

# SOME OTHER SUBSTANTIAL REASON (SOSR) FOR DISMISSAL

## Employment Law Roundtable

We hosted an Employment Law roundtable on the use of 'Some Other Substantial Reason for Dismissal' (SOSR) at our offices in London.

The event was co-hosted with Seddons Solicitors and chaired by Helen Crossland, a Partner and Head of Employment Law at Seddons. We were joined by senior human resources practitioners from a range of businesses and sectors. The aim of the session was to share insights and knowledge on SOSR and how it can be used. This whitepaper captures the key points which emerged from the roundtable discussion.

SOSR is a much-underused, potentially fair reason for dismissal, and reflects the commercial and practical realities organisations face, bringing to light the scenarios whereby organisations cannot continue to employ someone.

Specifically our conversation covered:

- The practical uses of SOSR:
  - Business reorganisation
  - Conflict of interest
  - Conduct causing substantial disruption
  - Breakdown in trust and confidence
  - Pressure from third parties
  - Inability to perform a contracted role
  - Reputational risk
- How to implement SOSR (process)
- Other useful considerations

# THE PRACTICAL USES OF SOSR

## The five reasons for fair dismissal

There are five reasons why you can potentially fairly dismiss an employee:

1. Misconduct – immediate dismissal due to gross misconduct or where behaviour has resulted in (a series of) warnings.
2. Capability – this can cover where performance is unsatisfactory, or where the individual is too unwell to work.
3. Redundancy.
4. Breach of statutory restriction or illegality – including where someone who had the right to work in the UK loses that right, for example when a visa expires, making it illegal to continue employing them.

5. Some Other Substantial Reason – this covers any reason falling outside the preceding four, provided it's not frivolous or insignificant, and it needs to be the only or main reason for dismissal.

SOSR is a much less recognised reason for dismissal, and is often overlooked by HR practitioners who don't realise that it covers a multitude of different scenarios. In aid of this, we explore seven scenarios where SOSR can be practically applied as a fair reason for dismissal.

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## Business Reorganisation

Changing terms and conditions of employment can be complex, especially when trying to balance the needs of the business and the rights of employees. Often situations arise whereby a company needs to introduce new terms as a result of business reorganisation, this might affect one person, a group of people, or the organisation as a whole. It may mean altering someone's pay package, bonus arrangements, place of work, or working hours.

The first port of call is to ask someone to consent to the changes; if the employee doesn't agree, ultimately what you can do is dismiss them and re-engage them on revised terms and conditions – in which case their continuous service is unaffected. This doesn't go without its risks, such as losing the employee altogether if they do not accept the new terms, or bring tribunal claims. Although, most of the time, people will sign up to the new terms when the alternative is a termination of their contract.

One example discussed was an employee who was originally hired on a part-time basis and the business now required a full-time resource. The employee was dismissed and upon re-engagement, claimed unfair dismissal at tribunal; however they lost the case on the grounds that the change had been necessary for the business. It's key to note that it's not essential to show that the change is vital to the survival of the business, but simply that there are sound business reasons for it.

Another case where terms might need to change is the introduction of post termination restrictions, which are restrictions written into employment contracts in order to protect the employer if that employee decides to leave. A good example is a rag to riches tale, where an individual rises up the ranks from office worker to CEO; it's empirical that post termination restrictions are suitable for employees at each stage of their career.

Best practice would be to review restrictions when offering an employee a promotion and, if it requires amending, making the promotion conditional on the employee entering into new terms.

Historic anomaly, for example where an individual is paid considerably more than what colleagues in the same role are getting paid, is clear motivation for business reorganisation. In cases of this nature the employer needs to follow the correct process, giving ample notice of termination of contract and a new contract to sign. The motivations for changing the T&Cs will also need to be made clear – and may include economic reasons and to ensure pay parity. The question was raised on the need to offer new terms in this type of scenario and the answer around the table was yes, as it indicates that as an employer you sincerely want to keep the employee, but can't do so on current terms.

## Conflict of Interest

When a situation arises at work where the aims of two different parties are incompatible, such as when employees have an interest in another competing business, they can be dismissed. Likewise, where there's a close relationship or connection to a person who works for a competing business or the business itself, an employee can also be dismissed. A good example to demonstrate this is an accounts manager working for an electrical company, whose husband set up his own electrical business. The wife's employment was terminated on the basis that she could be feeding her

husband commercially sensitive information, including customer details and prices, which would give his new business an advantage. Using conflict of interest for grounds for dismissal is quite rare, you would have to prove that the employee has access to sensitive information, the ability to use the information and that they have a close enough relationship to the external person, for example a similar case was dismissed at tribunal because they didn't consider that a next door neighbour constituted a strong enough relationship.

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## Substantial disruption

One of the more regular case studies under SOSR is substantial disruption which can manifest in various ways. One of the major expressions of this is personality clashes: these quite commonly arise when an office romance goes wrong, for example, where two people refuse to communicate or attend the same meetings. Ultimately, if it can't be sorted out, one of them will have to go – and that will be the one who is less valuable to the business. The reasons as to why one is being chosen over the other should be based on business needs. An example was given of a married director of a company. Upon ending his affair with his colleague, she acted on her threat to tell his wife. This was a classic case for SOSR because it was clear that the working relationship had irrevocably broken down. The secretary was later dismissed.

Along with personality clashes, it's not uncommon to hear about "difficult personalities" in the workplace. These individuals are typically "always on your radar, always making a fuss, or they have a personality which others find difficult." It can also be characterised in someone who is very vocal and explicit about their private life or opinions, which colleagues can find objectionable. When following the dismissal route here, employers need to be able to prove the behaviour was disruptive and inform the individual of the need to change. It's good to note that if there is a discriminatory backdrop, the route of misconduct could be utilised instead.

A final scenario worth mentioning is where employees collectively refuse to work with another employee. If, for example, a manager provokes various employees over a prolonged period of time, this would subsequently encourage them to band together and form an alliance. Most times these alliances result in a collective grievance or the group threatening to leave the organisation if the manager is not dismissed. Helen commented on a case she worked on of this nature, where the employer took the issue and threat of mass walkout so seriously, they removed the manager using SOSR.

The question was raised if it's possible to dismiss an employee on these grounds if they are pregnant. While it was acknowledged that there would be added risk associated with this scenario, if it can be clearly demonstrated that the dismissal had nothing to do with the pregnancy; and moreover that the issue would still persist even after the individual returns from maternity leave, the dismissal would be deemed fair.

When looking at these scenarios, fairness of dismissal will depend on the size of the business and the level of disruption caused. If there are any alternatives to dismissal, such as redeployment or change in teams, these should always be considered first.

## Pressure from third parties

When an individual works with external clients or agencies, there is a likelihood that they might not get along. If the employee is disliked by the third party, for whatever reason, to the extent that they request for that employee to be removed from working with them or from their premises, SOSR can be used as a fair reason for dismissal.

If the employer believes that the client's business will be lost if the individual isn't removed, and can't redeploy them within the business, it can be a fair reason for dismissal, even if the employer disagrees with the client's point of view or considers it is unjust to the employee.

## Breakdown in trust and confidence

In our previous [mental health roundtable](#), the room discussed a case of a teacher who'd shown an 18-rated film to a classroom of 15 year olds. He claimed, successfully, that his poor judgement was the result of stress caused by his known cystic fibrosis. His claims of unfair dismissal for gross misconduct and of disability discrimination were upheld.

In this case, the SOSR route could have been utilised instead. The argument would then have been based on a breakdown of trust and confidence, whereby the school accepted the disability and behaviour resulting from it, but that it could not withstand the disruption and did not have the confidence that the teacher would not have a second egregious lapse of judgement.

This argument leads to the idea of limits on what an employer needs to absorb when someone has a recognised disability. The breakdown of an employer's trust and confidence in an individual can be a reason for fair dismissal using SOSR, even where an employee has a known disability, as long as there are no other practical options, and the thought processes can be explained.

It's worth noting that a breakdown in trust and confidence can go the other way, an employee can feel that the organisation is "out to get them". This can transpire when someone has raised repeated grievances which have been investigated and closed, but they can't accept the findings. Or where an employee is continually raising new complaints and everyone is on eggshells around them waiting for the next one.

It's sometimes the case where the employee starts to dictate unreasonable terms, such as requesting witnesses be present at meetings, recording meetings and cc'ing work emails to a solicitor. In these instances it can be argued that the relationship of trust and confidence has broken down irretrievably and that there is no way to sustain a productive working relationship going forward. Employees who behave in this manner can also be deemed a substantial disruption: where the employer can argue that a disproportionate amount of HR and management time is being used to cover these claims and requests, which is unsustainable for the business.

## Inability to perform a contracted role

When someone is no longer practically able carry out their responsibilities, it's a fair reason for dismissal. Two simple examples are when a job heavily relies on the ability to drive and the employee loses their driving license or if a role is conditional on the completion of a qualification and the exam is failed. As mentioned at the beginning of this whitepaper, illegality is a separate and distinct reason for dismissal, when someone doesn't have the right, or loses the right to work in UK. Employers should be aware of this, the main reason being the substantial penalties levied on organisations that employ illegal workers.

Inability to perform a contracted role also covers instances where an employee can no longer come to work, an example was discussed of an employee being arrested

and remanded in custody for attempted murder - a process was followed to dismiss him.

The conversation led to the question, do employees need to disclose criminal convictions? Failure to disclose a conviction could be a breach of confidence and trust if the employer feels they have been lied to, and it has a bearing on the role. However, spent convictions are an unsafe reason to dismiss; a lot depends on what the conviction was for and when it happened. There may also be a reputational risk, and it could be fair to dismiss someone on those grounds, even if the criminal process is ongoing and they have not been convicted.

## Reputational risk

A common question from the table was around behaviour outside of work, for example views expressed on social media, membership to extreme organisations, unsavoury connections or where an individual has published views on social media incompatible with their continued employment. If there's a danger of reputational risk by association and if such behaviour is in the public domain, it could be a fair reason for SOSR dismissal.

For example, a Finance Director was dismissed because his wife was convicted of financial fraud, and the case was widely covered in the local media. The husband brought forward a case of unfair dismissal, but was unsuccessful.

It was argued that since the wife's conviction was in the same sector and the information surrounding the case had been mentioned by clients, it brought into question the Finance Director's integrity, representing a genuine reputational risk to the organisation if they continued the working partnership. In this example the route of SOSR was the fair route to dismissal; however it's not enough for an employer to simply engage in speculation that an employee's actions might or could damage its reputation. An employer will need to provide evidence that reputational damage has actually been caused (or is likely to be caused).

# THE RECOMMENDED PROCESS

## How to implement SOSR

It's not about implementing or developing a policy for SOSR, but rather to follow the correct process. Due to the very wide-ranging nature of SOSR, developing a policy is not advisable, and so the advice would be to follow a similar procedure to that of disciplinary action, but instead calling it a 'formal process'.

This could consist of various elements such as conducting an investigation if necessary; then inviting the employee to a formal meeting, setting out the allegations just as you would with the disciplinary process and, most importantly, disclosing any evidence. Like a disciplinary procedure, when starting the process and writing the letter to the employee in question, it should include the details of the meeting and that dismissal is being considered under the ground of SOSR. It's always good to remember that because of the nature of SOSR it might need to be explained, as they might not know that it is one of the five reasons for fair dismissal.

The letter should also specifically state what the dismissal is in relation to, such as substantial disruption or a breakdown in trust and confidence. It should also include the potential outcomes of the meeting, including dismissal, if for example assurances aren't received to show the relationship is not untenable.

When the meeting takes place it is important that all evidence is put forward to the individual in support of the allegations against them. They should then be given a chance to comment and make representations. Lastly, the outcome should be stated in writing, including an offer to be accompanied at any formal meetings, and to appeal. Although SOSR is not governed by the ACAS Code, it is recommended that employers adopt a fair process to support the reasonableness of the decision. Usually SOSR dismissals are with notice, only in exceptional cases would it be summary dismissal.

# OTHER USEFUL CONSIDERATIONS

When dealing with dismissals it's not uncommon for things to change, it's possible to start on one process and switch to another. An employee may be invited to a disciplinary meeting, in the meeting new evidence may come to light and at that point a decision can be made to change to a SOSR process.

As with all formal processes it's really important to show that alternatives have been considered: where there's third party pressure, could an employee be put on another client account? Where there's a personality clash, could someone move to a different office or division or work from home; would mediation or management coaching help? If these things can't reasonably be offered, or have failed, it should be listed in the outcome letter as a demonstration of fair treatment and why dismissal is the only viable sanction. However, where trust and confidence have broken down between the employer and employee, there's generally not much of an alternative.

During SOSR or any formal disciplinary process, it's good to be aware that an employee might try and resign before being dismissed, but are there any risks to agreeing that an employee may resign rather than going through the formal dismissal process? This was a question raised at the roundtable, and it was suggested that there may be value in continuing with a dismissal process, if perhaps there's a safeguarding issue or an exposure risk which the employer wants to close down. If there is a CPS issue, the employer might want to make it clear that had the employee not resigned, they would have been dismissed, to head off a future constructive dismissal claim.

Once an employee has been dismissed, do organisations have the obligation to give a reference? Helen explained that there is no obligation to give a reference. However, any reference given should be truthful and accurate. Organisations should be able to state why the person was dismissed in an effort to be truthful, particularly because the employer could in future have grounds to sue for not disclosing something pertinent in a reference. When asked about disclosing details of a disability, this is left up to the individual to disclose, a work around is to ask the employee for their consent, except if for instance the CPS or police are asking.

In summary, it was agreed around the table that if used correctly, SOSR is a really useful catchall reason for dismissal. It reflects commercial and practical realities as to why an organisation can't continue to employ someone, and in Seddon's experience it has a very high rate of success. Moreover, where the reasoning is sound, there's no need to consider a settlement unless that is the employer's choice. SOSR is less-used only because it's less familiar. However, as long as the evidence is there and the process is followed, there's no greater risk using this process over any other.

If you would like to register your interest in our next Employment Law Roundtable event, or to provide any feedback, please email: [marketing@markssattin.com](mailto:marketing@markssattin.com)

