Ill Health & Dismissal!

Ill health of an employee is recognised as a ground for dismissal. If the employee’s health has deteriorated to such an extent that he or she is no longer able to do the work for which he or she was employed, dismissal looms as a possibility. Naturally, a dismissal of this nature must comply with the basic principles of fairness as laid down in the Labour Relations Act (the LRA) and the Code of Good Practice: Dismissal.

Just like dismissals for misconduct or poor performance, items 10 and 11 of the Code of Good Practice lays down the basic principles of substantive and procedural fairness that the employer must comply with. But in the case of ill health, the process is (or should be) much more cooperative between the employer and the employee. It is not a case (as it is with misconduct) that the employer confronts the employee with charges, gives him or her an opportunity to respond, and then takes a final decision.

The primary consideration is whether the employee’s incapacity due to ill health is temporary or permanent. If the ill health is likely to be temporary, the employer must consider using temporary employees to do the work of the ill employee until he or she can return. Another option would be to re-organise work and work-flow so as to accommodate the employee’s absence. These are things employers do every day, of course, but the real difficulty arises if the employee’s disability will in all likelihood be of a permanent basis.

Another golden thread running through the principles and cases we have is that of accommodation: that the employer must try to accommodate an employee with illness or a disability in the workplace to the greatest extent possible. This obligation exists in all cases of ill health, but it is emphasised in the case where an employee is injured on duty.

The four-part process

In Standard Bank of South Africa v CCMA & others (2007) 16 LC 8.29.11 the Labour Court dealt with the issues arising in the context of a dismissal for ill health in some detail. In that case, the employee was injured on duty in a motor vehicle accident. This accident caused her severe pain in her back and it was clear that she could no longer travel as much as she used to. This did not mean, however, that she was not able to work at all – there were a number of things she could do in a desk-bound job. She could, for instance, use a telephone headset to make and receive calls – but the available equipment was incompatible. Nor could the employer provide her with a comfortable chair.

She was given demeaning and undignified tasks like filing and shredding documents. Eventually, she was dismissed: the employer claimed that she was dismissed for poor work performance. This was unfair, said the Labour Court: you cannot evaluate the performance of an employee against the standards of a healthy employee.

The judgment of the Labour Court in the Standard Bank case ranges far and wide, including consideration of international labour instruments and other jurisdictions. More practically, the Labour Court in that case held that the pre-dismissal enquiry in the case of an ill-health termination entails four stages.

The first stage entails an enquiry whether the employee is able or unable to do his or her work. The second stage focuses on the extent to which the employee is capable of working and thirdly, the most important question must then be considered: how and to what extent the employee’s work circumstances could be adapted. The fourth and final question is whether alternative work is there for the employee.
The other code of good practice

The Code of Good Practice: Key Aspects on the Employment of People with Disabilities GNR1345 of 2002) offers guidance to employers and employees on promoting equal opportunities and fair treatment for people with disabilities. The Code tries to help employers understand their rights and their obligations, to reduce uncertainty and to ensure that people with disabilities enjoy equal rights at work.

One of the most important provisions of the code is item 6. Employers are expected to seek reasonable accommodation of an ill employee in the workplace – a principle also underlying items 10 and 11 of the Code of Good Practice: Dismissal. The reasonable requirement accommodation, in items of the Code on Disabilities provides that this issue is relevant from the recruitment and selection process, the working environment, the way work is done, performance appraisal and the “benefit and privileges” of employment. The Code goes further, indicating that reasonable accommodation would include changing the existing workplace facilities to make them accessible to an employee with a disability, re-organising the workstations, changing training and assessment materials and systems, changing working time and leave and providing specialised supervision, training and support in the workplace.

An employer’s duty to accommodate is balanced against another consideration: the concept of “undue” hardship. An employer need not accommodate a qualified applicant or an employee with a disability if this would lead to an unjustifiable hardship on the business of the employer. Unjustifiable hardship is itself defined in item 6.12 of the Code of Good Practice: Disabilities as “action that requires significant or considerable difficulty or expense”. It involves balancing the accommodation of an employee against the possible disruption of the business.

New decision

A new Labour Court decision on the issue of ill health and dismissal has just been reported. In IMATU obo Strydom v Witzenburg Municipality & others (2012) 21 LC 1.11.12, the employee who had been working for the municipality for some length of time and in various capacities (including, at one point in time, municipal manager). Between May 2004 and January 2005 the employee was absent from work for about eight months as a result of a major depression disorder with associated post-traumatic stress disorder symptoms. The employer did not engage in any investigation or enquiry as to the employee’s ill health.

In January 2005 the employee applied for medical retirement (“medical boarding”) in terms of the rules of his pension scheme – the employer did nothing for a further four months. It was only when the employer was notified that the pension fund had declined the application that it communicated with the employee. The first letter asked the employee when he would return to work; the second letter notified him of an enquiry to be held into his incapacity. An incapacity enquiry was duly convened and it was found that the employee was incapable of doing the work. This eventually led to the referral of an unfair dismissal dispute: the employee’s dismissal was found to be both substantively and procedurally fair.

The Court highlighted a number of important points, for instance that a conclusion as to the employee’s capability can only be reached after the incapacity enquiry, focusing on the employee’s capability and a proper assessment of the employee’s condition. The Court also emphasised the importance of the employer’s trying to accommodate the employee and his or her incapacity by adapting the employee’s duties and workplace.
There was no doubt for the court that permanent incapacity arising from ill health or injury constitutes a legitimate reason for the employer to dismiss the employee – there is no obligation on the employer to retain an injured employee in service indefinitely. The Court also reminds us that items 10 and 11 of the Code of Good Practice: Dismissal are not isolated provisions – they relate to a duty implicit in the constitutional protection against unfair discrimination, and the employer’s duty to accommodate is an important legal instrument used to realise substantive equality for people with disabilities.

**At the enquiry and the arbitration**

The Labour Appeal Court looks at what happened in the incapacity enquiry in some detail, looking at the contents of the medical report for instance (by that time, it was six months old) that found that it would be premature to make a finding that the employee’s incapacity was permanent. The one medical report indicated that with on-going treatment and special management, the employee could return to work – either his own job or "reasonable alternative duties within the open labour market in the future". The chairperson also considered a report submitted by the pension fund administration.

Then the chairperson concludes that the employee’s continued employment with the employer would be contrary to medical opinion and not viable. These were just some of the facts the Court attached some importance to – especially the fact that the chairperson of the enquiry sought to finalise the process on the basis of an out-dated report. The Court also finds that the chairperson seemed to have used the enquiry for other purposes: considering whether or not a continued employment relationship was “amenable” to both parties, that the chairperson wanted to hear arguments in mitigation and whether the employee was guilty of fraud when he submitted a report to the Department of Labour.

The arbitration process did not go any better. Despite it being common knowledge by now that arbitration proceedings are de novo proceedings, that they entail a total re-hearing of the matter, including all the evidence, the arbitrator confined himself only to the evidence that was available at the time of the incapacity enquiry. A number of issues arose in respect of the arbitration process, including the fact that the commissioner seems to have been unsure as to how to deal with the evidence put before him and that the commissioner’s approach in respect of documentary evidence was inconsistent. Nor did he consider relevant facts that had been agreed in the pre-arbitration meeting and put before him in the pre-arbitration minutes.

**Reasonable decision-maker**

The Labour Appeal Court came to the conclusion that the commissioner’s failure to pay due attention to items 10 and 11 of the Code of Good Practice: Dismissal rendered the award reviewable. Even the Labour Court had erred in dealing with the medical evidence – none of the medical reports that were submitted claimed that the employee was permanently disabled or incapacitated. The medical reports were out of date, and, by the time the arbitration began, the evidence of one medical practitioner was that the employee had recovered from his condition sufficiently to resume his duties. There was therefore no grounds, said the Labour Appeal Court, for a finding that the employee was permanently incapacitated or that he could not be accommodated by the employer.

The Labour Court concluded that the commissioner and the Labour Court should have found that the employee’s dismissal was substantively and procedurally unfair. The remedy sought by the employee was reinstatement or compensation. This was not just a simple, straightforward matter of deciding on a number of months, the Court said. There were a number of issues at stake: that the employee did not want to work for the municipality, and the fact that the employee refused to give evidence at the arbitration.
Also relevant was the employee’s conduct after he was said to be fit to return to work. Here the Court found it relevant that the employee, not permanently disabled, said nothing and did nothing to demonstrate any interest in returning to work. The employee did not tender his services in any way, nor was he prepared to give evidence at the arbitration and be cross-examined on his willingness to return to work. It was also relevant that the employee had not worked since 28 May 2004 – and there was no evidence that the stressors that caused his conditions had been eliminated or lessened.

As a result, the Labour Appeal Court found that the dismissal was substantively and procedurally unfair, but that reinstatement was not appropriate. The Court ordered the payment of 12 months' remuneration as compensation.

(Carl Mischke I R Network)