

WE KNOW

# HUMAN RESOURCES

## INCAPACITY

QUICK GUIDE

*This Quick Guide provides summarised information on how to manage employees who are unable to work due to illness or injury.*

### DO YOU HAVE TO KEEP THE EMPLOYEE'S JOB OPEN?

If an employee is unable to carry out their duties due to illness, injury or other incapacity, an employer is not bound to hold their position open indefinitely. However, there are no hard and fast rules setting out how long a position must be kept open. Each situation needs to be assessed on its own merits. For example, a large employer may reasonably be expected to be able to keep a job open for longer than a small employer with limited resources.

### WHAT IF YOU CAN'T KEEP THE JOB OPEN?

An employer's decision to dismiss for incapacity may be challenged through the personal grievance procedure set out in the Employment Relations Act 2000 in the same way as any other dismissal. As for any dismissal, an employer must have a fair reason and follow a fair process before concluding that dismissal is justified having regard for all the circumstances.

#### Fair Reasons

The employer must be able to show that the time has come at which it can 'fairly cry halt' and dismiss an employee for incapacity. Factors to be taken into account include:

- The terms of the employment agreement. An employee cannot be dismissed while they still have sick leave available.
- How long the employment was likely to last in the absence of sickness or injury. Generally speaking, it is easier to justify termination if the employment is temporary, rather than a permanent long-term job.
- Whether the employee occupies a key role. This factor will be more significant in a smaller business that does not have the ability or resources to cover the period of absence.
- The nature of the illness or injury, how long it has continued, and what prospects there are of recovery. The greater the degree of incapacity and the longer it has persisted and is likely to persist, the more likely it is that an employer will be able to justify the dismissal.
- The period of employment prior to the injury or illness.

#### Fair Process

Even if there is a fair reason for the dismissal, it may still be unjustified if the employer has failed to follow a fair procedure in reaching their decision. Employers should:

- Give the employee adequate notice, in writing, of the possibility of dismissal.
- Carry out a fair and reasonable enquiry into the nature and likely duration of the incapacity. Reliable and up-to-date medical evidence about the prognosis for recovery and likely return to work should always be obtained, where possible. The employee's consent should be obtained in order to facilitate this. Any restrictions imposed as a result of the incapacity following a return to work and whether they are likely to be temporary or permanent, should also be identified. Without adequate and up-to-date information, an employer is unlikely to be able to justify a decision to dismiss.

- Consult with the employee before making the decision to dismiss. The employee must be given an opportunity to be represented at any consultation meeting. The employer should make it clear to the employee at the time of consultation that the information sought may be used to decide whether or not to terminate the employment relationship.
  - Objectively consider whether alternative duties or restrictions imposed by any ongoing disability can be reasonably accommodated, either on a temporary or permanent basis. There is no obligation on the employer to create a new role if none exists.
  - In Nelson v Open Country Dairy Ltd\* the Employment Relations Authority determined that whilst termination for incapacity was justified, the employee had suffered a personal grievance through unjustified disadvantage as a result of his employer not providing outplacement support after its decision to terminate employment. The employee was awarded compensation of \$2000 for loss of a benefit he might reasonably have expected to obtain if the disadvantage had not arisen and a further \$1000 for injury to his feelings resulting from an 'element of disregard' by the employer's failure to provide such support. The Authority took the view that dismissal for incapacity was more akin to the 'no fault' basis of a dismissal for redundancy and that the courts have observed in such 'no fault' dismissals that fair treatment may call for counselling, career and financial advice and retraining and related financial support.
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\*[2016] NZERA Auckland 290

For further information regarding this or other HR/ER issues, please contact The Chamber, email [info@cecc.org.nz](mailto:info@cecc.org.nz) or phone 03 366 5096.