

Dealing with Ill Health and Incapacity

A recent (in fact, current) case of medical incapacity of an employee at a municipality in the Northern Cape, provided an interesting, yet complicated study of the mutual influence of both labour law and municipal financial law on the procedures and limitations a municipality, as the employer, has to follow and adhere to.

The employee (let's call him Mr. Jones for the purpose of this discussion) was employed in 1996 as a handyman by the municipality at its water purification plant.

In September 2002 Mr. Jones (then in his early forty's) sustained a head injury and apparent concussion when he became dizzy and had a convulsive seizure whilst on duty. From a week after the incident, the employee experienced constant headaches and had similar seizures thereafter – some whilst at work, although none resulted in further injury to him. From an initial medical report, the referring physician suspected that Mr. Jones suffered from epilepsy. A follow-up examination and scan some ten days after the incident showed that Mr. Jones had a small cyst in his brain.

Medication was prescribed for Mr. Jones, but he never used it. After a follow-up examination by a specialist physician in January 2003, it was reported that “*the chances of a recurrence is low*”. The specialist physician was thus basically of the opinion that Mr. Jones did not suffer from epilepsy and he was therefore allowed to continue with his duties as normal.

However, despite the specialist's report that any recurrences were unlikely, Mr. Jones' seizures still occurred – especially during times when he experienced severe mental strain. Mr. Jones also started taking prescribed medication on a daily basis during 2003.

Now, part of Mr. Jones' daily duties is to inspect and clean the massive water reservoirs at the purification plant. He also has to change the (extremely dangerous and toxic) chlorine gas canisters from time to time.

Mr. Jones' supervisor and departmental head became worried that Mr. Jones might have a seizure whilst attending to the reservoirs and that he could fall into one of them and most likely drown. Apart from the fact that Mr. Jones' condition placed his own life at risk, it could also, to certain extent, pose a threat to the lives of his colleagues and even the public at large.

As a result, the municipality instigated a medical incapacity investigation into Mr. Jones' case and in September 2004 he was sent to the same specialist physician (who had examined him in 2002) for an objective evaluation. The physician recommended *inter alia* that Mr. Jones' dosage of medication be increased and that he “*should in any case no longer work in the region of water reservoirs, canals, open machinery or scaffoldings*” and that he should be considered for medical boarding or at least alternative employment.

Schedule 8.11 to the Labour Relations Act 66 of 1995 (as amended) prescribes the guidelines to be followed in cases of dismissal arising from ill health or injury. It states:

Any person determining whether a dismissal arising from ill health or injury is unfair should consider –

(a) whether or not the employee is capable of performing the work; and

(b) if the employee is not capable –

(i) the extent to which the employee is able to perform the work;

(ii) the extent to which the employee's work circumstances might be adapted to accommodate [the] disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and

(iii) the availability of any suitable alternative work.

Based on the recommendation and report of the specialist physician, it seemed, *prima facie*, that Mr. Jones' medical condition prohibited him from performing his normal duties at the water purification plant and thereby answering the question posed in Schedule 8.11(a) above (i.e. can the employee still perform his work).

Since Mr. Jones is still physically able to do his work (meaning that he at least has the physical and mental strength and capacity to do it), it becomes more difficult to answer the question posed by Schedule 8.11(b)(i). The problem however is the risk the municipality runs in allowing Mr. Jones to continue with his normal duties. Knowing of Mr. Jones' condition and the risks it poses, the municipality would expose itself to the risk of almost incalculable liability if he would have a seizure and fall into a reservoir and drown, or even worse, whilst fitting a chlorine gas container.

Mr. Jones in the meantime maintains that he is fine and able to work and refuses bluntly to be transferred to another position. Just to rid itself from most of the risk, the municipality reduced Mr. Jones's duties to menial activities around the purification plant such as picking up litter and tending (somewhat poorly) to the garden. The problem is just that Mr. Jones' earns an income of some R 48,000-00+ per year, which is a tad expensive for your garden variety general worker.

Mr. Jones's two colleagues now also have to bear the brunt of his condition, since they now have to work harder to accommodate the gap in labour caused by Mr. Jones' "light duty" arrangement.

The municipality also now finds itself in a dilemma since it is not justifiable to appoint another person in the place of Mr. Jones.

In an effort to provide some direction and momentum to the process, the municipality sent Mr. Jones to an occupational therapist to get another (more occupationally directed) objective evaluation.

The occupational therapist did a rather good and thorough job in evaluating both Mr. Jones as well as his working environment, which included an on-site inspection of the purification plant.

In terms of Mr. Jones' physical ability and agility, the occupational therapist was of the overall opinion that Mr. Jones is still quite suited to carry on with his normal duties.

Coming to his medical condition, the therapist was of the opinion that Mr. Jones would be able to perform his work 90% of the time. The problem is however (and also pointed out a few times in the report) that although Mr. Jones's only have seizures "once a while" (therefore not frequently), such seizures could happen randomly and at any given moment! If he would have such seizure at work, the next may very well be fatal. Now, Mr. Jones' seems to be quite alright to take that risk, but his employer is surely not!

Therefore, although Mr. Jones is still physically able to do his work, in his own best interest and also that of his colleagues' and the general public, one cannot but come to the conclusion that Mr. Jones cannot (or at least cannot be allowed to) perform his normal duties at all.

A problem for the municipality however, is that the occupational therapist pointed out (without making specific mention of which conditions) that some aspects of Mr. Jones' working environment does not comply with legal standards prescribed in the Occupational Health & Safety Act and other safety regulations and that if these deficiencies are corrected, together with a number of other physical adjustments, Mr. Jones should be able to carry on with his work with virtually no risk of injury if he should have a seizure whilst at work.

Now. If there are any physical aspects at the purification plant which do not comply with the relevant safety requirements, the municipality is of course under a legal obligation to take whatever corrective steps without delay.

If these steps alone would bring about a working environment where Mr. Jones could work in safety and without the risk of injury in the event of a seizure, the municipality must surely strongly consider keeping Mr. Jones in his position and allow him to carry on with his normal duties.

On the other hand, if minimum legal compliance alone would not ensure a totally safe working environment for Mr. Jones, then the municipality (in terms of Schedule 8.11(b)(ii)) at least has to investigate if his working environment could be adapted to accommodate him.

Since the occupational therapist did not point out any specific shortcomings, it is quite difficult to start looking for faults. Mr. Jones and his union likes to refer to this part of the therapist's report, but they themselves are also not able to point out the specific illegal spots.

On the other hand – the purification plant has been in operation for a long time and has been well maintained through the years. On face value at least, nothing seems to be wrong.

Granted – the reservoirs are not safe, specifically the protective railings around the reservoirs (they are only approximately 90 cm high) – but it is as safe as it could be to still allow daily maintenance and normal workflow. Increasing the height of the railings to ensure that no one falls in would cause that daily and necessary cleaning

and maintenance could not be done, thereby defying the object of a water purification plant in the first place!

It seems therefore that the municipality also overcame the second hurdle, namely that it is quite impractical to adapt Mr. Jones' working environment to accommodate him.

The second part of Schedule 8.11(b)(ii) however also determines that if it is impractical to adapt an employee's working environment, the employer must investigate the extent to which the employee's duties might be adapted.

Without going into a full discussion of Mr. Jones' job description, taking away all activities and situations where Mr. Jones could be injured in the event of a seizure, would entail a reduction of some 60%+ of his duties.

This would not be satisfactory, especially seen in the light that his colleagues would suffer unjustly if such adjustment is made. To keep him picking up litter at his salary is also not justified. It therefore seems that another hurdle was overcome.

The municipality therefore decided to move on to the next hurdle, namely the possibility of suitable alternative employment as required by Schedule 8.11(b)(iii).

Since the relevant municipality is not a big one, suitable alternative positions are somewhat on the scarce side. However, a position of garbage remover was offered to Mr. Jones – with a compulsory salary cut to boot.

Mr. Jones now strongly objected to the salary cut and also claimed that he has a hip problem which would disallow him to work as a garbage remover. The municipality is however not of the intention to have Mr. Jones work on any garbage removing vehicles, but simply to work in and around to public toilets.

Mr. Jones now also started to contest the opinion of the specialist physician and claimed that he is fully able to perform his normal duties. To help him prove his point, he requested to be evaluated by another specialist physician of his choice.

The municipality felt that it had done what could reasonably be expected of it to come to an objective, transparent and fair conclusion and declined Mr. Jones' request and informed him that if he wanted to get a second opinion, he had to carry the cost. Mr. Jones was given 21 days to prove his claim, obviously backed by reputable medical opinion(s).

The only problem for Mr. Jones is that such an evaluation would cost him in the area of R 4,000 to R 5,000 – money he simply does not have. He therefore requested the municipality to loan him the amount and then deduct it from his salary in whatever agreed instalments.

The municipality is of course under no obligation whatsoever to consent to such request, and is in fact prohibited to loan Mr. Jones the money. In terms of section 164 of the Municipal Finance Management Act, Act No 56 of 2003 a municipality is forbidden to make any loans to officials.

Although the matter is still not finalized at the time of release of this article, we are of the opinion that the municipality would be justified to terminate Mr. Jones' services if he cannot provide any medical evidence to support his claim and also still refuse to be transferred to the position of cleaner – with the compulsory salary cut.

It must also lastly be mentioned that somewhere in the whole process, the municipality assisted Mr. Jones in applying at the relevant insurance company that Mr. Jones be boarded on medical grounds. The insurer however requested further medical reports and has not yet given any indication of its further intentions. From experience, these things could easily take more than one to two years to get to finalisation.

It seems that a lot of municipalities make the mistake to make their own medical incapacity investigations subject to the outcome of that of their respective insurers / provident fund administrators.

Municipalities should always bear in mind that an employer's incapacity procedure is totally separate from that of an insurer.

An employer's incapacity investigation is governed by Schedule 8.11 of the Labour Relations Act. An insurer's decision on the medical incapacity is governed by its own rules, which, in general has quite little to do with Schedule 8. An employer might for instance come to a (legally justifiable) conclusion that an employee can no longer do the work he was employed to do, whilst an insurer might come to a conclusion to the effect that the employee is not suitable to do the same kind of work, but because he is still able to do other work, he is not medically incapable. It almost seems sometimes that insurers look for reasons to not find an employee medically incapable.

Employers should never stay their own medical incapacity proceedings pending the outcome of their insurer's investigation. We know of cases where employees have died long before the relevant insurer could come to any decision on that employee's incapacity.

In order to assist municipalities with this time consuming and often complex situations we have developed an Ill Health, Incapacity procedure that will assist municipalities greatly in the handling of Ill Health, Incapacity cases.

The procedure deals with the following aspects:

- Statutory prescripts
 - Is the employee capable of performing the work?
 - To what extent is the employee unable to perform the work?
 - To what extent might the employee's work circumstances be adapted to accommodate the disability? If this is not possible, to what extent might the employee's duties be adapted to accommodate the disability?
 - To what extent is suitable alternative work available?
- Substantive Fairness

- Procedural Fairness
- Incapacity: Ill Health or Injury Procedure
 - Step 1: Establish a standard/policy
 - Step 2: Collect all the relevant information
 - Step 3: Consultation with medical practitioners
 - Step 4: Determine according to Steps 2 and 3 whether absence for reported illness is justified
 - Step 5: Where absence is justified, formalise incapacity counselling process
 - Step 6: Evaluate whether alternative work is available
 - Step 7: Absence too disruptive
- Medical Certificates