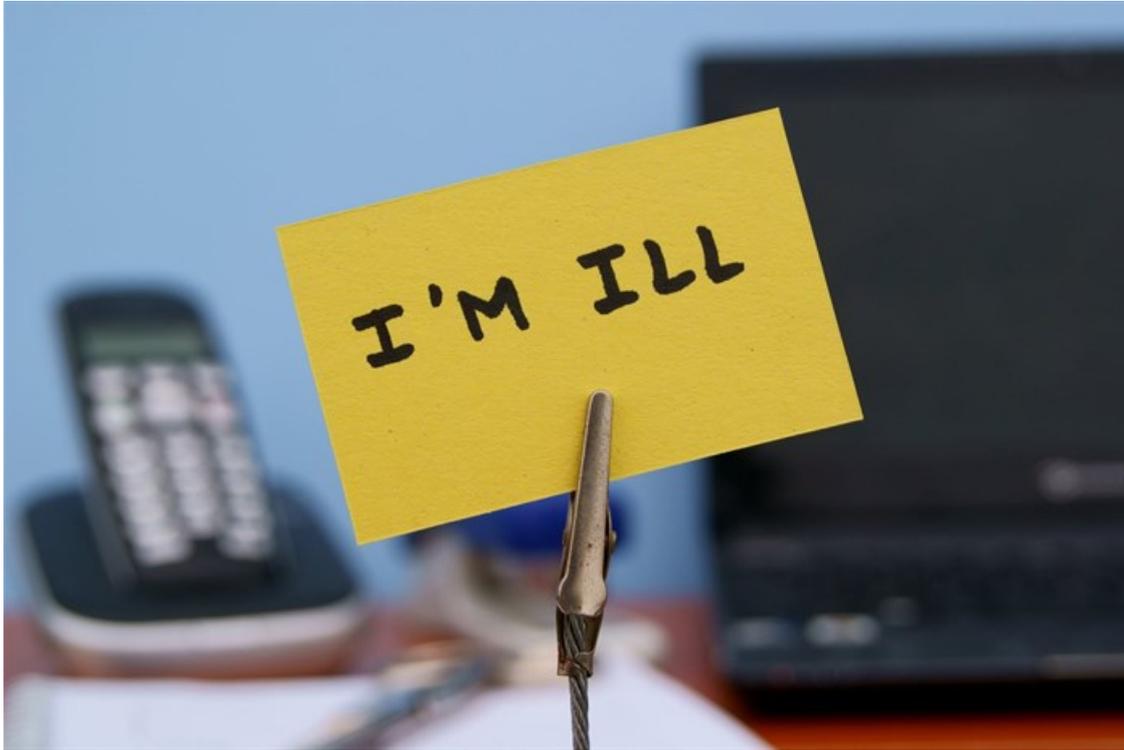


Incapacity and its role in dismissals for misconduct

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A recent judgment by the Labour Court addresses the role that incapacity can play when an employee is charged with misconduct, and whether an employer is required to exclude the possibility of incapacity in these circumstances.



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In a recent case, *BS Pahlanga v Petro Oil Gas* (9 July 2021), heard by the Labour Court, an employer successfully argued that it was not aware of an employee's incapacity at the time that the employee was charged with misconduct, and that the employee's dismissal for misconduct in these circumstances was fair. The Labour Court agreed and ultimately found that:

- An employer is not obliged to eliminate all possible explanations for deliberate and wilful misconduct, in circumstances where other possible explanations were not previously known or apparent.
- It is only in the case of anticipated unreasonably long-term absence from work in a case of incapacity that Schedule 8 of the LRA requires an employer to 'investigate all alternatives to dismissal'.

- In the guidelines for dismissals for misconduct, there is no similar obligation on an employer to conduct a full-scale investigation into what might underlie an employee's misconduct.

The facts of this matter and key takeaways for employers below:

Facts

In this matter, an employee was charged with misconduct for being absent for four or more days without a valid reason. At the time, the employee's previous transgressions relating to punctuality, unauthorised absence, fraud and negligence were noted on his disciplinary record.

The employee pleaded guilty at his disciplinary hearing, but in doing so, made a number of damning allegations against his employer. These included that there were no systems in place at the workplace to protect him, he felt uncomfortable at work and that bad interpersonal relations were affecting him psychologically. He said he had absented himself from work as he felt trapped and sought to avoid psychological breakdown or brain paralysis.

While the disciplinary chairperson accepted the employee's guilty plea, he declared that the disciplinary process was not concluded, pending consideration of a report of a clinical psychologist. The report of the psychologist was delivered, but it did not address whether any psychological issues were affecting the employee's behaviour. Nonetheless, the chairperson confirmed the employee's dismissal on that basis that:

- i. even if the psychologist's recommendations were adopted, he needed to balance this against the employee's need to fulfil his work obligations;
- ii. it was critical that the employee had still not provided a reason for his non-attendance;
- iii. there was no clear finding of incapacity; and
- iv. it was likely that his behaviour would continue.

The employee then referred an unfair dismissal dispute to the National Bargaining Council for the Chemical Industry, where an arbitrator found his dismissal to be substantively fair, but procedurally unfair (in that he was essentially suspended without pay pending the outcome of the disciplinary hearing). On substantive fairness, the arbitrator found that the employee had breached the requirement to render services unless he gave a valid and acceptable reason for not doing so. In this case, during his absence, he never offered any explanation.

Labour Court judgment

On review to the Labour Court, the employee argued (amongst other things) that:

- the employer was bound to investigate the possibility that incapacity was the root of his misconduct, where there was a view that his conduct might be due to a psychological problem.
- the employer did not discharge the onus of establishing that dismissal for misconduct was justified (in circumstances where it was aware that the employee's conduct might not be due to his own fault).
- an employer has a duty to explore all alternatives to dismissal.
- an employer must prove that incapacity is not the reason for the employee's behaviour, in circumstances where it might explain it, before it can dismiss an employee for misconduct.

The Labour Court, however, thought otherwise. It found that:

- an employer bears the onus of justifying the fairness of a dismissal on the basis of the reason given for that dismissal. While the reasons can sometimes become blurred, the employer must defend the dismissal on the basis of the reason it provides for the dismissal.

- if employees charged with misconduct believe that their actions can be explained by their physical or mental incapacity, then they can lead evidence to show that they are not at fault.
- in the present matter, the employee (i) had the opportunity to obtain a clear psychological diagnosis (ii) had the opportunity to advance psychological reasons as a defence to his charge of misconduct, and lead evidence to this effect, but he did not (iii) failed to provide a reason for not coming to work and (iv) never articulated any grievances about his unhappiness at work.

Ultimately, the Labour Court found that the prospects of the employee improving if he were reinstated were not encouraging, and that his absenteeism was not a trivial matter, given his role within the Company. Accordingly, the employee's review application was dismissed.

This judgment is important as it highlights the role that mental health can play when an employee is dismissed for misconduct, and the employee raises incapacity as a defence. While in this judgment the employee's dismissal was found to be substantively fair, it is important for employers to be aware of the mental health issues that employees may be experiencing, and to address these appropriately. The processes to be followed in dismissing an employee for misconduct and incapacity are vastly different and require different considerations. The process to be followed becomes even more complicated when it is uncertain whether an employee's incapacity played a role in his/her misconduct.

These are developing issues which appear to be coming before our courts more frequently, and of which employers should be aware. Other case law on this issue is instructive, and employers should bear in mind that:

- they have a duty to consider employees' mental health
- they should exercise caution when considering disciplinary action against employees with mental health issues
- they should be careful about deciding that an employees' conduct amounts to misconduct, ensuring that there is no causal link between the conduct and the mental illness.

This judgment indicated that employees charged with misconduct have an obligation to prove that their mental health played a role in their misconduct, especially when an employer was not previously aware of such incapacity.

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