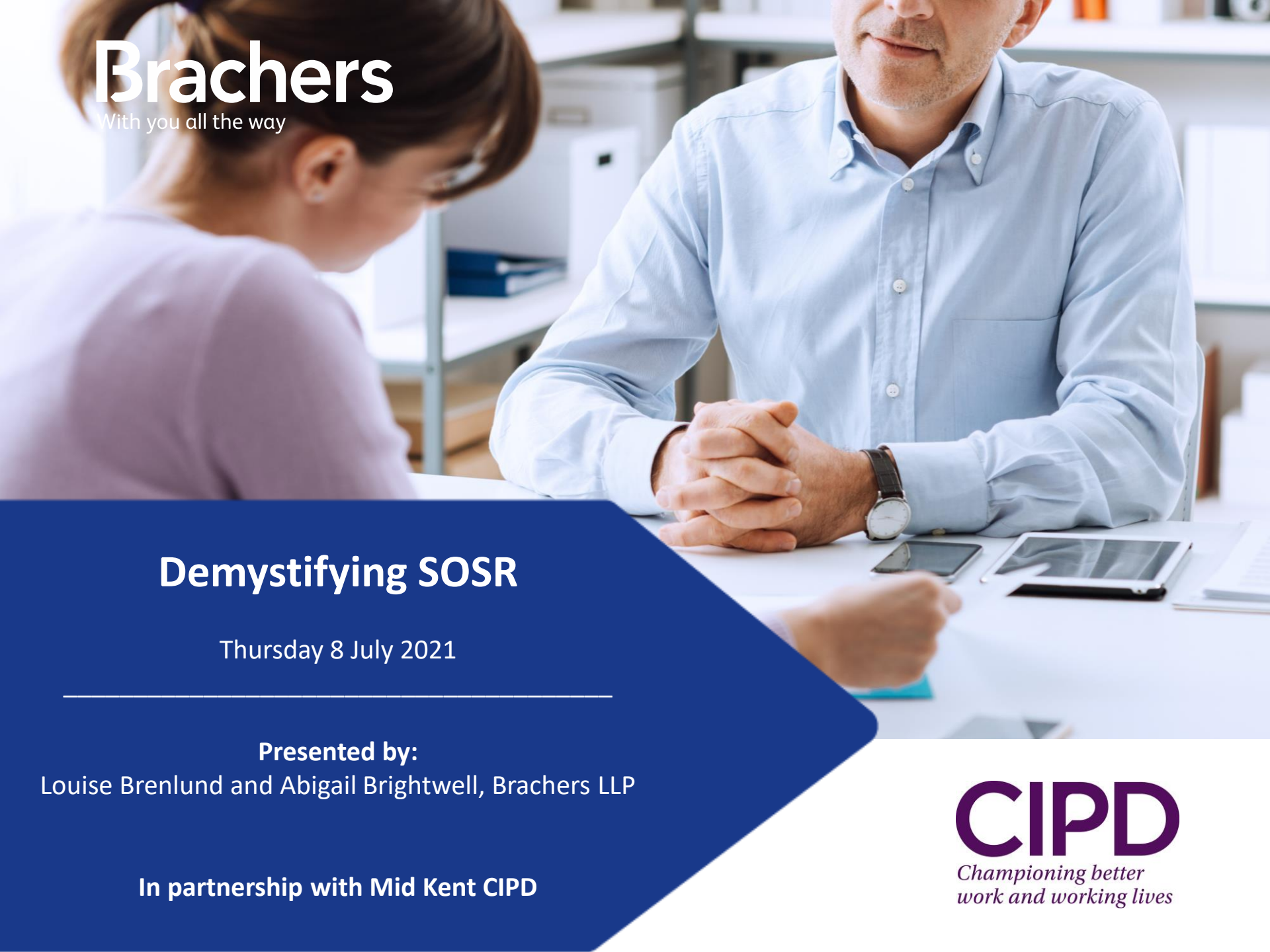


A man and a woman are sitting at a desk in an office. The man, wearing a light blue button-down shirt, has his hands clasped and is looking towards the woman. The woman, wearing a light purple top, is looking down at something on the desk. There are some papers and a smartphone on the desk. The background is slightly blurred, showing office shelves.

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Demystifying SOSR

Thursday 8 July 2021

Presented by:

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In partnership with Mid Kent CIPD

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*Championing better
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Today's presenters



Louise Brenlund | Senior Associate - Employment, Brachers LLP

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Louise joined Brachers in 2010. She has worked with specialist sectors including agriculture, construction, manufacturing, education and healthcare. She advises on all aspects of employment law, mainly acting for employers but also taking on complex, high-value employee claims work.

Louise is an experienced speaker and regularly provides external training.



Abigail Brightwell | Associate - Employment, Brachers LLP

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Abigail joined Brachers as a trainee in 2009 and qualified into the Employment team in September 2011. She has represented several NHS Trusts in cases covering unfair dismissal (including constructive dismissal), unlawful deduction from wages, discrimination and whistleblowing.

Abigail advises on a broad range of day-to-day workplace issues, both contentious and non-contentious, and is regularly called upon to give advice on settlement agreements.

We will look at:

- 01** When a fair reason for dismissal might be SOSR
- 02** Guidance on process
- 03** Factors when considering SOSR
- 04** Legal risks and pitfalls
- 05** Practical relevance and real-life examples

Some other substantial reason

The law

- S.98 Employment Rights Act 1996
- Conduct, capability, redundancy, breach of a statutory restriction and “some other substantial reason of a kind as to justify the dismissal” (SOSR)
- No statutory definition or statutory guidance
- Reason must be **substantial** and must justify the **dismissal** of an employee **holding the job in question**

Some other substantial reason

- “Catch all” provision
- Two-stage test for fair dismissal
 - (i) Burden of proof on employer to show that SOSR is the sole or principal reason for the dismissal
 - (ii) Was the decision to dismiss for SOSR reasonable in all the circumstances?
- Did the employer follow a fair procedure?

Process – Background

- No statutory guidance
- SOSR imposed by statute
- The overriding ERA requirements for a fair dismissal are that the dismissal must be reasonable in all the circumstances, which is judged *“in accordance with equity and the substantial merits of the case”*
- Does the Acas Code apply?

Process – What is a fair procedure?

Follow a reasonable and fair procedure. This is likely to include:

- Fair and proper investigation
 - Warn, meet and consult
 - Right to be accompanied
 - Robust evidence
 - Consider alternatives
- Confirm dismissal in writing
- Give the right to appeal

Considerations – Is a formal process always necessary?

- It will be a rare case where no process is appropriate.
- Example: *Gallacher –v- Abellio Scotrail* (UKEATS/0027/19)
 - Irretrievable breakdown of relationship
 - Nothing useful to be gained from holding formal meetings

Considerations – Example

- A breakdown in trust and confidence

What to consider?

- Look at the relationship and current position
- Consider the employee's state of mind and future intentions judged against the background
- Invite the employee to demonstrate how they could fit back into the business without disruption

Legal risks and pitfalls

- SOSR is a legitimate tool that justifies dismissal- don't be afraid to use it
- Ensure a reasonable decision and reasonable process if followed
- Was your decision within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted?

Legal risks and pitfalls

- What 'circumstances' might be considered?
- Failing to consider alternatives
- Dismissing for 'unsubstantial' reasons

Practical relevance

- Business restructuring
- Refusal to accept changes to T&Cs
- Reputational risk
- Breakdown in trust and confidence

Practical relevance

- Protection from competition
- Personality clashes
- Pressure from third parties
- Expiry of limited-term contract
- Compulsory retirement

Real-life examples

- Business reorganisation
- Does the employer have a “sound, good business reason”?
- *Scott and Co v Richardson EAT 0074/04*
- *Jackson v Berkley Catering Ltd ET 2302843/18*
- *Garside and Laycock Ltd v Booth 2011 IRLR 735*

Real-life examples

- Protecting employer's Interests
- *Simmons v SD Graphics Ltd*
EAT 548/79
- *Skyrail Oceanic Ltd v Coleman*
1980 ICR 596
- *Willow Oak Developments Ltd*
t/a Windsor Recruitment v
Silverwood and ors 2006 ICR
1552

Real-life examples

- Third party pressure
- *Edwards v Curtis t/a Arkive Computing EAR 845/95*
- *Davenport v Taptonholme for Elderly People EAT 559/98*
- Subject to reasonableness
- Employer must consider injustice to the employee
- *Petrofac Offshore Management v Olley UKEAT/0031/05*

Real-life examples

- Breakdown of working relationships
- *Ezsias v North Glamorgan NHS Trust* 2011 IRLR 550
- Conduct or SOSR?
- *SA Brain and Co Ltd v Philippart* EAT 0571/06
- Fair process
- *Gallacher v Abellio Scotrail Ltd* EATS 0027/19

Real-life examples

Expiry of limited-term contracts

- Expiry not itself a potentially fair reason for dismissal
- *Rochdale Metropolitan Borough Council v Jentas EAT 494/01*
- *Nayee v Lancashire County Council 2017 (ET)*

Real-life examples

- Miscellaneous reasons
- Reviewing pay structures to ensure equal pay compliance
- Imprisonment of employee
- Employed couples
- Erroneous belief that employee has resigned
- Dismissal of directors following takeover
- Dismissal provided for by contract



Any Questions?

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About Brachers' Employment team

Our [Employment and HR team](#) take pride in delivering employment law and HR services that are tailored to your needs. We are dedicated to listening and learning about your business to understanding the challenges you face, your ambitions, and how to retain, your key asset, your people.

We are one the largest employment and HR teams in the South East, working alongside businesses with 60,000 employees in the region.

We appreciate that business is about taking managed risks. Our commitment to you is that we will not sit on the fence but will make recommendations using the benefit of our judgment and experience.

Book a free online consultation

If you would like more information on how we can support you with the issues covered in this webinar, [book a 30-minute online appointment](#) with a lawyer from our Employment team for an initial discussion on your needs and to find out how we can help.

Connect with us on LinkedIn

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