

Medical Retirement or Medical Incapacity

What happens if I can't work, but my employer can't keep my job open?

When an employee is no longer able to do their job due to illness or injury, it can be a challenging time for both the employee and employer.

In these situations, employees often feel vulnerable. They may be concerned about not being well enough to do their job and worried about what will happen to them financially if they lose their job.

Similarly, their employer may be feeling pressure about how to manage workloads and also treat the staff member fairly and with dignity.

The law does not require an employer to keep an employee in employment who is unable to fulfil their role due to illness or injury. The question is, how long should an employer keep the role open. Before making a decision on what to do, the employer needs to understand how long or how often the employee is likely to be off work and whether they will be able to do their job again.

What are the factors my employer needs to consider before deciding to end my employment?

In order to end an employee's employment, 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 illness, 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 it is required in their employment agreement (although they can still decline).
- An employee has a right to privacy regarding their medical information and can decide not to share that information with their employer. However, an employer

is able to proceed with making a decision based on the amount of information they have on the situation.

- The nature of the employment and how important the employee's role is to the organisation, including:
 - the size of the organisation;
 - whether the employer has been able to manage for long periods of time without the employee or whether they've had to bring in someone else to do the job; and
 - what the financial impacts of the employee's absence are on the organisation.
- The likely timeframe for returning to work (which should be based on objective information such as a doctor's report). This is important – if an employee can show a reasonable prospect of returning to work in the short-term, an employer needs to make reasonable accommodation to enable their return.
- The employee's entitlement to sick leave (paid and unpaid).
- How long an employee has been employed with the current 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 illness or injury.
- If there are any alternatives to dismissal that are reasonable in the circumstances – such as part-time or reduced hours, re-deployment or alternative duties, or medical retirement.

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

What is medical retirement?

Medical retirement allows an employee to leave an organisation with dignity. It is different from normal retirement in that, while after normal retirement an employee usually does not work again, after medical retirement, an employee may look for a different job that is not limited by the illness.

Medical retirement must be agreed by both 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 included 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).

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.
- Medical retirement will be given as the reason for leaving which 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 considers future options. Sometimes a medical retirement package includes career support, EAP counselling or medical assistance.

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.

If, after a fair process and discussion has been held, the employee doesn't 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.

What does a dismissal for medical incapacity involve?

When dismissing an employee for incapacity, the employer must follow the principles of a fair process. See above for the list of considerations the employer must consider before they make the decision to end the employment.

Employers should be aware that it is common for a dismissal for a 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 ensures that both parties have had an opportunity to present evidence and give feedback and that all alternatives have been considered.

Please note: *The information in this document is to be used as a guide only and not as formal legal employment advice.*