

Dismissals for “some other substantial reason”



► Inside

What is SOSR?

The test for a fair dismissal

Overlap with other reasons

Examples of SOSR

Fairness and reasonableness



Introduction

“Some other substantial reason” (“SOSR”) is one of the potentially fair reasons for dismissing an employee. It can cover a wide variety of situations and can be a very useful tool for employers in unusual situations, although there are some limits on when it can be used.

This Inbrief looks at the various circumstances in which SOSR might be used as a fair reason to justify a dismissal.

What is SOSR?

The Employment Rights Act 1996 (“ERA”) gives five potentially fair reasons justifying a dismissal:

- conduct
- capability
- redundancy
- breach of a statutory restriction
- SOSR - “some other substantial reason of a kind as to justify dismissal”.

SOSR is something of a catch-all, and covers dismissals that are not within the scope of the other four potentially fair reasons.

There is no further definition of SOSR in the ERA, and no official guidance has been issued as to what exactly it can cover. It has been established that the reason must be substantial, (i.e. not wholly frivolous or insignificant). As long as this standard is met, the question of whether or not the reason is sufficient to show a fair dismissal will depend on the facts of each case.

The test for a fair dismissal

Where SOSR is used to establish a fair dismissal, the employer must show that it has a genuine reason for the dismissal which could justify the dismissal of an employee holding the job in question. The employer must also show that the actual decision to dismiss for this reason was reasonable in all the circumstances.

The question of reasonableness includes considering whether the employer followed a fair procedure. There is no set procedure for a SOSR dismissal and it is generally thought that the Acas Code of Practice on Disciplinary and Grievance Procedures would not apply. (It is, however, advisable to follow the Code in any event if the dismissal also involves disciplinary or poor performance issues.)

A fair procedure for a SOSR dismissal may vary depending on the underlying reason, but this is still a very important part of the reasonableness test. As a minimum, some form of discussion or consultation with the employee will normally be expected before dismissal is confirmed.

Overlap with other reasons

Employers should be careful to label the reason

for dismissal correctly and ensure that the appropriate procedure is followed throughout the dismissal process. It may be possible to use SOSR in situations that seem to overlap with other possible reasons, such as misconduct or redundancy.

For example, the dismissal of an employee responsible for the breakdown of working relationships may in some cases be classed as SOSR rather than misconduct, meaning that the employer is not obliged to follow its disciplinary procedure. Caution should always be exercised, however, when labelling reasons for dismissal. Employment Tribunals will not look kindly upon employers using SOSR to conceal the real reason for dismissal and avoid following proper procedures.

Examples of SOSR

There are no express limits on what may be a fair SOSR and many different kinds of reasons potentially qualify. Over time, the courts and tribunals have developed the law in relation to different categories of reason, including the procedure that an employer is expected to follow before dismissing. Some of the most common examples are set out below.

Business reorganisation

Where a restructure does not give rise to an actual redundancy situation, SOSR may provide an alternative fair reason for dismissal. For example, this can occur where jobs are being reorganised but there is no actual reduction in the numbers of employees or types of work to be done.

For there to be a valid SOSR there must be a genuine and substantial business reason for the change. Although statutory redundancy pay will not be payable, the employer must still follow a fair procedure. It would be advisable to consult with the affected employees about the proposals before making a final decision and offer available vacancies to any employees who are selected for dismissal.

Refusal to accept new terms

Dismissal may be justified where an employer needs to change contractual terms and conditions of employment and an employee refuses to agree to the change. Dismissal for refusing to agree to unilateral contractual

changes may fall within SOSR in appropriate circumstances.

The employer must be able to show that the changes are necessary for sound business reasons and follow a fair procedure which includes consulting with the affected employees and considering their reasons for rejecting the changes. It will also be necessary to consult collectively where 20 or more dismissals are proposed. For more information on changing terms of employment, please see our Inbrief *Reducing business costs – alternatives to redundancy*.

Conflict of interest

Sometimes a commercial conflict of interest can arise during employment, such as where an employee has a close relationship with someone who works for a competitor. To establish SOSR for dismissal in these circumstances, the employer needs to demonstrate that continuing to employ the employee would give rise to a real commercial risk due to a conflict of interest.

The employer will need to consider the amount of confidential information the employee has access to and the level of the relationship in question, before taking action. For example, a junior employee may have limited access to confidential information, while a senior employee who is married to another senior employee at a key competitor would pose a much more significant risk.

Personality clashes

Where personality clashes are causing substantial disruption to the business and all reasonable steps have been taken to try and resolve the issue, dismissal can amount to SOSR. The fairness of dismissal in these circumstances will depend on the size of the business and the level of disruption caused by the clash. If there are any alternatives to dismissal, such as redeployment or changing reporting lines, these should always be considered first.

Third party pressure to dismiss

This can occur where a third party, such as a client, is unwilling to continue working with an employee. SOSR may be established where a third party whose continued business is important to the employer threatens to stop working with it unless an employee is dismissed.

It is most common for this situation to arise where there has been misconduct or poor performance by an employee. However, the reason behind the third party's request is not of major importance - the key issue is the seriousness of the threat to the employer's business. The employer must, however, consider the injustice to the employee and try to limit this as much as possible. This might include trying to persuade the third party to change its mind and looking at possibilities for redeployment rather than dismissal.

Reputational risk

It can be a valid SOSR for an employer to dismiss an employee on the basis of reputational risk. For example, this can occur where an employee has been accused of a criminal offence and the employer is concerned about the effect on its reputation of continuing to employ him or her. The key question is whether it is reasonable in all the circumstances to dismiss for this reason. If the risk to reputation is genuinely serious, then dismissal may be justified. The employer must still follow a fair procedure, however, by giving the employee a chance to respond before making a final decision.

Expiry of a fixed-term contract

The termination of a fixed-term contract counts as a dismissal. Where such a contract comes to an end, the employer can often rely on redundancy as the reason for dismissal. In some cases SOSR may be more appropriate because the definition of a redundancy does not apply—for example, where the contract was used to cover the absence of a permanent employee so there is no reduction in the need for employees to carry out the work. The expiry of the contract must be the genuine reason for the dismissal and the employee must have been informed that the employment was only for a particular period.

Replacement employees

The ERA contains some specific provisions about replacement employees. Where an employee is dismissed after having been employed as cover for another employee who has now returned to work, the termination will automatically be potentially fair as SOSR. This applies to cover for maternity, adoption or shared parental

leave, and cover due to the suspension of an employee on medical or maternity grounds.

The employee needs to have been given clear information in writing about the fact that the employment will be terminated when the other employee returns to work. The employer must also follow a fair procedure, including considering whether there are any available alternative vacancies.

Breakdown in trust and confidence

A simple breakdown in trust and confidence between employer and employee can be SOSR for dismissal. This may overlap with some of the other reasons discussed above. Employers should, however, be careful about simply asserting that trust and confidence has been broken and using SOSR to dismiss a troublesome employee. The true reason may be misconduct or poor performance and trust and confidence should not be used to avoid following proper procedures for these types of dismissal.

Fairness and reasonableness

The nature of SOSR as a catch-all provision inevitably means that the dismissals which are caught under it are varied in nature. This variety means that there are no established ways of dealing with them and what is fair will always depend on the particular circumstances.

It is important to bear in mind the overriding ERA requirements for a fair dismissal. A decision to dismiss must be reasonable in all the circumstances, which is judged "in accordance with equity and the substantial merits of the case". Even if the reason for dismissal apparently falls under an established category of SOSR, these fairness requirements must still be met.

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