



Test of Justification

The Amendment Act justification provisions provide that:

- the test for justification in dismissal and disadvantage claims is now what a fair and reasonable employer **could** have done in all the circumstances
- in applying this test the Authority/Court must consider the following factors:
 - whether there was sufficient investigation having regard to the employer's resources before action taken by employer
 - whether concerns were raised before action taken by employer
 - whether the employee had a reasonable opportunity to respond before action taken by employer
 - whether genuine consideration of explanation before action taken by the employer
 - any other appropriate factor
- dismissal or disadvantage may not be found unjustified solely because of defects in process, where such defects are "minor" and "did not result in the employee being treated unfairly"

Comment

When will an employer action be justified?

The main change to the justification test is the substitution of the word "could" for "would". Seldom has such a small change generated such heat and been responsible for so much 'spilt ink' in employment law circles. What does it mean?

Generally it is seen as allowing a more subjective assessment by employers of the 'seriousness' of any deemed misconduct. Employer advocates will argue that although a dismissal or warning may appear harsh in any given circumstance it is still capable of being viewed as fair, and that it is not for the Authority/Court to substitute its view for that of the employer as long as the process has been sufficiently robust.

However, these are arguments only and should **not** be taken as grounds for accepting an employer's actions. If a dismissal or disadvantage appears unjustified, Organisers should continue to raise and proceed matters in the usual way.

What of the factors to be considered in applying the justification test?



Some have seen the listing of such factors as an attempt to 'codify' the rules of procedural fairness.

Litigation will be required to assess the practical ramifications of the listed factors given that they do not necessarily reflect current standards (e.g. does "sufficient investigation" equate with a "full and fair investigation"?).

Is there any real change due to the provisions concerning 'minor procedural defects'?

In practice it would in any event have been unusual for the Authority/Court to find an employer action unjustified **solely** because of minor defects which did not result in an employee being treated unfairly. When and if this did occur the Authority/Court often significantly reduce any remedies that would otherwise have been awarded, on the basis of contribution by the employee (sometimes by up to 100%).

So, effectively there may be little practical change in terms of this particular aspect of the amendment.