

White Paper Dismissal Conference

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How do you safely use SOSR as the reason for dismissal when a working relationship has broken down, even if the employee may not recognise this?

What is SOSR?

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Section 98(1) of the Employment Rights Act 1996

- In determining...whether the dismissal of an employee is fair or unfair, it is for the employer to 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.

Is the breakdown of a working relationship a potentially fair “substantial reason”?

- The breakdown of a working relationship **may** qualify as a substantial reason provided it is:
 - Serious enough to mean that a lesser sanction is not appropriate and dismissal is justified
 - Not rooted in a prohibited reason (e.g., it is discriminatory or automatically unfair)
 - The sole or principal reason for the dismissal (albeit that it may overlap with another potentially fair reason)

If it is, when will dismissal for that reason be fair?

- Need to ask whether the decision to dismiss for the relationship breakdown is reasonable in all the circumstances
- In practice this means that:
 - A fair procedure should be followed before dismissal
 - The decision is within the range of reasonable responses available to a reasonable employer in those circumstances and in that business

What am I going to look at today?

1. When might a relationship breakdown qualify as a substantial reason?
2. What are the 'red flag' issues to consider before dismissal?
3. When will a dismissal for relationship breakdown be reasonable in all the circumstances?
4. Conclusion: practical tips for achieving a fair SOSR dismissal for relationship breakdown

**When might a relationship breakdown
qualify as a substantial reason?**

Breakdown of working relationships caused by a difficult personality

Insensitive approach caused an unbearable atmosphere and had a serious impact on the business

Determined and forceful personality caused dissension amongst staff and provoked complaints

Brusque manner caused breakdown of relations with colleagues and problems with stakeholders and third parties

Blunt and antagonising manner and unrelenting complaints caused colleagues to refuse to work with employee

Lack of respect and intransigent approach by senior employee caused breakdown with line manager and wider disruption at a critical time

Unwillingness of senior employee to accept new CEO was destructive, destabilising and a drag factor for the business

Employer's loss of trust and confidence arising from problems in working relationships

- Examples:
 - ✓ Minor disagreements with employee responsible for intimate personal care
 - ✓ Serious personal attack on the integrity of the CEO with allegations of fraudulent misconduct in a lawyer's letter and lies provable by covert recording
 - × Disagreement over share entitlement including a lawyer's letter

Breakdown of relationship between an employee and a third party

- Substantial reason will be the third party pressure to dismiss (where applied following a relationship breakdown)
- Focus is on the importance of the relationship with the third party and the consequences of not complying with their request, rather than the breakdown itself
- Employers must consider potential injustice to the employee and what steps, if any, can be taken to avoid dismissal

Key takeaways

1. Dismissal for problems caused by manifestation of a difficult personality may be potentially fair for either SOSR or misconduct
2. Must have caused serious disruption to the business – being merely awkward or a bad fit will not be enough
3. Breakdown in relations must be at the point of no return
4. Be prepared for greater scrutiny where a junior colleague is dismissed for breakdown of relations with a senior colleague

What are the 'red flag' issues to consider before moving to dismiss for a relationship breakdown?

Is the relationship breakdown the real reason for the dismissal? (1)

- Is it really a cover for a discriminatory or automatically unfair reason (a prohibited reason)?
- Examples:
 - Possesses a particular protected characteristic (e.g. has a particular religious belief or is black, white, female etc)
 - Rejected a colleague's sexual advances
 - Blown the whistle on malpractice

If the relationship breakdown is the real reason, is it 'inseparable' from a prohibited reason?

- If inseparable, dismissal will be for the prohibited reason - examples:
 - Refusal to work with employee because she had blown the whistle
 - Friction caused by employee's implementation of health and safety procedure
- Dismissal for relationship breakdown caused by the manner in which the employee has pursued whistleblowing / discrimination complaints may be separable and fair

When will dismissal for relationship breakdown be reasonable in all the circumstances?

Does the Acas Code of Practice apply to SOSR dismissals?

- Does not apply to SOSR - Phoenix House Ltd v Stockman
- Other cases have said Code applies where the employee is culpable for what has happened – a risk in relationship breakdown cases where SOSR and conduct may well overlap
- If it applies and is not followed, could lead to a 25% uplift to compensation - safest course could be to apply the Code principles

What does a fair SOSR dismissal process look like (if Acas Code does not apply)?

- No hard and fast rules but a fair process usually requires:
 - Investigation
 - Notifying the employee and warning of risk of dismissal
 - Meeting
 - Consideration of alternatives to dismissal
 - Consideration of other relevant factors
 - Notifying the employee of outcome
 - Appeal

Conclusion: practical tips for achieving a fair SOSR dismissal

Practical tips for achieving a fair SOSR dismissal

1. Train investigating and dismissing officers on what they need to do
2. Investigate the nature of the relationship breakdown – how serious is it?
3. Investigate whether there are any red flag issues and take legal advice if necessary
4. Consider whether there are overlapping reasons for dismissal
5. In third party pressure cases be clear about what the third party has asked and try to persuade them to change their mind
6. Follow a fair dismissal process and consider alternatives to dismissal
7. Benchmark the process against the Acas Code to insure against a compensation uplift
8. Don't be overcautious – sometimes no process required at all – but more of a shield than a sword.

Questions

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