

Dismissal for alleged incapacity: ILL-HEALTH or INJURY

This checklist has been prepared having regard to the Code of Good Practice: Dismissal; Code of Good Practice: Key Aspects on the Employment of People with Disabilities; Code of Good Practice: Key aspects of HIV/AIDS and Employment; the CCMA Misconduct Arbitration Guidelines and relevant case law

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NB: The law does NOT require that each and every factor set out below apply in all cases. The law encourages the minimum of legal formality. This checklist is merely a guide and should be used with care and flexibility.

GLOSSARY: IH (Incapacity hearing), EE (employee); ER (employer); AG (CCMA Arbitration Guidelines on Misconduct); Code (Code of Good Practice: Dismissal); Disability Code (Code of Good Practice: Key aspects on employment of people with disabilities); HIV Code (Code of Good Practice: Key aspects of HIV/AIDS & Employment); Sidumo (Sidumo & Ano v Rustenburg Platinum Mines Ltd (CC)); Edcon (Edcon v Pillemer NO (SCA)).

NB: Ill-health & injury are the most common forms of incapacity. There are however other forms eg imprisonment or military call-up. **These are not covered in this check-list.** Factors to keep in mind: reasons for incapacity; extent of incapacity; whether permanent or temporary; whether it has a partial or complete impact on EE's ability to perform; and whether alternatives exist to dismissal.

The following are not considered disabilities by the Disability Code 5.3.3(c): sexual disorders; body adornments eg tattoos & piercings; drug & alcohol disorders unless EE participating in rehab program; height, weight and strength deviations.

PROCEDURAL FAIRNESS

- 1 The procedural issues that arise in incapacity hearings are very similar to those that arise in misconduct related hearings. Consult the checklist for MISCONDUCT in this regard.

SUBSTANTIVE FAIRNESS

- 2 Is there a **collective agreement**? AG66 What are its relevant provisions?
- 3 What are the essential / core functions of the EE's job? Is EE capable of performing **fully** or **partly** any of these? If partly, to what extent is he capable of performing? Code 11 Is the incapacity related to quality of work or the quantity ie the output? What is the required quality or quantity? Is the illness or injury having an effect on the quality or quantity?
- 4 Was the illness or injury contracted or **sustained in the workplace**? Code 10(4) (In these circumstances there is a duty on ER to accommodate the incapacity.)
- 5 Has EE been **absent** for a period of time? What is that period? Has EE exhausted all forms of leave? Is any further absence expected? Code 10(1)
- 6 Who performed EE's duties in his absence? Have there been **costs** relating to staffing or training? Has there been loss of productivity? Has there been decline in workplace morale as a result of EE's absence? Has there been workplace disruption? HIV Code 14.4
- 7 Are there **medical reports** setting out the nature, duration & effects of the illness or injury? (The Dr should be informed about the physical,

emotional and psychological demands of the job.) What is the **prognosis** for full or partial fitness to work & over what period is that expected? Is that period reasonable having regard to ER's operational needs?

- 8 Subject to affordability, has the ER offered to pay for a report? Has the EE refused to be examined by a Dr appointed by the ER at its own cost? If so, why? (The ER must explain to the EE the purpose of the examination, the information sought and the reasons for the process.)
- 9 Is the incapacity arising from the illness or injury **temporary** or **permanent**? Code 10
- 10 Is the condition **substantially limiting**? This means that in its nature, duration or effects, it substantially limits EE's ability to perform the essential / core functions of the job. (Some impairments are easily controlled, corrected or lessened eg the person who wears spectacles.) Disability Code 5.1.3
- 11 Having regard to EE's illness or disability is he able to work in **safety**? Disability Code 8.2.2 Is there **risk** to EE or others or property which cannot be reduced by reasonable accommodation? Disability Code 8.3.2
- 12 In cases of disability has the EE been **reasonably accommodated** ie has the job, workplace, equipment, or work time been adapted or altered to accommodate EE in the most cost effective manner consistent with effectively removing barriers to perform the job? Disability Code 6.2 (Reasonable accommodation can also consist of offering alternative work, reduced work or flexible work as an alternative to dismissal. Disability Code 11.5; Code 11).
- 13 Was EE **consulted** on the most reasonable & practical manner in which he can be accommodated? Is there a report by an occupational therapist, if applicable? Disability Code 6.6 (Where EE is frequently absent from work for reasons of illness or injury then ER should consult with EE to assess whether he can be reasonably accommodated.) Has the EE made any practical and cost-effective suggestions & have these been considered?
- 14 Would accommodation have imposed **"unjustifiable hardship"** ie would have required significant or considerable difficulty or expense for ER? Disability Code 6.12. (An ER need not accommodate if there is unjustifiable hardship CD 6.11)
- 15 Was EE tested to determine his **fitness** to work in cases where ER on reasonable grounds believed that EE was indeed fit to work? Disability Code 14.2.4
- 16 Has EE subjected himself diligently to the prescribed **treatment** or **rehab** regimen? (In cases of drug abuse or alcoholism counselling & rehab may be appropriate Code 10(3).)
- 17 Is it EE's case that the IH is based on **fabricated** evidence? If so, what is, in EE's view, ER's reason/motive?

DISMISSAL & REMEDIES

- 18 **DISMISSAL:** How have others in a similar situation been treated by ER? Has the treatment been **consistent** – both – historically & contemporaneously? AG77.2.3 Code 7(b)(iii). If not, what has ER done in the past when faced by a similar situation? AG100-103
- 19 Is there any alternative **short of dismissal**? Code 9(b)(iii) (When considering alternatives, relevant factors are the nature of the job, the period of absence, the seriousness of the injury or illness & the possibility of securing a temporary replacement or adapting duties.)
- 20 Has EE been offered an **alternative post** that reasonably accommodates his incapacity even if it is a **demotion**? Is EE agreeable to demotion? Is his refusal to be demoted reasonable?
- 21 Does EE have **long service**? What is the implication of that? (Sidumo)
- 22 What impact would dismissal have on EE? **Personal** / family circumstances? AG106 Who does he support? (Sidumo)
- 23 Can EE be relied upon to perform his duties properly having regard to his illness or disability & after reasonable accommodation?
- 24 **REINSTATEMENT / RE-EMPLOYMENT:** Is reinstatement or re-employment **reasonably practicable** or feasible? AG113
- 25 Would reinstatement cause a disproportionate level of **disruption** or **financial burden** to ER? AG115 Has another EE been **appointed** in place of the applicant, even though this is not an obstacle to reinstating a deserving EE? If reinstatement is not reasonably practicable, is **re-employment** a fair outcome? Is there a suitable post & what is the attached remuneration? Has ER shown that reinstatement or re-employment should not be from the **date of the dismissal**? AG115.
- 26 **COMPENSATION:** Factors when awarding compensation for **substantive unfairness:** EE's remuneration & benefits at the time of dismissal; time lapse since dismissal; whether EE has secured alternative employment & if so date thereof & rate of remuneration; whether EE has taken steps to mitigate his losses by finding alternative employment; financial loss suffered by EE; EE's prospects of future employment eg disability, age, experience, education, qualifications & availability of suitable job opportunities; whether EE failed to state a case at DH; whether resolution of dispute was unreasonably delayed & if so who caused the delay; whether there was a condonation for late referral; whether dismissal was both substantively & procedurally unfair; whether EE received any payments from ER over & above that required by law, any collective agreement or contract; whether EE unreasonably refused an offer of reinstatement made in good faith; whether actions of EE led to loss or damage to ER; ER's financial position. Factors when awarding compensation for **procedural unfairness ONLY**, consider whether the lapse was minor or serious & whether it caused prejudice. AG130-136