



## **Employees in prison - when may the employer dismiss?**

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Just about the only thing we know for certain when it comes to the employer's obligations towards employees who have been imprisoned for conduct that is not work related, is that imprisonment suspends the employer's obligation to remunerate the employee for the period of the employee's imprisonment.

But may an employee be dismissed for being in prison? If so, at what point, i.e. how long must s/he have been absent for? And what does one dismiss the employee for – capacity or operational requirements? What if the employee is released without being charged or found not guilty?

It has emerged from recent case law that irrespective of whether the employee was incarcerated for an offence s/he was ultimately found guilty of or not, *where the employer knows that the employee is in prison*, it cannot simply dismiss the employee because of the employee's absence from work (misconduct), but must develop a justification for the dismissal based either on the operational requirements of the business (s 189 of the LRA would have to be followed) or incapacity (i.e. the employee's inability to carry out his/her duties). Having to retrench in such circumstances seems like overkill, but while dismissal for incapacity appears to be the most logical peg on which to hang a dismissal, recent case law suggests that basing the dismissal of an incarcerated employee on incapacity would not necessarily guarantee a fair dismissal either. One would have to make out a plausible argument that the employee's 'incapacity' is such (given the nature of the job, length of incarceration and the like) that keeping the position vacant or filling it on a temporary basis does not make sense in the circumstances.

The safest course of action, and one we would recommend, is for the employer to employ somebody on a temporary basis to fill the employee's position, if at all possible, until such time as the employee is able to return to work, or there is certainty that s/he will not return to work at all for the foreseeable future where s/he has been found guilty and sent to jail, rather than to dismiss the employee.

In any event, where dismissal is possible, the employer should not dismiss the employee without providing the employee with some opportunity to respond to the employer's proposed decision to terminate the employee's services by any means possible (e.g. a hearing at the place of incarceration or, a more practical option, by inviting the employee in person or through a legal representative or shop steward to make written submissions). Nevertheless, we would advise that you seek professional advice before any decision to terminate the employee's services is taken.

If the employer is unaware of the employee's whereabouts it may treat the matter as a case of absence without leave. If the employee returns, however, an opportunity for an appeal should be granted.

It is advisable that employers should have a clear policy and rules regarding absence from work, and this should include absence due to imprisonment.

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