

Dismissing an employee

When a business wants to make a change to the terms and conditions of its employees, it often goes through a process of consultation, seeking agreement to the changes. If, after the consultation period, all or some of the employees do not agree to the proposed changes, the business may be able to dismiss these employees fairly for some other substantial reason (SOSR), offering employment on new terms and conditions.

In a recent case, a company asked its employees to take a 5% pay cut after a fall in the company's sales and profits. Following a company-wide consultation, only two employees refused to agree to the change. The company terminated their employment and offered new terms and conditions on the reduced pay. The Employment Appeal Tribunal held that the dismissal was fair for SOSR. The case confirms that employers do not have to show that their business reason for making a change was special or extraordinary. Where an overwhelming majority of the workforce accept the change, individual employees may struggle to show that their dismissal for refusing to accept the change was unfair.

The following checklist highlights some common examples of SOSR.

There are five potentially fair reasons for dismissing an employee:

- Conduct
- Capability
- Redundancy
- Breach of a statutory restriction
- Some other substantial reason (SOSR).

Almost any reason that does not fall within the other four potentially fair reasons for dismissal may amount to SOSR, if it is not an insignificant or frivolous reason that justifies the dismissal of an employee carrying out a particular role. This checklist highlights some of the more common examples of SOSR.

Business re-organisation

- If you are restructuring your business, but are not making any redundancies, SOSR may be relied on as a potentially fair reason for dismissal.
- Business re-organisations often include making changes to employees' terms and conditions. Dismissing an employee for their refusal to accept the proposed changes (either within the context of a business re-organisation or not) can also amount to SOSR.

Refusal to accept changes to terms and conditions

- An employment contract can only be varied in accordance with its terms or with the parties' agreement. If an employee refuses to accept a change to their terms and conditions and your business dismisses them for that reason, the reason may constitute SOSR.
- However, these cases are unlikely to be straightforward because an employee is contractually entitled to resist unilateral changes to their terms. In some instances, where the change amounts to a breach of contract, the employee may be able to resign and claim unfair constructive dismissal.
- For a unilateral change to amount to SOSR, your business must be able to demonstrate that the changes

Ware & Kay LLP in YORK



Address
Sentinel House
Peasholme Green
York, YO1 7PP



Tel
01904 716 000
Fax
01904 716 100

were not imposed arbitrarily, but were for a "sound business reason". There is no need for you to prove that the re-organisation was crucial to the survival of the business.

- However, you must provide evidence to demonstrate the business reasons for the change and show that they were not trivial.
- Where the overwhelming majority of employees accept the change, individual employees may struggle to show that their dismissal for refusing to accept the change was unfair.

Conflicts of interest

- Your business may be able to dismiss an employee for SOSR if they are in a situation that creates a potential conflict with your business' interests.
- You must be able to provide evidence demonstrating that the employee posed a risk to your business interests. Your business will need to show that:
 - ◇ the employee had access to commercial information;
 - ◇ the employee had close connections with a competitor (or an employee of a competitor); and
 - ◇ you feared the employee may leak confidential information.
- To rely on SOSR, your business must be able to show that continuing to employ the employee would create a real commercial risk.

Personality clashes

Personality clashes or irreconcilable differences between colleagues can amount to SOSR. However, to do so, the conflict would have to be causing substantial disruption to your business. An employment tribunal will expect you to take reasonable steps to solve the problem without resorting to dismissal, for example:

- Re-deploying one of the workers.
- Changing work patterns.
- Attempting to mediate.

Pressure from third parties

- Where a third party (for example, a customer or supplier) requires an employee's dismissal, the dismissal can be regarded as fair for SOSR.
- Your business should take into consideration the:
 - ◇ importance of the third party's continued business with your own business; and
 - ◇ seriousness of the third party's threat to leave.
- For example, if a major client is adamant that it will never contract with your business again unless you dismiss an employee, this is more likely to be regarded as fair than where a minor client simply requests removal of an employee, but does not threaten cessation of business.

Breakdown in trust and confidence

Businesses sometimes maintain that they must dismiss an employee because of a breakdown in trust and confidence. In some cases, SOSR can be relied on as a potentially fair reason for dismissal.

For further advice on employment issues please contact a member of our Employment Team.

Ware & Kay LLP

good on paper, even better in person

Ware & Kay LLP in WETHERBY



Address
The Aire Suite
Brunswick Court
Victoria Street
Wetherby, LS22 6RE



Tel
01937 583 210
Fax
01937 587 556