

**INCAPACITY AS A DISMISSAL GROUND IN SOUTH AFRICAN
LABOUR LAW**

by

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TABLE OF CONTENTS

CHAPTER 1	4
INTRODUCTION	4
1 General	4
2 Historical overview	5
2.1 Pre-Wiehahn era: the common law contract and incapacity.....	5
2.2 Wiehahn Commission: period of unfair labour practices	6
2.3 Labour Relations Act 28 of 1956	6
2.4 Labour Relations Act 66 of 1995 (LRA).....	9
2.5 Employment Equity Act 55 of 1998 (EEA) and incapacity	9
3 Categories of incapacity: ill-health and injury	10
4 Identifying difficulties	11
5 Conclusion	12
CHAPTER 2	13
INCAPACITY DUE TO POOR HEALTH OR INJURY	13
1 Introduction	13
2 Identifying difficulties	13
3 Labour Relations Act 66 of 1995	18
4 What entails poor health and injuries?	20
5 Conclusion	25
CHAPTER 3	26
MENTAL INCAPACITY AS A RESULT OF STRESS OR ILLNESS OR INTELLECTUAL IMPAIRMENT	26
1 Introduction	26
2 Caselaw re: mental incapacity, stress, illness or intellectual impairment	26
3 Conclusion	33
CHAPTER 4	34
CHRONIC ILLNESSES THAT CONTINUOUSLY RESULTS IN ABSENCE	34
1 Introduction	34

2	Caselaw re asthma, tuberculosis, depression, alcohol / drug addiction, diabetes.....	34
3	HIV / AIDS, disability and incapacity	38
4	Depression, disability and incapacity	43
5	Conclusion	44
CHAPTER 5		46
PROCEDURES IN RESPECT OF INCAPACITY: ILL HEALTH /INJURY		46
1	Introduction	46
2	Procedures to be followed by employers.....	46
3	Caselaw on procedures for incapacity: ill health / injury.....	49
4	Conclusion	54
CHAPTER 6		55
INTERNATIONAL LEGAL PERSPECTIVE		55
1	Introduction	55
2	International Labour Organisation and convention 158 of 1982: South Africa and England.....	55
3	English law	58
3.1	Basic principles	58
3.2	English case law.....	60
4	Similarities and differences between the South African law and the English law.....	62
CHAPTER 7		65
CONCLUSION.....		65
BIBLIOGRAPHY		67

CHAPTER 1

INTRODUCTION

1	GENERAL	4
2	HISTORICAL OVERVIEW.....	5
2.1	PRE-WIEHAHN ERA: THE COMMON LAW CONTRACT AND INCAPACITY ..	5
2.2	WIEHAHN COMMISSION: PERIOD OF UNFAIR LABOUR PRACTICES	6
2.3	LABOUR RELATIONS ACT 28 OF 1956	6
2.4	LABOUR RELATIONS ACT 66 OF 1995	9
2.5	EMPLOYMENT EQUITY ACT 55 OF 1998 AND INCAPACITY	9
3	CATEGORIES OF INCAPACITY: ILL-HEALTH AND INJURY.....	10
4	IDENTIFYING DIFFICULTIES.....	11
5	CONCLUSION	12

1 GENERAL

In this chapter we are looking at the general view that exists regarding any form of incapacity: ill health or injury, as a ground of dismissal and how development took place in South African legislation. One can distinguish between various forms of ill health and injury. We will have a look at what incapacity entails and when it may be used as a fair ground for dismissal. Incapacity is an issue that has existed in our law for a very long period of time. However, there is vagueness that clings to incapacity, on what it entails and how it should be treated. Many judgments support this observation and it will be discussed throughout the dissertation. If an employee is dismissed for incapacity, the dismissal is regarded as a no-fault dismissal.

It should always be kept in mind when dealing with incapacity whether the incapacity was caused by work related circumstances. If this was the case, then the employer

has a greater obligation to accommodate that employee.¹ There are various views with regards to incompatibility and incompetence and whether the two aforementioned subjects must be treated as incapacity.

In the chapters that follow the different forms of incapacity: ill health or injury will be discussed in detail, as well as the procedure prescribed by the legislator contained in the Labour Relations Act 66 of 1995 (LRA).

2 HISTORICAL OVERVIEW

2.1 PRE-WIEHAHN ERA: THE COMMON LAW CONTRACT AND INCAPACITY

During this era there were not many cases of incapacity to be found. Employers could do as they please and an employee had to accept the decision that the employer took. The common law was not used in many cases and the few cases that are available indicate that an employer was not obliged to give a reason for dismissal, so there was no substantive fairness.² An employer could therefore have dismissed an employee for any reason. Procedural fairness in dismissals was generally not required in terms of the common law. In the event that an employee was permanently unfit to work, it amounted to breach of contract and the contract was automatically terminated.³ The common law made provision for termination of the contract due to poor service or incapacity, but substantive and procedural fairness was not an issue or consideration for any employer. It was clear that the lawmakers did not care or provide protection for employees with incapacity.

¹ Van Jaarsveld, Fourie, Olivier *Principles and practice of labour law* (2012) Issue 23 par 823.

² Christianson "Incapacity and Disability: A retrospective and prospective overview of the past 25 years" 2004 *ILJ* 879.

³ Christianson 2004 *ILJ* 879.

2.2 WIEHAHN COMMISSION: PERIOD OF UNFAIR LABOUR PRACTICES

Unfair labour practices were provided for by legislation as a result of the Wiehahn Commission. Dismissal due to incapacity was included in the broad definition of unfair labour practice.⁴ The definition of unfair labour practices was in 1979 as follows: "Any practice which in the opinion of the Industrial Court constitutes an unfair labour practice."⁵ During 1982 a fundamental change for employees came through due to the insertion of section 43.⁶ In terms of the aforementioned provision, an employee had the option to approach the Industrial Court in cases where they were dismissed, suspended or if an employer's conduct was unfair.

In 1983 there were once again vast changes that favoured employees, when the court ruled in the case of *MAWU v Barlows Manufacturing Co Ltd*⁷ that when an employee was lawfully discharged, it may still be unfair. It is clear that during this period there was a substantive change in respect of the employee's position. It was the beginning of caring and protection of employees and the requirement of fairness was brought into the workplace.

2.3 LABOUR RELATIONS ACT 28 OF 1956

In terms of this Act⁸ the employer was usually required to conduct an appraisal of the employee's performance. It was stated in various court cases that it was the employer's prerogative to set standards and assess the performance of the employee.

⁴ Christianson 2004 *ILJ* 879.

⁵ Industrial Conciliation Amendment Act 94 of 1979.

⁶ Labour Relations Amendment Act 51 of 1982.

⁷ 1993 4 *ILJ* 283 (IC).

⁸ Labour Relations Act 28 of 1956.

The reason for dismissal (substantive fairness) in poor performance cases or cases of incompetence depended on the question whether an employer can be expected to continue with the employment relationship, bearing in mind his own interests and those of the employee and the circumstances of the case.⁹

Various cases were reported under this Act:

- a) In *Madola v SA Breweries Ltd*¹⁰, the employee was dismissed for incapacity due to his continued absence. It was established that he suffered from tuberculosis and it was recommended by a doctor that he must be transferred to another department. After a while, another position was available and the employer wanted to transfer the employee to the financial department, which option the employee refused to accept. The employee received a final written warning for his absence. He still stayed away from work and after several months he was dismissed for incapacity. The court found that the employer took every possible step to assist the employee with alternative work and it would not be fair towards the employer to expect them to keep the employee on at the workplace. The dismissal was fair.

- b) In *Collins v Volkskas Bank (Westonaria branch) – A Division of Absa Bank*¹¹, the employee fell pregnant for the second time within a period of two years after her first period of maternity leave. There was a policy that was agreed upon between the employer and the union that an employee is not allowed to take

⁹ *Hendricks v Mercantile & General Reinsurance Co of SA Ltd* (1994) 3 LCD 83 (LAC).

¹⁰ 1992 1 LCD 49 (IC).

¹¹ 1994 15 ILJ 1398 (IC).

maternity leave within a period of two years after the termination of a prior period of maternity leave. The employee stated she was not aware of the policy and applied for maternity leave. The application was rejected. The employee had no other option than to resign, in order to take statutory maternity leave. The court stated that she ought to have been aware of the policy and that the policy formed part of the employee's conditions of employment. The court further stated that they can intervene in agreements if it results in manifestly gross unfair labour practice, but held that the policy was not manifestly unfair. Of importance was that the court stated that the employer misconstrued the new policy conditions. The court also indicated that the employer should have considered the leave application on its own merits and had to apply their mind in line with the principles of fairness laid down by the court in regard to dismissals for incapacity. The court found that the policy was not unfair, however the way the policy was applied was unfair.

- c) In *National Union of Mineworkers & Another v Rustenburg Base Metals*¹², the employee was dismissed for operational requirements due to his excessive absenteeism due to sickness. The Industrial Court found that the employee's sickness was not work related and had to decide whether it was fair towards the employer to expect them to keep an employee on indefinitely, despite the fact that the employee was not able to fulfil his contractual obligations. The court also stated that even though there is no statutory test for reasonableness in South Africa, an employer's conduct when dismissing an employee for sickness should be considered at the hand of reasonableness and fairness.

¹² 1993 14 ILJ 1094 (IC).

The court noted that it is dangerous to lay down general principles, but said that there is a lesser duty on an employer when the illness is not work related. The court found in this case that the employee's sickness had reached such a stage that the employer could not be expected to keep the employee on any longer and that the dismissal was fair.

It is clear from the aforementioned three cases that the principles that the courts used, were considered and incorporated in the 1995 Labour Relations Act.

2.4 LABOUR RELATIONS ACT 66 OF 1995 (LRA)

Section 188 of the LRA recognises the fairness of dismissal for incapacity. It is important that one must differentiate between incapacity poor performance and ill-health or injuries. The LRA clearly differentiates between the reason for dismissal for poor performance and ill-health or injuries.

The legislature has set clear guidelines in the Code of Good Practice: Dismissals as contained in Schedule 8 to the LRA (the Code) for fair dismissals for poor work performance and ill health or injury. The employer must follow these guidelines. Thus, an employer must act substantively and procedurally fair. The substantive and procedural fairness is discussed throughout this paper.

2.5 EMPLOYMENT EQUITY ACT 55 OF 1998 (EEA) AND INCAPACITY

The EEA aims¹³ to achieve equality in the workplace by:

¹³ Section 2 of the Employment Equity Act 55 of 1998.

- “(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and
- (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.”

Persons with disabilities and the designated groups enjoy protection from unfair discrimination and affirmative action.

It is furthermore important for an employer to remember to differentiate between his obligations with regards to employees with disabilities in terms of the EEA and an employer’s obligations regarding incapacity in terms of the Code.

3 CATEGORIES OF INCAPACITY: ILL-HEALTH AND INJURY

Incapacity renders an employee temporarily or permanently unable to render services to the employer. The aforementioned must be distinguished from incompetence and incompatibility. Section 188 of the LRA refers to incapacity without distinguishing between poor performance and ill health or injury. Incapacity’s distinction is drawn in the Code.¹⁴

There are three categories of incapacity:¹⁵

- (i) physical incapacity due to ill health or injury;
- (ii) psychological (mental) disability (or disability) due to stress, illness, mental limitation, trauma, etc.; and

¹⁴ Basson, Christianson, Dekker, Garbers, le Roux, Mischke, Strydom *Essential Labour Law* (2009) 135.

¹⁵ Van Jaarsveld Issue 23.

- (iii) chronic diseases continuous absence resulting as asthma, tuberculosis, depression, alcohol or drug addiction, etc..

4 IDENTIFYING DIFFICULTIES

Incapacity can cause an affected employee not to render his duties properly, or not at all. Employers must have a reason to dismiss an employee and should follow the procedures as prescribed.

An employer should conduct a thorough investigation when it is of the opinion that an employee is not performing due to incapacity. One will have to look at the specific requirements and procedures that an employer must follow when determining whether an employer can take action against an employee and eventually dismiss the employee fairly.

Many employers have company policies and procedures concerning dismissals and employers must remember that they are bound by their policies and should follow it. If the aforementioned is not adhered to, then an employer could possible face a procedurally unfair dismissal.

The employer must determine if there is alleged misconduct present. This is important due to the fact that misconduct and incapacity often overlaps. Furthermore, one should also keep in mind that a distinction can be drawn between incompetence and incompatibility and each case must be determined on its own merits.

5 CONCLUSION

It is clear that the South African law developed over many decades and that fairness and equity plays an important role in the South African justice system. Under the 1956 Labour Relations Act the courts developed various rules and regulations which are now contained in the 1995 Labour Relations Act.

It should be kept in mind that an employer has to distinguish between incapacity and misconduct and the respective procedures, as well as disability and poor performance. Fairness or the decision to dismiss cannot be divorced from the process by which it was arrived at; it is through a fair process that fair decisions are generally reached.¹⁶

There are still some ambiguities which should be clarified, but the lawmakers satisfactorily covered a very broad base. Incapacity as a ground for dismissal is most relevant, because incapacity can happen any day at any time.

¹⁶ *AECI Explosives Ltd (Zomerveld) v Mambalu* 1995 ILJ 1505 (LAC).

CHAPTER 2

INCAPACITY DUE TO POOR HEALTH OR INJURY

1	INTRODUCTION.....	13
2	IDENTIFYING DIFFICULTIES.....	13
3	LABOUR RELATIONS ACT 66 OF 1995	18
4	WHAT ENTAILS POOR HEALTH AND INJURIES?	20
5	CONCLUSION	25

1 INTRODUCTION

Incapacity is an important aspect of our labour legislation and it is one of the internationally recognised grounds for fair dismissal.¹⁷ Every person is at all times exposed to the risk of becoming unfit for work due to ill health or injury. The aforementioned is an important aspect that should be carefully investigated. Employees who cannot perform their duties due to ill health or injury must be treated in a fair manner, also when determining whether the employee can be accommodated in an alternative position or whether the employee is really not suitable for his current position if changes are made. In this chapter incapacity due to poor health or injury will be discussed.

2 IDENTIFYING DIFFICULTIES

Employers must have a reason to dismiss an employee and should follow the procedures as prescribed.

¹⁷ Basson 135.

An employer should conduct a thorough investigation when it is of the opinion that an employee is not performing because of incapacity. One will have to look at the specific requirements and procedures that an employer must follow when determining when it can take action against an employee and eventually terminate the employee's contract of employment fairly. There are also requirements to prevent discrimination against employees when the employee suffers from a disability or incapacity.

As mentioned previously, the employer must determine if there is alleged misconduct present. This is important due to the fact that, as previously mentioned, misconduct and incapacity can often overlap. If misconduct is not present, the process of incapacity must be followed. When misconduct is present, one should consider the Code. However if incapacity is present one should also consider items 10 and 11 of the Code. These two grounds for dismissal should be kept apart, as the procedures differ. If the wrong procedure is followed and it has a material bearing on the decision to dismiss, the employer may be guilty of injustice and this can result in an unfair dismissal. The Code stresses that each case is unique and departures from the Code may, at times, be justified.¹⁸

Misconduct can best be described as the employee's failure to adhere to the rules and policies of the employer during working hours and sometimes even after work. To discipline an employee for misconduct, an employer must, in terms of the Code, prove that the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and if a rule or standard was contravened, whether or

¹⁸ Van Jaarsveld Issue 23 .

not the rule was a valid or reasonable rule or standard; the employee was aware, or could reasonably be expected to have been aware, of the rule or standard; the rule or standard has been consistently applied by the employer; and in cases of dismissal, whether dismissal was an appropriate sanction for the contravention of the rule or standard.

Incapacity on the other hand relates to performance of an employee. In other words the employee has failed to reach the agreed quantity and / or quality of work over an agreed period. Usually the performance of an employee is lacking and this can be as a result of circumstances beyond the employee's control. Incapacity can assume two forms, namely ill health or injury. However Du Toit *et al*¹⁹ mentioned that there are more than the two forms of incapacity mentioned by the Code. The first form of incapacity mentioned in the Code pertains to an employee who is incapable of doing his job due to the lack of skill, knowledge, ability or efficiency which is necessary to meet the employer's standards. The second form of incapacity in terms of the Code is when an employee is incapable of doing his work due to an illness or injury. The other forms, mentioned by Du Toit *et al*²⁰, are incompatibility and impossibility of performance.

There is a difference between incompetence and incompatibility. Incompatibility relates to an employee's ability to work in harmony within the business environment or with fellow employees.²¹ In this instance one must determine whether the employee fits into the corporate culture. There were many debates on whether

¹⁹ Du Toit, Woolfrey, Bosch, Godfrey, Rossouw *Labour Relations Law – A comprehensive guide* (2006) 419.

²⁰ Du Toit 419.

²¹ Du Toit 420.

incompatibility is a form of incapacity or whether it relates to an employer's operational requirements. However, the debates have died down and it is generally accepted that incompatibility is a form of incapacity.

It is reiterated that it is important for an employer to identify the correct substantive reason for dismissal.

An example of where misconduct and incapacity must be distinguished is where an employee is abusing alcohol or is under the influence of alcohol at the workplace. The employer will have to establish whether the employee has an alcohol problem or if it is misconduct. Counselling and rehabilitation rather than dismissal may be appropriate in cases of drug or alcohol-related problems.²² An employer must keep in mind that if an employee is causing disruptions in workplace relationships, appropriate warnings and counselling are required.²³

The EEA refers to persons with disabilities and defines persons with disabilities as "people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment." Employers have an additional duty towards persons with disabilities, considering reasonable accommodation where necessary.

Employers should differentiate between employers' obligations with regards to employees with disabilities in terms of the EEA and employers' obligations with regards to incapacity in terms of the Code. People with disabilities may be

²² Basson, Christianson, Dekker, Garbers, le Roux, Mischke, Strydom *Essential Labour Law* (2009) 146.

²³ Basson 143.

appointed in a position and then adhere to the inherent job requirements, while employees who suffer incapacity during employment can not necessarily adhere to the job requirements which they have been appointed to.

In *Wylie v Standard Executors & Trustees*²⁴ a trust officer was diagnosed with multiple sclerosis, a degenerative neurological disorder. When the employee could not meet the required performance standards she was transferred to another department, which meant less stress for her. However, she also could not handle that stress. A medical panel found that she was permanent disabled and suggested to the employer that they either consider to accommodate the employee in her current role, to seek employment for her in another role, or to assist her to pursue another position outside the bank. The employer informed the employee that two of the three aforementioned options would be explored for a period of three months and if there is no solution, her employment would be terminated. The three month period ended and the employee was dismissed. The commissioner emphasised that one must consider disability and incapacity separately and that they are not interchangeable. It was also found that the employer did not treat the employee as a person with a disability, but as a poor performer. The commissioner found that the applicant was dismissed unfairly.

It is obvious from the above that an employer can easily identify the pertinent factors incorrectly and as a result of the aforementioned, follow the incorrect procedure.

²⁴ 2006 ILJ 2210 (CCMA).

3 LABOUR RELATIONS ACT 66 OF 1995

Section 188 of the LRA recognises the fairness of dismissal for incapacity. It reads as follows:

“(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove –

(a) that the reason for dismissal is a fair reason -

- (i) related to the employee’s conduct or capacity; or
- (ii) based on the employer’s operational requirements; and
- (iii) that the dismissal was effected in accordance with a fair procedure.

(2) Any person considering whether or not the reason for dismissal is a fair reason or whether or not the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice issued in terms of this Act.”

One must differentiate between poor performance and ill-health or injuries. Item 9 of the Code, on poor job performance states as follows: “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.”

Item 10 of the Code provides as follows: "Incapacity: Ill health. -

(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 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.”

Item 11 of the Code provides as follows: "Guidelines in cases of dismissal due to 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.”

From the above it is evident that the legislature has set clear guidelines for treatment in respect of poor work performance, as well as ill health or injury. The employer must follow these guidelines in order to dismiss an employee fairly and it is apparent that the employee must at least be afforded an opportunity to state his side of the case.

4 WHAT ENTAILS POOR HEALTH AND INJURIES?

There is not a closed list of what specifically entails the concept of ill-health and injuries and each case must be determined on its own merits. There are many

different diseases and injuries that anyone can acquire. Due to the fact that anyone is at risk and this risk is outside an employee's control, responding to an employee's illness or injury is regulated by the law. The fact that there is a broad spectrum of illnesses and injuries that exists makes this subject difficult.

Item 11 of the Code determines what an employer should consider when dismissing an employee for incapacity. An employee may take sick leave in the event of illness or injury and is entitled to thirty six days sick leave in a three year period.²⁵

Following are some examples of cases with regards to incapacity and what the courts ruled where employees were dismissed for poor health and / or injuries:

- (a) In the matter of *Burger v Governing Body of Newcastle Senior Primary School*.²⁶ Burger was dismissed after she requested seven weeks unpaid leave to enable her to undergo a knee replacement. The employer denied the leave and stated that to grant her such extensive leave would break the continuity of the pupils' education. The applicant was unable to give the respondent an assurance that she would be fit to resume duty after the operation and her services was subsequently terminated by the employer. The Commission for Conciliation Mediation and Arbitration (CCMA) commissioner found that the dismissal was substantively unfair, as management of the school neither investigated the extent of the applicant's incapacity, nor gave her an opportunity to state her case.

²⁵ Section 22 Basic Conditions of Employment Act 75 of 1997. Sick leave is a topic on its own and will not be discussed further.

²⁶ 2005 2 BALR 175 (CCMA).

- (b) In the matter of *Tshaka v Vodacom (Pty) Ltd*²⁷ the employee, a call centre consultant, was diagnosed with severe voice fatigue, which prevented her from performing her duties as a full-time consultant. Medical specialists recommended that the employee be moved to another work environment or that her hours that she spends on the telephone with clients must be cut in half. Her employer was unable to assist with suitable alternative work in the workplace or to adapt her job and she was subsequently dismissed for incapacity after a hearing was held. The matter was referred to the CCMA. The commissioner stated that it was common cause that the employee's voice fatigue was work related and found that the employer failed to explore certain other possibilities. There was also reference to item 10(4) of the Code and the fact that there is a greater responsibility on an employer in cases where an employee's incapacity is due to work related illnesses. The commissioner found that the dismissal was unfair.
- (c) In *Davies v Clean Dale CC*²⁸ the employee was a branch manager and was in control of a number of teams. From time to time the employee had to do physical work. The employee sustained an injury and his right arm was injured badly. It is important to note that Davies wrote with his right hand. Davies was later dismissed on grounds of incapacity. The court found that the dismissal was unfair and stated that it was not demonstrated that the employee, because of this disablement of his arm, would not be able to perform the work for which he was employed at the time of the incident, either wholly or to a certain extent which would not meet the reasonable requirements of the

²⁷ 2005 ILJ 568 (CCMA).

²⁸ 1992 13 ILJ 1230 (IC).

employer. One should note that this case was heard before the 1995 Labour Relations Act.

- (d) In *National Union of Mineworkers v Libanon Gold Mining Co Ltd*²⁹ the applicant's duties required him to go underground from time to time. The respondent's medical advisor informed the applicant that he is not fit to work underground. The applicant's medical advisor however stated that the applicant should be allowed to work underground, but with certain precautions. As there was no vacant surface position, the employer terminated the employee's services. The Industrial Court dismissed the employee's claim. The Labour Appeal Court found that it was not wrong of the employer to rely on their medical advisor, however it was not correct that once they established that the employee cannot perform at the required level, there is no duty on them to keep him and that his dismissal would be fair. The Labour Appeal Court found that the dismissal was unfair.
- (e) In *Hendricks v Mercantile & General Reinsurance*³⁰ the applicant was dismissed on grounds of incapacity. The applicant was frequently absent on account of illness. The applicant's illness was stress and depression related and his co-workers also played a role in his problems. The respondent gave counselling to the applicant and the applicant was sent to a specialist physician and to a psychiatrist. A hearing was conducted and another position in different surroundings was offered, where he would be doing much the same work without losing any benefits. The applicant refused to accept this offer. The

²⁹ 1994 15 ILJ 585 (LAC).

³⁰ 1994 ILJ 304 (LAC).

court held that the applicant's refusal to accept the alternative position offered to him was unreasonable and the respondent acted fairly.

- (f) In *MTN Service Provider (Pty) Ltd v Matji NO & Others*³¹ the employee was absent for 202 days in a three year cycle and the employer was not sure if the employee was still able to render the service for which she had been employed. After an investigation a report was released stating that she was fit for work and there was a recommendation that the employee must be transferred to a less stressful environment. A hearing was conducted and the employer dismissed the employee. An unfair dismissal dispute was referred to the CCMA and the CCMA found that her dismissal was substantively and procedurally unfair. The aforementioned was upheld by the Labour Court. The Labour Court stated the following: “None of the witnesses for the employee testified that the employee had been given an opportunity to prove that she was capable of performing her tasks when she returned to work; the employer's decision to dismiss the employee was based not on her incapacity but on her long and persistent periods of absence from work due to ill-health. The test was whether the employee was capable of rendering her services to the employer, and she was never given a chance to prove this as she had been suspended pending the enquiry; the employee was given no say in the employer's consideration of alternative less stressful positions.”

- (g) In *SA Fibre Yarn Rugs Ltd v CCMA*³², the court mentioned several factors that should be taken into account when deciding whether there is a substantive

³¹ 2007 28 ILJ 2279 (LC).

³² 2005 ILJ 921 (AH).

reason to dismiss or not. The factors are:

- (i) the personal circumstances of the employee;
- (ii) the period of service with the employer;
- (iii) the degree of the misconduct;
- (iv) the employee or any specific instructions received;
- (v) any prior misconduct offenses, and
- (vi) the nature of misconduct and disciplinary sanction.

The above indicates that ill health and injury continues to cause controversy in the workplace, especially substantive fairness in respect of ill health or injury. The prescribed procedures must also strictly be adhered to by employers to avoid unnecessary disputes. The procedure that must be followed will be discussed in Chapter 5.

5 CONCLUSION

In the context of ill health or injury the employer is required to assess whether or not the employee can do the work and if not, the extent to which the employee can perform the work, with or without reasonable accommodation, adaption to the employee's work circumstances or the availability of suitable alternative work for the employee.³³

³³ Basson 144.

CHAPTER 3

MENTAL INCAPACITY AS A RESULT OF STRESS OR ILLNESS OR INTELLECTUAL IMPAIRMENT

1	INTRODUCTION.....	26
2	CASELAW RE: MENTAL INCAPACITY, STRESS, ILLNESS OR INTELLECTUAL IMPAIRMENT.....	26
3	CONCLUSION	33

1 INTRODUCTION

This chapter deals with incapacity due to specific causes. There are several issues with regards to matters of incapacity and disability that will be discussed in the chapters that follow. As stated previously, a distinction must be drawn between incapacity and disability. Illnesses such as depression can be a mental incapacity or a chronic illness that may result in continuous absence. Depression will be touched on in this chapter and in the following chapter, as it can be regarded as a mental or intellectual impairment or a chronic illness.

2 CASELAW RE: MENTAL INCAPACITY, STRESS, ILLNESS OR INTELLECTUAL IMPAIRMENT

*Automobile Association of SA v Govender*³⁴: The employee, Naidoo, suffered from severe depression, was ill and had to take several different medications on a daily basis for various conditions, which affected him physically and mentally. On 19

³⁴ 1999 ILJ 2854 (LC).

December 1998 Naidoo started with his shift. A colleague of Naidoo communicated with him over the radio and heard that Naidoo was not sounding well. At 17:00 Naidoo drove recklessly from one side of the road to the other side of the road and was thereafter involved in a collision with a truck.

After the accident, the owner of the other vehicle withdrew the keys from Naidoo's badly damaged vehicle. Naidoo took his gun out, threatened the other driver and took his keys back. The next day he stated he could not recall the accident or the threat towards the other driver. Naidoo was subsequently dismissed. It was found that his dismissal was unfair.

The aforementioned case clearly illustrates that his illness and depression was not of a permanent nature and that the medication he took had a severe negative impact on him. Consequently he could not act rationally. The employer had to endure this and dismissing an employee under these circumstances is questionable and unfair. Any employer would have to determine the nature and durations of the illness.

In *Spero v Elvey International (Pty) Ltd*³⁵ the applicant took medication for various reasons, but his medication was predominantly for his depression. Spero was later dismissed for incapacity and he instituted an unfair labour practice dispute against the employer in terms of section 46(9) of the previous Labour Relations Act³⁶.

It was argued by the respondent that the applicant did not complete his work at the clients of the employer and that the applicant brought the respondent's good name in

³⁵ 1995 ILJ 1210 (IC).

³⁶ *Supra* note 8.

disrepute at some of the respondent's clients. The respondent advised the applicant in a letter that as he is unable to perform his duties as a sales consultant satisfactorily he is therefore dismissed.

It was considered by the court that the employee suffered from depression and had an overdose of medication. He had on several occasions taken too much medication and then went to work. The applicant's depression was due to several reasons, which included his parents and his relationship with his former wife. The applicant had on several occasions been absent from work and was in psychiatric hospitals and provincial hospitals, but not for unreasonably long periods. It was stated that there was no evidence that the employer was shamed and there was no proper consultation with the applicant. A medical report stated that the applicant was suitable and capable to perform his duties.

The court stated explicitly in this matter that temporary absence from work due to illness or injury is not a valid reason for dismissal and that this statement does not require any further discussion. The court ruled that the applicant's dismissal was unfair and that he should be reinstated by the employer.

In the aforementioned case, the applicant was mentally incapacitated for the duration of several short periods and this was not enough for the fair dismissal of the applicant. Even though this case was decided under the previous act, the court found that all avenues must be explored and dismissal must be the last resort that the employer follows. Employers must be understanding towards employees in respect of incapacity for short periods. Employers should also investigate whether

the correct amount of medication could assist the employee to perform his duties satisfactorily.

*Bennett v Mondipak*³⁷: In this case the respondent dismissed the applicant after the latter has repeatedly been absent from work. The applicant had a nervous breakdown. The nervous breakdown was due to the high level of stress and workload that the applicant experienced at work. The applicant claimed that he was unfairly dismissed.

An important statement that the Commissioner made was that employees react differently to the same set of pressures and several factors are considered by different persons. The Commissioner referred to the definition that was highlighted by Newstrom and Davis³⁸ who state that: “Stress threshold – the level of stressors that one can tolerate before negative feelings of stress occur and adversely affect performance”³⁹ and further that: “Some people have a low threshold and are easily upset by the slightest change or disruption in their work routines. Others have a higher threshold, staying cool, calm and collected under the same conditions. This may stem partly from their experience and confidence in their ability to cope. A higher stress threshold helps prevent lowered performance unless a stressor is major or prolonged.”⁴⁰

The following conclusion was made: “No two persons will react in an identical manner to tension / stress being experienced. Tension and / or stress are a reaction

³⁷2004 ILJ 583 (CCMA).

³⁸ *Organisational behaviour - Human behaviour at work* 1993 465.

³⁹ *Bennet v Mondipak* 2004 ILJ 583 (CCMA) 592.

⁴⁰ *Bennet v Mondipak supra*.

to external stimuli which has an internal or physiological reaction. Coping with a particular stressor differs from person to person. Long-term exposure to a stressor can result in physiological illness.”⁴¹

The court ruled that the breakdown was based on work related stress. The employee experienced more pressure at work and his workload increased. Both work pressure and workload contributed to his collapse. It was further stated that there is an increased duty on the employer to accommodate the employee due to the fact that the disease was work related.

In this case, reference is made to item 10 and 11 of the Code and it was applied. Furthermore, an important obligation of employers was mentioned with regards to whether the employer / employment relationship had contributed to the employee’s incapacity. Employers must establish the aforementioned.

In the case of *NEHAWU & Another v SA Institute for Medical Research*⁴² the employee was dismissed for incapacity that arose out of ill health. The employee took 475 days’ sick leave in a period of 6 years. The employee received several warnings, final written warnings and several meetings were held to investigate the causes of the employee’s persistent ill health. The employer appointed a panel to investigate the situation. The employer tried to accommodate the employee by moving her to another hospital for two months. The employee submitted a report from a psychiatrist who recommended that she must be boarded off work

⁴¹ *Bennet v Mondipak supra*.

⁴² 1997 2 BLLR 146 (IC).

permanently. A second opinion was obtained and when the report was submitted the psychiatrist did not support the first psychiatrist's opinion.

It was established that the nature of the employee's problems was social (domestic) and psychological, rather than physical. The panel of the employer was of the opinion that the situation of the employee would not improve in the short to medium term and consequently the employee's services were terminated. The court found that the dismissal was fair and stated that: "The courts have developed an empathetic approach to employees in an ill health situation, and according to most of the above mentioned decisions, an employer is obliged to ascertain the following:

- a) the nature of the illness of the employee and prognosis;
- b) whether the employee is still capable of doing the work he/she was employed to do;
- c) if unable to do the work, what duties he/she is still able to do;
- d) consider alternative work, if available. I have to emphasise at this point that most of these cases deal with physical impairments".

The court also stated with regards to the period that one can see that the respondent never acted hastily; they attempted on various occasions to find a solution and gave the applicant sufficient time to try and improve her health.

In this case the court looked at various factors before concluding that the employee's dismissal was fair. The factors were listed by the court and the list provides a clear guideline that employers can follow and apply.

In the case of *SAMWU obo Solomons v City of Cape Town*⁴³ the employee was dismissed for incapacity ill health. The employee suffered from epilepsy. The employee stated that his dismissal was substantively and procedurally unfair, while the employer argued that it was a fair dismissal. The respondent held incapacity meetings and the employee was referred to the employer's occupational physician. The physician confirmed that the employee had epilepsy, but did not consult with the employee's physician. No tests were conducted to examine the possibility of different or stronger medication. The physician further stated that the employee was not permanently unfit to work.

The court held that the approach of an employer towards an employee who suffered from ill health or injury, should be based on sympathy, understanding and compassion. The court further held that epilepsy did not generally render an employee completely unfit for work, due to the fact that the correct medication and with certain precautionary measures taken, most employees with epilepsy were able to continue working. The court referred to the Code and to the extent of the employee's incapacity and stated that the investigation was not sufficiently done prior to his dismissal and that the employer took the decision without being aware of the true and correct facts. A proper investigation would have revealed that the employee, with the improved medication, was capable of performing a much wider variety of tasks than the employer thought he could. The court also stated that whilst it could not be disputed that employer had made some efforts to find alternative employment for the employee, inadequate investigations were conducted to establish whether the employee's duties and work circumstances could be adapted.

⁴³ 2009 18 SALGB 8.1.4.

While it could not be expected of an employer to create a completely new position for an employee, the employer was at least expected to attempt to adapt the working conditions and duties, so that the employee could continue working. Such important efforts were not made by the employer. The court therefore found that the dismissal was unfair.

It is clear from the aforementioned case that employers should consider alternatives and should seek to adapt an employee's duties where possible. An employer should not just blindly accept that the employee will not be capable of performing other duties.

3 CONCLUSION

In two of the abovementioned cases (*Automobile* and *Spero*), it clearly emerged that the employer had to endure the reasonable absence of the employee from work and that the mere removal of such person was unfair. It is important that proper consultation with employees must take place before any decisions regarding dismissal are taken. An employer must also be tolerant with employees, as employees differ and can cope with different levels of stress. Employers must be more tolerant with employees that are ill because of work related issues. Employers must also perform their investigations regarding incapacity thoroughly, as it will assist them when they need to make decisions with regards to possible dismissal.

CHAPTER 4

CHRONIC ILLNESSES THAT CONTINUOUSLY RESULTS IN ABSENCE

1	INTRODUCTION.....	34
2	CASELAW RE ASTHMA, TUBERCULOSIS, DEPRESSION, ALCOHOL / DRUG ADDICTION, DIABETES	34
3	HIV / AIDS, DISABILITY AND INCAPACITY.....	38
4	DEPRESSION, DISABILITY AND INCAPACITY	43
5	CONCLUSION	44

1 INTRODUCTION

There are many different chronic diseases that result in an employee being absent from work. This issue is important, yet difficult to resolve. This chapter discusses issues such as depression, cancer and HIV / AIDS. The most recent findings on chronic diseases will also be discussed.

Slow onset illnesses, like cancer or HIV / AIDS may start as a mild form of incapacity and can developed into a serious form of incapacity. Incapacity can affect an employee's ability to render service at the workplace.

2 CASELAW RE ASTHMA, TUBERCULOSIS, DEPRESSION, ALCOHOL / DRUG ADDICTION, DIABETES

In the case of *Naik v Telkom*⁴⁴ the applicant had seventeen years of service at Telkom. He was a regular drinker, but it was never a problem at work until 1998. In

⁴⁴ 2000 ILJ 1266 (CCMA).

1998 he participated in a rehabilitation program which he successfully completed and then he attended weekly sessions. In 1999 there was an incident at work where he threatened a fellow employee with a panga, while under the influence of alcohol. He received a final warning for the aforementioned incident. Later in 1999 he failed to attend an important meeting and was found in his car where he was under the influence of alcohol. After a disciplinary hearing he was dismissed.

The employee argued that an alcohol problem is a disease that cannot be cured overnight and that the healing process takes a certain period of time. It was furthermore argued that he was not given enough time to recover. The employee's representative at the hearing stated that Naik was willing to be demoted or transferred.

An important aspect in this case was that the presiding officer referred to alcohol abuse as a disease. Thus, an employee with an alcohol problem must be treated exactly the same as an employee with a medical condition. The employee should not be guilty of any of misconduct, because then he is treated differently. A distinction should also be made between misconduct and incapacity in cases where alcohol is abused. In this case, the employee clearly had an alcohol related problem.

Furthermore, in the instance of an employee who suffers from an illness or has symptoms of an illness, a thorough investigation must be conducted before dismissal is considered.

“Alcohol problems are multi-dimensional and the treatment must not be narrowly constructed. The initial treatment may involve certain experimentation with different remedies to assist the individual patient to find the appropriate route to follow”⁴⁵

After considering facts and factors, the presiding officer ruled that the employee’s dismissal was substantively unfair. The aforementioned just once again emphasises that one must distinguish between alcohol abuse as a medical condition and as act of misconduct.

In an article titled *Drinking on Duty*⁴⁶, the author stated that it must be determined if the conduct of the employee constituted misconduct or incapacity. In the case of misconduct where an employee is abusing alcohol and for example is working in a mine and is responsible for security, dismissal would be fair. The aforementioned article is once again a confirmation of the importance to distinguish between misconduct and incapacity in cases of abuse of alcohol.

In the case of *IMAWU v City of Cape Town*⁴⁷ the employee, Stuart Murdoch, was refused the position of a firefighter because he had diabetes. It was argued that there was direct discrimination against the employee on grounds of disability. The important question which the court had to answer was whether a person with diabetes may be refused to be a firefighter. Reference was made to section 6(1) of the EEA that stipulates that “No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or

⁴⁵ Albertyn and McCann *Alcohol, employment and fair labour practice* (1993).

⁴⁶ Van Jaarsveld “Drinking on Duty” 2002 *JBL* 50(1) 16.

⁴⁷ 2005 ILJ 1404 (AH).

more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.”

The court ruled that the employer unfairly discriminated against the employee and that he could apply for the post despite his diabetes. It is important to note that the court stated that a blanket ban amounted to discrimination. Thus, even though an employee has a permanent illness, it does not necessarily mean that the employee is not suitable for a position. An employer cannot exclude all employees for a position, but every person’s position must be evaluated on their own merit.

In the case of *IMATU obo Strydom v Witzenberg Municipality*⁴⁸ the employee was initially employed as a town clerk. Several town councils merged to form the Witzenberg Municipality and the employee then acted as municipal manager, whilst at the same time holding the position of senior administration officer. Between May 2004 and January 2005 the employee was absent from work due to illness for approximately eight months, during which period he was booked off sick on the ground of a mental condition: "major depression disorder with symptoms of post-traumatic stress disorder". Throughout his period of absence, the employer never initiated any enquiry into the employee's absence on account of ill-health.

During January 2005 the employee applied for ill-health retirement benefits and his claim was repudiated. Thereafter the employer directed two letters to the employee. Firstly the employer enquired as to the employee's intended date of resumption of

⁴⁸ 2012 JOL 28586 (LC).

duties and secondly, on the same day, the employer notified the employee about an enquiry that was to be held with regards to his incapacity. The enquiry was subsequently held and it was found that the employee was incapacitated from performing his functions with the employer on a permanent basis and was dismissed. The employee referred an unfair dismissal dispute to the CCMA and the commissioner found that the dismissal was procedurally and substantively fair. The employee unsuccessfully launched a review application and then applied for an appeal.

On appeal the court referred to items 10 and 11 of the Code, which sets out the employer's obligations in effecting a dismissal based on ill health, namely that non-compliance with the aforementioned items would render a dismissal both procedurally and substantively unfair. The court found that the items were not followed and that the employee's dismissal was both substantively and procedurally unfair.

3 HIV / AIDS, DISABILITY AND INCAPACITY

HIV/AIDS is a separate ground for unfair discrimination in the act⁴⁹. Employees with HIV/AIDS are protected by labour laws against any form of unfair discrimination where equality and human dignity are violated⁵⁰.

After a study was conducted by the ILO, it was found that the majority of working age persons living with HIV, 90%, are engaged in some sort of employment⁵¹. The

⁴⁹ Employment Equity Act 55 of 1998.

⁵⁰ *Hoffmann v SA Airways* 2000 ILJ 2357 (CC).

⁵¹ ILO: Saving lives, protecting jobs: International HIV and AIDS Workplace Education Programme, SHARE (Strategic HIV and AIDS Responses in Enterprises) 2008 *Geneva* 3.

mentioned study emphasizes the reality of employees that live with HIV on a daily basis.

An employer may dismiss an employee with HIV/AIDS due to incapacity, if the employee no longer performs up to the expected standard, or if he is too ill to continue working and there are no suitable alternatives for the employee. Thus, one can follow the incapacity route to dismiss an employee fairly if the employee has HIV/AIDS and he is unable to perform his duties anymore. One cannot however dismiss an employee because he is suffering from HIV/AIDS. An employer must adhere to *The Code of Good Practice*⁵² relating to employees with HIV/AIDS.

It is unclear and uncertain whether employees with HIV/AIDS fall within the definition of disability. The aforementioned is an important issue as the specific employee should be treated fairly and if such persons are not treated as such, they may act against the employer. If HIV/AIDS falls within the definition of disability, the relevant employees could be entitled to protection under the affirmative action provisions. An employer would have to do a thorough investigation to determine the reason why the employee is not performing and whether it could possibly constitute a disability. HIV/AIDS could possibly result in a form of a disability; that could be a lengthy debate on its own.

It is important that the prescribed procedures are adhered to by employers. The employer should monitor whether the disease has an impact on the employee and if he can perform his duties. If it is discovered that it does have an influence on the

⁵² Code of Good Practice: Key Aspects of HIV/AIDS and Employment, Labour Relations Act 66 of 1995.

outcome of his duties, then the employer must still consider alternatives before terminating the employee's services.

Another important aspect of HIV/AIDS in the workplace is the testing thereof. Can an employer force an employee to undergo the test and can an employee refuse to subject himself to testing? These issues will however not be discussed in this dissertation.

In *Gumede v Natal Iron and Brass Foundry*⁵³ the applicant suffered from HIV/AIDS and was dismissed for incapacity and poor performance after falling behind on production targets for two years. The applicant claimed that his dismissal was unfair. The commissioner held in his award that the fact that the applicant had been dismissed for poor work performance rather than incapacity was immaterial; the issue was whether the respondent had complied with the Code of Good Practice relating to employees with HIV/AIDS. This provides that employees may not be dismissed solely because they have contracted the disease, and that before dismissing such employees, the employer must comply with the Code of Good Practice: Dismissal. There was no indication that the employer dismissed the employee merely because he had HIV/AIDS. The employer counselled the employee, offered him alternative employment and allowed him to stay at home for lengthy periods. It was clear that the employee could not cope with the demands of his job. The aforementioned warranted dismissal, irrespective of the cause of the employee's incapacity. It was found that the dismissal was fair.

⁵³ 2009 BALR 1111 (MEIBC).

In the important decision of *Hoffmann v SA Airways*⁵⁴, the Constitutional Court had to deal with an employee, Hoffmann, who applied in 1996 to SAA for a position as a cabin assistant. He was one of eleven candidates that applied for the position. The candidates had to go for various tests of which one of the tests was a medical test. Hoffmann was tested for HIV/AIDS and have tested positive. He was informed that he was no longer a suitable candidate for the position due to his positive HIV/AIDS status. He eventually appealed to the Constitutional Court after his earlier claim in the High Court was rejected.⁵⁵

The appeal concerns itself with the constitutionality of SAA's practice not to employ persons with HIV/AIDS as cabin attendants. The Constitutional Court looked at *inter alia* the following questions: Whether the practice of SAA is against the Bill of Rights, and if it is against the Bill of Rights, what the appropriate remedy in this case would be. Hoffmann argued that his rights to equality, dignity and fair labour practices were unfairly affected because he tested positive for HIV/AIDS during medical tests.

SAA has justified their decision not to appoint a person with HIV/AIDS with security, medical and operational grounds. It was also argued by them that SAA staff travel worldwide and that their employees should be vaccinated against yellow fever, because they fly to countries where one could be infected with yellow fever. Persons with HIV/AIDS whose CD4 + count below 350 cells per micro litre, cannot be vaccinated against yellow fever and that SAA's put their clients' interests first. Hoffmann's lawyers argued that his CD4 + count is 469 cells per microliter and he

⁵⁴ 2000 ILJ 2357 (CC).

⁵⁵ 2000 ILJ 891 (W).

could thus be vaccinated against yellow fever.

The Constitutional Court rescinded the High Court's judgment and ruled that SAA should offer Hoffmann a position. Section 38 of the Constitution⁵⁶ provides that where a right contained in the Bill of Rights is violated, the court may grant an appropriate outcome. It is emphasised that when the aforementioned takes place, the outcome must be fair and the most appropriate remedy must be applied, for that particular person in that particular circumstances.

The elimination of unfair discrimination is not only referred to in Chapter 2 of the Constitution⁵⁷, but it is also an international obligation that must be met by South Africa, as signatories of the African Charter on Human and Peoples' Rights. In the preamble of the aforementioned charter, it is expressly stated that any form of discrimination must be eliminated. Furthermore, the Southern African Development Community (SADC) Code of Conduct on HIV/AIDS and Employment, which was formally adopted by the SADC Council of Ministers, states clearly that HIV status is a factor that must be taken into consideration when deciding on a person's work status, promotion or transfers.

HIV/AIDS is part of our everyday life. It is mostly regulated by medication and an employee with HIV/AIDS can have an uninterrupted employment relationship with his employer. HIV/AIDS can also have an enormous impact on an employee and can affect his ability to perform. An employer will have to consider what can be done to assist an employee in all possible ways, as an employer is not allowed to dismiss an

⁵⁶ Act 108 of 1996.

⁵⁷ *Supra*.

employee merely because he is suffering from HIV/AIDS.

4 DEPRESSION, DISABILITY AND INCAPACITY

Stress has become part of everyday life. All people are exposed to stress at home and stress at work. Stress can result in depression and depression is increasing at an alarming rate in every sector. Reference? Depression and/or physical disorders are neither discussed in detail in textbooks, nor are they regulated by any laws in South Africa.

In some other countries, such as the United Kingdom and America, depression is seen as a disability and their laws guides' one with regards to this issue.

It is important to note that the Constitution⁵⁸, the LRA and the EEA protect people with disabilities from unfair discrimination. If depression were to fall within the ambit of the EEA, an employee will enjoy more protection from dismissal. *The Code of Good Practice: Key Aspects of Disability in the Workplace*⁵⁹ applies when an employee is dismissed for disability. South Africa could benefit from legislation or a more comprehensive code to clarify and give much needed guidance to both employees and employers.

The EEA defines 'people with disabilities' as people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment". This definition must be broken down in order to understand it properly.

⁵⁸ Act 108 of 1996.

⁵⁹ GN 1064 Government Gazette 23718 19 August 2002.

Basson *et al*⁶⁰ state briefly that incapacity and disability are used interchangeable and that severe depression may affect an employee to the extent that the problem constitutes incapacity or disability. The writers further state that the first attempt to regulate disability in the workplace is with *the Code of Good Practice: Key Aspects of Disability in the Workplace*⁶¹. They concluded that a dismissal based on disability may be automatically unfair, giving the employer no defence and the judge no discretion, except if the reason is based on operational requirements.

In neither Van Niekerk⁶², nor Du Toit *et al*⁶³ textbooks did the authors discuss the issue of depression versus disability in the workplace. This subject field is rarely addressed and still requires much attention in South Africa. It is clear that depression is not currently regarded as a disability and it is suggested that South African legislators should address this issue.

5 CONCLUSION

It is evident that depression is treated as incapacity in South Africa and furthermore that depression and HIV/AIDS is not treated as a disability. One should take into account that incapacity ill-health could possibly result into disability.

It is important to remember that South Africa is a member of the International Labour Organisation (ILO) and that we strive to adhere to their conventions and recommendations. It is time that the legislator revise the South African position and take into account the Convention on Vocational Rehabilitation and Employment of

⁶⁰ Basson 148.

⁶¹ GN 1064 Government Gazette 23718 19 August 2002.

⁶² Van Niekerk, Christianson, McGregor, Smit, Van Eck *Law @ Work* (2012).

⁶³ Du Toit, Woolfrey, Bosch, Godfrey, Rossouw *Labour Relations Law – A Comprehensive Guide* (2006).

Disables Persons⁶⁴. This aforementioned Convention states in the preamble *inter alia*:

“Considering that the year 1981 was declared by the United Nations General Assembly the International Year of Disabled Persons, with the theme ‘full participation and equality’ and that a comprehensive World Programme of Action concerning Disabled Persons is to provide effective measures at the international and national levels for the realisation of the goals of ‘full participation’ of disabled persons in social life and development, and of ‘equality’, and considering that these developments have made it appropriate to adopt new international standards on the subject which take account, in particular, of the need to ensure equality of opportunity and treatment to all categories of disabled persons, in both rural and urban areas, for employment and integration into the community”.

It is suggested that the aforementioned part of the preamble should be taken into account when the South African legislator looks at incapacity and disability and the overlapping of these two subjects.

⁶⁴ 159 of 1983.

CHAPTER 5

PROCEDURES IN RESPECT OF INCAPACITY: ILL HEALTH /INJURY

1	INTRODUCTION.....	46
2	PROCEDURES TO BE FOLLOWED BY EMPLOYERS	46
3	CASELAW ON PROCEDURES FOR INCAPACITY: ILL HEALTH / INJURY	49
4	CONCLUSION	54

1 INTRODUCTION

Incapacity could be a valid reason for an employee's dismissal, however each case must be considered on its own facts and merit. It is important to note that in all cases one has to adhere to the appropriate procedures that are prescribed by the applicable statutory provisions. A fair procedure must be followed by the employer.

If an employer has a reason to dismiss an employee and does not follow the correct procedure, the employer will face a procedurally unfair dismissal and will most probably face a monetary award against it. Thus, one must follow the appropriate procedure.

2 PROCEDURES TO BE FOLLOWED BY EMPLOYERS

Item 10 of the Code regulates the procedures to be followed. The Code determines that one should firstly distinguish between temporary or permanent incapacity on grounds of ill health or injury. If the incapacity is permanent, the employer must

determine whether the following is possible⁶⁵:

- a) alternative employment for the employee; and
- b) to adjust the employee's duties to accommodate his or her incapacity.

If no possibility of the aforementioned exists, the employee could be fairly dismissed.

If the employee's incapacity is only temporary, the employer must⁶⁶:

- a) determine the severity or the extent of the incapacity or the injury;
- b) investigate all possible alternative short of dismissal;
- c) look at the duration of absence to determine whether it will be 'unreasonably long'.

If it appears that the employee would be absent for an unreasonably long period, the employer should also consider other alternatives, which do not include dismissal.

The following factors should also be considered⁶⁷:

- a) the nature of the employee's work;
- b) the period of absence;
- c) substitution or temporary replacement;
- d) seriousness of illness.

In cases of permanent incapacity the possibility of alternative employment should be considered as well as adapting the duties of the employee or the work circumstances.⁶⁸

⁶⁵Du Toit Chapter 7.

⁶⁶ Van Jaarsveld Issue 23.

⁶⁷ Grogan *Workplace Law* (2009) 267.

⁶⁸ Basson 146.

The following requirements must be complied with before an employee may be dismissed due to ill health or injury, namely⁶⁹:

- a) The employee received a proper opportunity to present his case, either personally or through a representative;
- b) the cause of the incapacity is considered, for example, work-related injury, alcoholism, drug abuse or depression;
- c) the degree of the incapacity;
- d) whether the employee is unable to perform his duties;
- e) whether it is possible for the employee's duties or working conditions to be adapted to suit his disability;
- f) whether the incapacity is severe;
- g) whether there is suitable alternative work available;
- h) the nature and cause of incapacity and other circumstances.

Items 10 and 11 of the Code describe the process to be followed in respect of incapacity with regard to illness and injury. It should be noted that an employee does not have to exhaust his sick leave or disability benefits before an employer could dismiss him for incapacity; an employer is also not automatically entitled to dismiss an employee if his or her sick leave or disability benefits are exhausted.⁷⁰

The aforementioned once again reiterates that each case must be determined on its own merits.

⁶⁹ Van Jaarsveld Chapter 14.

⁷⁰ Van Niekerk Chapter 9.

3 CASELAW ON PROCEDURES FOR INCAPACITY: ILL HEALTH / INJURY

The procedures to be followed in incapacity cases have been highlighted in several court cases, of which a few cases are discussed below:

In *EC Lenning Ltd t/a Besaans Du Plessis Foundries v Engelbrecht*⁷¹ an employee, Pieter Engelbrecht, was employed for almost 20 years. Over the years he developed lung problems caused by his work environment. The employee handed a note to his manager that stated that he was incapable of resuming his previous duties. The employee applied for disability pension. The employer thought they must dismiss the employee in order for the employee to claim his disability pension. The employer subsequently dismissed the employee.

The matter was referred to the Industrial Court where the court awarded the employee compensation. The matter was then referred to the Labour Appeal Court, where the court stated specifically that an employer must offer an employee an alternative position, if one is available, and held that the employer did not follow the correct procedure. It was held that the employer must initiate the process to investigate whether there is a suitable alternatives in the workplace and it must be discussed with the employee.

In *Standard Bank v CCMA*⁷² the court identified a four stage process contemplated by the Code that has to be followed before an employer can effect a fair dismissal for incapacity. Such an enquiry may take days or can even take years, depending mainly on the prognosis of the employee's recovering period, whether adjustments

⁷¹ 1999 ILJ 2516 (LAC).

⁷² 2008 ILJ 1239 (LC).

can be made to the employees work and whether accommodating the employee has become an unjustified hardship for the employer. The four stages as mentioned in this case are as follows:

Stage one:

The employer must enquire into whether or not the employee is able to perform his or her current work and to what if not, to what extent it can or cannot be performed. If the employee is unable to perform his or her work and his or her injuries are long term or permanent, then follow the three stages below.

Stage two:

The employer makes a factual enquiry to establish the effect that the incapacity has on the employee performing his or her work. The employer may require medical or other expert advice to answer the aforementioned question.

Stage three:

The employer must enquire into how the employee's work circumstances can be adapted to accommodate the employee's incapacity. If the aforementioned is not possible, the employer must enquire the extent to which it can adapt the employee's duties. An employer must consider alternatives short of dismissal and must take into account certain relevant factors which include the following: the nature of the employee's job, the period of absence, the seriousness of the illness or injury that the employee sustained and the possibility of securing a temporary replacement for the employee.

Stage four:

If no adaptation is possible, then one must enquire if any suitable work is available. The employer must reasonably try and accommodate the relevant employee.

It is clear from the aforementioned that the stages that the court mentioned overlaps with the relevant items in the Code. This case can thus be used by employers as a guideline in cases of ill-health/injury.

In *National Union of Mineworkers obo EMD Fillisin v Eskom*⁷³ the commissioner touched on several important aspects that were discussed. One of the aspects dealt with is when will dismissal due to incapacity be fair and what the test is to determine when an employee can be dismissed.

The facts in this case were briefly as follows: An employee suffered from depression, which arose as a result of conflict in the workplace. The employee took approximately 400 (four hundred) days sick leave. He was also admitted to hospital. The employee's doctor advised that he must be moved to another position, but his suggestion was ignored. Later the employer offered an alternative position, but it resulted that the employee would be demoted. The employee's doctor later indicated that he was permanently unfit for work. His employer initiated a formal process to look at the incapacity. The employee was subsequently dismissed. The employee's dismissal was found to be unfair and the employee was reinstated, subject to certain conditions. The requirements used in this case are applied as outlined in the Code.

⁷³ 2002 13 (1) SALLR (ARB).

To summarise, the test used in this case that must be applied to determine whether an employee should be dismissed for incapacity, is as follows:

- a) the employer was obliged to ascertain the capability of the employee to perform the work for which he was employed;
- b) if unable to do so, the extent to which could the employee perform functions;
- c) if so, whether his duties can be adapted;
- d) if not, whether an alternative position could accommodate the employee.

It was also stated by the commissioner that with regards to the reason, the employer should apply the following: Once a degree of incapacity had been diagnosed which rendered the employee incapable of performing the job functions, one has to take reasonable steps to adapt either his position or offer any alternative employment, if it is available. The employee has to take reasonable steps to treat his illness and attempt to fulfil any alternative position or adapt where possible. The employer has to give the employee every opportunity to safeguard his employment. The employee has a degree of responsibility to attempt to overcome his incapacity. Where possible, the employee has to offer his services for alternative employment, even if such employment is at a lower rank.

It is once again emphasised that the employer must communicate and consult with the employee throughout the process. Alternatives must also be discussed.

In *Tither v Trident Steel (Pty) Ltd*⁷⁴ the employee was dismissed after she could not perform her duties as a telesales assistant anymore. She developed severe neck

⁷⁴ 2004 4 BALR 404 (MEIBC).

pain. The employer tried the following to assist the employee: buying a new chair, making adjustments to her computer, making a headset for the employee so that she would not have to cradle the telephone in her neck whilst typing and affording the employee the opportunity to work half day for approximately six months to assist her in her recuperation.

The parties had various discussions. The employer then terminated the employee's services after the employee could not perform a full day's work. The employee argued that an alternative that could be considered was a half day position, such as a secretarial position, which was not offered to her. The CCMA found that the dismissal was unfair and ordered reinstatement. The aforementioned was supported by the Labour Court. On appeal, the Labour Appeal Court rescinded the Labour Court's decision and found that the dismissal was fair. The Labour Appeal Court held that it was common cause that the position of receptionist was filled at the time when the employee was in the employment of the employer. The employee further did not make the suggestion in respect of being a receptionist and the court cannot see why it should be said that the employer acted unreasonably in not suggestion that position. It was found that the employer acted reasonably throughout the entire period.

If one considers the extent to which the employer went in the aforementioned case, it is quite clear that the employer explored many avenues. The employer bought another chair for the employee as well as headsets. It is clear that the employer considered alternatives.

4 CONCLUSION

What is of the utmost importance with regards to following the correct procedure is that the employer should have tried all possible alternatives to accommodate the specific employee. It must further ensure that the employee is aware of the status of the investigation and the employer must ask the employee for suggestions; the employee must be part of all the discussions. If an employee and employer work together to try and reach some sort of solution and the parties then cannot reach a solution or alternative, the employer will be entitled to dismiss the employee as a last resort and the employee will have to accept the dismissal, as he was part of the process and alternatives throughout the process.

CHAPTER 6

INTERNATIONAL LEGAL PERSPECTIVE

1	INTRODUCTION.....	55
2	INTERNATIONAL LABOUR ORGANISATION AND CONVENTION 158 OF 1982: SOUTH AFRICA AND ENGLAND.....	55
3	ENGLISH LAW.....	58
3.1	BASIC PRINCIPLES.....	58
3.2	ENGLISH CASE LAW.....	60
4	SIMILARITIES AND DIFFERENCES BETWEEN THE SOUTH AFRICAN LAW AND THE ENGLISH LAW.....	62

1 INTRODUCTION

The South African law, like English law, developed over many decades. However, the South African legislator focused earlier on important topics such as incapacity. Both South Africa's and England's legislators included the right for employees not to be unfairly dismissed. Several of South Africa's legislation has originated from English law. This chapter will consider the English law and how it compares to the South African law and to what extent both countries complies with the conventions of the ILO.

2 INTERNATIONAL LABOUR ORGANISATION AND CONVENTION 158 OF 1982: SOUTH AFRICA AND ENGLAND

The ILO was established after the end of the First World War as part of the Peace Treaty of Versailles. One of the goals of the ILO was to create international

standards, establish social justice and to correct some of the negative effects of international competition. The ILO is the agency in the United Nations' system that promotes a job-centred and rights-based approach to development.⁷⁵

South Africa was one of the founder members of the ILO, but later resigned. South Africa was not a member of the ILO in 1983, however, South Africa has re-joined the ILO since 1994 and has also adopted the Constitution of 1996. In June 1982, Convention 158 was adopted by the ILO. The name of the Convention is "Termination of Employment Convention". Convention 158, the Employment Convention of 1982 deals with termination of employment at the initiative of the employer. This is an important convention.

Although South Africa is a member of the ILO it has not ratified all its conventions. England is also a member of the ILO and also has not ratified all of the conventions of the ILO; neither South Africa nor England has for instance ratified the aforementioned Convention 158.

The aforementioned is however not an indication that South Africa does not strive to adhere to the conventions. Even though South Africa may not have ratified certain conventions, it still attempts to comply, as is evident through the legislative framework and gazetted guidelines.

There are three core principles of Convention 158 and both South Africa and England adheres to the three core principles. The first core principle is contained in

⁷⁵ Smit *Disciplinary Enquiries in terms of Schedule 8 of the Labour Relations Act 66 of 1995 - South African Dismissal Law: An International Perspective* (PhD dissertation 2010 UP).

section 4 of the Convention⁷⁶ that sets out that one must have a reason for dismissal. Section 4 states: “The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service”. South Africa and England adheres to this principle in that in South Africa section 188 of the LRA provides that there must be a valid reason for dismissal and in English law the Employment Rights Act⁷⁷ provides that an employee has the right not to be unfairly dismissed.

The second core principle of the Convention⁷⁸ is contained in section 7, which outlines the broad procedural requirements for dismissal. Section 7 states: “The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity”. South Africa adheres to this principle as item 4 of the Code provides a clear guideline with regards to procedural fairness. In England section 98 of the Employment Rights Act⁷⁹ was amended to introduce statutory dismissal and disciplinary procedures. An employee must be informed of the decision reached against him or her and has the right to an internal appeal hearing.⁸⁰

The third core principle is contained in section 8(1) of the Convention⁸¹, which states: “a worker who considers that his employment has been unjustifiably terminated shall

⁷⁶ Convention 158 of 1982.

⁷⁷ Section 94(1) of the Employment Rights Act 1999.

⁷⁸ Convention 158 of 1982.

⁷⁹ 1999.

⁸⁰ Smith and Van Eck “International Perspectives on South Africa’s Unfair Dismissal Law” 2010 *XLIII CILSA* 56.

⁸¹ *Supra* footnote 78.

be entitled to appeal against that termination to an impartial body, such as a court, labour tribunal, arbitration committee or arbitrator”. In South Africa a dismissed employee has the right to refer his matter to the CCMA or to the appropriate bargaining council; the matter can also be referred to the Labour Court or Labour Appeal Court for adjudication. In England an employee can refer a dispute to the Employment Tribunal and the Advisory Conciliation and Arbitration Service. It can therefore be concluded that both South Africa and England adheres to the three core principles contained in Convention 158 of 1982.

3 ENGLISH LAW

3.1 BASIC PRINCIPLES

Section 98 of the Employment Rights Act⁸² states the following:

“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

- a) the reason (or, if more than one, the principal reason) for the dismissal; and
- b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

- a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
- b) relates to the conduct of the employee,
- c) is that the employee was redundant, or

⁸² *Supra* footnote 79.

- d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)-

- a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
- b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
- c) (3A) In any case where the employer has fulfilled the requirements of subsection (1) by showing that the reason (or the principal reason) for the dismissal is retirement of the employee, the question whether the dismissal is fair or unfair shall be determined in accordance with section 98ZG.

(4) In any other case where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

- a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- b) shall be determined in accordance with equity and the substantial merits of the case.

Section 57(3) of the Employment Protection (Consolidation) Act 1997 reads, *inter alia*, as follows: "... the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown to the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and that question shall be determined in accordance with equity and the substantial merits of the case".

3.2 ENGLISH CASE LAW

In *Marshall v Harland & Wolff Ltd*⁸³, the English National Relations Court listed factors which should be considered when deciding on the employee's ability to do his future employment and how his ability matched his employment contract. The following factors were listed by the court:

- (i) the terms of the contract;
- (ii) the nature of the employment;
- (iii) the nature of the disease and how long it will last etc.

From the *Marshall* matter one can see the similarities that exist between the two countries, as in South Africa we also investigate whether the incapacity is temporary or permanent and how long the specific employee will be affected by the incapacity.

In *Spencer v Paragon Wallpapers Ltd*⁸⁴, the Employment Appeal Tribunal made *inter alia* the following comments:

- (i) "the case of misconduct and the case of ill-health raise different

⁸³ 1972 7 ITR 150.

⁸⁴ 1972 ICR 301.

considerations, but an employee ought not to be dismissed on the grounds of absence due to ill-health without some communication between the employer and the employee before he was dismissed;

- (ii) the word 'warning' is not appropriate perhaps, for by its association with cases of misconduct it carries with the suggestion that the employee is being required to change or improve his conduct;
- (iii) that is not the case where the absence is due to ill-health where there could be some damage done by a written warning unaccompanied by a more personal touch. "

It is clear from the *Spencer* case that South African and English law has the same approach with regards to the distinction between misconduct and capacity.

In *Williamson v Alcan (UK) Ltd*⁸⁵, the court stated that in cases of dismissal, there is a consultation. The consultation is described as an "an elementary requirement of fairness." In South African law it is eminent that one has to consult, thus another similarity.

In *Lynock v Cereal Packaging Ltd*⁸⁶ the Tribunal stated the following: "The approach of the employer ... is to be based on ... sympathy, understanding and compassion."

⁸⁵ 1978 ICR 104.

⁸⁶ 1988 IRLR 510.

4 SIMILARITIES AND DIFFERENCES BETWEEN THE SOUTH AFRICAN LAW AND THE ENGLISH LAW

The British lawmakers' main focus was on small businesses, approximately twenty employees, where the South African lawmaker focuses on all businesses. South Africa has a much more practical approach due to the fact that the size of the business should not be a predominant factor to be taken into account. However both countries have adopted the empathetic approach.

In many countries around the world, which includes England, HIV/AIDS are defined as a disability. South Africa deals with HIV/AIDS as a separate ground of unfair discrimination in Article 6(1) of the EEA. I believe that there is a need for the South African legislators to address HIV/Aids more comprehensively.

In the United Kingdom there is not any protection for employees with less than one year of employment service. In South Africa length of service at the employer is not relevant. As long as the employee is employed for more than twenty four hours a month, he is covered by the relevant labour legislation. The legislators in the United Kingdom should reconsider the one year exclusion period, as it is just not reasonable.

In a South African Court case, *National Union of Mineworkers and Another v Rustenburg Base Metals Refiners (Pty) Ltd*⁸⁷, the judge referred to English law in his judgment. The judge explained the reasonableness test that applies in England and stated that there is not an identical statutory reasonableness test in South Africa;

⁸⁷ 1993 14 ILJ 1094 (IC).

however, the common law in South Africa provides that the test that must be followed is reasonableness. The judge also stated that when an employer is considering the dismissal of an employee due to illness, reasonableness and fairness remains the decisive factors. He further indicated that the aforementioned does not mean that the reasonable employer test, as in English law, must be applied here in South Africa, but rather that each case must be considered on its own merits. He also explained that equity stood on two legs, namely substantive and procedural fairness.

In England three criteria are applied when deciding whether dismissal for sickness was reasonable⁸⁸: Firstly the nature of the illness will be considered, secondly the likely length of the continuing absence and thirdly the need of the employer to have the work done that the employee was engaged to do.

It is clear from the aforementioned that the reasonableness test in the United Kingdom and the procedure that we must follow in South Africa demonstrates a number of similarities.

In the United Kingdom there are extensive research with regards to work, health and wellbeing. Various pertinent discussions on important topics such as capacity and older employees, disability claims on the medical basis of incapacity claims, the changing profile of incapacity claimants etc. have taken place lately in the United Kingdom as illustrated in *Work, Health and Wellbeing*⁸⁹.

⁸⁸ *National Union of Mineworkers & another v Rustenburg Base Metals Refiners (Pty) Ltd* 1094.

⁸⁹ Vickerstaff, Phillipson and Wilkie *Work, health and wellbeing: The challenges of managing health at work* (2012).

In my view the aforementioned is immensely relevant in the society that we live in, due to the fact that some employees well pass the age of 65 are still employed, while others' health are severely affected by HIV/AIDS well before retirement age.

CHAPTER 7

CONCLUSION

Incapacity is one of the internationally recognised grounds for dismissal. The LRA, more specifically the Code, regulates this ground of dismissal. As discussed in the previous chapters, even though the Code regulates this ground for dismissal, there is not a simple and straightforward answer in certain cases of incapacity.

It is imperative that an employer establishes whether the situation that arose is a misconduct or a capacity issue, as the procedures in which misconduct and incapacity cases are dealt with differ. If the wrong issue is identified by the employer, it will possible face an unfair dismissal finding in respect of that employee.

Each matter should also be assessed on its own merits and it is important that the prescribed procedures must be followed. By adhering to the procedures, both employers and employees will benefit. If both parties are part of the process, fewer disputes will be referred to the various forums. The reason why the employee's services are terminated must always be fair.

Every person interprets what they do in their own way and the law is interpreted in a certain manner by professional persons. The aforementioned is one of the reasons why there are still many disputes before the CCMA, bargaining council and the courts. From the various case law that were discussed throughout this dissertation it is evident that there are many disputes on the subject of incapacity and that there is

still a vagueness that clings, in a certain manner, to incapacity disputes. Unfortunately there also still remain many different opinions and legal positions in respect of these issues. As there are several legal positions on the same aspects of incapacity, it makes it difficult for attorneys / legal consultants to inform their clients on what more or less will transpire. Our country's presiding officers should apply the rules and regulations strictly and consistently.

I believe that the test for reasonableness, as exercised in England, should always be applied in South Africa, as it often is done. The legislator should also include the test for reasonableness in the LRA.

As it was discussed in the various chapters, certain forms of incapacity can overlap. Depression can for example not be placed under a specific title and it must yet be determined whether HIV/AIDS is a disability or incapacity.

Although the legislatures did well to lay down guidelines and to give recourse to applicants to enforce their rights, the aforementioned are clear examples of grey areas under incapacity, which the legislator should still address. I believe that clarification on these issues will not only lead to consistency in the application of the law, but will result in a decrease of the number of disputes that are referred to the CCMA, bargaining council and the courts.

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