

Dismissal for incapacity due to poor work performance or due to ill-health and injury

The dismissal of an employee is the strictest possible sanction in the workplace. It not only terminates the employment relationship but the employee's source of income as well. It changes the person's status from employee and breadwinner to unemployed and dependant and has economic and social consequences – not only for the individual, but also for the country's economy. Therefore, the fairness of the dismissal process is of the utmost importance.

In terms of the Constitution of the Republic of South Africa¹, everyone has the right to fair labour practice. This right is further qualified in the Labour Relations Act² ("the Act"), namely that everyone particularly has the right not to be unfairly dismissed.

In case of dismissal, the employer must ensure that it takes place in a substantively and procedurally fair manner. Substantive fairness relates to the reason for dismissal, while procedural fairness refers to the process followed by the school. The process must be in accordance with the provisions of Schedule 8 of the Labour Relations Act, i.e. the Code of Good Practice: Dismissal.

In terms of the Act, there are three grounds of dismissal, namely:

1. Misconduct
2. Retrenchment, and
3. Incapacity

¹ Act 108 of 1996.

² Act 66 of 1995.

This opinion, only focus on incapacity as a ground for dismissal. The Act does not define the meaning of incapacity. However Schedule 8 of the Act, the code of good practice on Incapacity divides incapacity into two categories.

1. Incapacity due to poor work performance; and
2. Incapacity due to ill health or injury.

Incapacity due to poor work performance

Poor work performance or failure by the employee to reach and maintain the employer's work performance standards in terms of quantity and quality of output is an ever increasing problem. It is implicit in all employment contracts that the employee undertakes to perform according to the reasonable, lawful and attainable work performance standards set by the employer. Should the employee fail in this duty, then he is said to be "incapable" and the employer has the right to dismiss after following a fair procedure and ensuring that the dismissal is for a fair reason.³

Disciplinary action is never applied in cases of poor work performance. The reason is that poor work performance is usually not the fault of the employee, and the employee cannot be disciplined for something that is not his fault.

There are many factors that can be the direct cause of it, or may contribute to it. Some of these are⁴:

- Lack of training, qualifications and experience;
- Alcohol or drug addiction;
- Outside influences;
- Work related stress;
- Incompatibility.

³ <http://www.labourguide.co.za/poor-performances/508-poor-performance-procedures>.

⁴ <http://www.labourguide.co.za/poor-performances/508-poor-performance-procedures>.

Paragraph 9 of schedule 8 of the Labour Relations Act gives the following guideline in cases of dismissal for poor work performance:

“9. Guidelines in cases of dismissal for poor work performance.— Any person determining whether a dismissal for poor work performance is unfair should consider—

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

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

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

*(ii) the employee was given a fair opportunity to meet the required
performance standard; and*

*(iii) dismissal was an appropriate sanction for not meeting the
required performance standard.”*

Procedural fairness will be achieved by the employer following the procedures in this course.

Steps to follow in dismissing for incapacity due to poor work performance:

- Establish that the problem is poor performance;
- Identify the causes of the poor performance;
- Meet with the employee to establish the causes of the poor performance;
- In particular, obtain the employee's reasons for the poor performance;
- Evaluate the employee's reasons for the poor performance;
- Obtain commitment from the employee regarding what action he will take to rectify the problem;

- Inform the employee of what action the employer will take to assist in that process (See annexure “A” for a draft letter following a discussion on poor work performance.);
- Agree on a reasonable time period for improvement;
- Follow up and monitor the progress;
- Substantive fairness is achieved by the employer proving that the employee actually failed to meet the work performance standard, despite having been given the necessary evaluation, counselling, training and guidance and despite having been afforded a reasonable time period in which to attain and maintain the required standard. Thus the only remaining option was dismissal. (**See Annexure “B”**)

Incapacity due to ill-health or injury

In the case of incapacity due to ill-health or injury the test is whether, because of the employee's absences and incapacity, and considering the frequency and duration of such absences, and the effect that it has on the employee's co-workers morale, the question to be asked is can the employer in all fairness, be expected to wait any longer before considering dismissal?⁵

Paragraph 10 and 11 of schedule 8 of the Labour Relations Act gives the following guideline in cases of dismissal for ill health and injury:

“10. Incapacity: Ill health and 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

⁵ <http://www.labourguide.co.za/discipline-dismissal/341-fairness-of-dismissal-for-incapacity-ill-health>.

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 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 arising 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."

Steps to follow in dismissing for incapacity due to ill-health or injury

First talk to the employee informally about his health. He should be told about the impact it has on the business, the department's needs, his colleagues, etc. The situation should not be ignored and then all of a sudden call the employee to the meeting in step 1. An employer needs to be able to show that everything has been tried before going the formal route below.

Step 1: Send a meeting notification

The employee must be sent a written communication asking for a meeting. The tone of the letter is extremely important. It should be firm, but the employee must know it is serious and cannot carry on. The difficult position the employee is in should be taken into account.

Step 2: Hold the meeting or consultation

The meeting is to look into the reasons for the incapacity. Both the employer and employee must work together to find the best solution. The employer's interests must be productivity and commitment from the employee. The employee's interest is to keep his job. Start the meeting by asking the employee how he is. He must be told that his absenteeism has been noticed and that he has not been able to do his work properly. The employee must be told the future needs to be discussed. He further must be asked that if the situation improves, will he be able to work a full day and/or shift.

Step 3: Conduct an investigation

An employer has a legal obligation to look into the incapacity, with the cooperation of the employee (A consent to inspect medical and psychological reports attached as **Annexure "C"**). The incapacity needs to be looked at, including its severity, how it impacts on the work and what the likely diagnosis may be. In other words is the employee able to return

to work in the long run? The best solution to the problem must be investigated. The operational needs of the employer must be considered and the employee's need to earn a salary.

Step 4: Give the employee an outcome

A solution will depend solely on the employee's condition. This will include the likely prognosis, alternatives the employer has considered in the business, the operational requirements and the employer's ability to support the employee. The employer must also look at the extent to which it can afford to be generous and supportive. This could include placing the employee on ill health retirement should there be a pension and/or provident fund that make provision for such retirement.

The final outcome may be dismissal (Notice of dismissal attached as **Annexure "B"**). This will be when there is no alternative viable for the employee and the employer cannot afford to keep the employee any longer. The dismissal must be dealt with sensitively and the wording of the termination letter must be compassionate. Before the employee is dismissed, the employer must make sure to follow a formal incapacity hearing. (An example of the notice of such hearing, attached as **Annexure "D"**.)

In summary, then, it will be fair to dismiss an employee for incapacity if:

- The employee has been counselled and his medical condition and the problems arising from them have been discussed with the employee;
- The employee's medical condition makes it impossible for the employee to perform his normal duties;
- The employee's prognosis is poor;
- The employee has had a fair opportunity to contest the employer's conclusions about his medical condition and prognosis;
- The employee's working conditions cannot be adapted or there is no alternative work for the employee.

**DRAFT LETTER FOLLOWING DISCUSSION ON POOR WORK PERFORMANCE, ON
THE SCHOOLS’S LETTERHEAD**

Employee

By hand

Re: Poor work performance

The discussion on _____, during which the employer informed you of their dissatisfaction about your poor work performance, refers.

During the abovementioned discussion, it was made clear to you that the discussion as such does not constitute a disciplinary action, but that your competence to perform your work is investigated.

The following matters were discussed with you, and are hereby placed on record:

1. The expected standard of work was explained, and the provisions of your employment contract and duty sheet again pointed out to you.
2. The rationale behind the expected standard of work was confirmed.
3. You were requested to cooperate in order to improve your poor work performance.
4. The particular instances of poor work performance under discussion are:

4.1

4.2

4.3

5. The following possible solutions to the poor work performance were considered:

5.1

5.2

5.3

6. It was agreed that point ____ above shall be implemented in order to solve the problem of poor work performance.

7. The school has undertaken to take the following steps in order to support you:

7.1 Training: (who) (when) (what)

7.2 Assistance: (who) (when) (what)

7.3 Advice: (who) (when) (what)

8. You have undertaken to do the following:

8.1 What:

8.2 When:

9. It is confirmed that you will be evaluated on to ascertain whether your work performance has improved.

Kindly cooperate and bring your work up to standard. Should your work performance not improve, the employer will have no choice but to reconsider your suitability for your current post.

SCHOOL PRINCIPAL

DATE

I, _____, hereby acknowledge receipt of
the letter on _____.

Witness (if employee refuses to sign)

NOTICE OF DISMISSAL, ON THE SCHOOL’S LETTERHEAD

Employee

By hand

Re: Dismissal on grounds of incapacity

It is confirmed that it came to the attention of the employer that an objective impossibility exists for you to perform in the workplace, as set out below:

- 1) _____
- 2) _____ 3) _____
- _____

In view of the aforementioned, you are dismissed with immediate effect.

Your final salary, as calculated up until _____ 20__, will be paid on _____ 20__. Together with your final salary, you will also receive a payout of all outstanding vacation leave due to you.

Your certificate of service will be handed to you on _____ 20__.

The employer has no internal appeals procedure. In terms of the Labour Relations Act, Act 66 of 1995, you are free to refer the matter to the CCMA within 30 days.

We thank you for your contributions during your time at the school and wish you all the best with future ventures.

Employer

Date

I, _____, hereby acknowledge receipt of
the letter on _____.

Witness (should employee refuse to sign)

ANNEXURE "C"

CONSENT TO INSPECT MEDICAL AND PSYCHOLOGICAL REPORTS

I, the undersigned, _____**[insert name of employee]** hereby consent to _____**[insert name of Employer]** ("the school") and/or any person designated by the School, inspecting any psychological and/or medical certificates, medical or psychological evaluations or examinations for the purpose of evaluating my capacity to perform my duties as a _____
[insert position of employee, and if necessary, attach a job description or list of tasks performed by the employee].

I further consent to undergoing a psychological and medical evaluation at the instance of the school for the purpose of determining the nature, extent and duration of any incapacity suffered by myself.

Signed at on this the day of 20__.

Signature

Date

Witness

Date

Witness

Date

**NOTICE OF A MEETING REGARDING INCAPACITY DUE TO ILL-HEALTH ON THE
SCHOOL'S LETTERHEAD**

Employee

By hand

Re: Notice of a meeting regarding incapacity due to ill-health

You are hereby notified to attend a meeting on

DATE: _____

TIME: _____

VENUE: _____

Wherein you will be consulted on your capacity to fulfill your job function as
_____ in that:

(i) Over the period _____ to _____ you have been absent
from work for a period of _____ days arising from your alleged incapacity.

(ii) Such absence has exceeded by _____ days your sick leave entitlement.

The purpose of this consultation will be to determine: -

(a) Whether or not you are capable of performing your responsibilities as a
_____ ; and if you are not deemed to be capable,

(i) The extent to which you are able to perform this work;

- (ii) The extent to which your work circumstances might be adapted to accommodate any disability, or, where this is not possible, the extent to which the your duties might be adapted; and
- (iii) The availability of any suitable alternative work.

In making such a determination, regard will be held to the following: -

- (b) The nature, extent and duration of such incapacity, now and in the future;
- (c) The nature of your current job responsibilities, the period of absence, the seriousness of the illness and the possibility of securing a temporary replacement or alternative employment.
- (d) And whether counseling and rehabilitation may be appropriate in the circumstances.

Should it be determined that such incapacity cannot be accommodated by (**NAME OF THE SCHOOL**), your services with the school may be terminated. In the circumstances your cooperation in addressing your alleged incapacity will greatly facilitate this consultation process.

Due to the sensitive nature of this meeting, you will be required to sign a Consent to inspect your medical and psychological records to enable us to evaluate the nature, extent and duration of your alleged incapacity, and to further undergo a psycho - medical investigation at the instance of the school. You will be advised of the school's requirements in this regard at the above-mentioned meeting.

REMARKS:

1. You are entitled to be represented by a representative from the workplace at which you are employed.
2. Should you fail to present yourself at the meeting, the meeting may be held in your absence without further notice to yourself and action taken accordingly.
3. You are allowed to call witnesses if you so wish and the employer should be notified accordingly to make the necessary arrangements. (Notification should reach the employer 2 working days prior to the meeting.)
4. You are entitled to an interpreter, but it is your responsibility to inform the undersigned of your preferred language at least two working days prior to the inquiry, so that an interpreter could be arranged.
5. You will be entitled to call and cross examine witnesses during the disciplinary inquiry.
6. You are entitled to state your case.

PRINCIPAL

DATE

I, _____, hereby acknowledge receipt of the letter on _____.

Witness (should employee refuse to sign)