (LAC).
6.4.2 THE LRA

Sick leave is indicative of incapacity on the grounds of ill health or injury, and is regulated by Schedule 8 of the LRA. The LRA does not distinguish between paid or unpaid sick leave, but identifies the temporary or permanent inability to work. The LRA also does not distinguish between prolonged absence in one period or repeated absences for short periods.

Grogan\textsuperscript{229} submits that the Code does not appear to lay down that the absences, which gave rise for dismissal must be for an unbroken period. In \textit{AECI Explosive Ltd (Zomerveld) v Mambalu},\textsuperscript{230} the court stated that habitual absenteeism and once-off incapacity must be treated in the same way, \textit{ie} that both forms of incapacity require counselling and consultation.

Incapacity on grounds of medical illness will consider such aspects as:

- Temporary incapacity on the grounds of ill health or injury:
  
  - The employer will investigate the extent of the incapacity or the injury.
  
  - The employer may dismiss an employee, who is likely to be absent for a time that is unreasonably long in the circumstances.
  
  - Alternatives short of dismissal, will be considered.

- Permanent incapacity:
  
  - The possibility of securing alternative employment or adapting the duties or work circumstances of the employee will be considered.

\textsuperscript{229} Grogan \textit{supra} 183.
\textsuperscript{230} (1995) 16 \textit{ILJ} 15050 (LAC).
The employer will consider:

- whether the employee is capable of performing the normal work;
- the extent to which the employee is able to perform the normal work;
- the extent to which the employee’s work circumstances might be adapted to accommodate disability.
- The extent to which the employee’s duties might be adapted.
- The availability of any suitable alternative work.

- The investigations and deliberations will allow an employee the opportunity to state a case, also in response, and to be assisted by a trade union representative or fellow employee.

- The employer will arrange for counselling and rehabilitation, at the employee’s expense, in cases of alcoholism or drug abuse.

- The employer will make the utmost efforts to accommodate employees who are injured at work or who are incapacitated by work related illness.

6.5 ASPECTS OF ABSENCE

Absence, as defined above, falls in the category of “time-related offences”. These are not expressly mentioned in the LRA or in the Code.

When analyzing the aspects of absence, the following factors appear important:

6.5.1 THE REASON FOR THE ABSENCE

- “Illness or disease” is the objective entity, which can be diagnosed by a doctor.
• “Sickness” is the perception and experience of illness by the patient.

• Not all illness or sickness leads to absence.

• Sick absence occurs when the worker, who decided to assume the role of patient, decides not to work or a doctor decides that his patient is unfit for work.

6.5.2 THE PROOF FOR THE ABSENCE

This may be

• a sick certificate;

• a family responsibility leave certificate;

• other forms of permissible absence (eg shop steward study leave, a certificate from the trade union);

• any document proving the supervening impossibility of performance (eg proof of detention in police cells);

• the employees assertions\(^\text{231}\): an employer is required to pay sick leave to an employee if the employee has been absent from work for two consecutive days or less on less than two occasions during an eight week period.

6.5.3 THE DURATION OF THE ABSENCE

In order to justify dismissal, the courts require the absence to be of unreasonable

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\(^{231}\) BCEA: s 23. Proof of incapacity:

(1) An employer is not required to pay an employee in terms of s 22 if the employee has been absent from work for more than two consecutive days or on more than two occasions during an eight week period and, on request by the employer, does not produce a medical certificate stating that the employee was unable to work for the duration of the employee’s absence on account of sickness or injury.
6.5.4 THE PERMISSIBILITY OF THE ABSENCE

Where absence is taken without permission, the court has upheld dismissal. Where an employee was expressly instructed to report for duty, absenteeism is viewed in a more serious light.

6.5.5 THE PATTERN OF ABSENCE

Where absence is taken just before or just after weekends or public holidays, some collective agreements extend the employee’s duty to present proof of illness in the form of a sick certificate. Abscondment, where the employer is entitled to assume that an employee has resigned, after being absent for a reasonable period.

6.5.6 THE EFFECT OF THE ABSENCE ON THE EMPLOYER AND THE EFFECT OF THE ABSENCE ON OTHER EMPLOYEES

In AECI Explosive Ltd (Zomerveld) v Mambalu, the court examined the effect of the employee’s absence on the employer and on other employees. Time-related offences have different effect for different employment categories: an airline pilot arriving late for a scheduled trip will cause a ripple effect on both the employer and on its customers. Non-attendance of the employee in charge of a team, causes the whole team to be unable to work.

In Hendricks v Mercantile & General Reinsurance Co of SA Ltd, the Labour Appeal Court observed the following relevant factors:

(a) The substantive fairness of a dismissal for persistent illness depends on the

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233 Khumalo & Another v Otto Hoffmann Handweaving Co (1988) 9 ILJ 504 (IC): shop stewards dismissed after attending a trade union meeting without permission.
235 Metal and Engineering Industries Bargaining Council, Main Agreement.
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.

(b) 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 or length of service.

### 6.6 DISMISSAL FOR EXCESSIVE ABSENTEEISM

Where an employee’s work attendance does not conform to the employer’s expectations, the employee may be disciplined:

(a) For misconduct, where the absences are not permissible. It is then critical to establish:

- whether or not the employee contravened a rule or standard regulating attendance;
- whether the rule was a valid or reasonable rule or standard;
- whether the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
- whether the rule or standard has been consistently applied by the employer.
(b) For incapacity: poor work performance, when the employer perceives that the absences are interfering with the contractual obligations. The employee must then be given:

- appropriate evaluation, instruction, training, guidance or counselling;
- a reasonable period of time for improvement;
- should the employee continue to perform unsatisfactorily, a procedure leading to dismissal may be instituted.

(c) For incapacity: ill health or injury.

6.7 DISMISSAL FOR EXCESSIVE SICK ABSENTEEISM

**Defined illness of repeated short-term absences**

- Excessive sick absenteeism due to a defined medical incapacity, must be treated with regard to Schedule 8 rules on Incapacity: Ill health or Injury.

- It is difficult to decide whether persistent short-term absences should be treated as a form of incapacity or as a misconduct.

6.8 WHEN IS SICK ABSENTEEISM TREATED AS MISCONDUCT?

Excessive absenteeism and abuse of sick leave are two instances in which a case for misconduct is considered.

6.9 EXCESSIVE SICK ABSENTEEISM

6.9.1 EXCESSIVE SICK ABSENTEEISM AS A FORM OF MISCONDUCT

It may be difficult to decide whether perceived excessive absences are a form of incapacity or a form of misconduct. The LRA appears to categorise dismissals
within strict boundaries and does not explicitly determine double categories. It is important for employers, engaged in disciplinary management, to identify both aspects of the employee’s absenteeism behaviour.

In *AECI*, the court confirmed the acceptability of “mixed” management of dismissal. The employee’s excessive sick absenteeism could, acceptably, be substance for a “misconduct dismissal”. The procedure, in this case of repeated short illness absences, did not require a formal medical enquiry.

**6.9.2 EXCESSIVE SICK ABSENTEEISM AS A FORM OF INCAPACITY**

Where an employee is dismissed for excessive absenteeism and, in each case, the employee had a medical certificate to cover the period of absence, the issues to be decided are:

- What are the substantive requirements for a fair dismissal of an employee with repeated absences caused by certified illnesses?
- What are the procedural requirements?

**6.9.3 SUBSTANTIVE ASPECTS**

Civil and labour courts have long recognized that an employment contract can be terminated on grounds of protracted absence due to illness or injury. The absence must endure for a period, which is unreasonable, given the needs of the employer. The LRA and the Code of Good Conduct: Dismissal (Schedule 8) recognize “incapacity” of an employee as a permissible ground for dismissal. Significantly, the Code does not lay down that sick absence must be for an unbroken period.

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238 *Myers v Sieradzki* 1910 TPD 869.
Hence, that these absences are intermittent does not prevent the employer from terminating the contract, when the absences are perceived unreasonable.\textsuperscript{239} The duration of the absence was examined in \textit{Hendricks v Mercantile & General Reinsurance Co of SA Ltd}.\textsuperscript{240} The employer must consider:

"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".

Significantly, the court also found that this test may be applied even before the employee has exhausted his contractual sick leave. In determining what is "unreasonably long", the following aspects must be considered:

- The strategic importance of the job.
- The length of service.
- The ease with which the employee may be replaced.
- The financial capacity of the employer to replace the absent employee.
- The prospect of the employee recovering.
- The effect of the employee's absence on other employees.

Grogan in \textit{NUMSA obo Coto v Eveready SA (Pty) Ltd}\textsuperscript{241} concludes the matter of the justification of the dismissal in a mathematical and comparative way. In the \textit{Hendricks} case, the appellant had been absent for 16 and 38 days respectively, in two consecutive years. In the \textit{AECI} case, the respondent had been absent for a total of 75 days in about 3 years.

In both cases the courts held that the length of absence justified the employee's dismissals. In this case, employee X had been absent for a total of 49 days in 20 months. Since this is comparable with the number of days on which employees were absent in the \textit{Hendricks} and \textit{AECI} cases, it can be said that the employee exceeded the limit of what the courts consider reasonable. In principle, therefore, it

\textsuperscript{239} \textit{Mambalu v AECI Explosive Ltd (Zomerveld)} (1994) 5(12) SALLR 21 (IC) and LAC reported at (1995) 6(9) SALLR 1 (LAC); \textit{Hendricks v Mercantile & General Insurance Co of SA Ltd} (1994) 15 ILJ 304 (LAC); \textit{Croucamp v Le Carbonne SA (Pty) Ltd} (1995) 6(1) SALLR 31 (IC).

\textsuperscript{240} (1994) 15 ILJ 304 (LAC) at 314B.

\textsuperscript{241} (1997) 8(4) SALLR 8 (CCMA).
can be said that the employer was justified in terminating the contract when that limit was reached.

However, whether the termination is also *substantively fair* is not a matter of arithmetic computation alone. It is now that the principles, as cited in *Hendricks* apply.

### 6.9.4 PROCEDURAL ASPECTS

Traditional disciplinary processes have distinguished between “incapacity” procedures and “disciplinary – misconduct” procedures.

Incapacity procedures start by acknowledging that a non-conformance is identified in the field of the employees’ work capacity: the employee’s performance is not acceptable. A primary objective will be to determine, whether this is a medical (ill health-injury) or non-medical (poor work performance) issue.

Incapacity procedures will lead to the identification of the performance standard, which the employee did not meet, the reason thereof and the counselling of the employee. This counselling must give the employee a fair opportunity to meet the required performance standard. If repeated counselling fails and dismissal is an appropriate sanction for not meeting the required performance standard, the employee may be dismissed.

Where the incapacity is due to illness or injury, the code’s procedural requirements requires that “the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee”. Incapacity procedures, hence will not “charge” employees and use terms such as “guilty/not guilty” and “warning”.

Misconduct procedures are disciplinary actions and charge an employee with a specific complaint or offence.
Grogan dismisses the importance of the format of forms: what is considered critical, in terms of the requirements of the Code is that the employee was allowed an opportunity to state a case in response. This “places an onus, so to speak, on the employee to make some suggestions as to how the problem can be alleviated, either by providing some assurance that his attendance record might improve, or, if that cannot be done, to suggest ways to ameliorate the problems caused by the absences”.

Grogan’s remark from Shakespeare “As the Bard remarked, a rose by any other name smells just as sweet”, perhaps best describes the ambiguity of this form of dismissal and the acceptability of managing it as cross-breed between incapacity: ill health and misconduct dismissal.

6.10 ABUSE

Abuse of sick leave is undoubtedly a disciplinary offence.

6.10.1 IS THE EMPLOYEE REALLY SICK?

The fact that sick leave must, under certain conditions, be granted without any other proof than the employee’s factual statement that he was unfit for work due to illness or injury, makes this question particularly difficult: who determines, in this case, whether the employee is sick?

The fact also that a doctor, who certifies that an employee is unfit for work, may not have established (or may not be able to establish) whether the employee is actually sick, also complicates this matter.

In the AECL Explosive Ltd case, the Industrial Court held that the employee’s dismissal was unfair, because the employer had accepted the medical certificates,

\textsuperscript{242} NUMSA obo Coto v Eveready SA (Pty) Ltd (1997) 8(4) SALLR 8 (CCMA).
\textsuperscript{243} Personal observation: in many enquiries into excessive absenteeism, employees will confirm that the certifying doctor made no physical examination at all.
\textsuperscript{244} When a doctor certifies that a patient has a migraine, there may be little in the way of objective findings or testing, which will prove the existence of the condition.
which gave the reason for absence. The LAC overruled this, confirming that even if a reason of absence is given, misconduct may still have taken place.

Hence, the statement that the existence of an illness or injury does not preclude the employer from charging the employee with misconduct, where evidence to the latter exists. In AECI, the court found the employee to be totally unreliable and guilty of misconduct, in respect of work attendance.

Where alcoholism and drug abuse cause absence, one may consider this a particular form of sick absenteeism. In Paper Printing Wood and Allied Workers Union v Nampak Corrugated Containers,\textsuperscript{245} Cowling reinstated an employee who was unfairly dismissed because of excessive absenteeism. Some pertinent statements appear from the award:\textsuperscript{246}

“\textit{The precise nature of the employee’s illness was also relevant, namely, that his drinking problem arose from … community [pressure].}”

\textbf{6.10.2 IS THE EMPLOYEE REALLY UNFIT FOR WORK?}

This is a difficult question to answer. One must consider the case of an employee suffering from high blood pressure, who takes the correct medication and whose condition is perfectly controlled: whilst taking medication, the employee has normal blood pressure. When such an employee collects his medication, monthly, at a state hospital and is required to spend a day away from work, the employee may be given a sick certificate. This certificate, if correctly completed, cannot state that the patient suffers from hypertension, as, on the day, the patient had taken his medication and is not ill; neither is the employee unfit for work.

Is this absence sick leave? Should the employer pay the wages for the absence? Can the employer require the employee to collect tablets on his “off-days, or off-shifts” or to put in a day of annual leave?

\textsuperscript{245} (1996) 7(9) SALLR 1 (CCMA).
\textsuperscript{246} At 17H.
6.10.3 IS THE SICK CERTIFICATE ACCEPTABLE?

When considering a sick certificate, the employer must distinguish between format problems and contents’ problems.

Format problems may be the responsibility of the employee (alterations, false certificates) or the problem of the doctor (illegible, ambiguous terminology, multiple options not properly deleted, improper stationery or doctor identification).

Of particular interest is the proof of absence issued by a traditional healer.\textsuperscript{247} In \textit{Paper Printing Wood and Allied Workers Union v Nampak Corrugated Containers},\textsuperscript{248} Cowling, comments that medical absence due to the services of a traditional healer, in the particular circumstance of the case, must be given the same value as if the absence where to be due to a hospital admission.

Most categories of non-conformance with this requirement, will all in the disciplinary category.

6.10.4 IS THE ABSENCE PERMISSIBLE?

Where absence is taken without permission, or where an employee was expressly instructed to report for duty misconduct procedures apply.

6.10.5 DOES THE PATTERN OF ABSENCE POINT AT ABUSE?

The pattern of absence, particularly sick leave taken just before or just after weekends, public holidays or pay day will be subject to disciplinary procedures or enforced production of a sick note.

\textsuperscript{247} Traditional healers have no “registered” council, as yet. Certificates are not acceptable, ito the BCEA, for sick pay.

\textsuperscript{248} (1996) 7(9) SALLR 1 (CCMA).
This will not be without considerable substantive problems, as the following extract from *NUMSA obo Coto v Eveready SA (Pty) Ltd*,\(^{249}\) illustrates:

‘Where employer Y suggested that there was reason to suspect that employee X had abused his sick leave entitlement because many of the absences commenced on a Monday, and because the employer had consulted a number of doctors, rather than on, for his various ailments, and because his absenteeism rose markedly after his permanent appointment and dropped when his first sick leave cycle was exhausted, the difficulty here with this contention would be that the employer also conceded that the employee had been genuinely ill on the various occasions he had been booked off.

The various warnings given to the employee were for ‘excessive absenteeism’ and it was for this, and not for abuse of sick leave, for which he was ultimately dismissed.

Had the employer relied on abuse of sick leave, it would have been confronted with some difficulty in justifying the employee’s dismissal, because, on the evidence, there was no more than a suspicion in that regard.’

Finally if the absence of an employee has a proven negative effect on the economical performance of an employer or on the work-conditions of fellow employees, a case for incapacity due to poor work performance must be considered.

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\(^{249}\) (1997) 8(4) SALLR 8 (CCMA).
CHAPTER 7

CONCLUSION

7.1 INTRODUCTION

As is evident, from what has been stated in the preceding chapters, the present treatise has traced the developments, that have occurred in the law, as regards the issue of dismissal for medical incapacity, from the period covered by the common law through that covered by the 1956 LRA up to the current period covered by the 1995 LRA.

Various aspects of such developments have been outlined in the treatise but particular attention has been paid to the changes and developments through the different legal regimes as regards, inter alia:

(a) the requirements, both substantive and procedural, to be satisfied by an employer that wishes to terminate a contract of employment on the grounds of an employee’s medical incapacity;

(b) the remedies available to an employee that wishes to challenge such termination.

7.2 THE COMMON-LAW POSITION

Under the common law, it appears, from what is stated in this treatise, that the position, in brief, as regards the issues referred to under paragraphs 1(a) and (b) of the summary above, was as follows:

(a) medical incapacity was treated as constituting a species of impossibility of performance;

(b) such medical incapacity could be either of a permanent or temporary nature;
(c) where the medical incapacity was of a permanent nature, the employer would be entitled to terminate the contract of employment and such termination would be a *lawful* termination or dismissal. (Under the common law, there was no concept or requirement of a *fair/unfair* termination/dismissal as opposed to a *lawful/unlawful* termination/dismissal.);

(d) where the medical incapacity was of a temporary nature, the employer would be entitled to terminate the contract of employment on the grounds of such incapacity where the incapacity endured for an unreasonable period. What constituted an unreasonable period was not defined and would arguably depend on various factors including, *inter alia*, the operational requirements of the employer;

(e) the employer was not obliged to comply with any procedural requirements prior to terminating the employee’s contract on the grounds of his temporary or permanent medical incapacity;

(f) in the event that the employee contended, that the termination of his contract of employment by the employer, on the grounds of the employee’s alleged medical incapacity, constituted an unlawful termination, the employee would have to approach the ordinary courts of law and seek relief in the form of either specific performance or damages. It appears that the courts were, as a rule, reluctant to order specific performance and, instead, preferred the remedy of damages.

From the above, hence, it is clear that, under the common law, a medically incapacitated employee occupied a relatively weak and vulnerable position *vis-à-vis* the employee’s employer in the sense that there were very few legal requirements to be met by an employer, that was desirous of terminating an employee’s employment contract on the grounds of the employee’s medical incapacity, and, furthermore, the remedies available to such an employee were limited in the sense that such an employee would have to approach the ordinary courts of law to obtain relief - there were no specialist tribunals like the industrial court, CCMA or labour courts - which clearly entailed a comparatively expensive and complex procedure, the employee
could only challenge the termination on the grounds of its being unlawful, and not also on the grounds of its being “unfair”, and the relief awardable was generally limited to damages as the courts were reluctant to award specific performance (reinstatement).

7.3 THE POSITION UNDER THE 1956 LRA

Under the 1956 LRA, it appears, from what is stated in this treatise, that the position, in brief, as regards the issues referred to in paragraphs 1(a) and (b) of this summary above, was as follows:

(a) The 1956 LRA did not contain any definitions of the concepts of dismissal or medical incapacity;

(b) The 1956 LRA did not contain any statutory provisions or guidelines as regards the requirements to be met by an employer that was desirous of terminating an employment contract on the grounds of the employee’s alleged medical incapacity;

(c) All challenged dismissals, including medical incapacity dismissals, were dealt with by tribunals created under the 1956 LRA, being the industrial court and the labour appeal court, as falling under the courts’ broad 1956 LRA unfair labour practice jurisdiction. The 1956 LRA contained a very broad definition of an unfair labour practice and it was accepted by the courts that a dismissal could, in certain instances, constitute such an unfair labour practice;

(d) In the absence of statutory provisions and guidelines, as to the requirements for rendering a medical incapacity dismissal fair, the courts were forced, over a period of time, to attempt to lay down, via case law, such guidelines;

(e) Clearly there was conflicting case law in this regard but, in general, it appears that the approach of the courts, as regards the issues of the substantive and procedural fairness requirements in respect of medical incapacity dismissals, was as follows:
(i) **Substantive fairness:** the substantive fairness of the dismissal was said to depend on the question of whether the employer could be fairly expected to continue the employment relationship bearing in mind the interests of the employee, the interests of the employer and the equities of the case. Relevant factors here could include, *inter alia*, the following:

(aa) the nature of the incapacity;
(bb) the cause of the incapacity;
(cc) the likelihood of recovery, improvement or recurrence;
(dd) the period of absence and its effect on the employer’s operations;
(ee) the effect of the employee’s disability on the other employees; and
(ff) the employee’s work record and length of service;

(ii) **Procedural fairness:** here the position was somewhat unclear particularly in the light of the fact that certain instances of alleged illness-related absence were treated as misconduct while others were treated as incapacity with the result that the requisite procedures laid down by the courts often evidenced a confusing mix of misconduct- and incapacity-type procedural requirements. What was, however, clearly and consistently required, from a procedural perspective, was that the employer had to satisfy the *audi alteram partem* rule in the sense that the employee had to be given an opportunity to be heard and state his case prior to being dismissed;

(f) As regards remedies, the aggrieved employee could approach the industrial court for relief in the form of reinstatement and back pay or compensation. Generally a finding, that the dismissal was substantively unfair, could result in the employee’s being reinstated whereas a finding, that the dismissal was only procedurally unfair, would usually only lead to relief in the form of compensation. However, here too the decisions of the courts are somewhat conflicting and it is difficult to extract any clear and consistent guidelines and rules from these decisions.
From the above, hence, it appears that the position of the dismissed medically incapacitated employee, under the 1956 LRA, was markedly better than that of his counterpart under the common law in that, *inter alia*, under the 1956 LRA, unlike under the common law, medical incapacity dismissal could be challenged on the grounds not only of its being an *unlawful* termination of the employment contract but also on the grounds that it was an *unfair* dismissal, there were specific case-law-based substantive and procedural fairness requirements to be met to render a medical incapacity dismissal fair, the employee could approach specialist tribunals, like the industrial court and the labour appeal court, to challenge his dismissal and the processes to be followed here were less complex and expensive than action before the ordinary courts of law and the employee was more likely to receive substantial relief, including reinstatement, from such tribunals.

### 7.4 THE POSITION UNDER THE 1995 LRA

Under the 1995 LRA, it appears, from what has been stated in this treatise, that the position, in brief, as regards the issues referred to in paragraphs 1(a) and (b) of this summary above, is as follows:

(a) under the 1995 LRA, employees have a statutory right not to be unfairly dismissed;

(b) the 1995 LRA contains specific statutory provisions wherein the concept of a dismissal is defined (see section 186) and where distinctions are drawn between permissible (potentially fair) and impermissible (automatically unfair) dismissals (see section 188 and section 187);

(c) medical incapacity dismissals fall, under the 1995 LRA, within the ambit of permissible (potentially fair) dismissals (see section 188 which implies that a dismissal may be fair if the reason for the dismissals is related to the employee’s *capacity*);

(d) the 1995 LRA, in turn, distinguishes statutorily between two types of incapacity dismissals being poor work performance incapacity dismissals and ill-
health/injury incapacity dismissals (see items 7-9 and items 10-11 of Schedule 8/the Code of Good Practice: Dismissals, respectively);

(e) furthermore, within the ambit of ill-health/injury incapacity, a distinction is drawn statutorily between permanent and temporary ill-health/injury incapacity;

(f) detailed guidelines, as regards the substantive and procedural fairness requirements to be met by an employer, that is desirous of dismissing an employee on the grounds of ill-health/injury incapacity, are then set out in items 10 and 11 of Schedule 8 and, in addition, further guidelines as regards the employer’s duties, when faced with a medically incapacitated employee, are provided in various codes of good practice subsequently issued, such as those pertaining to HIV/Aids and employees with disabilities;

(g) again, specialist tribunals have been established under the 1995 LRA for the arbitration/adjudication of all dismissal disputes, including those pertaining to ill-health/injury incapacity - consider, in this regard, the CCMA, bargaining councils and the labour and labour appeal courts;

(h) in addition, the powers of the abovestated tribunals, as regards the type of relief awardable in respect of different types of dismissals, including ill-health/injury incapacity dismissals, are now regulated by statutory provisions - see, inter alia, s193 and s194 that deal with the circumstances whereunder reinstatement and/or compensation would be the appropriate remedy and the factors relevant to the amount and degree of relief awardable;

(i) notwithstanding the significant statutory regulation of all types of dismissal, including ill-health/injury incapacity dismissals, effected by the legislature through the 1995 LRA, the present treatise shows that an examination of selected case law reveals that certain specific areas in the field of medical incapacity still pose problems for the pertinent tribunals and courts. Included herein are issues such as the following: how to distinguish alcoholic and drug abuse, that constitutes misconduct, from that which constitutes ill-health/incapacity; in a case of intermittent excessive absenteeism caused by ill-
health incapacity, what degree of absenteeism is required before dismissal for such incapacity would be warranted; numerous difficulties attendant on the issue of HIV/Aids.

It is clear that, under the 1995 LRA, the position of employees and the protections afforded them have been greatly increased in that, *inter alia*, not only do employees have a statutory right not to be unfairly dismissed but, in addition, the legislature has set fairly stringent requirements to be met to render their dismissal, on the grounds of ill-health/injury (medical) incapacity, fair, specific tribunals have been created to afford them a speedy and inexpensive route to challenge their dismissals and there are clear statutory provisions regulating the type of relief that they may claim which relief can take the form of reinstatement (specific performance) or compensation.

It is evident, hence that, unlike under the common law, where the medically incapacitated employee occupied a weak and vulnerable position in relation to the employer, the medically incapacitated employee, under the 1995 LRA, has been afforded considerable protection and safeguards against arbitrary and unfair treatment by his employer.
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