



GORDONS

**WHITE PAPER
CONFERENCE**

**CULTURAL
MISALIGNMENT**

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WHEN IS ENOUGH, ENOUGH?

If an employee is difficult, negative, culturally misaligned or a mischief-maker – but not objectively underperforming?





IF AN EMPLOYEE IS DIFFICULT, NEGATIVE, CULTURALLY MISALIGNED OR A MISCHIEF-MAKER — BUT NOT OBJECTIVELY UNDERPERFORMING?

- **Qualifying period (soon to change - January 2027 - 6 months)**
- **Five potentially fair reasons for dismissal**
 1. Misconduct
 2. Capability
 3. Redundancy
 4. Statutory Provision
 5. Some Other Substantial Reason (SOSR)

Capability/ Underperformance and SOSR different grounds.

Sometimes pleaded in the alternative but the Tribunal makes a finding of fact on what the real reason is.



SO, IS THE EMPLOYEES'S NEGATIVITY, CULTURAL MISALIGNMENT, OR MISCHIEF MAKING SUFFICIENT TO BE SUBSTANTIAL ENOUGH TO BE A FAIR REASON FOR DISMISSAL?

- **Employer Must Establish SOSR**

1. SOSR must be the sole or principal reason for dismissal
2. Showing an SOSR reason that could justify the dismissal

- **Act reasonably in making the decision to dismiss**

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



BREAK DOWN IN WORKING RELATIONSHIP/ PERSONALITY CLASH

Case law has established that a breakdown in working relationship can be a sufficiently substantial reason to be a potentially fair reason to dismiss.

EARLY CASE LAW

Gorfin v Distressed Gentlefolk's Aid Association (1973)

The employee, a domestic worker at an old people's home, was dismissed after complaints had been made by other staff members. She was a 'determined and forceful lady' and caused dissension in the home. She was dismissed to restore harmony amongst the staff and that was held to be sufficient to amount to some other substantial reason.



CASE LAW

Treganowan v Robert Knee & Co Ltd (1975)

“T worked in an office with other girls. The atmosphere in the office had become so tense that it was unbearable and was seriously affecting the company's business. The cause of the trouble was a personality clash between T and the other employees for which T was to blame. Apparently the hostility arose 'from a difference of opinion as to the merits of the permissive society' and T was 'completely insensitive to the atmosphere ...”



CASE LAW

Perkin v St George's Healthcare NHS Trust (2005) C of A

In that case the tribunal had approached the matter on the basis that the dismissal was on the grounds of conduct in circumstances in which the employee, who was a senior finance director, had caused a breakdown in relationships with other members of the senior executive committee by reason of his manner and management style.

The Court of Appeal was of the view that although 'personality' could not of itself amount to a misconduct reason for dismissal it could manifest itself in such a way as to amount to a fair reason for dismissal.

Court of Appeal also stressed that it is still necessary for the employer to prove the facts.



CASE LAW

Ezsias v North Glamorgan NHS Trust (2011) EAT

An employer was permitted to change the ground for disciplining a consultant, with whom colleagues found it difficult to work, from misconduct to some other substantial reason after the investigations had begun, which had the effect that the employer did not have to go through complex misconduct procedures laid down by the Department of Health.

Caution!



CASE LAW

Moore v Phoenix Product Development Ltd (2021) EAT

The claimant had invented the product that the company was formed to market and had been its CEO for a long time; when relationships with the new CEO became fractious and he was dismissed it was held that this was for SOSR, and fair (even in the absence of an appeal) in the light of his unique position in the company, his lack of remorse for his destructive and destabilising conduct and evidence that he would not get on with anyone appointed as CEO in the future.



LOSS OF TRUST AND CONFIDENCE

Caution is needed when using this as an SOSR

- Loss of trust should not be resorted to too readily as some form of panacea/catch all (A v B (2010) and McFarlane v Relate (2010) – “Mission creep that should be avoided”
- In particular, if there are specific allegations of misconduct the employer should rely primarily on those and be prepared to prove them in the normal way.
- However, in a strong enough case an allegation of (terminal) loss of trust may come within SOSR and justify dismissal (Ezsias).
- Where this is the case, it may not be enough for the employer to establish merely the fact of that loss of trust because a tribunal may (not must) look into the background to that loss to consider the fairness of the dismissal in the light of all the facts (*Governing Body of Tubbenden Primary School v Sylvester (2011)*).



CASE LAW

Turner v Vestric Ltd (1980) EAT

It will be for the ET to consider what reasonable steps, if any, the employer had taken to try to resolve the problems that had arisen.

EAT said that the question was whether the employer had taken 'sensible, practical and genuine steps' to do so.

Matthews v CGT IT UK Ltd EAT (2024)

There was nothing further that the employer could reasonably have done because the employee was so set on seeking retribution.

So, once potentially fair reason of SOSR established...

- Fair Procedure – what does that look like for SOSR?



FAIR PROCESS

No such prescriptive path as the Burchell Test or ACAS Code.

- So many potential “reasons” = so many potential processes.
- Be led by the facts of the case.

Think back to the Turner case –

It will be for the ET to consider **what reasonable steps**, if any, the employer had taken to try to **resolve** the problems that had arisen.

SUGGESTIONS

- Mediation
- Counselling
- Workplace communications training
- Re-working management lines
- Re-working co-working



RISKS – POTENTIAL DISCRIMINATION/AUTOMATIC UNFAIR DISMISSALS

Scrutinise the case

- 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



REAL LIFE EXAMPLES

1) The serial grievance raiser

- Warehouse cleaner
 - Grievances raised against co-workers, HR, supervisors, managers, those that decided on grievances, those that decided on grievance appeals.
 - Walking on egg shells.
 - Employees not wanting to work with him.
 - Grievance raiser states his trust and confidence destroyed in his series of grievances.
 - Leap of faith for co-workers to give statements regarding untenability of working relationship.
 - For a number of reasons employee ruled himself out of working elsewhere than warehouse.
 - Protected Conversation



REAL LIFE EXAMPLES

2) The “bully”

- Sales Director.
 - Aggressive in sales but also aggressive in communication.
 - Blame culture.
 - No complaints or grievances raised.
 - Resignation from co-worker – uncovers poor working relationship being the only factor for resignation.
 - No clear or dated examples of treatment.
 - On investigation – many employees felt intimidated. Statements taken and shared.
 - Mediation and training offered to whole group – co-workers did not have faith that mediation would be effective – entrenched behaviours.
 - Protected Conversation



PROTECTED CONVERSATIONS

SECTION 111 A Employment Rights Act

“Pre-termination negotiations” means any offers made or discussions held, before the termination of employment in question, with a view to it being terminated in terms agreed between the employer and the employee.



RISKS

- Refusal to engage
- Worsens the situation
- Employee goes on long term sick
- Employee raises grievance
- PCs don't cover other claims than Unfair Dismissal
- The offer itself leads to fundamental breakdown



DECREASE RISKS

- 1) Are the potential claims wider than unfair dismissal for SOSR? Might the breakdown in relationship/personality clash be connected to Protected characteristics?
 - e.g. religious views on sexual orientation etc
- 2) Look with fresh eyes on what the offer is under the Protected Conversation – is it enough to be tempting rather than derisory?
- 3) Decide on your BATNA – “Best Alternative to a Negotiated Agreement” – what are your next steps if the employee refuses to engage?
 - Straight to SOSR dismissal?
 - Mediation? – which may or may not succeed?
- 4) Script the conversation and stick to it.
- 5) Avoid any undue pressure on the employee – consider your tone and language used.
- 6) Ensure sufficient time for the employee to make a decision – ACAS – 10 days.



TAKE AWAY POINTS...

- Think carefully about what the reason is for the potential dismissal.
- If more than one reason, say it.
- Be able to explain why it is such a substantial reason that the termination of employment would flow from it.
- Be able to explain the background to the damage to the working relationship.
- Consider all potential alternatives to dismissal.
- The more resource and bigger the organisation you work for, the more justification you will need to show as to why dismissal is needed.
- Make a contemporaneous note of the alternatives considered and why it has been concluded that they would not be successful in avoiding the dismissal.
- Consider what a fair process looks like on the facts before you, not on previous cases.
- Consider before you start, what do you need to show (potentially to a judge in the future) that dismissal is the appropriate decision.
- Phone a friend if in doubt...

QUESTIONS





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