

SOSR dismissals

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SOSR dismissals

Using real-life examples, when is an SOSR dismissal the option to go for?

What are the dos and don'ts, i.e. if your business restructuring doesn't really constitute a redundancy situation or your client won't work with your employee and wants him or her removed?

What is SOSR?

- S.98(1) Employment Rights Act 1996
- In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show:
 - the reason (or, if more than one, the principal reason) for the dismissal, and
 - that 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

What is SOSR?

- Reason must:
 - Be substantial:
 - Justify dismissal (not some lesser sanction)
 - Justify dismissal of job holder
- Usual Unfair Dismissal Two stage test:
 - Burden on employer to show that SOSR is sole or principal reason for dismissal (s.98(1))
 - Whether (neutrally) decision to dismiss for SOSR was reasonable in all the circumstances (s.98(4))

- Reasonableness and fair procedure
 - Does dismissal fall within the range of reasonable responses?
 - Does the Acas Code apply?
 - Even if not – what would a fair procedure look like (s.98(4))?
- Overlap with other potentially fair reasons
 - Can plead in the alternative
 - May affect which procedure to follow
- Consult, alternatives, invite to meeting, confirm in writing, appeal

Usual SOSR type dismissals

- Business reorganisations
- Refusal to accept changes to terms and conditions
- Protection from competition
- Pressure from third parties
- Absence dismissals
- Reputational risk
- Personality clashes
- Breakdown in trust and confidence

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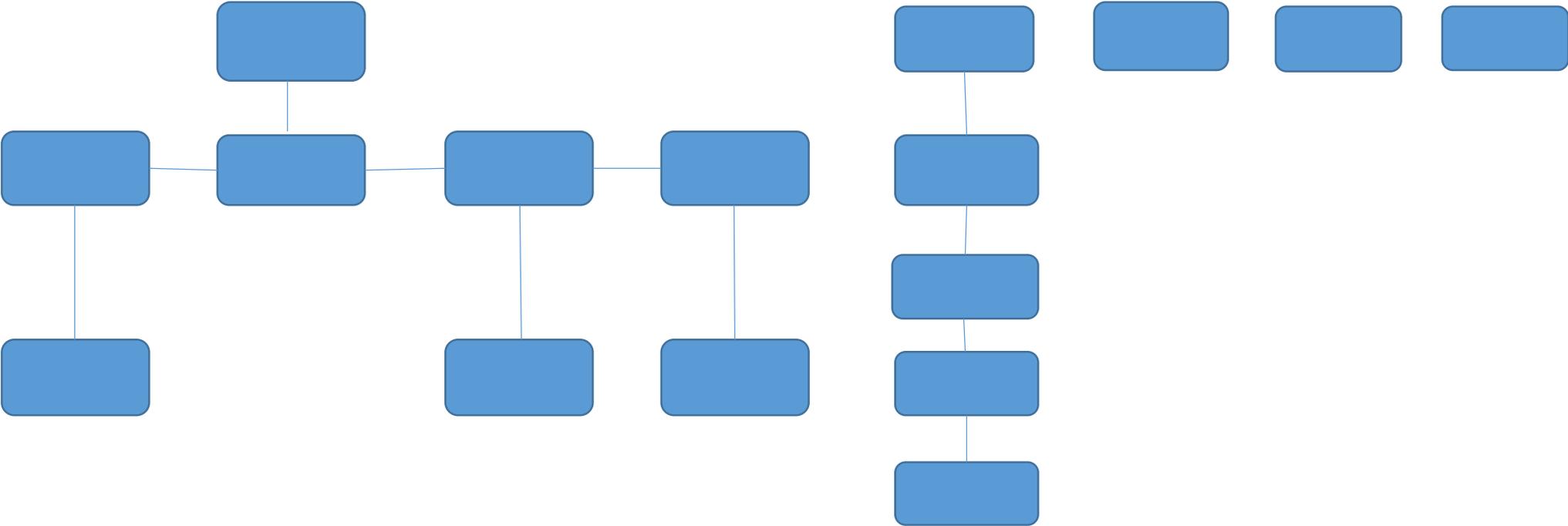
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Business Reorganisations

- Common for businesses to restructure – into divisions, work streams, sector teams, practice areas, client teams.....
- No reduction in employees – but change in role/focus for employees or managers
- It may not be a “redundancy” situation
 - i.e. your requirement for managers has not diminished – you just want them to do different things

Business Reorganisations



Business Reorganisations

- Proceed in accordance with your redundancy procedure
- If 20 or more jobs are not in the new structure – potential collective “redundancy” under s.188 TULR(C)A 1992
- If employees do not want a role in the new structure – probably “redundant” unless unreasonable refusal to accept suitable alternative employment
- Some employers use to try to avoid paying out on enhanced “redundancy” terms
- Plead SOSR in the alternative if defending ET claims

Refusal to accept changes to Terms and Conditions

- If agreement to new Terms and Conditions is not possible – it is possible to dismiss under SOSR and offer re-engagement on new Terms and Conditions
- If 20 or more employees affected – collective “redundancy” under s.188 TULR(C)A 1992
- Consult, seek agreement, if not possible, dismiss on notice and offer re-engagement on new terms
- Fairness determined by numbers accepting/rejecting, business need, whether union agreed, effect on employee

Refusal to accept changes to Terms and Conditions

- Example:
 - Public sector employer – facing budget cuts – spending £6m p.a. on sick pay
 - Equivalent to c.200 redundancies of front line staff
 - Proposed change to T&Cs changing (significantly) sick pay & holiday scheme
 - Union rejected “go ahead, make the redundancies!”
 - Out of 10,000 staff only 7 refused new T&Cs

Protection from Competition

- Usually a potential conflict of interest situation (rather than where you have evidence of wrongdoing – which would be a misconduct issue)
- Evidence of risk to business:
 - Access to confidential information/client relationship
 - Close connection to competitor (or employee of a competitor)
- Continuing to employ the employee would give rise to a real commercial risk (test is risk, not loss)
- Process vital – explaining issues, consulting, considering alternatives

Protection from Competition

- Example:
 - Employee at a transport/service company – husband and father in law also employed there
 - Husband and father in law dismissed, set up in competition and begin to take customers
 - Most/all positions involve access to confidential information valuable to competing business
 - Employee offers to enter into further restrictive covenants/confidentiality agreement
 - Risk to employer huge – small profit margins and loss of one major client would have significant consequences

Pressure from Third Parties

- Two scenarios:
 - Third party control the operation/place of work entirely and refuse to admit/allow employee (for whatever reason)
 - Third party customer do not want the employee on their account (for whatever reason)
- Either way:
 - Test their resolve (within reason) & obtain evidence of instruction
 - Consider alternatives
 - Consider injustice to the employee
 - Consult with the employee

Pressure from Third Parties

- Example:
 - Employee works in a third party's (secure) premises. Premises entirely under the control of the third party
 - Employee does something that annoys the third party
 - Third party refuses security clearance to allow employee to enter their site
 - Employer attempts to persuade them to change their mind, looks (unsuccessfully) at other sites, employee unwilling to work elsewhere

Pressure from Third Parties

- Example:
 - Employee works 90% of their time on a specific customer's account
 - Customer advises that they no longer want that employee on their account at all
 - Look at alternative work (this work would have to be done by someone else – which creates a vacancy...)
 - Employee not prepared to do alternative work (and employer unhappy with transferring “problem” employee...)

Summary

- SOSR is a legitimate tool
- Good (substantial) business reason that justifies dismissal
- Reasonable decision and reasonable process
 - Follow ACAS code and/or employer's procedure (if applicable)
- Consider alternatives
- Consult
- Do what is right for business

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