

WHITE PAPER DISMISSAL CONFERENCE 2023

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?

Introduction

1. Use of “some other substantial reason” (**SOSR**) to justify dismissal for relationship breakdown is an area in which the courts and tribunals have shown employers a surprisingly large degree of lenience, but you can still get caught out. So, do proceed, but with caution.
2. There are five potentially fair reasons for dismissal set out in section 98 of the Employment Rights Act 1996 (**ERA**). Four specific reasons are given in section 98(2) of the ERA, namely, conduct, capability (covering both poor performance and ill-health), redundancy and illegality. The fifth reason given in section 98(1)(b) of the ERA is where there is “...*some other substantial reason of a kind as to justify the dismissal of an employee holding the position which the employee held.*”
3. Dismissal for SOSR can be understood as a residual catch-all potentially fair reason for dismissal. If the reason for dismissal is not one of the specific reasons within section 98(2) of the ERA, then it *must* fall within section 98(1)(b) of the ERA in order for the dismissal to be potentially fair. In practice, the reason for dismissal may not fall neatly into one category; there may be overlapping reasons. In a relationship breakdown case, the overlapping reason will usually be conduct. Where this is the case, this should inform how an employer manages the dismissal process. This is discussed further at paragraphs 36 below.
4. When will a reason pass muster as “some other substantial reason”? Although there is no statutory definition of the term, we know that *any* reason, however obscure, may qualify as a substantial reason. However, the reason must be substantial, which means that it must not be whimsical or trivial.¹ In a relationship breakdown case, this will usually mean that the relationship has deteriorated to such an extent that the employee cannot be retained without causing unacceptable disruption.
5. The reason must also not be based on a prohibited reason, such as a protected characteristic or an automatically unfair reason (e.g. that the employee has made a protected disclosure). Before dismissal, employers must interrogate the reasons behind the relationship breakdown in order to discount the risk of a prohibited reason being at play. A failure to do so could result in the dismissal being discriminatory or automatically unfair. This is discussed further at paragraphs 14 to 29 below.
6. The burden is on an employer to show that the relationship breakdown amounted to a substantial reason and that it was the sole or principal reason for the dismissal. Once established, an employment tribunal will consider whether the decision to dismiss was reasonable in all the circumstances, taking into account the employer’s size and

¹ Willow Oak Developments (t/a Windsor Recruitment) v Silverwood & Ors, [2006] EWCA Civ 660.

administrative resources, the principles of equity and the substantial merits of the case. In practice, this means that the employer must have followed a fair procedure prior to dismissal and the decision to dismiss fell within the range of reasonable responses available to a reasonable employer in those circumstances and in that business. In particular, the tribunal must be satisfied that the reason justified the dismissal of the employee holding the particular job that they held, rather than some lesser sanction, such as redeployment.

7. In this paper I will explore:

- a. when a relationship breakdown may be sufficiently bad to qualify as a “substantial reason” for dismissal, by reference to real life cases;
- b. the “red flags” that employers should pause to consider before moving to dismiss for a relationship breakdown; and
- c. how to ensure that such a dismissal is reasonable in all the circumstances.

Provided an employer can jump these three hurdles, dismissal for the breakdown of a working relationship should amount to a fair SOSR dismissal.

When might a relationship breakdown qualify as a substantial reason?

8. Where a workplace relationship has broken down, the substantial reason for the dismissal is usually that an employee’s difficult personality has resulted in the breakdown of a working relationship that can no longer be tolerated. Alternatively, a reason sometimes given is that the employer has lost trust and confidence in the employee because of the breakdown in working relationships. Below, I consider cases falling into both camps, before briefly turning to look at how the breakdown of an employee’s relationship with a third party might also amount to a potentially fair reason for dismissal.

Breakdown of workplace relationships caused by a difficult personality

9. There have been a number of cases where an employee’s difficult personality has resulted in conflict in the workplace, and this has been accepted as a substantial reason which could justify dismissal. Examples of such cases are discussed below.

- a. In Tregoanowan v Robert Knee and Co Ltd hostility arose from a difference in views about the benefits of a permissive society.² In particular, Ms Tregoanowan’s frank discussions at work about her sex life offended the other employees and resulted in an atmosphere in the office that had become “so tense it was unbearable”. Ms Tregoanowan was also “completely insensitive” to the prevailing mood, was unashamed about the fact that she had had a child out of wedlock and boasted of her relationship with a boy almost half her age. The relationship breakdown had a serious impact on the business and the employer concluded that - given its size - there was no alternative but to

² [1975] IRLR 247.

dismiss. The Employment Tribunal held that this constituted SOSR, and the dismissal was fair. The decision was upheld by the Employment Appeal Tribunal (EAT).

- b. In Gorfin v Distressed Gentlefolk's Aid Association, Ms Gorfin, a care home worker with a determined and forceful personality caused dissension within the care home.³ Staff raised complaints about Ms Gorfin's behaviour, which had also been observed by the matron of the care home. The employer decided to dismiss Ms Gorfin because the matron wished to "*restore harmony among her staff which was essential to run the home successfully*". The Employment Tribunal held that this constituted SOSR, and the dismissal was fair despite the fact that Ms Gorfin had not received any warnings prior to dismissal. On the facts, it found that warnings would have made no difference to Ms Gorfin's approach. The decision was upheld by the EAT.
- c. In Perkin v St George's Healthcare, Mr Perkin, a finance director of an NHS Trust, was responsible for managing a team of employees, liaising with senior colleagues and establishing working relationships with third parties.⁴ His manner and management style led to a breakdown in working relationships with other members of the senior executive committee and meant that he failed to establish the necessary relationships with relevant stakeholders and third parties. Further, during a disciplinary process, he engaged in personal attacks on colleagues, which meant that it would be impossible for him to re-establish normal working relationships with them. The employer dismissed P for these reasons. Mr Perkin claimed he had effectively been dismissed because of his personality and that this was unfair. The Court of Appeal agreed that an employee's difficult personality *per se* could not amount to a substantial reason capable of justifying dismissal. However, the manifestation of that difficult personality could do so. It held that where a difficult personality had led to a breakdown in the functioning of the employer's operation, this could qualify as a potentially fair dismissal either by reason of conduct or SOSR. Here, the Court classified the dismissal as SOSR, but the fact that the Employment Tribunal had regarded it as a conduct dismissal did not affect the safety of its decision.
- d. In Ezias v North Glamorgan NHS Trust, Mr Ezias, a consultant surgeon expressed concerns about standards in his department in blunt terms and antagonised his colleagues.⁵ He also raised complaints about colleagues that an internal inquiry found were "*excessively frequent, unacceptably detailed and unrelenting to an extreme degree*". Mr Ezias refused to accept the findings of that inquiry and continued to raise complaints. Nine of Mr Ezias' senior colleagues signed a joint letter to the Chief Executive of the Trust stating that they lacked confidence in Mr Ezias and that the breakdown in relations was affecting the quality of patient care. Eight of the nine colleagues also said they

³ [1973] IRLR 290.

⁴ [2005] IRLR 934.

⁵ [2011] IRLR 550.

were not prepared to continue working with Mr Ezias and would resign if expected to do so. A further investigation found that the relationship breakdown was “*in large measure*” down to Mr Ezias’ actions. The Trust dismissed Mr Ezias on the basis that there had been a fundamental and irretrievable breakdown of trust and confidence between Mr Ezias and his colleagues (rather than for his conduct in causing the breakdown). Accordingly, it did not apply the Trust’s disciplinary procedure prior to dismissal. The Employment Tribunal held that the reason for dismissal was SOSR and not conduct, since E’s responsibility for the state of affairs was incidental to the decision to dismiss. Further, the fact that Mr Ezias “*would never be satisfied with anything which the Trust had done or would do in future*” meant that it was reasonable for the employer to have concluded that dismissal was the only option. The decision was upheld by the EAT.

- e. In Gallacher v Abellio Scotrail Ltd, Ms Gallacher, a senior employee, developed negative feelings towards her line manager, after she failed to authorise a salary increase.⁶ In the years that followed, the relationship between Ms Gallacher and her line manager began to deteriorate. The line manager felt that Ms Gallacher did not trust her and was intransigent and disrespectful. Separately, other employees complained about Ms Gallacher’s leadership qualities and her ability to delegate and provide support. The line manager concluded that the relationship with Ms Gallacher had broken down and this was disrupting the team and the wider business. This arose at a critical time for the business when Ms Gallacher’s team was needed to take forward deliverables to help the business navigate a trading loss. Taking all of this into account, the line manager decided to dismiss Ms Gallacher and was advised by HR to do so without following any form of dismissal process. The Employment Tribunal held that the dismissal was not for either conduct or performance reasons but for SOSR, namely the loss of trust and confidence between two senior employees which had become a barrier to delivering the objectives of the business at a critical time. Despite the lack of procedure, the dismissal was held to be fair, and the decision was upheld by the EAT (see paragraph 38(e) below for a discussion of the procedural aspects of this case). However, the EAT warned that employers should be prepared for greater scrutiny of SOSR dismissals where a junior employee is dismissed following a breakdown of relations with a more senior employee. The EAT said that “*any substantial disparity in seniority between protagonists [is] likely to put the Tribunal on high alert that the alleged breakdown in relations is a cloak for another reason for dismissal*”.
- f. In Moore v Phoenix Product Development, Mr Moore was an inventor of a product which was manufactured and sold by a company of which he was CEO for 16 years.⁷ In 2017 he was replaced as CEO but stayed on as a director and employee. He struggled to accept the change and brought about an irreparable breakdown in trust and confidence with the new CEO that was considered to

⁶ [2020] 2 WLUK 691.

⁷ [2021] UKEAT 0070/20/2005.

be destructive, destabilising and a “drag factor” for the business. Further, Mr Moore was unrepentant and showed no signs of being willing to change in future. He was dismissed and was not offered a right of appeal. The Employment Tribunal held that the reason for dismissal was SOSR, namely that there had been an irretrievable breakdown in working relationships. Despite the lack of an appeal, the dismissal was held to be fair, and the decision was upheld by the EAT (see paragraph 38(d) below for a discussion of the procedural aspects of this case).

Employer’s loss of trust and confidence arising from problems in a working relationship

10. Alternatively, in SOSR dismissals the substantial reason for dismissal may be the employer’s loss of trust and confidence in the employee. Such a loss of trust and confidence could arise for a wide variety of underlying reasons, including the breakdown of a working relationship. Examples of cases where this was argued are discussed below.

- a. In Hutchinson v Calvert, Mr Hutchinson was a disabled man and Ms Calvert was employed as his personal carer.⁸ Following a series of minor disagreements, Mr Hutchinson dismissed Ms Calvert on the basis of loss of trust and confidence. The Employment Tribunal said the dismissal was unfair on the basis that the disagreements were too trivial to have led to a loss of trust and confidence. However, this was overturned on appeal. The EAT said it was wrong to view the disagreements between Mr Hutchinson and Ms Calvert objectively. What mattered was whether Mr Hutchinson had genuinely lost trust and confidence in Ms Calvert and that the reasons for this were not trivial. Remarking that this was a “*wholly exceptional*” case, the EAT said that the fact the Ms Calvert was responsible for Mr Hutchinson’s intimate personal care meant that that the reasons could not be discounted as trivial. The dismissal was held to be fair on SOSR grounds.
- b. In Javed v Optimal Strategix Group Ltd, Mr Javed was the CEO of the company and made an unauthorised bonus payment to himself.⁹ The CEO and CFO of the parent company, Dr Sukumar and Mr Aloï, met with Mr Javed to discuss the matter and during the meeting presented him with a “letter of concern”. The meeting did not go well, and Mr Javed called Dr Sukumar a liar. The following day, Mr Javed’s solicitor served a letter of claim on Dr Sukumar alleging fraudulent misrepresentation and seeking damages of £150,000. The letter also referred to the fact that Mr Javed had secretly recorded the meeting. Two days later, Dr Sukumar terminated Mr Javed’s employment on the basis of loss of trust and confidence which was beyond repair. The Employment Tribunal held that this was a potentially fair SOSR dismissal. Dr Javed’s letter of claim contained a serious personal attack upon Dr Sukumar’s integrity which led the company to conclude that the relationship of trust and confidence was

⁸ [2006] UKEAT 0205/06/2006.

⁹ [2017] UKET/2404451/2016.

irreparably broken. However, the dismissal was ultimately found to be unfair on procedural grounds.

- c. In Handshake Ltd v Summers, Mr Summers was employed in a small company in the senior management team, made up of three people.¹⁰ There was a disagreement about Mr Summers' entitlement to shares in the company, which proved difficult to resolve. Eventually, Mr Summers' solicitor wrote to the company about the dispute and stated that Mr Summers was beginning to lose trust and confidence in the company. In response, the company dismissed Mr Summers on the basis that it has lost trust and confidence in him, and the relationship had become unworkable. However, the Employment Tribunal held that the dismissal was unfair as the loss of trust and confidence arising out of breakdown in the working relationship was not the real reason for dismissal. Rather, there had been a mere "power struggle" about the share entitlement. This was upheld by the EAT who said that an employee who questions a term of their employment is not, by that act alone, acting in breach of trust and confidence. Moreover, it was clear that the parties were still able to work together, notwithstanding that the relationship had soured, and the dispute had not been resolved.

11. These cases suggest that where a working relationship has genuinely broken down and this causes the employer to lose trust and confidence in the employee, this may amount to a substantial reason capable of justifying the dismissal. However, it is worth pausing to note that the courts and tribunals have expressed concern about the use of loss of trust and confidence in SOSR dismissals.

- a. In McFarlane v Relate Avon Ltd (this was not a working relationship breakdown case) a marriage counsellor was dismissed on SOSR grounds, where the substantial reason was the employer's loss of trust and confidence in Mr McFarlane after he was equivocal about whether he would be willing to counsel gay couples.¹¹ The EAT said that citing loss of trust and confidence as the substantial reason for dismissal was "*unhelpful*". The EAT Judge noted that in almost all cases where an employee is dismissed for something they have done (as opposed to something like redundancy), the employer could say they have lost trust and confidence in them. It is more helpful to focus on the specific issue that led to the dismissal decision. In this case, it would have been better to have treated the employee's apparent unwillingness to perform an aspect of his job role as misconduct. Ultimately, however, the failure by the employer to attach the right label to the dismissal was not fatal. The EAT held that the Employment Tribunal had been entitled to find that the dismissal was for SOSR, and that the employer had acted fairly and reasonably in treating Mr McFarlane's equivocation over an important part of his job as a sufficient reason to dismiss.

¹⁰ [2012] UKEAT 0216/12/2210.

¹¹ [2010] IRLR 196.

- b. This criticism was echoed in Leach v The Office of Communications (OFCOM) (again, not a working relationship breakdown case), Mr Leach was dismissed on SOSR grounds, where the substantial reason was loss of trust and confidence after the employer had received information that Mr Leach posed a risk to children.¹² The EAT said that it was not sufficient for an employer to point to a loss of trust and confidence as the reason for dismissal – something more is needed. In this case, the employer needed to identify with greater precision why the information it had received about Mr Leach made it impossible for them to continue to employ him. The EAT held that the substantial reason was, in fact, a legitimate concern about damage to its reputation. The Court of Appeal agreed that a breakdown in trust and confidence should not be used as a “*convenient label*” to apply to any situation where there is no other obvious fair reason for dismissal.

Breakdown of a relationship between the employee and a third party

12. Relationship breakdowns between an employee and a third party (e.g. a supplier or client of the employer) may also provoke the employer to dismiss on SOSR grounds. In such cases, the substantial reason is not the relationship breakdown itself but that the third party has applied pressure to the employer either to dismiss the employee or face some sort of negative consequence. Dismissal in response to such third-party pressure is potentially fair.¹³ In such cases, the precise details of why the third party has made the request will usually be irrelevant. What is relevant is how important the continued relationship with the third party is to the employer and how serious and definite the threat by the third party is. Two examples of such cases are discussed below.

- a. In Dobie v Burns International Services (UK) Ltd the employer was a contractor supplying security guards to an airport.¹⁴ The local council had the right to request the removal of the security guards supplied to the airport. Mr Dobie, a security guard, came into conflict with a senior council employee and was later dismissed at the behest of the council. The dismissal was held to be fair. The Court of Appeal said when considering fairness in such cases a tribunal must consider whether the dismissal is an injustice to the employee, taking into account things like length of service, disciplinary record and where it leaves them in terms of getting another job. If there is an injustice, the employer must be able to show that it has considered what steps it can take to avoid dismissal (e.g. could the third party be persuaded to change its mind, or could the employee be redeployed?).
- b. In Henderson v Connect the employer was a contractor providing transport services to the local council.¹⁵ The council had the right to object to the use of any member of staff employed by the contractor. H was employed as a bus driver for disabled children. The council discovered that H had been accused

¹² [2012] IRLR 839.

¹³ Scott Packing & Warehousing Co Ltd v Paterson, [1978] IRLR 966.

¹⁴ [1984] ICR 812.

¹⁵ [2010] IRLR 466.

of child sex abuse (which he denied and was never charged with) and sought to have him removed. The Court of Appeal held that the substantial reason for dismissal was the third-party pressure to dismiss. In light of the fact that the employer had sought to persuade the council to change its mind and had considered alternative roles, the dismissal was held to be fair.

Establishing the substantial reason – key takeaways

13. I think that we can draw out the following principles from the above cases:

- a. Dismissal because of an employee's difficult personality alone will not be fair. Dismissal because of the manifestation of that personality may amount to either SOSR (where the principal reason is that the state of affairs that has been brought about) or misconduct (where the principal reason is the employee's responsibility for bringing about that state of affairs).
- b. Given the misgivings expressed over citing loss of trust and confidence as the substantial reason for dismissal, it is preferable to avoid approaching the dismissal in this way.
- c. Where the SOSR route is pursued, an employer needs to show that the working relationships in question have deteriorated to such an extent that retaining the employee risks an unacceptable level of disruption to the business. The fact that an employee is merely regarded by others as awkward, not a "good fit" or not a "team player" is unlikely to be sufficiently substantial.
- d. Where the SOSR route is pursued, it must also be the case that the working relationships in question have broken down irretrievably. This may be evidenced by the employees' colleagues refusing to work alongside them anymore, or by the employee showing no willingness to build bridges, or both.
- e. Where a junior employee is to be dismissed because of a breakdown in relations with a more senior employee, employers should be prepared for a greater degree of scrutiny by tribunals into the underlying breakdown to check that there is no hidden reason for the dismissal.
- f. In relationship breakdown cases, because the working relationships will have reached "the point of no return", the requirements of a fair SOSR dismissal procedure may be less demanding than the procedure to be followed in conduct and capability situations. This is discussed more fully at paragraphs 31 - 38 below.

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

14. Before moving to dismiss an employee on SOSR grounds in response to a relationship breakdown, employers must pause to consider certain 'red flag' issues that would raise the stakes considerably in terms of potential compensation available to the employee, and reputational damage to the employer.

Is the relationship breakdown the real reason for the dismissal?

15. The first point to consider is whether the real reason for the dismissal is not, in fact, the relationship breakdown, but another reason which is not potentially fair. In particular, employers need to be concerned about whether the real reason is a prohibited reason, namely a discriminatory reason or an “automatically unfair” reason.¹⁶ For example, is the employee really being dismissed because s/he has a particular protected characteristic or because s/he has rejected a colleague’s sexual advances? Or is the employee really being dismissed because they have committed a “protected act” such as complaining about discrimination, or because they have blown the whistle on malpractice?
16. It is important for employers to consider this question because if the dismissal is found to have been for a prohibited reason it may have the consequences set out below.
 - a. The dismissal will be automatically unfair or discriminatory. Depending on the circumstances, this may attract negative publicity.
 - b. The potential compensation award will be uncapped in discrimination claims and also in whistleblowing and health and safety-related automatically unfair dismissal claims. (It is capped in the usual way where the dismissal is for other automatically unfair reasons.)
 - c. Employees may apply for “interim relief” within seven days of their dismissal where it is claimed that the dismissal was for certain automatically unfair reasons.¹⁷ If successful, an employment tribunal will order the employer to continue employing the employee or, failing that, to continue paying their salary until the final determination of their claim (and such monies are not repayable even where the employee ultimately loses the claim).
17. In deciding whether a dismissal was discriminatory, an employment tribunal must assess the grounds for the treatment in question. Where the dismissal itself is not inherently discriminatory, it can be rendered discriminatory by the conscious or unconscious motivations which led to it. A dismissal on the grounds of a relationship breakdown is not inherently discriminatory, which means the tribunal would need to consider the motivation for the dismissal.
18. When considering motivations, the tribunal will focus on the mental processes of the dismissal decision-maker (or makers) only. It is not necessary to consider the motivations of anyone who has supplied information to, or sought to influence, the decision-maker (or makers).¹⁸ That said, where someone has a very high degree of influence, they may be viewed as a *de facto* joint decision maker, meaning that their

¹⁶ A full list of automatically unfair reasons is set out in the Appendix to this paper.

¹⁷ Namely trade union membership or activities, whistleblowing, or activities as a health and safety representative, working time representative, an employee representative in the context of a collective redundancy or TUPE transfer, or as a pension scheme trustee.

¹⁸ CLFIS (UK) Ltd v Reynolds, [2015] IRLR 562.

motives *would* come under scrutiny.¹⁹ Therefore, a dismissal on the basis of a relationship breakdown only risks being discriminatory where the decision-maker (or one of a number of joint decision-makers) has a discriminatory motive.

19. A very similar approach is taken in automatically unfair dismissal claims. Here, the tribunal will look at the reason for dismissal operating on the mind of the dismissal decision-maker (or makers) only.²⁰ However, the Supreme Court identified what they called a “narrow qualification” to this rule in the case of Royal Mail Group v Jhuti, which is discussed below.²¹

- a. An employee, Ms Jhuti, made several whistleblowing disclosures to her manager, Mr Widmer, during her probationary period. He forced her to retract them and retaliated by bullying her and painting a false picture of inadequate performance. While Ms Jhuti was off sick with stress, Royal Mail began a process to decide whether she should be dismissed for poor performance. Ms Vickers was appointed to chair that process and review the evidence. As Ms Jhuti was too ill to attend a hearing, she made written submissions in the form of some 50 lengthy and incoherent emails. Within them, she alleged that she was going to be “sacked for telling the truth”. Ms Vickers asked Mr Widmer about this allegation. He said that Ms Jhuti had made allegations of malpractice, which she had later accepted were wrong and had withdrawn. He maintained that Ms Jhuti was a poor performer. Ms Vickers accepted this evidence at face value and did not probe the whistleblowing issue any further. She decided to dismiss Ms Jhuti for poor performance.
- b. Ms Jhuti claimed that she had been automatically unfairly dismissed by Royal Mail because she had blown the whistle. She initially lost the claim on the basis that Royal Mail was only responsible for the motivations of the dismissal decision-maker. Here, Ms Vickers had acted in good faith and had genuinely believed that Ms Jhuti’s performance was unacceptable. It did not matter that Mr Widmer had concocted the poor performance story to try to secure a dismissal. These improper motivations did not belong to the dismissal decision-maker, and, in turn, did not belong to Royal Mail. On appeal, the Court of Appeal upheld this decision, agreeing that only the motivations of the dismissal decision-maker could be attributed to the employer.
- c. Ms Jhuti appealed to the Supreme Court. The Supreme Court held that where the real reason for dismissal has been concealed from the dismissal decision-maker, the tribunal’s role would be to “penetrate through the invention rather than to allow it also to infect its determination”. If it is revealed that a person who is senior to the dismissed employee had hidden the real reason for a dismissal behind a false one, and the false reason was accepted by the dismissing officer, then the reason for dismissal will be the real reason not the

¹⁹ The Commissioner of Police of the Metropolis v Denby, [2017] All ER (D) 173.

²⁰ Orr v Milton Keynes Council, [2011] EWCA Civ 62.

²¹ [2019] UKSC 55.

apparent reason. In Jhuti, this meant that the real reason for the dismissal was the whistleblowing and not the alleged poor performance.

20. It is not possible for employers to insulate themselves entirely from the risk of a prohibited reason being identified as the true reason for dismissal. However, there are some practical steps employers can take to help minimise this risk.
- a. Codes of conduct and training should set out the standards expected from managers and should emphasise the importance of honest, ethical and non-discriminatory behaviour in all dealings, and the consequences of failure.
 - b. Decision-making processes should be transparent and those providing information or evidence to a decision maker should be instructed not to stray into the territory of lobbying for a particular outcome. In the event that a dismissing officer is heavily influenced by someone else when making their decision, the safest course would be to regard that person as a joint decision-maker.
 - c. Dismissing (and investigating) officers should receive detailed training on the scope of the role. Such training should underline the importance of looking for, and interrogating, evidence that supports the proposed reason for dismissal, as well as any evidence that supports the employee's position. As the Supreme Court noted in Jhuti, dismissing officers should "*address all rival versions of what prompted the employer to seek to dismiss the employee*".
 - d. Dismissing officers must satisfy themselves that the apparent reason is the real reason, even if this requires obtaining more extensive witness evidence and/or reviewing more documentation than initially planned or desired. This will be of particular greater importance where the employee is too ill to participate in the process and make cogent submissions in their defence.

If the relationship breakdown is the real reason for dismissal, is it "inseparable" from a prohibited reason?

21. Even where an employer is confident that the relationship breakdown is the real reason for dismissal, there remains a risk that this reason is found to be so closely related to a prohibited reason that it is inseparable from it. Where this is the case, the risks outlined at paragraph 16 above will remain. This is a particularly pertinent issue in whistleblowing cases, where whistleblowers often deliver unwanted messages which may, in turn, lead to friction in the workplace.
22. A good example of this was seen in Whalley v Pinewood Veterinary Practice.²² Here, Ms Whalley was a veterinary nurse who blew the whistle about the conduct of a vet who had stood on a dog's neck to restrain it and later sent it home with a limp. Relations between Ms Whalley and the vet were already strained and deteriorated further after this incident. Ms Whalley asked not to work alone with the vet during evening surgeries and he then made a complaint about her and said he could no longer

²² ET Case No. 2407735/15.

work with her. The employer asked Ms Whalley to work at a different site and she refused on the basis that her nursing duties would be reduced. She was dismissed on SOSR grounds, and the substantial reason given was the relationship breakdown. The dismissal was held to be automatically unfair on whistleblowing grounds. The vet's refusal to work with Ms Whalley was a direct result of her having blown the whistle.

23. In Sinclair v Trackwork Ltd, Mr Sinclair was a track maintenance supervisor who was given a mandate to implement a new safety procedure.²³ His colleagues were unhappy with his approach, considering him to be overcautious and overzealous. Mr Sinclair was dismissed on SOSR grounds, and the substantial reason given was that he had created friction and upset by the manner in which he had gone about implementing the new procedure. Mr Sinclair brought a claim alleging that his dismissal was automatically unfair on the basis that it was inseparable from the health and safety activities he performed. The EAT concluded that the manner in which Mr Sinclair had performed the activities could not be separated from the activities themselves and the dismissal was, therefore, automatically unfair. The EAT noted that the purpose of the automatically unfair dismissal protection was to guard against the fact that the carrying out health and safety activities will often be unwelcomed and even resisted. Allowing an employer to distinguish the activities from the upset they caused, and relying on the latter to dismiss the employee, would undermine the protection.
24. However, there are limits to this line of argument. There have been cases where a relationship breakdown has been in close proximity to a prohibited reason, but was, nevertheless, found to be separable from it. The following cases are examples of this.
25. In Martin v Devonshires Solicitors, Ms Martin complained that she had been harassed and victimised and that one of the firm's partners had made discriminatory comments to her.²⁴ Her allegations were investigated and dismissed, and the firm commenced disciplinary proceedings against her for making false allegations. She raised further grievances and brought an employment tribunal claim. The firm received evidence that Ms Martin was suffering from psychotic episodes during which she experienced paranoid delusions. In response to this information, the firm dropped the disciplinary proceedings but later dismissed her on the basis that there had been a breakdown of trust and confidence between the firm and Ms Martin. Ms Martin brought a further claim alleging that her dismissal was an act of victimisation. The EAT examined the reason for Ms Martin's dismissal. It noted that there could be cases where an employer dismissed an employee in response to a protected act, but where it could say that the reason for the dismissal was not the act itself, but a feature of it which was "genuinely separable" from it, such as the manner in which the complaint was made. In such cases, the dismissal would not amount to victimisation. Here, the EAT said that the reasons for the dismissal (i.e. the false allegations, Ms Martin's inability to accept they were false, the fact that both were the result of mental illness and the risk of further unmanageable conduct) were genuinely separable from the making of the complaint itself. Therefore, the dismissal was not an act of victimisation.

²³ [2020] UKEAT 0129/20/0112.

²⁴ [2011] ICR 352.

26. In Panayiotou v Chief Constable of Hampshire Police and anor, Mr Panayiotou, a police officer, made protected disclosures to his employer.²⁵ He was dissatisfied with his employer's response and began to campaign relentlessly for his complaints to be dealt with in the way that he wanted. As a result, his employer had to devote significant time to dealing with Mr Panayiotou's correspondence and complaints. At the same time, Mr Panayiotou was no longer able to work on medical grounds. He was dismissed and he complained that this was because he had blown the whistle. However, the EAT said that Mr Panayiotou's dismissal was due to the combination of his long-term sickness absence and the manner in which he pursued his whistleblowing disclosures. This was genuinely separable from the disclosures themselves and, therefore, the dismissal was not automatically unfair.
27. In Kong v Gulf International Bank (UK) Ltd, Ms Kong was the Head of Financial Audit at Gulf International Bank (UK) Ltd.²⁶ She prepared a draft audit report in which she was critical of the use of a particular legal template governing one of the Bank's new financial products. Ms Kong felt it was unsuitable and did not contain sufficient safeguards. Ms Kong sent this report to Ms Harding, the Bank's Head of Legal, and others. It was accepted that the concerns raised amounted to whistleblowing. Ms Harding was unhappy with the concerns raised by Ms Kong and confronted her about it. She entered Ms Kong's office without an appointment and without knocking. She was agitated and began discussing the legal template issue. In the course of the discussion, Ms Kong questioned Ms Harding's legal knowledge regarding the right type of agreement to be used. Ms Harding became upset and left, slamming the door on her way out. Ms Harding complained to the Head of HR and the CEO, giving the impression that she could not work with Ms Kong anymore and she sought to limit interactions with her from this point onwards. Ms Kong was dismissed on the basis that her behaviour, manner and approach had resulted in colleagues not wanting to work with her. The dismissal letter referred to her questioning of Ms Harding and said that this fell "*well short of the standard of professional behaviour expected*" and was contrary to the principles of treating colleagues with dignity and respect. The letter went on to say that the dismissal was not connected to the whistleblowing concerns she had raised.
28. Ms Kong claimed that she has been automatically unfairly dismissed because she had made whistleblowing disclosures. The Employment Tribunal rejected the claim on the basis that the reasons for Ms Kong's dismissal were genuinely separable from the whistleblowing disclosures. The Court of Appeal agreed. It said that, in principle, there can be a distinction between the whistleblowing disclosure itself and the conduct associated with making the disclosure. The role of the tribunal is to identify the reason or reasons operating on the mind of the decision-maker when deciding to dismiss. Tribunals should be able to identify a feature of the conduct relied upon by the decision-maker that is genuinely separable from the whistleblowing disclosure. Provided it can do this, the principal reason for the dismissal will not be the whistleblowing disclosure. Importantly, the Court said there is no objective standard against which such conduct should be assessed. Nor does the conduct in question

²⁵ [2014] IRLR 500.

²⁶ [2022] EWCA Civ 941.

have to reach a particular standard of unreasonableness in order to be viewed as separable. In this case, the Tribunal had not erred in deciding Ms Kong's conduct was the reason for her dismissal. Therefore, the dismissal was not automatically unfair.

29. As these cases demonstrate, the issue of separability can be finely balanced, and it is hard for employers to predict with certainty whether a particular dismissal will fall on the right side of the line. Where this is a concern, employers would be wise to seek legal advice before confirming any dismissal.

Did the relationship breakdown arise as a result of bullying of the employee by colleagues?

30. One final red flag issue for employers to consider in relationship breakdown cases is whether the breakdown is a consequence of bullying of the employee by colleagues. This issue should be explored during the investigation process. Where an employer fails to spot the issue, or spots it but dismisses the victim anyway, this may lead to a finding that the dismissal is unfair. Although the relationship breakdown would be a potentially fair reason for the dismissal, there is a significant risk that a tribunal would say the employer had not acted reasonably in all the circumstances (i.e. by failing to investigate the matter properly or by sanctioning the victim instead of the perpetrators). Depending on the circumstances, other claims could arise including discrimination and personal injury claims.

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

31. Being satisfied that a relationship breakdown is a potentially fair reason for dismissal (and that there are no aggravating red flag issues) is not the end of the matter. The decision to dismiss must also be reasonable in all the circumstances.
32. Importantly, this includes a consideration of whether the employer has followed a fair procedure prior to dismissal. For certain types of dismissals, the dismissal procedure must meet the minimum standards set out in the statutory Acas Code of Practice on Disciplinary and Grievance Procedures (**Code**). Where the Code applies, and an employer unreasonably fails to follow it, an employment tribunal may uplift relevant compensation by up to 25%. Therefore, it is important for employers to get this right.
33. The Code is expressed to apply to conduct and performance dismissals. It does not apply to redundancy dismissals or to the non-renewal of fixed-term contracts (the latter being one type of SOSR dismissal). Unhelpfully, the Code is silent on whether it applies to ill-health or other types of SOSR dismissals. This has led to some uncertainty about whether an SOSR dismissal process must meet the minimum standards in the Code.
34. There have been cases which have said the substance of the dismissal is what matters when considering whether the Code applies. In Lund v St Edmund's School, Canterbury, the EAT held that the Code applies to SOSR dismissals where the disciplinary procedure has been, or *ought* to have been, invoked (i.e. where there was

some element of culpability).²⁷ In Holmes v Qinetiq Ltd the EAT concluded that the Code would apply to an ill-health situation where there was culpable behaviour at play which deserved to be punished (e.g. a failure to comply with a sickness reporting procedure).²⁸ In Hussain v Jurys Inns Group Ltd, the EAT said, *obiter*, that if the Acas Code is given a purposive construction, it should apply to SOSR dismissals.²⁹

35. However, the EAT took a more robust view in Phoenix House Ltd v Stockman and another, holding that the Code does *not* apply to dismissals for SOSR.³⁰ Here, Ms Stockman believed that she had been mistreated in an internal application process for a new role because her manager disliked her. She interrupted a meeting to confront her line manager about it and ignored requests to leave. Disciplinary proceedings were commenced, after which she went on sick leave and raised a grievance. The grievance was dismissed, and Ms Stockman was given a warning for her misconduct. Ms Stockman appealed both decisions, but, before the appeals were concluded, she said she wished to return to work. She agreed to engage in workplace mediation. Following the mediation session, the employer concluded that there had been an irretrievable breakdown in the working relationship between Ms Stockman and her line manager. Ms Stockman was dismissed on SOSR grounds. The Employment Tribunal held that the dismissal was unfair, and the employer had unreasonably failed to comply with the Code. The EAT agreed that the dismissal was unfair but disagreed that the Code applied. It noted that elements of the Code are capable of being, and should be, applied to certain SOSR dismissals. However, it said that if Parliament had intended employers to be subject to a sanction (i.e. the potential uplift to compensation) for non-compliance with the Code then it should have been explicitly stated to apply to SOSR dismissals.
36. In my view, it would be sensible for employers to observe the Code's requirements where there is an overlap between the relationship breakdown and misconduct. This is because the tribunal may follow the approach in Lund and Holmes, namely, that the Code applies if the employee is in some way culpable for the breakdown. Moreover, if the employer decides to address the overlap head on, and plead alternative reasons for the dismissal, then the dismissal process must meet the minimum procedural requirements for *both* reasons. If it does not, and the tribunal finds that conduct is the real reason for dismissal, then the result may be that the dismissal is held to be procedurally unfair, and any compensation may be subject to an uplift.
37. Even if the Code does not apply to an SOSR dismissal, it must still be procedurally fair. Save in exceptional circumstances, certain core principles of fairness will apply. Although the precise nature of the process will vary from case to case, an employer will ordinarily be expected to follow the steps set out below.
- a. Carry out an investigation. In Perkin (see paragraph 9(c) above) the Court of Appeal highlighted the need for employers to back up allegations regarding relationship breakdowns with facts. Relying on vague complaints and

²⁷ [2013] ICR D26.

²⁸ [2016] IRLR 664.

²⁹ [2016] UKEAT 0283/15/0302.

³⁰ [2019] UKEAT 0284/17/0507.

generalisations will not be good enough. Further, as discussed above, an investigation is also vital to uncover any red flag issues.

- b. Notify the employee of the allegations and warn of the possibility dismissal. This is of particular importance where the employee is not aware that the relationship has broken down and could result in dismissal.
 - c. Hold a meeting where the employee can make representations.
 - d. Consider alternatives to dismissal. Employers will usually be expected to take steps to resolve the relationship breakdown without resorting to dismissal. This could include things like offering workplace mediation, redeploying one of the clashing parties or changing work patterns so that the clashing parties do not have to work together.³¹
 - e. Consider other relevant factors. This includes things like the length of service, disciplinary record, consistency of approach and the impact on the employee of losing their job.
 - f. Notify the employee of the outcome. The employee should be notified of the decision in writing and offered the right of appeal.
 - g. Hold an appeal hearing. An appeal hearing should be held if necessary and the final decision notified to the employee in writing.
38. Exceptionally, a relationship breakdown may be so serious as to make some, or even all, of the usual dismissal process futile.
- a. **Meetings:** in Jefferson (Commercial) LLP v Westgate, Mr Westgate was dismissed after he asserted that he had irretrievably lost confidence in the company, after which the company said that it had lost confidence in him.³² Mr Westgate's employment was terminated after a single meeting, with no further discussion. The Employment Tribunal said it was unfair to dismiss after a single meeting. However, this was overturned on appeal. The EAT held that what amounts to a reasonable or unreasonable procedure will depend on the particular circumstances. The law does not prescribe any particular process or number of meetings that must take place. Where there has been an irreparable breakdown of confidence then a tribunal should consider whether there would be any point to holding further meetings to discuss matters.
 - b. **Warnings:** in Gorfin v Distressed Gentlefolk's Aid Association (see paragraph 9(b) above for a discussion of the facts leading to dismissal), Ms Gorfin was dismissed for SOSR, and the dismissal was held to be fair despite the fact that

³¹ Turner v Vestric Ltd, [1980] ICR 528.

³² [2012] UKEAT 0128/12/1907.

Ms Gorfin had not received any warnings prior to dismissal.³³ On the facts, it found that warnings would have made no difference to Ms Gorfin's approach.

- c. **Alternatives to dismissal:** as above, employers will be expected to consider alternatives to dismissal. However, there are limits to what can be done. For example, in Rowe v West Sussex County Council and anor, Ms Rowe was a teaching assistant who had an affair with a teacher at the same school.³⁴ The relationship ended when Ms Rowe discovered that the teacher also had a close personal relationship with another teaching assistant. Ms Rowe then took extended sick leave. The school made efforts to implement a return-to-work plan which allowed Ms Rowe to have minimal contact with the teacher in question, but she refused to return while he still worked there. The school concluded that there was nothing else that could be done: it had no lawful grounds to dismiss the teacher in question and no power to transfer him to another school. Accordingly, there was no choice but to dismiss Ms Rowe for SOSR, namely the impasse in the working situation which arose out of the breakdown of their relationship.
- d. **Appeals:** in Moore v Phoenix Product Development Ltd (see paragraph 9(f) above for a discussion of the facts leading to dismissal), Mr Moore was dismissed for SOSR, namely the irreparable breakdown in relations, and was not offered a right of appeal.³⁵ The Employment Tribunal held that the dismissal was fair. On appeal, the EAT held that an appeal will usually form part of a fair procedure, but this will not always be the case. Given the size of the company, Mr Moore's seniority, the severity of the breakdown and the fact that Mr Moore was unrepentant, it was open to the Tribunal to conclude that an appeal would have been futile.
- e. **Any process at all:** in Gallacher v Abellio Scotrail Ltd (see paragraph 9(e) above for a discussion of the facts leading to dismissal), the employer decided that there was no benefit to following a dismissal process.³⁶ Accordingly, Ms Gallacher was told she was to be dismissed in her annual appraisal meeting and no right of appeal was offered. The Employment Tribunal concluded that the dismissal was for SOSR, namely the loss of trust and confidence between two senior employees which had become a barrier to delivering the objectives of the business. Accordingly, the employer was not obliged to follow the Code prior to dismissal. Further, the Tribunal did not feel that any form of dismissal process would have served a useful purpose and, in fact, may have worsened the situation. It also concluded that any appeal would have been going through the motions because "*it was not a situation where an alternative decision could be reached*". Despite the lack of dismissal process or appeal, the dismissal was fair. The Scottish EAT agreed. The loss of trust and confidence had been mutual, there was no suggestion that Ms Gallacher had been interested in

³³ *Ibid.*

³⁴ ET Case No. 3101928/11.

³⁵ *Ibid.*

³⁶ *Ibid.*

retrieving the relationship and following a formal process would have been futile and even damaging.

Conclusion: practical tips for achieving a fair SOSR dismissal

39. There is no failsafe pathway to achieving a fair SOSR dismissal. The reason itself is nebulous (reflecting the fact that it is a catch-all potentially fair reason) and the fairness of the dismissal process will turn on the particular facts. Nevertheless, there are some important practical tips that can be drawn out from the discussion above which should help to put employers in the best possible position.

- a. Ensure that the investigating and dismissing officers are trained on the scope of their role.
- b. Investigate the nature of the relationship breakdown. Has it really become intolerable? What is the supporting evidence? Is the employee facing dismissal the junior party (if so, be prepared for a higher degree of scrutiny)?
- c. Investigate whether there are any red flag issues. If there are, take legal advice before going any further.
- d. Assuming no red flags, identify whether there are overlapping reasons for the proposed dismissal? If so, be prepared to plead alternative reasons for dismissal if appropriate (most likely to be conduct).
- e. Ensure a fair process is followed prior to dismissal (unless you are very confident that you could demonstrate that it would be futile). Ensure that viable alternatives to dismissal are fully explored.
- f. Benchmark the dismissal process against the Code principles to insure against a compensation uplift if you lose.
- g. In third party pressure cases, ensure you have clear evidence of the third party's instruction and the potential negative consequences and that you have taken steps to persuade the third party to change its mind.

**Gareth Brahams
BDBF LLP
24 November 2022**

The information in this paper is intended for reference purposes only and does not constitute legal advice. Specific legal advice should be sought before taking any action in connection with the subject matter of this document.

APPENDIX

LIST OF AUTOMATICALLY UNFAIR REASONS FOR DISMISSAL

Reasons for which no qualifying period required

Reason for dismissal	Compensatory award capped?
Unfair dismissal in connection with carrying out jury service.	Yes
Unfair dismissal for reasons connected with pregnancy, childbirth, statutory maternity paternity, adoption, shared parental, parental or parental bereavement leave, time off for attending antenatal and adoption appointments or time off for dependants.	Yes
Unfair dismissal for a health and safety reason.	No
Unfair dismissal of a shop or betting worker for refusing to work on a Sunday.	Yes
Unfair dismissal for a reason connected with rights under the Working Time Regulations 1998.	Yes
Unfair dismissal for performing functions as an occupational pensions trustee.	Yes
Unfair dismissal for performing functions as an employee representative on a TUPE transfer or collective redundancy.	Yes
Unfair dismissal for whistleblowing.	No
Unfair dismissal for asserting a statutory right listed in section 104(4) of the ERA 1996.	Yes
Unfair dismissal related to the national minimum wage	Yes
Unfair dismissal for enforcing rights in relation to working tax credit.	Yes
Unfair dismissal in connection with an application for flexible working.	Yes
Unfair dismissal of a jobholder if the reason for dismissal was the employer's duties under the auto-enrolment regime or its contravention of those duties.	Yes
Unfair dismissal in connection with time off for study and training request rights.	Yes
Unfair dismissal in connection with a prohibited list under the Employment Relations Act 1999 (Blacklists) Regulations 2010 (SI 2010/493).	Yes
Unfair dismissal for refusing to accept an offer to become an employee shareholder.	Yes
Unfair dismissal in connection with European works council activities.	Yes
Unfair dismissal related to status as a part-time worker.	Yes
Unfair dismissal related to status as a fixed-term employee.	Yes
Unfair dismissal in connection with information and consultation agreement activities.	Yes
Unfair dismissal in connection with carrying out functions as an employee representative under the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (SI 2006/349).	Yes
Unfair dismissal in connection with performing functions under the European Cooperative Society (Involvement of Employees) Regulations 2006 (SI 2006/2059).	Yes
Unfair dismissal in connection with performing functions under the European Public Limited-Liability Company (Employee Involvement) (Great Britain) Regulations 2009 (SI 2009/2401).	Yes
Unfair dismissal in connection with exercising prescribed rights as an agency worker.	Yes
Unfair dismissal for a reason relating to the employee's political opinions or affiliation.	Yes
Unfair dismissal in connection with the employee's membership of a reserve force.	Yes

Unfair dismissal in connection with trade union recognition.	Yes
Union membership and activities. Unfair dismissal for trade union membership or non-membership, or participation in trade union activities.	Yes
Unfair dismissal in connection with exercising the right to be accompanied to a disciplinary or grievance hearing.	Yes
Unfair dismissal for taking part in protected industrial action.	Yes
Unfair dismissal in connection with the breach of an exclusivity term in a zero hours contract.	Yes
Unfair dismissal following selection for redundancy on certain of the grounds listed above.	Yes (unless selected because of whistleblowing or a health and safety reason)

Reasons for which 2-year qualifying period is required

Reason for dismissal	Compensatory award capped?
Dismissal because of a spent conviction.	Yes
Dismissal where the sole or principal reason for the dismissal is a TUPE transfer itself, unless it is an ETO reason entailing changes in the workforce.	Yes
Unfair dismissal in connection with exercising prescribed rights in relation to the removal of the Swedish derogation.	Yes