

How to determine whether the excessive use of sick leave by an employee is misconduct or incapacity

Where an employee takes excessive sick leave, the question may be raised as to whether the employee is genuinely ill or whether the employee is in fact abusing sick leave. This will depend on the facts and circumstances surrounding the employee's absence.

Factors that may be relevant include:

- Frequency of the absence;
- Whether or not the absence always happens at a particular time;
- Whether the employee provides a valid medical certificate i.e. a certificate issued by a medical practitioner or any other person who is certified to diagnose and treat patients, and who is registered with a professional council established by an Act of Parliament;
- The employee's conduct around the period of absence.

The following questions may assist in determining whether the employee's behaviour amounts to misconduct or incapacity:

- What are the dates that the employee has been ill?
- Has he/she exhausted their sick leave?
- Do the dates of the sick leave suggest a pattern; i.e. is the employee typically sick on Mondays and Fridays or before or after a public holiday, or after a payday?
- What is the context of the employee's sick leave?
- Has the employee submitted sick notes?
- Is the sick note legitimate?

In terms of section 23(2) of the BCEA, "the medical certificate must be issued and signed by a medical practitioner or any other person who is certified to diagnose and treat patients, and who is registered with a professional council established by an Act of Parliament."

Rule 16.1 of the Ethical and Professional Rules of the Health Professions Council of South Africa provides the following guidelines in determining the validity of the medical certificate. It provides "A practitioner shall grant a certificate of illness only if such certificate contains the following information -

- the name, address and qualification of the practitioner;
- the name of the patient;
- the employment number of the patient (if applicable);
- the date and time of the examination;
- whether the certificate is being issued as a result of personal observations by such practitioner during an examination, or as a result of information which has been received from the patient and which is based on acceptable medical grounds;
- a description of the illness;
- whether the patient is totally indisposed for duty or whether such patient is able to perform less strenuous duties in the work situation;
- the exact period of recommended sick leave;
- the date of issue of the certificate of illness; and



- the initial and surname in block letters and the registration number of the practitioner who issued the certificate.”

A certificate bearing an illegible signature and a rubber-stamp is thus unacceptable.

- Does the certificate reflect that the employee’s absence was due to illness or injury?
- Are the notes from one or several doctors?
- Is there any evidence that suggests that there may be other reasons for the employee’s absences (e.g. domestic violence, depression)?

Generally, if medical certificates are provided, the absence should be dealt with as incapacity provided they are not invalid, in which case there would exist a reasonable suspicion of abuse of sick leave, which would then necessitate the misconduct approach to be pursued. Similarly, where there is a trend or pattern in taking sick leave, and the evidence exists that an employee used sick leave for a purpose other than recuperation or receiving medical treatment. However, a fair process must be followed and the evidence produced to support a claim of misconduct.

An employer is entitled to confirm the validity of a medical certificate with the issuing practitioner if there is any suspicion that the certificate may be falsified.

In a case that came before the Labour Appeal Court, the employer dismissed the employee for abusing sick leave. The employer’s evidence was that the employee suffered from insignificant complaints such as shoulder pain and was usually absent on Fridays and Mondays.

The Labour Appeal Court found that the dismissal was fair and stated that it is not always possible to differentiate misconduct from incapacity. In this case, however, the employee had had a fair hearing and had been afforded an opportunity to improve. The employee was also informed of the consequences of her actions and that it was likely to result in dismissal.

