INCAPACITY DUE TO ILL-HEALTH OR INJURY: HAVE YOU BEEN GETTING IT ALL WRONG?

5 TIPS TO GETTING IT RIGHT!

Over the years, I've assisted many corporate clients with matters relating to illness and injury. There is a very fine line between 'reasonable' assistance to the employee on the one hand, and the interests of the employer in maintaining ongoing productivity and a feasible enterprise, on the other. This fine line is often further blurred by our own inability as employment law and HR practitioners, to interpret legislative provisions in a manner that protects the rights and interests of all parties involved.

Generally, organisations tend to dismiss employees who, as a result of illness or injury, are unable to perform their duties and tasks at the levels required of them. Granted, hearings may take place and workspaces or jobs amended, but these account for the minority of cases. Ultimately, the attitude of most companies towards these employees has very much been one of "don't make your health problems our problem".

This attitude and approach has been changing slowly, mainly as a result of employers realising the cost of replacing skilled and competent employees and partly due to recent developments in case law. If you have been one of those less-than-sympathetic employers, all is not lost. The key to successfully managing incapacity due to ill health or injury is to be found firstly, in the process and general approach that should be followed and secondly, in the employer's understanding of the status of these employees as potentially 'disabled' candidates.

The Labour Relations Act (the LRA) provides guidelines relating to both procedural and substantive fairness which, although helpful, do not contain sufficient information for the average employer. It's one thing to read that you are responsible for conducting an 'investigation', but it's quite another to actually obtain the information that you require, without damaging interpersonal relationships and without infringing on the rights of the employee involved in the process. Unfortunately, in the majority of cases, many companies tend to conduct the 'investigation' required by the LRA in the same manner that they would conduct a disciplinary enquiry – some even go so far as to issue a notice to attend a disciplinary hearing. Once that notice has been issued, the process invariably becomes adversarial and the focus shifts from seeking to assist and accommodate the employee, to identifying a means of terminating the employment relationship. Employees, fearful of the outcome, tend to withhold crucial information and do not cooperate in the process as they are convinced that it will ultimately lead to their dismissal.

The Employment Equity Act (the EEA) provides the definition of 'disability' and distinguishes between physical and mental disabilities. According to the EEA, a person is considered to be disabled

if they have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in employment.
Physical impairment would include full or partial loss of bodily functions or part of the body, including sensory impairment.
Mental impairment refers to a clinically recognised condition or illness that affects a person's thought processes, judgment or emotions.

Considering this definition, an employee who has been injured in a motor vehicle collision and who has undergone various surgeries for subsequent back injuries and problems, could potentially be considered to be 'disabled' if the injury leads to a partial loss of bodily function. This consideration would require of employers to offer more than just 'assistance' – a disabled candidate is, after all, a preferential candidate for employment in terms of the purpose and intentions of the EEA.

The Labour Court confirmed this approach in the now infamous Standard Bank judgement. Standard Bank had approached the Court after the CCMA had found it's dismissal of an employee on the basis of alleged incapacity due to injury, to be unfair. The Labour Court upheld the CCMA's original decision and dismissed Standard Bank's review application with costs.

Considering all of this, the question which remains, is how exactly these delicate matters should be approached:

1. **Change your attitude and beliefs** about ill health and injury: not all employees are 'faking it' and just looking for a means to be medically boarded. In the majority of cases, these employees do have skills and competencies which can be applied in your organisation and there may be an onus on you as an employer to provide preferential treatment if the employee's illness or injury is a long term or recurring condition which would render them either physically or mentally disabled as per the EEA definition;
2. **Change your approach and processes**: instead of convening a disciplinary enquiry, you can still obtain all the information required by the LRA to comply with procedural fairness requirements, in a much 'friendlier' and consultative environment. The aim of the process should be not only to obtain all the relevant information, but to actually assist and accommodate the employee;
3. **Shift the focus**: dismissal should be the final outcome when all else has failed – it shouldn't be the foremost consideration on the table. Focus on finding mutually beneficial solutions without making unreasonable demands of either party;
4. **Update your policies and procedures**: consult with a suitably qualified expert to update your policies and procedures relating to the management of ill health and injury within the workplace. These policies and all standard documentation should reflect your commitment to seeking mutually beneficial outcome by means of a collaborative process; and

5. **Create awareness**: invest in communicating with line managers and ensure that everyone has adequate access to information and training on how to effectively manage ill health and injury in a progressive manner. Empower everyone from payroll to HR to operational team leaders with the knowledge that they would require to bring the matter to your attention as early as possible.

Incapacity due to ill health or injury does not have to mean the death of the employment relationship. It could just signal the beginning of a new chapter in the employee's career.

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