

September 1, 2020

Understanding dismissal for incapacity due to ill health



Incapacity is the inherent inability of an employee to perform work according to the employer's established standards of quality and quantity due to ill health or injury, which can be temporary or permanent.

We are focusing on elements of incapacity in the workplace in the form of a series of articles over the next few weeks.

In this blog we will look at incapacity from a general ill health perspective.

Case law: ***Parexel International Pty Ltd v Chakane and Others***

In the case of ***Parexel International (Pty) Ltd v Chakane and Others [2019] 11 BLLR 1245 (LAC) (Parexel case)***, an employee had been injured and had subsequently been off work for more than nine months, during which time the employee had submitted medical certificates indicating various reasons for the employee's absence.

Code of Good Practice: Dismissal

Item 10 of the Code of Good Practice: Dismissal in Schedule 8 (The Code) draws a distinction between a permanent and temporary incapacity as follows:

- *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.*

Item 11 of Schedule 8 to the Code states that any person determining whether a dismissal arising from ill health or injury is unfair should consider—

1. *whether or not the employee is capable of performing the work; and*
 2. *if the employee is not capable—*
- *the extent to which the employee is able to perform the work;*
 - *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*
 - *the availability of any suitable alternative work.*

The Court, in the ***Parexel case***, had relied on the case of ***Kievits Kroon Country Estate (Pty) Ltd v Mmoledi and Others (2014) 35 ILJ 406 (SCA)***, which in paragraph 31 held that—

“an employer is not expected to tolerate an employee's prolonged absence from work for incapacity due to ill health. And it may, if it be fair in the circumstances, exercise an election to end the employment relationship”.

Can an employee frustrate the enquiry process through a lack of detailed medical opinion?

The Court, in the ***Parexel case***, held in paragraph 18 that-

“the fact remained that in failing to provide a report as to the reasons for her absence and an assessment as to when her recovery could be expected, the employee frustrated a proper consideration as to the basis for her extended absence”.

What are the obligations of an employer in the enquiry process?

The Court, in the ***Parexel case***, in paragraph 20, went on to hold that-

“it is self-evident that whether an employee is willing and able to work and when she may be in a position to do so are material considerations to which regard must be had when considering an employee’s incapacity, whether she has been absent from work for an unreasonably long period of time and whether alternatives to dismissal exist.

The employee’s extended absence from work was not explained by way of a properly detailed medical report. The different medical certificates provided to the employer (own emphasis added) did not explain why her extended absence from work had been necessary or why her continued absence was justified. On her own version, the employee was unable to return to work and was unable to indicate when she may be able to do so.”

In conclusion

The Court, in the ***Parelex case***, finally concluded that the employer was not required to hold an employee’s position open indefinitely when the employee had failed to provide any clear basis as to the reasons for and anticipated extent of the employee’s continued absence.

We at **SERR Synergy** fully support the judgement of the Johannesburg Labour Appeal Court and, in doing so, *we seek to assist employers in conducting ill-health incapacity enquiries in a manner that is compliant with statute and case law.* We undertake to provide conclusive advice and proper assistance to employers on ill health in the workplace.

Make sure you don't miss our next article where we will look in-depth into incapacity from the perspective of depression.

About the Author: Hilisha Sewnarain joined SERR Synergy in February 2018 as a Labour Legal Assistant. She was promoted and has held the position of Labour Legal Advisor as of June 2019. Hilisha studied at the University of KwaZulu-Natal and completed her LLB degree in 2014. She has four years' experience in the legal and labour relations field, respectively.

©SERR Synergy, www.serr.co.za