

B.1 Giving a reason for dismissal

Once employees have proved that they were dismissed, the burden shifts to the employer to show the reason, or, if there was more than one, the principal reason, for the dismissal and that it falls within one of the following categories:¹

- it relates to the capacity or qualifications of the employee for performing work of the kind which he or she was employed to do
- it relates to the conduct of the employee
- the employee was redundant
- the employee could not continue to work in the position held without contravention, either on the employee's part or that of the employer, of a duty or restriction imposed by or under a statute
- there was some other substantial reason of such a kind as to justify the dismissal of an employee holding the position which the employee held.

Several points must be made at this stage:

- Where no reason is given by the employer, a dismissal will be unfair simply because the statutory burden has not been discharged. Equally, if a reason is engineered in order to effect dismissal because the real reason would not be acceptable, the employer will fail because the underlying principal reason is not within section 98(1) or (2) ERA 1996.²
- The fact that an employer has inaccurately described the reason for dismissal is not necessarily fatal, for it is the tribunal's task to discover what reason actually motivated the employer at the time of dismissal.³ That the correct approach is the subjective one has been confirmed by the Court of Appeal: 'A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which causes him to dismiss the employee.'⁴ Subsequently, the Court of Appeal has been prepared to attribute a reason for dismissal even where the employers had argued throughout the case that they had not dismissed, but the employee had resigned.⁵

The reason for dismissal must have existed and been known to the employer at the time of dismissal, which makes it impossible, for example, to rely on subsequently discovered misconduct.⁶ The reason itself may be an anticipated event. For example, if an employee is subject to a long period of notice, it is possible to give notice in anticipation of a decision, giving what the employer expects to happen as a reason for the dismissal.⁷

Section 107 ERA 1996 provides that in determining the reason for dismissal, or whether it was sufficient to dismiss, a tribunal cannot take account of any pressure, in the form of industrial action or a threat of it, which was exercised on the employer to secure the employee's dismissal. It is not necessary that those exerting the pressure explicitly sought the dismissal of the employee: the test is whether it could be foreseen that the pressure would be likely to result in dismissal.⁸