Medical incapacity

When an employee is no longer able to do their job due to illness or injury, it can be a challenging time for both employees and employers. In these situations employees are often feeling vulnerable and stressed, worried about not being able to do their job, placing stress on other staff and concerned about what will happen to them financially if they lose their job.

Similarly, their employer may be feeling pressure about how long they’re going to keep the job open, how they’ll run their organisation, treat the staff member with dignity and manage the workload while they go through any process.

The law does not require that an employer is to keep in employment an employee who is unable to fulfil their role, due to illness or injury, or not able to do their work. The question is how long an employer should keep the role open for the employee to return to.

Before making a decision on what to do, the employer needs to understand how long the employee is likely to be off work and whether they’ll be able to do their job again. To get this information, the employer should work in a positive and supportive way with their employee.

Employers should make sure that any investigation into understanding the medical situation for their employee is not viewed as a disciplinary investigation – the employee has not done anything wrong.

Employment agreements provides information on terms and conditions and types of agreements.

The Employment Agreement Builder has a draft medical retirement clause for your use.

Employers should follow a fair and reasonable process that includes considering the range of factors from those below.

Deciding to end the employment relationship

To end the employment relationship, an employer needs to reasonably believe that an employee can no longer do their job and that the employer cannot reasonably keep the job open for them. To do this the employer should consider a range of factors, including:

- The terms of the employment agreement.
- The nature and extent of the problem, including how long the employee has already been away from work. Where the incapacity is caused by a health issue, the employer should request appropriate medical advice. Sometimes it may be appropriate to ask for independent or specialist advice. Employees have the right to refuse to provide an employer with access to their medical information unless this is required in their employment agreement (even then they can decline). If an employee is not willing to provide this information, the employer can make a decision based on the information the employer has.
- The nature of the employment and how important the employee’s role is to the employer’s organisation. Consider:
  - the size of the organisation
  - if the employer has been able to manage for long periods of time without the employee or they’ve had to bring in someone else to do the job
  - what the financial impacts of the employee’s absence are on the organisation
- The chance of recovery and the likely timeframe for returning to work (which should be based on objective information such as a doctor’s report).
- The employee’s entitlement to sick leave (paid and unpaid).
- How long an employee has been employed with the employer?
- Steps the employer can take to help with rehabilitation, such as providing part-time or light duties.
- How long the employee would have been employed if not for the problem?
- If there are any alternatives to dismissal that are reasonable in the circumstances – such as part-time or reduced hours, or medical retirement.
- If the employer is at fault for the employee’s problems in any way. For example, where the employer may have failed to provide a safe workplace causing mental stress to the employee, who then has to take a lengthy period of time off to recover.

After making the decision that it is reasonable for the employment relationship to end, the employer should decide which process to take. There are two possible options: medical retirement or dismissal due to medical incapacity.

Medical retirement

Medical retirement allows an employee to leave an organisation with dignity. It is different from normal retirement because after normal retirement the employee doesn’t often work again, after medical retirement the employee often looks for a different job that is not limited by the illness or injury. Medical retirement must be agreed by the employer and the employee. Employers should consider discussing it as a possible option with the employee before deciding on dismissal for incapacity. Medical retirement provisions may be in an employment agreement or workplace policy, but even if they’re not, the employer and employee can still agree to medical retirement (the agreement should be in writing).

Benefits of medical retirement

Medical retirement usually has benefits to both parties:

- The employer has some certainty, is able to hire someone else for the job sooner, and reduces the chance of a personal grievance.
- For the employee having medical retirement as the reason for leaving will be reflected in their record of service and in any references that the employer gives them (rather than dismissal for incapacity). A medical retirement package may include a financial payment which can provide some financial security while the employee gets better and considers future options. Sometimes a medical retirement package includes career support, EAP counselling or medical assistance.

Agreeing on medical retirement

Employers often avoid having a conversation about the option of medical retirement because of concerns about constructive dismissal. However, as it is a retirement process, it needs to be agreed by both the employer and employee. While it can be difficult, once the employer has the required information from the employee they should follow a fair process with the employee to discuss the option of medical retirement.

It is good for the employee to have a representative or support person with them for any conversation on medical retirement. A support person can be helpful for the employee in what can be an emotional conversation, and it will mean that they have someone else in the room who is less personally affected and can hear the information, ask questions, and talk the options through with the employee either during, or after, the meeting/s.
It is important to understand that this is a difficult area and it will be useful to get professional advice to avoid a personal grievance later.

Unable to agree

If, after a fair process and discussion has been held, the employee does not agree to medical retirement, and doesn’t want to resign or otherwise leave their employment, and the employer decides there is no alternative but for the employment relationship to end, then the employer may need to use dismissal for medical incapacity.

Dismissal for medical incapacity

When dismissing an employee for incapacity, the employer must follow the principles of a fair process.

Employers should be aware that it is common for a dismissal for medical incapacity process to take a number of weeks, if not months, and there will be a number of meetings or exchanges of information. This makes sure that both parties have had an opportunity to present evidence and give feedback, and to ensure that all alternatives have been considered. Such dismissals are very rare.

It is recommended that employers seek professional advice before deciding on or starting a process for dismissal for medical incapacity.

Workers on ACC

Dismissing an employee for incapacity while they are on long-term accident compensation because of injury, whether work-related or not, should be handled carefully.

Under the Accident Compensation Act 2001, employers have an obligation in relation to work-related (vocational) rehabilitation. This applies when ACC decides it is reasonably practicable to return the claimant to their pre-injury employment with the same employer. If this is the case, ACC will notify the employer in writing, and the employer must then take all practicable steps to help the employee to meet the work-related rehabilitation goals. The duty on employers to help rehabilitate injured employees applies to both work-related and non-work-related injuries.

Where an employer is considering the dismissal of an employee on long-term accident compensation, they should:

- act in line with any relevant provisions in the employment agreement or the workplace policies
- assist with any vocational rehabilitation programme for the employee through ACC
- fully investigate an employee’s work capability and the actual needs of their job
- base their decision-making on up-to-date medical information about what the long-term effect of the injury will be
- warn the employee that their long-term absence may result in dismissal, and ask the employee to give feedback during the decision-making process
- consider giving the employee alternative, light work if they are temporarily unable to carry out their normal job.

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