

Managing Incapacity

1. Overview

- 1.1. “Incapacity” is the term used when an employee is unable to work for a prolonged period, due to illness, which may be physical or mental, or injury.
- 1.2. Case law has established that employers do not need to hold an incapacitated employee’s job open indefinitely. As a well-established case says, “there comes a time when the employer can ‘cry halt.’”
- 1.3. There is no absolute rule as to how long an employer needs to keep a job open when an employee is absent due to incapacity. This will depend on the nature of the job, how hard it is to find temporary cover, the nature of the illness or injury and the prognosis for recovery. The employee should of course be able to use their available sick leave, but most incapacity situations will exceed sick leave entitlement before termination of employment is considered. Six months is sometimes used as a guide, but dismissals due to incapacity in shorter time frames have occasionally been held to be justified where the work requires an urgent replacement. In the case of a permanent illness or injury, meaning that the employee will not be able to work again, it is not necessary to wait a specified timeframe.
- 1.4. Incapacity situations are often not clear cut. The prognosis for partial or full recovery may often be uncertain. It is not uncommon for an absence that was initially anticipated to be a couple of weeks to stretch into months, due to complications, slower recovery than expected or the like.

2. Process

- 2.1. As with any termination of employment, a fair process needs to be followed by an employer terminating employment due to incapacity. The employee must be made aware of the proposal to terminate their employment and must have a chance to comment before final decisions are made. The employer needs to consider all of the relevant information, including the employee’s views and any available medical information, and should consider alternatives to termination of employment. It is recommended that employers:
 - Keep in touch with the employee and keep communication open from the outset of the absence
 - Consider whether the absence can be accommodated
 - Collect relevant information
 - Seek a medical opinion or second opinion if necessary

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- Write to the employee, formally raising the possibility of termination of employment
- Meet with the employee to discuss the options
- Where there are no other viable options, write to the employee again, formally proposing termination of employment
- Meet with the employee prior to making a final decision to allow the employee to provide feedback on the proposal to terminate their employment

3. Regular Communication

- 3.1. Keep in touch with any employee who needs to be off work for more than a few days. As well as checking in to see how the employee is going in order to plan for cover, employers will want to check on their employee's wellbeing, ensure they are managing and comfortable, and see if there is anything they need. Regular communication – about the employee's wellbeing, not just the job – is more likely to result in the employee regularly providing information about their prognosis, timing of consultations and the like. This in turn helps the employer to plan for temporary cover while the employee is away.

4. Other Options

- 4.1. Where the absence appears likely to be prolonged or permanent, other options should be considered prior to thinking about terminating employment. Can the employee's position be held open while they are away? How will the position be covered? Can other staff be moved around or pick up different parts of the role? Can a temporary employee be hired? Is there other work the employee could do while they recover, or at a certain point in the future? Could the employee do light duties, or shorter hours, or lesser days, if this would aid in their recovery and return to work?
- 4.2. Where the incapacity is permanent and means that the employee will be unable to return to their current work, is there any other type of work they could potentially do that would avoid the need to terminate their employment?

5. Considering Whether the Absence Can be Accommodated

- 5.1. Sometimes as the time an employee is away stretches out, it can become more and more difficult to accommodate their absence. Goodwill from other staff can be eroded, other staff may need to take leave, or temporary arrangements may not be covering the role properly or may no longer be possible.
- 5.2. Where an employer reaches the point that it is becoming very difficult or not possible to continue to accommodate a long-term absence, the employer may start to consider termination of employment.

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6. Collect Relevant Information

- 6.1. When termination of employment is being considered, the employer will need to understand as much as possible about the prognosis for the employee's return. This will include information directly from the employee, including any planned treatment and likely recovery time. The employee will be providing regular medical certificates, and these may provide further information, or the employee may provide information from their doctor.
- 6.2. The employer should also consider whether they need any further information about covering the employee's role to consider – for instance, if the employer feels it would be easier to permanently replace the employee than to hire a temporary replacement, has this view been tested in practice?

7. Seeking a Medical Opinion

- 7.1. The employee's medical practitioner may have provided information about their likely prognosis. It is important to understand whether it is expected that the employee will recover or to what degree, whether the prognosis is certain or uncertain, and whether there will be any short or longer term limitations on what the employee will be able to do.
- 7.2. The employer does not of course have a right to obtain detailed personal and medical information about the nature of the illness or injury, or general health information about the employee – the employer only needs to know about the impact of the illness or injury on the employee carrying out their role.
- 7.3. Where the information is unclear, limited or mixed, the employer may want to consider requesting a medical opinion to provide further information. This should be raised with the employee, as the employee will need to consent for any information to be provided. The employee should be told what the employer will be asking for, and it is good practice to show the employee the draft letter to the medical practitioner. The employer should make it clear that only information about the employee's capacity to carry out their role is being sought, not detailed medical information or medical history.
- 7.4. The letter to the medical practitioner should include background information such as the date of injury or commencement of absence due to illness and the nature of the employee's role, including the types of tasks that the employee carries out. Think about the nature of the role - physical tasks such as walking, driving, lifting, computer work etc, mental capacity such as complex problem solving, needing to remember information or drafting documents, or emotional resilience, such as dealing with anger or confrontation, negotiation, and so forth. It is important that the medical practitioner has a good understanding of what the role involves if they are to advise about prognosis, so specific information about what the employee does should be provided.

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- 7.5. The employer should show the draft to the employee, ask them for feedback, and ask them to provide consent to their medical practitioner to provide appropriate information. If the employee refuses to provide consent, ensure the employee is advised that decisions will be made about their employment with the information available to the employer at the time.

8. Write to the Employee

- 8.1. Where termination of employment is being considered, the employer should write to the employee to formally raise the possibility of termination of employment (see Appendix A for an example of a draft letter). The letter should cover:
- The history of the incapacity and the amount of time the employee has been away
 - The employer's difficulties with covering the employee's position
 - The employer's understanding of the prognosis
 - Other options considered
 - A request to meet to discuss where to from here
 - A proposed meeting time
 - A statement that the employee may wish to take advice and to bring a representative or support person to the meeting
 - A request for the employee to provide any medical or other information they would like the employer to consider
 - A clear statement that termination of employment may need to be considered

9. Meet with the Employee

- 9.1. At the meeting, the employer can summarise what has happened thus far and should explain why the employee's absence is causing difficulties for the employer. The employer should refer to any other options considered and ask the employee whether they have any other options they would like to suggest. The employer should ask the employee about their understanding of when they may be likely to be fit to return to work. This may include a discussion about planned treatment, medical opinion, any further medical opinion required, and the employee's own thoughts as to their progress.
- 9.2. There could be a number of possible outcomes from this meeting. The employer and employee may agree that further information is required, or may agree to await further treatment or to allow a further period of time for recovery. The employer may advise that they need to think about where to from here and state that they will be in touch when they have considered all of the information.

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10. Write to Propose Termination of Employment

10.1. Where the employer feels that termination of employment is the only feasible option, either as a result of the meeting or subsequently, the employer should again write to the employee. This letter should make it clear that the employer is proposing to terminate the employee's employment and wishes to give the employee the opportunity to respond to this prior to making a final decision. See Appendix B for an example of a draft letter. The letter should cover:

- The history of the incapacity and the amount of time the employee has been away
- The employer's difficulties with covering the employee's position
- Other options considered
- The employer's understanding of the prognosis
- What happened at the previous meeting/s
- Any further actions or information provided since the last meeting
- A clear statement that the employer is now proposing to terminate the employee's employment, but before a final decision is made, the employer wishes to meet with the employee to discuss this
- A proposed meeting time
- A statement that the employee may wish to take advice and to bring a representative or support person to the meeting
- A request for the employee to provide any medical or other information they would like the employer to consider

11. Meet with the Employee

11.1. At the meeting, the employer should summarise what has happened so far and what the letter said. The fact that termination of employment is being proposed should be clearly stated. The employer should ask the employee to provide feedback about the proposal to terminate the employee's employment. The employer should also ask whether there is any other information the employee would like the employer to consider before making a final decision.

11.2. The employer should take an adjournment to consider what the employee has said before making a final decision about termination of employment.

11.3. If the decision is to proceed with termination of employment, the employee should be advised of this, and the decision should be confirmed in writing.

[Need more help?](#)

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APPENDIX A

SAMPLE LETTER TO REQUEST A MEETING

Date

Employee's name
Employee's address

Dear _____

I am writing to you with regard to your absence from work due to your **injury/illness**.

As you know, you **became ill/suffered an injury** on _____. You have been unable to work for -- months.

Your absence has meant **[set out difficulties with covering the employee's position]**.

I understand that **[set out understanding of prognosis/likely return date – refer to what employee has advised, or to medical certificates provided etc]**.

We have considered **[set out the options that have been considered]**

Unfortunately, it is becoming increasingly difficult to cover your position, and we are now in the situation where we need to meet with you to discuss where we go to from here. I would like to meet with you on ___ at _____. I would like to invite you to take advice and to bring a representative or support person to this meeting.

It would be very helpful if you could provide us with any updated medical information you would like us to have, and any other information you would like us to take into account.

Regrettably, we are now at the point where we may need to consider terminating your employment due to your incapacity, and I would like to discuss the situation with you now to make sure I have all of the information. I would welcome any information you would like to provide to us and any suggestions you may have for other options.

Yours etc

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APPENDIX B

SAMPLE LETTER PROPOSING TERMINATION OF EMPLOYMENT

Date

Employee's name
Employee's address

Dear

I am writing to you with regard to your ongoing absence from work due to your injury/illness.

As you know, you became ill/suffered an injury on _____. You have been unable to work for -- months.

As you will be aware, your absence has meant [set out difficulties with covering the employee's position].

We have considered [set out the options that have been considered]

My understanding is that [set out your understanding of prognosis, possible return to work]

We met on _____ and discussed [set out what was discussed; set out anything that has happened since the meeting]

Regrettably, given all of this, we are now at the point where we cannot continue to hold your position open. [explain why] We are therefore now at the point where, unfortunately, we must propose to terminate your employment with us.

Before we make any final decisions, we would like to meet with you again to discuss this and to give you the chance to provide any feedback or further information you would like us to take into account. If you have any further medical information, please provide this to me before we meet, so I can take time to read it before our meeting.

I would like to meet with you on ____ at _____. I would like to invite you to take advice and to bring a representative or support person to this meeting.

I am sorry that we are now at the point where we must consider termination of employment and want to emphasise that this is not a reflection of your performance or commitment.

Yours etc

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