

# A mental disorder or mental incapacity law employment essay

Law



## INTRODUCTION

The issue of dismissal whether with "just cause" or "without just cause" still had been debated and argued every day. Employer and employee have seen this problem from different angle and standpoint. One of the grounds of the dismissal is based on the incapacity of the employee to perform his assigned job; either the employee suffered from mental incapacity/ mental disorder or suffered from physical incapacity/physical disability. A mental disorder or mental incapacity[1] is a psychological pattern or anomaly, potentially reflected in behavior, that is generally associated with distress or disability, and which is not considered part of normal development in a person's culture. Mental disorders are generally defined by a combination of how a person acts, feels, thinks or perceives. Meanwhile, physical incapacity/physical disability[2] is a limitation on a person's physical functioning, mobility, dexterity or stamina. In short, incapacity can be defined as the absent of physical or mental capabilities to perform work as a result of one's poor health or due to an injury. Generally, an employee's incapacity whether permanent or temporary can cause the employment to be dismissed. People with mental incapacity will affects the way they behave and think and it also will reduced their capability to protect their own interest, and in most cases it will influences their decision-making abilities. Even this is very rare; it also cannot be denied that on some occasions, people with mental incapacity pose risks to themselves and people around them. This will bring negative consequences to people who often dealing with them such as the employer, their fellow colleagues and their client. Physical incapacity which limits the employee's movement and functioning

will reduce the capability and the quality of work done by the employee. This will give impact to the operation of the company. This is the main reason why the employer needs to dismiss this group of people in order to protect company's interest and to make sure the smoothness running of the company. To ascertain whether the employer's decision to dismiss an employee with mental/physical incapacity was reasonable will differ, depending on the size and nature of the company as well as the conditions and circumstances of the individual. Thus, this paper will look into the relevant law governing dismissal particularly dismissal due to mental/physical incapacity, procedural requirements before dismissing the employee with reference to the relevant cases and also remedies afforded to the employee who was dismissed due to their incapacity.

## **DISMISSAL BASED ON MENTAL/PHYSICAL HEALTH**

Chapter 3: DISMISSAL BASED ON MENTAL/PHYSICAL HEALTH<sup>3</sup>. 1Frustration of Contract<sup>3</sup>. 2Principles in dealing with employees with a medical condition (mental/physical health)<sup>3</sup>. 3Procedural FairnessFrustration of contract is a common law doctrine which applies to all types of contract, including employment contract. It occurs when without the fault of either party, a situation that is not stipulated in the contract arises which makes performance of the contract radically different from what the parties previously agreed. When a contract is frustrated, the general rule is that the parties will be relieved of their contractual obligation. There are very few decided cases in Malaysia in which an employment contract has been declared frustrated and come to an end. There are numerous situations where the contract can be considered as frustrated. For example, the <https://assignbuster.com/a-mental-disorder-or-mental-incapacity-law-employment-essay/>

employee may be detained by the authorities and as the outcome of the detention he is unable to turn out to work. Second possibility leading to frustration of contract is where the employee requires a license in order to be able to do his work and for some reason, the issuing authority withdraws/revokes this license[3]. Medical problems can also lead to an employment contract being frustrated. Justice Newbould in the case of *Duong v Linamar Corporation*[4] emphasized that frustration of contract can occur in the employment context where the employee is absent from work due to illness. There are number of instances where employees are threatened that they will lose their job as a result of an illness or an injury. In the case of *Kumpulan Guthrie Sdn Bhd v K. P Sukumari Amana*, the Learned Chairman states the following: "A contract of employment may come to an end in a number of different ways, apart from the dismissal of the employee. One of them is by the application of the doctrine of frustration. By "frustration" is meant that there has been such a change of circumstances that events make it physically impossible for a contract to be performed- as for example, where the illness of the employee lasts or is likely to last for a prolonged period. It cannot be disputed that illness or incapacity which is permanent will frustrate the contract, and so will illness which is of so prolonged a nature as to prevent the employer from getting substantially what he has bargained for. Long terms disability benefits are a lifeline for a sick employee who is able to receive the salary while resting at home enjoying his medical leave. However, if the medical leave continues for a very long period, the employee will facing the risks being terminated for frustration of contract. Frustration of contract was governed under Section 57(2) of Contracts Act

1950 whereby the Act states that: A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. Before dismissing the employee on the ground of the frustration of contract, certain element or certain criteria need to be examined before the dismissal can be justified as a fair dismissal. This is important to avoid the employer being challenge by the employee before the Industrial Court.

### **To examine the terms of contract**

whether the contract contains any terms which stipulated that the employment contract will be terminated in the event the employee absent from work due to illness be it mental illness or physical illness. What happens if all medical leave has been exhausted? Can employer terminate his employee right after he had utilized all of his sick leave? Lang v Eagle Airways[5]: although the appellant's conditions of employment entitled her to sick pay for generous periods, it did not follow that the employer was bound to continue to employ a pilot who consistently needed to use her sick leave. Taylor v Air New Zealand, the plaintiff's contractual entitlement to " unlimited sick leave" did not preclude his dismissal for incapacity when it became clear that he would be unable to return to his duties within a reasonable time. Kempas Edible Oil, the Claimant sometime in 2000 had been diagnosed with a sleep/anxiety disorder. The Claimant subsequently in August 2001 had been diagnosed to be suffering from dysthymia with narcolepsy. Despite the medical attention which the Claimant had been receiving, the Claimant's medical condition continued to deteriorate to the

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extent that the Company then tried to determine if the Claimant could be medically boarded out pursuant to the provisions of the insurance policy which the Company had taken out for the benefit of all its executive employees. The insurance underwriters, had, however, on two separate occasions rejected the Company's application for the Claimant to be medically boarded out. In 2002, the Claimant had been on paid medical leave for 87 days. In 2003, the Claimant never came in to work at all. The Claimant had in fact been on paid medical leave from the period 1 October 2002 till the date he was dismissed, on 11 September 2003. In view of the fact that the Claimant was unable to perform his work due to his medical condition, the Company terminated his employment on medical grounds. The Industrial Court concluded that since the Claimant was unable to perform his duties any longer because of his illness, the contract of employment had therefore become frustrated. In conclusion, the above mentioned factors should be taken into account by employers before making a final decision on the continued employment of an employee suffering a long term illness.

### **The need of the employer for the work to be done by the employee/ the nature of the employment/ the urgency of the work**

Whether the employee hold the key position because the absence of the key employee for a long time will affect the operation of the company. Hoskin v Coastal Fish Supplies[6]the employee in question was the manager of a shop and had been incapacitated for lengthy periods. The Arbitration Court considered that in that situation the employer was justified in dismissing the employeeand appointing a permanent replacement. The Court considered

that it would have been unreasonable to expect the employer to obtain a temporary shop manager to cover for the employee's absence. *Wilson v Johnathons Catering*, the Court upheld the Tribunal's decision that the termination for incapacity of the appellant's employment as the supervisor of a catering contract was justified. The Tribunal had accepted that it was not possible for the employer to do without a supervisor for the length of the appellant's intended absence and it was not practicable to hire a temporary reliever for the appellant's role or to cover her work in other ways.

### **The nature of the illness, its duration and the likelihood for the illness to recurring**

How long the illness has already continued and the prospects of recovery. Whether the employer can be expected to wait any longer for employee to recover? *Gopalakrishnan Vasu Pillai v Goodyear Malaysia Berhad*[7], the case where employee who has a long term medical condition with little prospect of recovery. The Claimant, who was a master technician, suffered from a recurrent right knee injury. After numerous medical examinations , the doctors recommended that the Claimant be given light duties. The company was however, unable to accede to the Claimant's request as its operations involved using heavy machinery. The company, whilst accepting that the Claimant had been an excellent worker, medically boarded him out due to the knee injury and the long periods of medical leave that had been taken. The Claimant, however, contended that his dismissal had been unjust as he had not been offered or recommended alternative employment in the company. In handing down an award in favour of the company, the Industrial Court referred to the English authority of *Spencer v Paragon Wallpapers Ltd*<sup>2</sup>

wherein it was stated: In cases of ill health, the basic question that has to be determined in every case is whether in all circumstances the employer can be expected to wait any longer and if so, how much longer. The nature of the illness, the likely length of the continuing absence, the need of the employers to have done the work which the employee was engaged to do is also the relevant factors need to be considered as laid down by Phillips J in Spencer's case. In arriving at the conclusion that the dismissal was justified, the Industrial Court in Goodyear Malaysia Berhad considered the following issues: did the medical reports state that the Claimant will recover and return to normal; the number of days the Claimant had been on medical leave; and did the company foresee that the Claimant will be bound to take many more days of medical leave which will inevitably affect the productivity and profits of the company. The Industrial Court in Goodyear Malaysia Berhad also acknowledged the fact that the company like any other company was incorporated to carry on business with a view to profit and was not a charitable organisation or a welfare home. Innes- Smith v Wood[8]: a good reason [to dismiss for incapacity] usually consists of a combination of the length of absence to date of the employee and the prospects for the future as to a return to work. On a practical note, in most circumstances it will be virtually impossible for an employer to fairly and reasonably undertake the balancing act required of it if it has not considered when the employee is likely to return to work. The period of past employment

PROCEDURAL FAIRNESS  
Notification to the employee of the possibility of dismissal  
Reasonable effort to establish the true medical position  
Communication and consultation with the employee  
Alternative



work Whether employer is obliged to offer alternative work to the  
employee Whether change of job function and job status tantamount to  
breach of contract which then constitutes grounds for constructive  
dismissal Was the decision reasonable of the merits