

## Dismissal for incompatibility

### We increasingly hear about the "toxic workplace" and workplace bullying. Might there actually be an incompatibility issue?

2020 has been a most unusual year. We have all had to get used to lockdowns and working remotely, or to not working at all, and overall things have been a bit stressful. For some people the uncertainty and financial insecurity has also exacerbated underlying health issues such as anxiety, and this has affected their conduct and behaviour at work. We know we need to "be kind" but even at the best of times it can be hard to work with people who are being difficult and who seem to be actively contributing to dysfunction in the workplace.

There is no quick fix. The Employment Court has made it very clear that dismissing an employee on the basis of incompatibility can be justified only in very rare situations. The employer must establish that;

- an irreconcilable incompatibility exists;
- the irreconcilable incompatibility is wholly or substantially attributable to the employee; and
- the dismissal was procedurally fair

One of the leading cases relates to Financial Controller Ms. Vicki Walker, whose employment was terminated on the grounds of incompatibility. She filed a claim with the Employment Relations Authority, which found her dismissal to be unjustified and awarded her compensation and lost wages. Despite this success Ms. Walker challenged the Determination to the Employment Court; a move the Judge described as "*high-risk*."

The Court found Ms. Walker's dismissal was justified. It noted that she was surrounded by conflict but failed to see her own role in it, and that she had demonstrated increasing defiance towards her employer.

Ms. Walker had what was described as 'a confrontational communication style' and her emails included the following;

*"Best you brief me on what is to be discussed because I need to prepare myself to listen to bullshit without losing my temper with the perpetrator of the greatest crime since the Holocaust..... that would be the CEO."*

Ms. Walker's employer, ProCare Health Ltd, had implemented a variety of measures designed to address the workplace issues, including mediation and an independent review; appointing an HR specialist to work with the team; offering paid leave and independent counselling to Ms. Walker; and offering to engage with Ms. Walker's medical specialist to see what might be done to support her. The Court looked at the matter globally and found that the evidence of irreconcilable incompatibility was overwhelming. ProCare's submission that no organisation could withstand this type of disharmony was accepted.

The recent Authority decisions confirm that the employer must have taken 'significant steps to address workplace issues' before a dismissal on the grounds of incompatibility can be justified. In the *Parmar v Pharma Pac Ltd* case, from February this year, employee Mr. Parmar was found to have been unjustifiably dismissed and unjustifiably disadvantaged. As is not uncommon, the situation had escalated from what seemed a fairly innocuous beginning; Mr. Parmar (a forklift driver) had dropped a load and then left the site to address another matter. No disciplinary action ensued but the correspondence from Pharma Pac suggested to Mr. Parmar that he was being blamed.

He was upset by this and requested information, such as CCTV footage and the company health and safety policies so that he could explain himself further. When the information was not provided, he took sick leave for stress related symptoms, raised concerns that he was

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## Dismissal for incompatibility (Continued)

being bullied, and was ultimately dismissed for incompatibility.

The Authority found that Pharma Pac's decision to terminate Mr. Palmer's employment did not fall within the range of what a fair and reasonable employer could have done in all the circumstances at the time. Pharma Pac did not have a sufficient and reliable basis for concluding there was incompatibility in the workplace, and the process was flawed.

Amongst other things, the Authority said that Pharma Pac could have disclosed to Mr. Parmar the information he had requested; could have met with him in person to understand the basis for his concerns (particularly since English was Mr. Parmar's second language); and could have followed its own policies for dealing with the bullying issues Mr. Parmar had raised. During the Authority investigation it became clear that matters had been taken into account which had not been raised with Mr. Parmar. Ultimately Pharma Pac had not done enough to try to address the situation and the Authority found the employment relationship was not yet irretrievable.

In a further Authority Determination, where the employee's dismissal for incompatibility was found to have been justified, the Authority noted that the employee had been concerned exclusively about her own safety at work, and seem to have little realisation that the safety of others was every bit as important.

The message is that employers must 'Be Prepared', in terms of having robust pre-employment checks and warranties, and maintaining and following robust employment policies.

It is then important to 'Do Something', in terms of taking steps to address dysfunction in the workplace. Employers must deal with issues as they arise rather than getting things brew and boil. The steps required will depend on the circumstances at the time, but can include offering support and training together with interventions such as restorative sessions or mediation.

If robust measures have been taken but the issues remain, and there is continuing risk to the business and/or the health and safety of other staff, a dismissal on the grounds of incompatibility may be justified. It is not a decision that can be reached lightly or quickly. It is, however, something that we may need to deal with more frequently, given the long term impact of the global pandemic.