

How to manage the employment relationship where the employee is unable to work due to sickness or injury (ill health / injury)

A situation may arise where an employee is unable to work at all; or cannot do certain aspects of his/her job or is absent so often that it disrupts the employee's ability to do the job that s/he is employed for, due to sickness (ill health) or injury.

If an employee is temporarily unable to work or to do certain aspects of the job and it is likely that the employee will be absent for a reasonably short period of time, the employer should consider alternatives short of dismissal. An example would be where a shop assistant has broken a leg, is on crutches and cannot stand for long periods.

If an employee is permanently unable to do the work, the employer should consider reasonably possible adaptations to the job or appropriate alternative work, prior to dismissal.

If an employee has become temporarily or permanently incapacitated or disabled as a result of a work-related accident or injury, the responsibility of the employer to accommodate the employee is greater in terms of Schedule 8 to the Labour Relations Act 66 of 1995 (LRA), the Code of Good Practice: Dismissal.

People with disabilities constitute a special group and unfair dismissal of such employees on grounds of ill health is very serious, as there is a duty on the employer to attempt to reasonably accommodate employees with disabilities.

The cause of the ill health may also be relevant. In the case of alcoholism or drug addiction (which is regarded as an illness) where this impacts on the employee's ability to do his/her work, an employer may have to consider suggesting that the employee seeks counselling and rehabilitation. Where an employee does not have access to medical aid, s/he may seek to be assessed for admission into one of the different state treatment centres or outpatient programmes.

Where an employer has commenced incapacity proceedings against an employee whose substance addiction is impacting on his/her work performance, and despite reasonable efforts made to address the employee's substance dependency/addiction, s/he is not willing to face up to this or to receive or obtain assistance, the employer may move towards terminating the employment relationship.

Mere substance abuse (alcohol or drugs) by an employee may be regarded as misconduct and should be dealt with accordingly. It is therefore important for an employer to distinguish and establish whether the employee is abusing alcohol or drugs or suffers from an actual dependency or addiction.

In the case of incapacitated employees, dismissal may be an option if the accommodation required by the employee imposes unreasonable hardship on the employer. Hardship means more than mere inconvenience.

The employer must distinguish between employees who are temporarily or permanently incapacitated on the grounds of ill-health or injury as well as those who abuse sick leave which is a form of misconduct.

The following preliminary steps should be taken:

1. If an employee cannot perform adequately due to illness, request a medical certificate, report or statement from the medical practitioner which indicates the period the illness is likely to affect work performance and what type of work the employee may / may not perform.
2. Assess the medical report against the nature of the job and the probable period of absence or inability to perform certain aspects of the job. Discuss the impact of the illness on the employee's ability to work

with the employee’s supervisor / manager and the impact that this will have on the work/business operations.

3. Consider alternatives: The possibility of securing a temporary replacement for the employee; job-swapping with another employee for a period or re-assigning / adapting jobs between employees to accommodate the ill employee; short time or paid or unpaid leave of absence can be considered. Use the following checklist to assist:

See Information Sheet: Who may issue and sign a medical certificate [3.6B]

CHECKLIST: RELEVANT FACTORS TO CONSIDER: ILL HEALTH OR INJURY

1.	What is the nature of the illness / injury?	
2.	What is the nature of the employee’s job?	
3.	What is the anticipated period of absence?	
4.	How serious is the illness / injury?	
5.	Is the injury / illness temporary or permanent ?	
6.	Is the employee capable of working? If the employee is not capable, the extent to which the employee is able to work.	
7.	If the illness/injury is permanent, can alternative employment be found or can the employee’s duties or working conditions be reasonably adapted to accommodate the employee’s disability? If the illness is temporary, consider interim options.	

What steps must an employer take to assist an employee who is unable to work due to sickness or injury?

An employer must meet with the employee to investigate and discuss the employee’s sickness or injury to determine the nature and extent of it (illness inquiry).

How to consult with an employee in a fair manner where the employee is unable to work due to sickness or injury:

See Template: Notice to Attend a Consultation: Ill Health [3.6C]

1. The employer must invite the employee to meet and discuss the employee’s ill health / injury to determine the nature and extent of it. The employee must be given proper notice of this meeting.



2. Advise the employee that s/he may bring a representative to the consultation. This may be a fellow employee or a trade union representative (shop steward). Assistance by a trade union representative only applies if a trade union has been granted organizational rights to have elected shop stewards for this purpose. A trade union representative who does not satisfy this criterion may only assist an employee if s/he is a fellow employee.
3. Should the employee require the assistance of an interpreter, the employer should provide this service or advise the employee that s/he may bring a fellow employee to the counselling session to assist as an interpreter.
4. Arrange an appropriate venue for the consultation and inform the relevant persons of the need to attend (for example manager or a supervisor).
5. State the purpose of the meeting and how it will run. Advise the employee to prepare properly for the meeting and bring relevant documents that s/he considers necessary to present. Inform the employee that you will be taking notes and/or recording the proceedings.
6. Go through the medical documentation and other relevant factors. Ensure that the privacy of the employee is respected and that confidential information is only used with his/her permission and for the intended purpose.
7. Explain that you want to discuss ways in which the impact on the company may be minimised without negatively impacting on the employee's condition.
8. Explain how the employee's role contributes to your business success and that an employer has the right to enquire about the illness / injury that may impact on performance of duties.
9. Give the employee / representative the opportunity to comment.
10. The employer together with the employee and his/her representative should look at ways to accommodate the employee taking into consideration the nature and extent of the ill health/injury and the implications for the employer/the business or organisation.
11. The employer should listen actively and open up the discussion if there are disagreements. The employer should listen and respond to the employee's concerns.
12. The employer should propose and seek acceptance of alternatives that the employer believes are feasible in the circumstances, for example, adapting facilities to make them accessible; adapting equipment or acquiring new equipment to assist; re-organising a workplace or workstation; restructuring jobs; re-assigning aspects of jobs; adjusting work-hours; etc. Should any suggestion or option presented by the employee not be feasible for the employer, then the employer should provide valid reasons for this. In some circumstances, it may be necessary for an employer to "test" whether an option would be feasible or not.
13. Once a way forward has been agreed, the employer should provide a written summary of agreement which indicates clear time-frames, linked to the medical report(s) and prognosis. Failing agreement, the employer may make a determination after having taken into account relevant information. This should be followed by a written summary of the decision.
14. Where applicable, the adaptations should be agreed with the employee as well as a clear and reasonable time-frame during which his/her inability will be accommodated, if possible. Monitoring and reviewing the time-lines and who will conduct it should be determined.



15. The employer should obtain the employee's commitment to providing feedback and requesting help if required, by establishing a channel for open, two-way communication between the employee and his/her manager.
16. The employer should also explain that continued illness after the current time-frame assessed for healing by the medical practitioner, might lead to termination of employment.

Note:

The employer has the right to request the employee to submit to a medical assessment by its own medical professionals, if there is any doubt as to the accuracy of the medical information provided by or on behalf of the employee.

Should the employee not manage with the measures that the employer has implemented to accommodate the employee, and the employer is satisfied that it has done everything reasonably possible to assist the employee, the employer may convene a final hearing to address the situation and to make a final decision as to the way forward.

Or alternatively:

Where all alternatives are investigated during the first consultation meeting and no suitable alternatives are found to reasonably accommodate the employee, given the nature and the extent of the ill health / injury, the employer may terminate the employee's services on the grounds of ill health / injury. An unreasonable failure by the employee to accept reasonable alternatives proposed by the employer may also lead to termination of the employee's services.

See How to Guide: How to end employment fairly due to ill health or injury [4.5A]

How to manage employees affected by HIV and AIDS

In terms of item 11 of the Code of Good Practice on Key Aspects of HIV/Aids and Employment, employees with HIV/AIDS may not be dismissed solely on the basis of their HIV/AIDS status. If an employee has become too ill to perform his/her work, the employer must follow the guidelines for dismissal for incapacity contained in the Code of Good Practice: Dismissal. The employer must ensure that the employee's right to confidentiality regarding his/her HIV status is maintained and an employee may not be compelled to undergo an HIV test or disclose his/her status as part of such proceedings unless the Labour Court has authorised such a test after an application to the Labour Court has been made. It is advisable for an employer to be familiar with the guidelines contained in the Code of Good Practice: Key Aspects Of HIV/AIDS and Employment.

See CCMA Information Sheet: Ill Health or Injury [3.6F]