



# INCOMPATIBILITY AND CONSTRUCTIVE DISMISSAL

*the easy complete guide for employers*

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# CHAPTER 1 - INCOMPATIBILITY

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## IN RARE CASES ONLY

Although it is not common, you can dismiss an employee for being incompatible with the company. The Employment Court has ruled that it is “an unusual and rare case in which an employer may justify dismissal of an employee because of an irreconcilable breakdown of trust and confidence”. In other words, the employment relationship is “irreparable”.

The onus is on the employer to show that dismissal is justified and in this regard, once again, you should review the following from chapter 2 –

### **A fair and reasonable employer would...**

You must be able to justify dismissal or any other action that disadvantages an employee. There are two issues – WHAT to look at and HOW to look at it.

WHAT to look at. You should look at all of the circumstances, including (but there may be more factors)–

- The conduct of the employee
- The conduct of the employer
- The employment history
- The nature of the industry and its customs and practices
- The terms of the contract (express, incorporated and implied)
- The terms of any other relevant agreements
- The circumstances of the dismissal.

HOW to look at it. Then you must view the matter as a fair and reasonable employer would do. There is no standard for such an employer – it is a hypothetical idea.

The matter is made more difficult by section 103 of the Employment Relations Act, which the Court said “redressed the imbalance of power” between employer and employee and “shifted it out of the hands of the employer”. The relevant part of section 103 reads as follows –

*“... the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by considering whether the employer’s actions, and how the employer acted, were what a fair and reasonable employer would have done in all the circumstances at the time the dismissal or action occurred.”*

Clearly, process is paramount.

In so far as the decision itself is concerned, the Court has given the following guidance –

*“...if an employee is unequivocally caught red-handed stealing large amounts of money, a fair and reasonable employer both could and would dismiss with justification. However, if an employee has made a negligent accounting error, the employer could dismiss but whether a fair and reasonable employer would dismiss is a matter for evaluation against all the relevant circumstances.”*

All the circumstances of the case includes not just the employer's reaction to the misconduct with it honestly believes has occurred, but also the circumstances under which the misconduct occurred and the circumstances of both the employee and the employer.

### **DISMISSAL IS JUSTIFIED IF**

- The employer can conclude that the employment relationship is irreparable
- If so, whether the breakdown can be attributed wholly or substantially to the employee
- The manner in which the dismissal is carried out is fair.

### **PROVIDED YOU FOLLOW THIS PROCEDURE**

You must have made a real attempt to remedy the incompatibility.

In order to be procedurally fair, an employee should be -

- given an opportunity to explain their side of the story
- advised how and why their conduct causes incompatibility
- given time to improve
- helped to address the problem by being sent on appropriate training courses, for example
- warned that their continued conduct would lead to their dismissal.

If it is possible to put an end to the incompatibility by transferring the employee, this has to be considered and attempted, even though this is in many cases simply seen as 'transferring the problem'. In many situations, the workplace would simply be too small.

You should not consider dismissal for incompatibility without professional advice.

### **KEY POINTS**

#### **INCOMPATIBILITY**

- The employment relationship is irreparable
- Wholly or substantially attributable to the employee
- Fair dismissal process.
- Take specialist advice

## CHAPTER 2 - CONSTRUCTIVE DISMISSALS

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### WHAT IS IT ANYWAY?

Constructive dismissal occurs where the employer's conduct forces an employee to resign because the employee feels that the employer has rejected the employment agreement. The employer is then said to have effectively dismissed the employee without cause, which is unjustified dismissal.

The employer's conduct has to be serious enough to make it reasonably foreseeable that the employee would not be prepared to continue working under those conditions.

So, constructive dismissal is when an employee leaves because of your behaviour. It does not matter whether the employee simply abandons their work or whether they hand in their notice.

### TWO KEY QUESTIONS

#### **Was the resignation caused by you breaching your duty as an employer?**

A breach could be –

- Unilaterally changing the employment agreement
- Providing an unsafe workplace
- Bullying
- Not following agreed procedures
- Stress
- False accusations
- Offering an exit package during disciplinary proceedings.

If the answer to the above question is yes, the next question to ask is:

#### **Was the breach so serious that it would be obvious to a reasonable employer that the employee would leave?**

An example of this would be failing to pay an employee without good reason - you could hardly claim not to have foreseen that the employee would not work without pay.

The test here is what a fair and reasonable employer would have done. Since this is a hypothetical employer, this means that the Employment Relations Authority or Court will decide what you should have done. It is important to note that the Employment Court has ruled that section 103A of the Employment Relations Act (which prescribes the test) was passed into law to redress the imbalance of power between employer and employee, by shifting it towards the employee. The Court expects employers to take this imbalance into account and to redress it when they take any action that may disadvantage an employee.

## WARNING SIGNS

Watch out for –

- Requests for a change of duty or shift
- Complaints about the workload
- Repeated sick leave with no details on the medical certificate. This may indicate stress
- Continuing relationship problems, especially between manager and employee.

## WHAT TO DO TO

The most effective way of countering constructive dismissal claims is to deal with the issue immediately, and to suggest options to resolve the matter. This could include –

- Reassessing the workload
- Counselling, mentoring or an employee assistance programme (EAP)
- Meeting with the employee to establish which aspect of the workplace is causing the problem
- Having the employee report to someone else
- Getting an independent workplace or safety audit done
- Suggesting mediation.

Examining unexpected resignations carefully will not protect you from claims (it is too late at that stage), but it could alert you to similar claims.

### KEY POINT

#### CONSTRUCTIVE DISMISSALS

- It is a form of unjustified dismissal
- Caused by THE EMPLOYER'S behaviour
- Employee believes employer is breaching employment agreement
- Reasonably predictable to a fair and reasonable employer that employee would leave
- Watch out for warning signs
- Best defence is to deal with the matter immediately