

Some other substantial reason for dismissal

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Consider the following scenario

You have an employee who:

- Is perceived as difficult and dogmatic, resistant to change;
- Is disliked by most colleagues - often considered bad mannered (speaking over colleagues at meetings and not speaking to those who have disagreed);
- You have heard the employee is putting off new candidates from applying to join;
- Has sub-optimal work performance (albeit not particularly bad) and who doesn't make any discretionary additional effort;
- Is blocking promising junior employees from obtaining promotion.

You have been asked to exit the employee as quickly as possible.

What “fair” reason for dismissal would you use?

Conduct

Capability

Redundancy

Breach of statutory restriction

Some other substantial reason

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SOSR is not a panacea

- Not following applicable procedure may strengthen discrimination or whistleblowing claims or create unfair dismissal
- Courts are wary of employers using SOSR to conceal the real reason for dismissal and avoid following proper procedures (*Ezsias v North Glamorgan NHS Trust* [2011]).
- Misleading an employee as to the “true” reason for dismissal may allow a constructive (unfair) dismissal claim (*Rawlinson v Brightside Group Ltd* [2017])
- Breach of applicable procedure may allow employee to seek injunction

Examples of potential SOSR reasons

- Personality clashes
- Reputational risk
- Third party pressures
- Expiry of a limited-term contract
- Business reorganisation (outside of statutory definition of redundancy)
- Refusal to accept changes to terms and conditions
- Breakdown in trust and confidence

What procedure should you follow for a SOSR dismissal?

- The nature of SOSR as a catch-all provision inevitably means that these dismissals are varied in nature.
- This variety means that there is no established single “fair” way of dealing with them.
- A reasonable procedure will always depend on what’s fair in the particular circumstances. NB relevance of size of organisation and resources.
- ETs will apply range of reasonable responses test in looking at the procedure and look at knowledge at time of dismissal.

What procedure would you follow for a SOSR dismissal?

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Managing SOSR dismissals

Breakdown in trust and confidence

- Employer must have genuinely held belief.
- What has caused this and is it reparable/ should there be any warnings?
- Pattern of conduct you can point to?
- Often a catch all following another reason arising (virtually every case of dismissal involves breakdown in T&C!) so address underlying reason.

Reputational Risk

- The employer must still follow a fair procedure (giving the employee an opportunity to respond); and
- The employer must show that the risk to reputation is sufficiently serious (not imagined), providing sound business reasons.

Managing SOSR dismissals

Expiry of a limited-term contract

- The expiry of the limited-term contract must be the genuine reason for termination;
- The employee must be informed as early as possible that their contract is only for a particular period (e.g. on appointment); and
- SOSR cannot be used to mask a redundancy situation.

Business reorganisation (outside of statutory definition of redundancy)

- There must be a good business reason;
- A quasi-redundancy process including consultation may be appropriate; and
- Has employee been offered an alternative role and would that be appropriate?

Refusal to accept new terms

- Are the changes necessary for sound business reasons?
- Have new terms been offered as alternative employment?
- Conduct a period of consultation with the relevant employees.

Managing SOSR dismissals

Personality Clashes

- Significance and impact/consequences of personality clash?
- What can be done to remedy e.g. mediation/ warnings?
- Are there alternatives to dismissal, such as redeployment or changing reporting lines?

Third Party Pressure

- How clear is third party pressure?
- What is impact/significance of third party pressure?
- While an employer does not need to establish truth of any 3rd party allegations, what steps would be reasonable to verify?
- What can be done to avoid dismissal/ mitigate consequences (e.g. redeployment)?

A few precautionary steps worth thinking about

- What is fundamental reason and what objective evidence is there for it?
- Generally either a consultation or inquiry of some description will be necessary. Records should be kept of procedure undertaken and evidence gathered.
- What steps can be taken to repair the situation and is it reasonable not to try those (even if doomed to failure)?
- Consider alternatives to dismissal - can the employee be redeployed? Is there a potential redundancy situation?
- Consider true reason for dismissal and whether another process should be adopted.

Back to our scenario

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Thank you

For more information, contact:



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