



Any Excuse: A Guide to SOSR Dismissals

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The Problem

- Some Other Substantial Reason (“SOSR”) is often pleaded in the alternative as a fair reason for dismissal, but with little in the way of additional argument or evidence. In the vast majority of cases this simply doesn’t work.
- SOSR is a distinct reason for dismissal with numerous stands of separate case law. To be properly relied upon there needs to be a clear basis for it and a case needs to be prepared accordingly.



The Law

- Employment Rights Act 1996 section 98 (1)(b);

“In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show...

... that it 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 that the employee held.”



Reorganisation

- Two broad situations;
 - i) Where reorganisation results in dismissal due to there being no role for the employee
 - ii) Where reorganisation results in a new contract being offered to the employee, which is rejected
- The first is often pleaded as an alternative to redundancy, but is substantively different. It may be appropriate to plead it in the alternative where on the facts it is unclear whether there has been a reduction in the need for employees to carry out work of a particular kind.



Reorganisation – No Role

- In practice the Tribunal deals with this in a very similar way to redundancy dismissals. Broadly speaking, a reasonable process must be followed.
- As with redundancy, the employee must be fairly considered for any new job created in the organisation (*Oakley v Labour Party* [1988] ICR 403)
- Worth noting that the requirement for reasonableness, as with other SOSR dismissals, is rooted in s.98(4) ERA 1996.



Reorganisation – Rejected contract

- Most case law on reorganisations deals with situations where the employee has rejected a new contract
- Richmond Precision Engineering v Pearce [1985] IRLR 179
 - The ET found that the test was whether R was acting reasonably in deciding that the benefits to the business of the reorganisation outweighed the perceived disadvantage to the employees (as per Chubb v Harper).
 - The EAT found that that was the wrong test. The correct test is whether R acted reasonably in treating the reorganisation as a sufficient reason for dismissal, which is to be determined in accordance with the principles of equity and the substantial merits of the case.



Reorganisation – Rejected Contract (2/3)

- The broader balancing test of what was “fair” was approved in *Catamaran Cruisers v Williams* [1994] IRLR 386
- Shortly thereafter section 98(4) of the ERA 1996 came into force, which states as follows;

Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether a dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.”



Reorganisation – Rejected Contract (3/3)

- Garside and Laycock Ltd v Booth [2011] IRLR 735
 - There is no principle of law that the survival of the business must depend upon the adoption of the terms.
 - Nor is it correct to assess the reasonableness of the dismissal based on whether or not it was reasonable for the employee to reject the terms.
- The test is therefore now a two stage test;
 - i) Can the reason justify dismissal?
 - ii) If so, a balancing exercise is undertaken between the needs of the employer and the detriment to the employee. This exercise requires a focus on the words “*in accordance with equity*”, as well as careful scrutiny of the procedure followed (as per *Garside*).



Expiry of Fixed Term Contract

- North Yorkshire CC v Fay [1986] ICR 133
 - This can be a fair reason for dismissal when it is shown that the contract was adopted for a genuine purpose, the fact was known to the employee, and it is also shown that the specific purpose for which the contract was adopted has ceased to be applicable.
- BUT note the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, which states that a fixed term employee cannot be treated less favourably than a comparative permanent employee (Reg 3(1)) including in relation to training (Reg 3(2)(b)) and securing permanent employment (Reg 3(2)(c)), though a defence exists of objective justification (Reg 4).



Mobility Clauses (1/3)

- A redundancy situation can exist not only where the requirement for work diminishes, but also where the requirement for work to be undertaken in a particular place diminishes.
- An employer cannot claim that an employee is not redundant due to the existence of a mobility clause, because an employee's place of work is where they actually work and not where they might be asked to work. The employer has to actually use the mobility clause to move the employee to attempt to avoid a redundancy situation.



Mobility Clauses (2/3)

- United Bank v Akhtar [1989] IRLR 507 confirmed that there are three implied terms in mobility clauses;
 - The employer should give reasonable notice of the move.
 - The employer would not exercise its discretion to provide relocation expenses in a way that would make it impossible for C to meet his obligations
 - The employer would not act in such a way so as to damage the relationship of trust and confidence between employer and employee.
- EAT also confirmed that implied terms do not override express terms; they are there to ensure that an employer acts reasonably in the way that it seeks to use express terms.



Mobility Clauses (3/3)

- In practice cases involving mobility clauses are often constructive dismissal claims, where an employer is claiming that there was no breach, or that the dismissal was due to SOSR.
- Employers need to ensure that they act in accordance with the implied terms, but should also be aware that courts/tribunals will interpret mobility clauses very strictly. Employers should therefore also ensure that the wording of mobility clauses is clear.



Third Party Pressure

- Scott Packing & Warehousing Co Ltd v Paterson [1978] IRLR 166
- Henderson v Connect South Tyneside EAT/0209/09
 - Client is under no obligation to behave fairly towards an employee. Client acting unfairly does not render the dismissal unfair
 - Employer must do everything it reasonably can to avoid or mitigate the injustice, including trying to convince the client to change its mind, and to find other work
 - Unjustness does not equate to unreasonableness



Third Party Pressure (2/2)

- Martin v JFX Express [2004]

In some situations reasonableness will demand that an employer challenges the client's decision at a higher level of management.

- Bancroft v Interserve UKEAT/0329/12/KN

Employer may act unreasonably if it does not intervene at an early stage to resolve a problem between an employee and a third party.



Other Examples

- Protection of a business interest (*RS Components v Irwin* [1974] 1 All ER 41)
- C being sent to prison (*Kingston v British Railways Board* [1984] ICR 781)
- Employee's personality (*Perkin v St George's Healthcare NHS Trust* [2005] EWCA Civ 1174, see also *Ezsias v North Glamorgan NHS Trust* [2011] IRLR 550)
- Dismissal of an employee brought in as maternity cover (s.106(2) ERA 1996)



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