INCAPACITY DUE TO ILL-HALTH VERSUS MISCONDUCT

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

Employers in workplaces have to deal with incapacity due to ill-health, and misconduct. As in the case of poor performance, it is imperative to clearly understand the distinction between these two issues otherwise a totally wrong procedure could be followed and totally wrong actions/decisions could be made with far reaching repercussions. This is based on the fact that the approaches for dealing with incapacity is totally different from the approach for dealing with misconduct.

The employer cannot simply dismiss the employee with an incapacity problem since the employee is facing a situation beyond his/her control. Therefore, if a dismissal is to occur as a result of incapacity, the employer must follow a correct and fair procedure. Dismissal must be substantively fair and procedurally fair. Section 10 and Section 11 of Schedule 8 of the Labour Relations Act, 66 of 1995 as amended, provides clear guidelines that must be followed to ensure that a fair procedure is observed/followed.

Normally, every job has a performance standard which is laid down by the employer and that constitutes an employer's prerogative. Therefore, employees are expected to meet the performance standards set for their jobs. That is why it is important and advisable that employers engage employees on performance/work standards so that they will clearly understand what is expected of them with regards to work performance.

If a problem of incapacity is noticed by the employer, he must:

- Notify the employee thereof and invite him or her to a meeting/consultation to find out what the problem is and the nature thereof.
- He must give the said employee sufficient time to prepare for the meeting/consultation (and Crystal Mclauchlin suggests at least 48 hours).
- During the consultation the employee must be given an opportunity to explain why she/he is not meeting the required performance standards.
- He/she can be represented by a fellow employee or union representative if he/she so wishes; and
- The atmosphere must be conducive to enabling the employee to express him/herself.
- Consider the availability of any suitable alternative work.

The Employee Health and Wellness Sub-directorates will always be available to assist and ensure that professional service is rendered to assist the employee and the employer alike. If the problem persists, it can be submitted to Human Resources for further attention.

Most importantly, the employer is obliged to engage the employee in good faith in a process as a measure to address the incapacity and to minimise the impact and effects thereof. In fact, counselling sessions play a crucial role in attending to problems of incapacity. Even Commissioner Niehouse asserted that during the counselling sessions, it would be shown as to whether or not the incapacity is due to the factors beyond the employee's control. (Refer also to **Robinson and Sun Couriers (Pty) Ltd (2003) 23 ILJ 655 (CCMA)**, **Gosstelov v Datalor Holdings (Pty) Ltd t/a Corporate Copilith (1993) 14 ILJ 171 (IC), Marion Fouche in**

Bezuidenhout, Stanley and TR Business Systems, Burton v HWH & Associates (Pty) Ltd (unreported-NH 13/2/5299 (IC), and many more). If dismissal is to occur, it should be the last resort where this process of engagement/consultation has failed.

As has been mentioned in the third paragraph above, section 10 and 11 of the Code of Good Practice: Dismissal, provides the guidelines that must be followed by an employer should an employee become incapacitated, temporarily or permanently through ill-health or injury. Section 10 and 11 referred to herein is normally encapsulated in employers' disciplinary codes and procedures.

It is of utmost importance, therefore, that managers and supervisors clearly understand the distinction between incapacity/poor work performance and misconduct to appropriately deal with the problem as and when it arises (**Sun Couriers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (2002) 23 ILJ (LC)**.

However, in the event that incapacity/poor work performance relates to a managerial employee the approach differs. By virtue of his/her position (senior employee), he/she ought to know if he/she is not meeting the required performance standard. A senior employee's job is like that a pilot, and demands high degree of professional skill where a small departure from the required standard could have costly/disastrous consequences (refer to **New Forest Farming CC v Cachalia & others (2003) 24 (LC); Department of Home Affairs and General Public Service Sectoral Bargaining Council Z Mdladla and KR Malatji (2013) (LC); and Palace Engineering (Pty) Ltd v Thulani Ngcobo, Commissioner Shaan Govender N.O., and Commissioner for Conciliation Mediation and Arbitration (2014) [LAC)**. In such cases, departure from the required standard could constitute misconduct, requiring appropriate proceedings to be instituted in accordance with the employer's disciplinary code and procedure. Such proceedings must be based on fairness.

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