

*gunnercooke*

# Dismissal and Re-engagement

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## Dismissal and Re-engagement

- When can you use dismissal and re-engagement?
- What are the risks of running a dismissal and re-engagement process?
- What constitutes a good procedure?
- What would an employment tribunal take into account?

# SOSR

- 5 Fair Reasons for Dismissal
  - Redundancy
  - Conduct
  - Capability
  - Illegality
  - Some Other Substantial Reason (SOSR)
- SOSR - The “sweep up” provision of the Employment Rights Act 1996.
- Or the last resort.

# Classic SOSR

1. Used in Cases where dismissal is justified, but doesn't fit into one of the other 4 categories.

## Examples

- Personality Dismissal
- Pressure from a customer or other third party
- Differences between employees
- Reputational Risk

# Classic SOSR

2. Used in cases where an employer wishes to make reasonable and justified changes to an employee's contract and the employee refuses to accept those changes.

An employer may decide to give notice to terminate employment on the existing terms, and offer to re-engage on new terms.

The employee can choose to either accept the new terms and employment continues, or refuse, and employment will come to an end.

# Dismissing for SOSR

- The decision to dismiss an employee always needs to be reasonable, both substantively (the reason for dismissal) and procedurally.
- Employer who dismisses carries the burden of proof in showing SOSR is the sole or principle reason for dismissal
- Employer must then show that the decision to dismiss for SOSR was reasonable in all the circumstances, and a fair process was followed.

# Dismissing for SOSR

- ACAS Code of Practice on disciplinary and grievance procedures doesn't apply to an SOSR dismissal.

## HOWEVER

- Following the principles of the ACAS COP will help you to demonstrate reasonableness.

### White v Reflecting Roadstuds Ltd

“..no responsible employer will, on reflection, wish to reach a decision having a material effect on one of his employees whether it is redundancy, mobility, switch of jobs or something similar without **discussion, explanation or consultation**”

# Discuss, Explain, Consult

- SOSR dismissal is a last resort
- Seeking agreement to changes is by far the easiest method – can you win hearts and minds?
- Consult as to why you need the changes to happen, and the implications for the business if they don't happen

# Principles

Where an Employer wants/needs changes to be made to employees' terms and conditions, the assessment of reasonableness entails **a balancing act** in which the tribunal considers the reasonableness of the employer in dismissing the employee, with the reasonableness of the employee in refusing to accept the change or changes.

# Principles

- When dismissing and re-engaging, follow your usual fair process principles.
  - Invite employees to meetings in writing;
  - allow them to be represented by a colleague/trade union rep;
  - provide them with copies of relevant material in advance;
  - ensure they know dismissal could be an outcome;
  - deliver decisions in writing; and
  - give a right of appeal.
- What is an acceptable period of consultation?

# A Fair Process

- Announce changes, and why they are necessary.
- Seek consent, and have willing employees sign and date new terms.
- Have additional meetings with any dissenters to allay concerns.
- If they continue to hold out, invite them to a further meeting in writing, warning them that a result of the meeting could be their dismissal with notice.
- After that meeting, serve notice in writing and make it clear the new terms will remain available until the last day of employment.
- Offer a right of appeal

# What will an ET consider?

- The employer must demonstrate that the changes were not imposed for arbitrary or capricious reasons but were in pursuit of a "sound business reason".
- This does not have to be a reason that the tribunal considers sound, but one which a reasonable employer would consider sound.

Scott and Co v Richardson [2005] All ER (D) 87 - the EAT overturned an employment tribunal's decision that the employer had failed to demonstrate that the change to the shift system gave the employer such a "discernible business advantage" that the employee's refusal to accept the change could not amount to SOSR.

# What will an ET consider?

- There is no need for the employer to prove that a change was crucial to the survival of the business, or to show that the changes did indeed bring about significant improvement.
- However the employer must provide evidence to demonstrate the business reasons for the change, and must show that they were not trivial.

Banerjee v City and East London Area Health Authority [1979] IRLR 147, the employer decided to make certain jobs full-time only. A part-time employee was dismissed. The employer produced no evidence at all as to why there was any benefit to making the job full-time. The EAT found that in that case there could be no finding of SOSR and the dismissal was unfair at the first stage.

# Summary of Factors Commonly Taken into Account

- The employer's motives for introducing the changes.
- Whether the employees were given reasonable warning of the proposed changes.
- Whether the changes and full effect of those changes have been sufficiently and clearly explained to the employees.
- Whether the employer has undertaken an assessment of the impact of the changes on employees and whether it has considered alternatives to any changes.

# Summary of Factors Commonly Taken into Account

- Whether the employer has attempted to obtain the employees' voluntary agreement to any of the changes.
- Whether a reasonable and genuine consultation process with the affected employees has taken place. This will include listening to their reasons for rejecting the changes, responding reasonably to objections and making concessions, where reasonable to do so.
- Whether a majority of the employees affected have accepted the changes.
- Whether any recognised trade union recommended or objected to the changes.

# Practical Tips for Agreeing Change

Check the contract.

- Are the existing terms sufficiently broad to accommodate the employer's proposals?
- Is a specific right for the employer to vary the contract in this way?
- Does the contract give the employer a general power to vary its terms?

However:

- Any ambiguity in the terms of the contract will be construed against the employer.
- Any specific flexibility clauses will be given a restrictive interpretation by the Courts and may be limited by an implied term (for example, an obligation to exercise the clause reasonably).
- General flexibility clauses can usually only be used to make reasonable or minor administrative amendments that are not detrimental to the employee.

# Practical Tips for Agreeing Changes

## Do all changes have to be implemented at one time?

It may be possible to make some changes (such as those relating to remuneration) over time and put in place transitional arrangements. This may help to address employees' concerns; employees often find the timing of a change more disconcerting than the change itself.

## Can employees be offered any incentive to help them accept the change?

Offering an additional benefit in return for a detrimental change is often an effective way of securing agreement. This does not necessarily have to be a financial benefit. Employers should consider whether there are any innovative ways to induce employees to agree to the proposed change.

Time changes with pay rises?

# Practical Tips for Agreeing Changes

## Listen to what employees have to say

Employees are more likely to be inflexible when they do not feel that their concerns are being listened to by their employer, even if the employer is not (ultimately) able to accommodate all of the views being expressed.

## Be flexible and consider alternative proposals

Not only is this fair and reasonable practice, but your employees may actually have some good ideas.

## Risks

Wrongful dismissal

Unfair dismissal

Recovery of economic loss

# Practical Tips for Agreeing Change

Notes!

Paperwork!

# QUESTIONS

# Contact Us

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