

SOSR Dismissals: Risk Mitigation

HOW DO YOU MITIGATE THE RISKS OF USING SOSR AS THE REASON FOR DISMISSAL WHEN A WORKING RELATIONSHIP HAS BROKEN DOWN, EVEN IF THE EMPLOYEE MAY NOT RECOGNISE THIS, SUPPORTED BY PRACTICAL EXAMPLES?

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Unfair Dismissal: Generally

Employee who has completed the two-year qualifying period has the right not to be unfairly dismissed.

Dismissal will be unfair unless the employer can show:

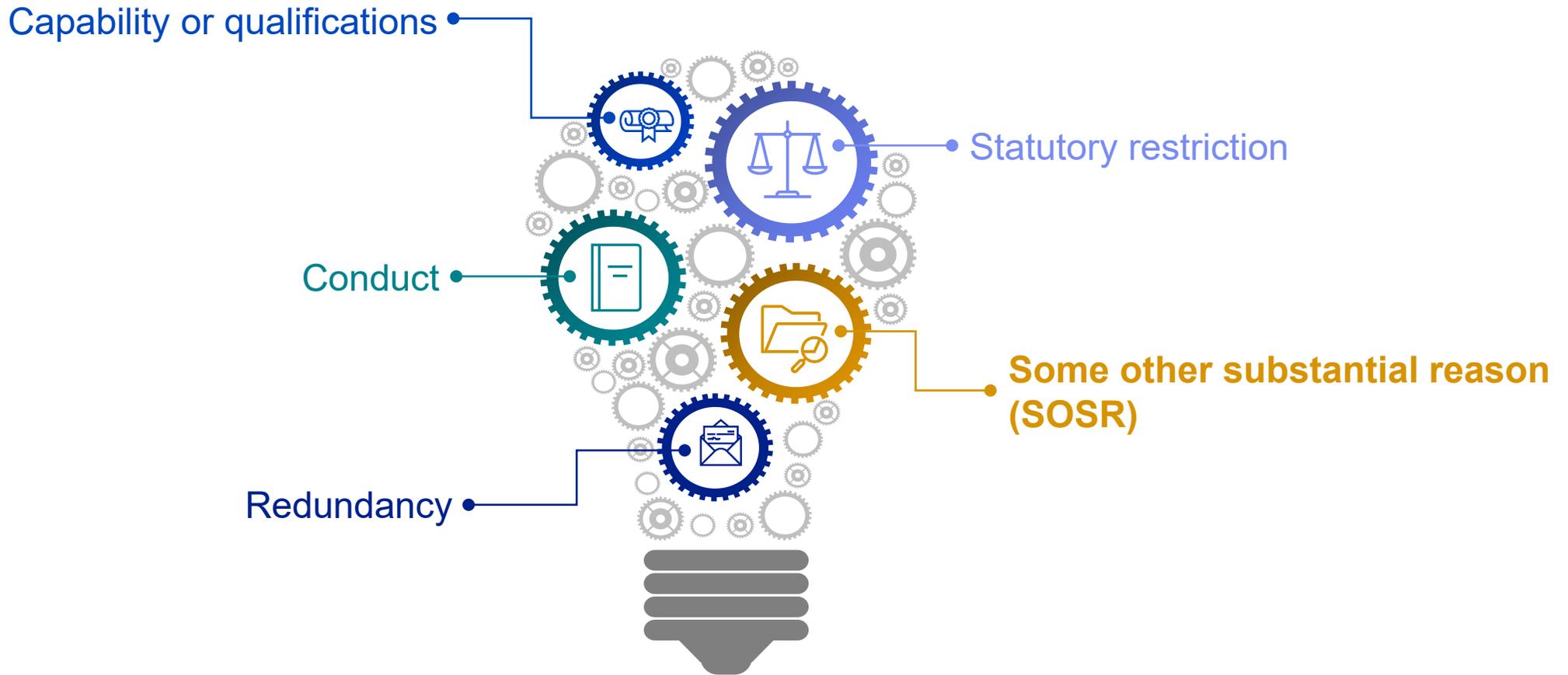
a

the reason (or, if more than one, the principal reason) for the dismissal, and

b

that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

Unfair Dismissal: Potentially fair reasons for dismissal



SOSR: The Basics

1

Establishing a SOSR reason for dismissal

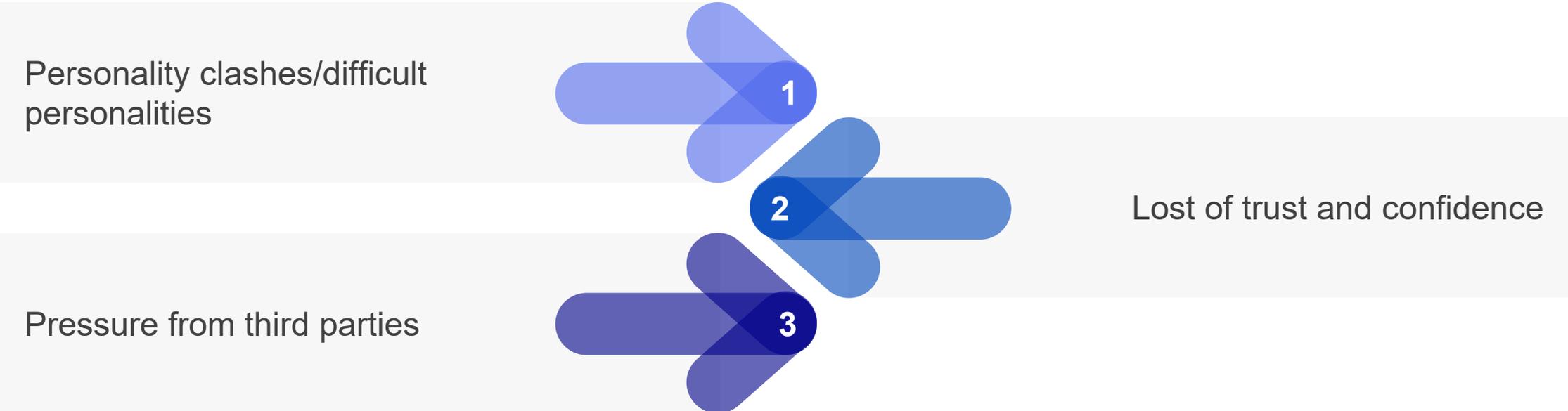
- SOSR must be the sole or principal reason for dismissal
- Showing an SOSR reason that *could* justify the dismissal

2

Acting reasonably

- The decision to dismiss for SOSR must be reasonable *in all the circumstances* (for example, the employer's size and administrative resources)
- Following a fair procedure

SOSR: Common Examples



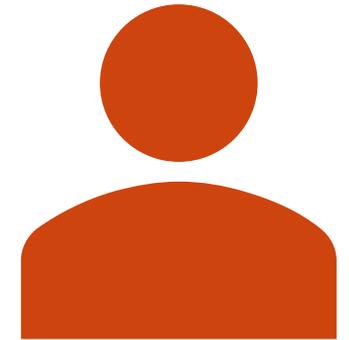
SOSR: Personality clashes/difficult personalities (1)

Position: Senior employee

Issue:

Relationship breakdown after salary increase refused leading to a series of other disagreements. As the employer was entering a critical period and the manager believed that the relationship with the employee was unrecoverable, the manager dismissed the employee. The employee was notified about the dismissal at pre-arranged annual appraisal.

Process: No dismissal procedure was followed.



Practical considerations:

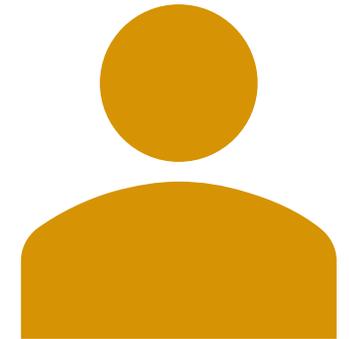
- What amounts to a fair procedure is fact specific and ET is entitled to consider all factors, including the effect on business
- Employee's role/position/seniority will be highly relevant – expect far greater scrutiny if complaints are raised by more junior employees
- Approach with caution – compare with the next example...

SOSR: Personality clashes/difficult personalities (2)

Position: Director, who held a management role and worked closely with senior colleagues

Issue: Despite no criticism of the director's technical competence, there were issues with their management style, the ability to develop good relationship with external stakeholders and advisors, and the ability to represent the organization in a positive light.

Process: A disciplinary meeting was convened, where the director made personal attacks on their colleagues.
The dismissal process was, however, procedurally unfair as the chair of the internal disciplinary hearing was not impartial. In addition, there had been no warning that the director's behavior may lead to dismissal if there is no improvement.



Practical considerations:

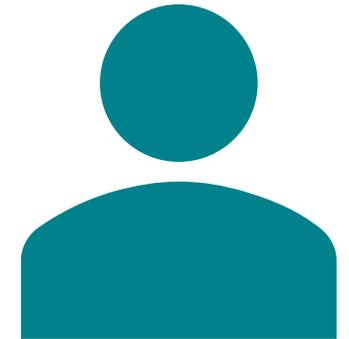
- Difficult personality in itself cannot be a fair reason for dismissal, but the manifestation of difficult personality in the employee's behavior with other employees, clients or other stakeholders may amount to SOSR
- The importance of conducting an impartial internal investigation

SOSR: Loss of trust and confidence

Position: Senior manager within a smaller company

Issue: There was a dispute regarding the entitlement to a share in the company's share capital. As a result, the senior manager sent the employer a letter stating, among other things, that they lost all trust and confidence in the company. The employer attempted to engage the senior manager, but then dismissed them because the relationship had been soured and the company lost trust and confidence in the employee.

Outcome: In this case, it was not possible to establish a SOSR as the parties were still able to work together. It means that trust and confidence had not been broken down, and the reason for the dismissal was the "power struggle" over a term of the employment. Dismissal was unfair.



Practical considerations:

- Special scrutiny where "trust and confidence" cited as the primary reason
- Crossover between SOSR and other potentially fair reasons for dismissal

SOSR: Pressure from third parties

Position: Security guard employed by a contractor supplying services to an airport

Issue: The airport was controlled by the local council. The employee got into a conflict with the chief security officer. Subsequently, the employee was dismissed by the employer at the local council's request.

Process: The employer did not agree with the dismissal and offered the employee alternative employment at a lower wage which he refused.
In considering the reasonableness of the decision to dismiss an employee, the court must consider the employer's conduct and whether dismissal is an injustice to the employee.



Practical considerations:

- What does the services contract say? How important is the third party?
- What are the alternatives?
- Could there be a “red flag”?

SOSR: Tricky Issues - Potential discrimination/automatic unfair dismissals

- What if the employee doesn't agree that the SOSR is the genuine reason for the dismissal?
- How can employers handle situations where there is a “cross-over” between the SOSR dismissal and potential discrimination and automatic unfair dismissals?

What questions should the HR specialists be asking?



Is the dismissal actually because of a protected characteristics?



Has the employee blown the whistle?



Or carried out another protected act?



What if the relationship breakdown is intrinsically linked to a protected characteristic – e.g. disability?

SOSR: Alternatives to dismissal?

1 Attempt to mediate a resolution between employees

2 Redeploy one of the employees involved in the conflict

3 Change employees' reporting lines or work patterns



SOSR & ACAS

The employer must follow a fair procedure

The Acas Code of Practice on Disciplinary and Grievance Procedures

- Tribunals may adjust any compensation by up to 25% for unreasonable failure to comply with the provisions of the Code

The applicability of the Acas Code:

- Covers misconduct and poor performance
- Excludes dismissals for redundancy or the non-renewal of a fixed-term contract
- It does not explicitly apply to SOSR (but it does not expressly exclude it)

Employers should be mindful of the recommendations set out in the Code if events leading up to or associated with the dismissal have involved disciplinary proceedings

Key Takeaways and Practical Tips

Determine the reason why the organization wants to dismiss a particular employee

- Is there more than one reason for dismissal?
- Is SOSR the sole or principal reason for dismissal?
- Are there other factors to take into account?
- Can you clearly explain the factual background to the potential dismissal?

Procedural fairness

- Investigate
- Explain the reasons to the employee and give them an opportunity to respond
- Consider all relevant factors
- Alternatives to dismissal?
- Select a suitable person to act as a decision-maker
- Inform of the outcome in writing
- Right of appeal?
- **KEEP A DETAILED RECORD!**

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