Appeal No. UKEAT/0012/21/BA

EMPLOYMENT APPEAL TRIBUNAL

ROLLS BUILDING, 7 ROLLS BUILDINGS, FETTER LANE, LONDON, EC4A 1NL

At the Tribunal

On 19th May 2021

Before

THE HONOURABLE MRS JUSTICE EADY DBE

(Sitting Alone)

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1) MR A GAVLI
2) MR M ALI

APPELLANTS

LHR AIRPORTS LTD

RESPONDENT

Transcript of Proceedings

JUDGMENT

FULL HEARING

APPEARANCES

For the Appellants	MR A GAVLI MR M ALI (The Appellants in Person)
For the Respondent	MS C URQUHART (of Counsel) Instructed by: Eversheds Sutherland (International) LLP 1 Callaghan Square Cardiff CF10 5BT

SUMMARY

UNFAIR DISSMAL

Unfair dismissal – remedies – reinstatement, re-engagement – compensatory award - Acas uplift

The Claimants were dismissed from their jobs as passenger service operatives after allegations had been made that they had bullied, harassed and intimidated new starters who were working in the same team. Having upheld the Claimants' claims of unfair dismissal, the Employment Tribunal went on to consider remedy. Recording that Mr Gavli was seeking reinstatement but Mr Ali was only seeking compensatory relief, the ET accepted the Respondent's case that reinstatement or re-engagement would not be practicable: the unchallenged evidence was that working relationships had irretrievably broken down. On the question of compensation, the ET took account of the buoyant local economy at the relevant time and concluded that the evidence demonstrated that neither Claimant had taken reasonable steps to mitigate their losses; had they done so, they could have found alternative employment within three months. Although both Claimants said they had suffered prejudice as a result of their dismissals by the Respondent, the ET found that was not the reason why they had not found other work: in both cases, there was little evidence that they had applied for alternative employment. Both Claimants had claimed an uplift of 25% for failure to comply with the Acas Code but their counsel had not specified the particular provisions relied on; in the circumstances, the ET made no uplift. The ET also recorded that claims for pension losses had been included within the Claimants' schedules of loss but this had not been particularised and it declined to make any award under this head. Having reached its determination on the various heads of claim, the ET made compensatory awards, setting out the prescribed period in each case

The Claimants appealed against the ET's remedy decision.

Held: *allowing the appeal in part*

UKEAT/0012/21/BA

The ET had not erred in its decision on reinstatement or re-engagement. It had first considered this possibility in Mr Ali's case but recorded that he was only seeking a compensatory remedy. As that was the way his case had been put below, the ET did not thereby err in failing to further consider the question of reinstatement or re-engagement in his case. As for Mr Gavli, criticism was made of the ET for failing to consider the question of practicality in the light of the case of another employee, DR, who had faced similar allegations but had been transferred to work at another terminal. This was, however, not a point that had been made below. Although DR's case was referenced, it was not suggested his circumstances were so similar to those of the Claimants as to give rise to an inconsistency of treatment that rendered the dismissals unfair. Moreover, although the Claimants were aware that DR had been kept on, his case was not relied on to support the claim for reinstatement or re-engagement. This ground of appeal was dismissed.

Mr Ali also challenged the ET's decision on the basis that it had not taken into account the fact that he could have continued to work (part-time) whilst undertaking pilot's training. The ET's reasoning made clear, however, that it had this in mind but found his failure to mitigate his losses arose from his failure to continue to apply for work. No error of approach was disclosed; this ground of appeal was dismissed.

Both Claimants challenged the ET's refusal to consider the question of an uplift for failing to comply with the Acas Code. Although the Claimants had failed to specify the particular provisions of the Code relied on in their submissions before the ET, Mr Ali's ET1 had provided some particulars in this regard and both Claimants had included claims for an uplift in their schedules of loss. Claims under section 207A Trade Union and Labour Relations (Consolidation) Act 1992 were thus before the ET and there was nothing to suggest that these had been withdrawn. As the Respondent acknowledged, the ET's findings on liability also allowed of the possibility that there had been breaches of the Acas Code. In the circumstances, the ET erred in its failure to consider this element of the claims.

The final two grounds of appeal related solely to Mr Gavli. He first objected to the prescribed element to the compensatory award, explaining that the universal credit he had received also related to his wife. Secondly, he complained that the ET had failed to make any award in respect of his loss of pension benefits. In relation to the first of these points, this was not a matter raised before the ET and did not, in any event, relate to any aspect of the ET's decision. As for pension loss, this had been included as a heading within Mr Gavli's schedule of loss; although not further particularised, the Respondent's counter-schedule had provided the relevant calculation of this loss. Given that it was not disputed that this was a loss suffered by Mr Gavli, an injustice arose from the ET's failure to make an award under this heading. Although Mr Gavli's lawyers may not have properly particularised this element of the claim, it had not been withdrawn and the ET was in a position to make an award on the basis of the undisputed figures given by the Respondent. The overriding duty on the ET was to make an award that was just and equitable in the circumstances; in discounting the claim for loss of pension benefits, it had failed to do so. This ground of appeal would also be allowed.

THE HONOURABLE MRS JUSTICE EADY DBE

Introduction

1. This appeal raises various issues relating to remedies ordered in respect of successful claims of unfair dismissal.

2. Save as necessary to distinguish between the Claimants by name, I refer to the parties as the Claimants and the Respondent, as below. This is the full hearing of the Claimants' appeal against the Judgment of the Reading Employment Tribunal (Employment Judge Anstis, sitting alone, on 30 June and 1 July 2020; "the ET"), by which it was held that both Claimants were unfairly dismissed and were entitled to compensation as follows: (1) in Mr Gavli's case, of £7,086.64 (subject to a prescribed element of £5,337.69); (2) in Mr Ali's case, of £4,853.82 (subject to a prescribed element of £3,329.69).

3. Mr Gavli was legally represented throughout the ET proceedings. Although Mr Ali was acting in person when he completed his ET1 Form, he was subsequently represented by the same legal representatives as Mr Gavli, and both Claimants were represented before the ET by counsel. On this appeal the Claimants have acted in person, whilst the Respondent has retained the same representation as below.

4. Given the continuing need to reduce the transmission of the coronavirus, and with the agreement of the parties, this hearing was conducted remotely by MS Teams. Although there was some difficulty from the Employment Appeal Tribunal's side in setting up the initial link, no issues of connectivity or audibility occurred during the hearing. Moreover, whilst taking place by video link, these have remained public proceedings and details of the hearing, including its mode and how to obtain access, were published in advance in the cause list.

5. At the outset of the hearing, the Claimants made an application for a postponement, to enable them to obtain legal representation. I refused that application for reasons given orally at the time.

The Background Facts and the ET's Conclusions on Liability

6. The Claimants were employed by the Respondent as passenger service operatives ("PSOs"); in the case of Mr Gavli, from June 2015 until 21 February 2019, in that of Mr Ali, from July 2015 until 16 May 2019. As PSOs, the Claimants worked as part of a team of around a dozen employees, with varying lengths of service, looking after trolleys at Terminal 5 at London Heathrow Airport. The PSO team members reported to a passenger service manager ("PSM"), but were not subject to close supervision and they would work either alone or in pairs across the airport; as the ET records, it was important that the Respondent was able to trust them to work without immediate supervision.

7. At the relevant time, there was a degree of uncertainty regarding the future of the trolley team and whether it would be outsourced. The ET accepted the Respondent's case that any change in this regard would have been the subject of collective consultation. In the event, no outsourcing in fact took place. In September 2018, however, allegations came to the Respondent's attention to the effect that the Claimants were intimidating new starter PSOs by saying they were going to lose their jobs due to the on-going outsourcing discussions. It seems that some allegations also involved another employee, a Danish Raja (referred to by the ET as "DR"), who was a trade union representative at Terminal 5.

8. An investigation was conducted and, in February 2019, the Claimants were each invited to disciplinary hearings to consider allegations of bullying, harassment and intimidation towards new starters. The hearings were ultimately scheduled on dates convenient for the Claimants and their representatives, and the disciplinary meeting for Mr Gavli took place on 21 February 2019,

that for Mr Ali on 16 May 2019. Both hearings were conducted for the Respondent by Mr Adaway.

9. In respect of Mr Gavli, who attended the hearing accompanied by his trade union representative, having heard his responses to the allegations, Mr Adaway stated that it was his reasonable belief that the charges were proven and Mr Gavli should be summarily dismissed. This decision was communicated at the hearing and confirmed by letter of 12 March 2019. Similarly, in respect of Mr Ali, who was accompanied by two trade union representatives, Mr Adaway said that he held the reasonable belief that the charges were made out and that Mr Ali would be summarily dismissed. That decision having been communicated at the hearing, it was later confirmed by letter of 30 May 2019.

10. Both of the Claimants appealed against Mr Adaway's decisions and their appeals were heard by Ms Hegarty, who upheld the dismissals. The ET records that DR was also said to have been the subject of a disciplinary hearing, but was not dismissed. The ET stated that it had no information relating to DR's position but noted that:

> **"It was not part of the Claimants' case that their dismissal was unfair by reason of inconsistent treatment of them and DR" (ET Written Reasons para. 47)**

11. The ET found that both the dismissals were unfair. That was because the Respondent had failed to clarify exactly what the Claimants were said to have done wrong: there were generalised allegations of bullying, harassment and intimidation but a failure to properly identify what had been alleged and that had impacted on the fairness of the investigation and on the dismissal decisions. Whilst Mr Adaway had a genuine belief that the Claimants were guilty of misconduct, that was not held on reasonable grounds and those defects were not cured on appeal. In the circumstances, the ET found that the dismissals had fallen outside the range of reasonable responses open to the Respondent.

The ET's Decision on Remedy

12. The personal circumstances of the Claimants, relevant to the questions of remedy, were very different. Mr Gavli was in his forties and was, as he explained to the ET, the sole breadwinner for a family of five. Mr Ali was in his twenties and was differently-placed, being able to draw on family support to embark on a pilot's training course. The two Claimants had also put their claims on remedy differently; as the ET recorded (see para. 136 of its Written Reasons), Mr Gavli was seeking an order for reinstatement, while Mr Ali only sought an order for compensation.

13. Before turning to the Claimants' claims, the ET first considered the Respondent's contention that it should find the Claimants had contributed to their dismissals and/or that, pursuant to **Polkey v A E Dayton Services Limited** [1987] ICR 142, there was a chance that they would have been dismissed, in any event and, therefore, that any compensation awarded should be reduced accordingly. The ET did not, however, consider that it should make any reduction, either on **Polkey** grounds or for contributory fault.

14. Turning then to Mr Gavli's Claim, the ET first considered the question of reinstatement under section 116 of the **Employment Rights Act** 1996 ("ERA"). On the question of reasonable practicability, the ET took into account the unchallenged evidence of Mr Adaway that, for whatever reason, Mr Gavli's relationship with new starters (his colleagues at work) had broken down. From the material before it, the ET found that the relationship had broken down irretrievably and it considered that this rendered it impracticable for Mr Gavli to resume his former job by way of reinstatement. As for any re-engagement into another position, doing the best it could on the limited information before it, the ET found that the different trolley teams (even working at other terminals) would be closely connected. In the circumstances, given the minimal supervision of PSOs, the breakdown in working relationships, and the Respondent's

genuine belief in Mr Gavli's misconduct, the ET concluded that re-engagement was also not practicable.

15. As for any compensation, Mr Gavli had obtained casual work in a coffee shop earning around £175.00 per week from 27 June 2019, otherwise he had not worked since his dismissal and he had been in receipt of universal credit. Although Mr Gavli said he had applied for many jobs, there was only evidence before the ET of some eight applications made between October 2018 to April 2020, some of which had been made whilst Mr Gavli was still employed by the Respondent. Noting that he had been dismissed at a time when the economy around Heathrow and in West London was buoyant, the ET found that, had he taken reasonable steps to mitigate his losses, Mr Gavli could have obtained full-time work, at the same level of pay as he had enjoyed earning with the Respondent, within around three months. As there was no documentary evidence to suggest that the reason he had lost his job with the Respondent had been an obstacle to Mr Gavli obtaining alternative employment, the ET limited the period for which compensation would be due to the end of May 2019.

16. In Mr Ali's case, the ET noted that he had not sought reinstatement but only requested compensation. In support of that claim, in his statement, Mr Ali said that he had tried to apply for many jobs since his dismissal but had been rejected once he explained that he had been dismissed from his previous role. The ET considered that was an incomplete account of the position and observed that there were unexplained differences between his original and revised schedules of loss: the former showed earnings for temporary security work from 1 July 2019, corroborated by payslips, but that was omitted from the latter. Furthermore, the original schedule had explained that Mr Ali had embarked a two-year course in August 2019 to train to be a pilot, albeit he could work part-time whilst doing this. Again, this detail was omitted from the revised

schedule and, although Mr Ali's evidence was that he could combine the course with full-time work, no documentation had been provided to corroborate this.

17. Having found that most of the evidence of job searches provided by Mr Ali related to applications for the security work he obtained in July 2019, with only three applications having being made once Mr Ali started his pilot's training, the ET concluded that he had not been prejudiced by his dismissal by the Respondent; rather, Mr Ali had not continued to seek work once he had started the course. Again, having regard to the buoyant state of the local economy at the relevant time, the ET concluded that Mr Ali could have mitigated his losses within three months.

18. The ET further noted that for each Claimant a claim had been made for an uplift for failure to comply with the ACAS Code of Practice. In each case, in relation to this aspect of the claim, the ET observed as follows:

> **"100. Mr Gavli's schedule of loss also includes an uplift for failure to comply with the ACAS Code of Practice, What that alleged failure was is not obvious to me, is not set out in the claimant's claim and was not referred to in his evidence or in Mr Perhar's submissions." (Mr Perhar was the counsel acting for both Claimants before the ET)**

19. Similarly, whilst the schedules of loss included an element for pension contribution, against which was written "TBC", there had been no reference to this in the evidence and it was never confirmed, quantified or even mentioned. In the circumstances, the ET did not consider that this could properly be included in either Claimant's loss of earnings.

The Grounds of Appeal and the Parties' Positions

20. Although separate Grounds of Appeal are pursued in relation to each Claimant, there is some degree of overlap and I have therefore sought to group together those Grounds on which there is a common, or similar, position.

21. By the first Ground of Appeal in each case, the Claimants contend that the ET erred in not making reinstatement orders. In Mr Gavli's case, it is said that this amounted to an error of law, given that DR (who had been accused of the same allegations) had not been dismissed but had been moved from Terminal 5 to Terminal 4 to carry out the same role as a PSO. In the Claimants' Skeleton Argument in support is it said that "*On the second day of hearing this point was discussed*" and that, in answer to a question from the ET, Mr Adaway had said that DR "*is no longer in business*". It is said that this was a lie.

22. In Mr Ali's case, it is further contended that the ET erred in stating that he had not sought reinstatement. Whilst this was not claimed in his ET1 Form, that had been completed whilst Mr Ali was still acting in person, and, in the Grounds of Appeal, it is contended that, in his oral submission at the hearing, Mr Ali had made clear that he wanted to be reinstated into his former job.

23. In the Claimants' skeleton argument for today's hearing, greater explanation is provided. It is first said that Mr Ali in fact raised the issue of reinstatement with his trade union solicitor but that had apparently not been communicated to his barrister in advance of the hearing. It is said that Mr Ali then raised this matter with his counsel at the hearing, but the point was not argued because there was insufficient information. Slightly later in the skeleton argument, however, it is contended that this was something brought up by the Claimants' barrister in his oral submission, but the ET had failed to document this.

24. More generally, Mr Ali's case in this regard is put as follows:

> **"The judgment copy clearly says that MA was Unfairly Dismisses by respondent LHR Airports Ltd so why has MA not gain his employment back?"**

25. For completeness, Mr Ali also makes the same points regarding DR's position as are raised in relation to Mr Gavli's case.

26. In addition, in oral submissions, the Claimants have reminded me that Heathrow is one of the largest airports in the world and they say they could have been moved to work at a different terminal, as DR had, and their understanding was that he had been moved once more since; or into a different role in a different part of the business. They further refer me to the case of **United Lincolnshire Hospitals NHS Foundation Trust v Farren** UKEAT/0198/16/LA, in which the ET was found to have erred by assuming that the claimant's misconduct meant that she could not be re-engaged. The Claimants also refer to the case of **Dafiaghor-Olomu v Community Integrated Care & Anor** UKEATS/0001/17/JW, in which an ET was found to have erred in its approach to re-engagement by failing to look behind assumptions that had been made regarding the claimant's position in relation to a possible relocation.

27. For the Respondent it is argued that the inconsistent treatment argument relating to DR was not one pursued by the Claimants before the ET (as the ET had recorded at para. 47 of the Judgment). This was a new point being raised on appeal and exceptional circumstances did not exist such as to warrant it being considered by the EAT (see **Kumchyk v Derby City Council** [1978] ICR 1116 EAT). In order to consider this issue, it would be necessary to hear further evidence and submissions; effectively, the matter would have to be re-litigated. Given that it had been open to the Claimants to take this point before the ET but they had not done so, it was not a matter that should be permitted to be raised on appeal.

28. As for Mr Ali's position, the Respondent says it was clear that his case was presented on the basis that he was not seeking reinstatement, as the ET had recorded. Again, it was not open to the Claimants to seek to take a point that had not been pursued before the ET.

29. A more general point of challenge is then taken in Mr Ali's case, which I have treated as a second Ground of Appeal, by which it is asserted that the ET erred in its approach to remedy (either in relation to reinstatement or in the award of continuing compensation) by failing to take account of the fact that he could have worked part-time whilst undertaking his pilot's training.

In support of this submission, it is stated that the pilot's course is designed in such a way that it would be open to Mr Ali to work alongside that training. He contends that he has lost his earnings and that it should be part of his compensation. More generally, it is stated in the Claimants' skeleton argument, that:

> **"16. [Mr Ali] may face more complication in finding the job in aviation industry if he will be ask the questions about his termination by respondent as even though he was unfairly dismissed it leaves a bad impression to future employers.**
>
> **17. [Mr Ali] feels he has not been given justice as he lost his job for which was not even his fault as detailed in the employment judgment and given a mere £1500. If this is the case then how can anyone just put false malicious allegations on their colleagues to have them be dismissed within the company?"**

30. For the Respondent, it is said that the ET had regard to these factors in relation to reinstatement or re-engagement, albeit that this was not a remedy sought by Mr Ali below. As for compensation, the ET made findings of fact against Mr Ali in relation to his search for alternative employment and the question of whether or not his course could be undertaken alongside part-time employment was nothing to the point.

31. Thirdly, the Claimants take issue with the ET's failure to award a 25% ACAS uplift. Noting that the ET stated it was unclear what the failure was on the part of the Respondent, the Claimants point to the earlier liability findings, where it had been held that the Respondent failed to carry out a fair investigation before disciplinary hearing.

32. For the Respondent it is accepted that a claim was made under this head in the Claimants' schedules of loss and was also mentioned in Mr Ali's Grounds of Claim, albeit, the Respondent says, only in relation to the conduct of the appeal. That said it is observed that this was not a point to which any further reference was made by the Claimants, either in evidence or submissions, and at no stage was the ET directed to any particular provision of the ACAS Code that was claimed had been transgressed.

33. By a fourth Ground of Appeal, the Claimants asked why a figure had been deducted from the total awards made in respect of the prescribed element. In clarifying this point in oral submissions, Mr Gavli complained that the prescribed element in his case had related to the universal credit that had, in fact, been received by both himself and his wife. It was his case that the ET, therefore, ought to have only allowed 50% of the benefit claimed in this regard.

34. Fifthly, and again pursued solely in Mr Gavli's case, it is said that Mr Gavli had been contributing towards his pension but there had been no award made in this regard; that, the Claimants contend, amounts to a further error by the ET. In the Claimants' skeleton argument for this hearing, it was acknowledged that this was not a point addressed by Mr Gavli before the ET, but explained that he was expecting an order for reinstatement to be made and he now sought the opportunity to go back to the ET to make good this omission.

35. For the Respondent, it is again objected that this was not a point pursued before the ET and the Claimants should not be permitted to raise it on appeal.

36. Additionally, although not raised as a Ground of Appeal, Mr Gavli also seeks to object to the ET's failure to make a larger compensatory award in his case, given that, when he was interviewed for jobs after his dismissal, he was asked about his employment with the Respondent and his reason for leaving. Mr Ali, in oral submissions, has also sought to raise a similar, additional objection.

Discussion and Conclusions

37. In permitting this matter to proceed to a full hearing, His Honour Judge Shanks made the following observation:

> **"The Appellants will need to follow the procedure under the [full hearing] Order paragraph 5 in relation to: (i) the evidence (if any) given to the … ET about [DR] and his continuing to work at T4 (ii) what was said during the hearing in relation to any claim by Mr Ali to compensation (iii) the evidence (if any) about Mr Gavli's pension."**

38. Para. 5 of the EAT's Order made clear the procedure to be followed by the parties, should they consider that any point of law raised in the appeal could not be argued without regard to evidence given or not given before the ET. It is apparent that those acting for the Respondent have provided the Claimants with extracts from their notes from the hearing, but it does not appear that the Claimants have engaged with the exercise required under the EAT's Order. I have no reason to doubt that the notes taken by the Respondent's lawyers do other than provide a reasonably accurate, if not verbatim, record of what was said below and I have, accordingly, referred to them, as appropriate, when considering the issues raised by this appeal:

1) Reinstatement/re-engagement

39. Reinstatement and re-engagement are sometimes described as the primary remedies for complaints of unfair dismissal. Certainly, these are the first remedies that an ET is required to consider. As s112 **ERA** provides:

> **"112 The remedies: orders and compensation.**
> **(1) This section applies where, on a complaint under section 111, an employment tribunal finds that the grounds of the complaint are well-founded.**
> **(2) The tribunal shall—**
> **(a) explain to the complainant what orders may be made under section 113 and in what circumstances they may be made, and**
> **(b) ask him whether he wishes the tribunal to make such an order.**
> **(3) If the complainant expresses such a wish, the tribunal may make an order under section 113.**
> **(4) If no order is made under section 113, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126 . . .) to be paid by the employer to the employee."**

S113 **ERA** provides:

> **"113 The orders**
> **An order under this section may be—**
> **(a) an order for reinstatement (in accordance with section 114), or**
> **(b) an order for re-engagement (in accordance with section 115)"**

40. Although it has been said that s112 of the **ERA** places a mandatory obligation upon an ET (see **Pirelli & General Cable Works Ltd v Murray** [1979] IRLR 190 EAT), a decision on remedy in which there was a failure to adopt this procedure would only be set aside where it has led to prejudice, unfairness or injustice (see **Cowley v Mason Timber Ltd** [1995] ICR 367 CA). In Mr Gavli's case there is no issue: the question of reinstatement or re-engagement was obviously considered by the ET (and I will return to the criticism of that decision below). A complaint is, however, made on this issue in Mr Ali's case; although it cannot be said that the ET did not *raise* the issue, it did not consider it further in his case because it understood that he was seeking only a compensatory award, not reinstatement or re-engagement.

41. On the appeal, however, an issue is taken as to how Mr Ali's case was put below.

42. The ET's reasoned Judgment is clear: Mr Ali was seeking compensation, not reinstatement or re-engagement. The Respondent's notes from the ET hearing further corroborate that position:

> **"Gavli seeks reinstatement. Ali does not"**
>
> **"Remedy – AG seeks reinstatement or re-engagement. HRW is a large [Respondent] and his job does not involve interaction with management much and 4 terminals to choose from. Job insecurity due to covid 19. MA – not seeking reinstatement but is retraining but [would] have carried on working full time at HRW if not sacked."**

43. From both the ET's formal record and the contemporaneous notes from the hearing, I am satisfied that the issue of reinstatement or re-engagement was raised by the ET, as it was required to do under s112 **ERA**, and the Claimants' counsel made clear that this was not a remedy that was being sought by Mr Ali. There could have been no prejudice to Mr Ali in the ET, therefore, not proceeding to consider this question as that was not the case that was being presented on his behalf.

44. In saying this, I make it clear that I accept that Mr Ali had acted in person when he completed his ET1 Form and would not expect a claimant to necessarily be held to the remedy

claimed in the ET1 Form - particularly if completed when acting in person - by the time that question is being considered by the ET on an unfair dismissal claim. The important point, however, is what took place at the ET hearing, how Mr Ali's case was put at that stage. The time to raise the issue was before the ET; it is not a point that can be taken for the first time on appeal. Certainly, there was no error of law on the part of the ET in how this issue was dealt with in Mr Ali's case.

45. Turning then to how the appeal is put on this issue in Mr Gavli's case; the objection made is in this regard to the ET's failure to consider how DR was treated and to assess the practicability of reinstatement or re-engagement in light of the fact, as it is said, that DR was kept on and simply moved to work at a different terminal.

46. From the Respondent's notes, it is apparent that Mr Adaway was asked questions in cross-examination about DR's position. He agreed that DR was given a warning but was not dismissed, but he did not accept that the evidence from the investigation relating to DR was the same as that relating to the Claimants. Mr Adaway stated that DR was investigated with evidence specific to him: *"More limited than the other 2 claimants, he did not turn up for his final hearing for the outcome – not dismissed, got first stage warning as evidence lacking against him – no longer in business – went AWOL and not returned."*

47. Ms Hegarty was also asked about DR, Mr Perhar (counsel for the Claimants) saying: *"I am told DR is still working for the Respondent*", to which Ms Hegarty responded: *"Don't know. I heard [Mr Adaway] here earlier say that [DR] had left the company but that is just what I heard here today.*"

48. It seems that Mr Perhar referred to DR's position - to the fact that he had not been dismissed - in his closing submissions on unfair dismissal liability, but there is nothing to indicate that this was a point then referred to in relation to remedy.

49. It is, in any event, apparent that the ET was alive to the issue of inconsistency of treatment as between the Claimants and DR. On the question of liability, however, the Employment Judge recorded that this was not a point that had been pursued and he noted that he did not have much information regarding DR's position. Certainly, on the evidence before the ET, there was insufficient information to suggest that the circumstances of DR and those of the Claimants were sufficiently similar to raise a question of unfairness on grounds of inconsistency.

50. As for remedy, it does not appear that this was a point raised on the issue of reinstatement or re-engagement in Mr Gavli's case. From the notes of the hearing, it is apparent that the Claimants believed that DR had been kept on and, had this been a point which they wished to rely on in relation to the issue of reinstatement or re-engagement, it was something that could have been identified in contradicting Mr Adaway's evidence in relation to working relationships. It was not. In the event, the ET plainly considered the question of continuing working relationships with some care and was satisfied, notwithstanding its findings on liability, that Mr Adaway was correct: for whatever reason, relations between Mr Gavli and his colleagues had broken down irretrievably, and this was not something that could be overcome simply by moving him to another terminal.

51. I do not consider that the cases of **Farren** or **Dafiaghor-Olomu** assist in this regard. Inevitably, all cases, particularly in relation to reinstatement or re-engagement, will be fact- and context-specific. I do not consider this was a case in which the ET simply made assumptions about the position or lost sight of the size and nature of this employer. It heard evidence on this question, which was not challenged, and reached a conclusion that was open to it. Given the way the case was put below and the information available to the ET, I do not consider that this decision reveals any error of law or approach. I therefore dismiss the appeal in relation to both Claimants on the question of reinstatement or re-engagement.

2) The ET's approach to Mr Ali's case

52. I turn next to the more general point of challenge in Mr Ali's case, that the ET erred in failing to order reinstatement/re-engagement or to award continuing compensation on the basis that he could have worked part-time whilst undertaking his pilot's training course.

53. There was some lack of clarity in how Mr Ali's case was put below: whether he could have worked full-time or part-time in undertaking his pilot's training. This is a point, however, that I am satisfied the ET took into account; indeed, the Respondent's notes record the Employment Judge asking Mr Ali about this: "*If you continued at Heathrow … you would have done the course but later*?", with Mr Ali responding*: "yes, 6 or 7 years later and could work at Heathrow alongside course.*"

54. The Employment Judge then sought to explore with Mr Ali why, after he had embarked on the pilot's training, he had apparently found it so difficult to find alternative work since his dismissal. Mr Ali explained that he had had to state that he had been dismissed, suggesting this was the reason for his inability to mitigate his loss, although he accepted this was not something he had been asked about by the security company where he had obtained temporary employment. The ET was thus plainly aware that it was Mr Ali's case that he could work while undertaking his pilot's course. It did not understand that he was asking to be reinstated or re-engaged (and I have addressed that point above), but, in assessing his claim for compensation, the ET found that Mr Ali had hardly made any applications for alternative work since he had started the course; such applications as were evidenced in the documentation largely related to the security work that he had obtained and the ET was entitled to find that his dismissal from the Respondent had not prevented him from securing *that* work.

55. More generally, the ET permissibly had regard to its own understanding of the job market in the area. As a local ET, used to hearing evidence of job searches in the area, it would be entitled to draw upon its knowledge of that position to take judicial notice of the local economy.

Doing so the ET was satisfied that, had Mr Ali taken reasonable steps to secure alternative work, he would have mitigated his losses after three months. On the evidence before it, the ET plainly concluded that, after starting his pilot's training, Mr Ali had chosen not to seek to mitigate his losses or, at least, not to take all reasonable steps to do so. That was a conclusion the ET was entitled to reach. Again, no error of law or approach is demonstrated and, again, I am bound to dismiss this Ground of Appeal.

3) Acas Uplift

56. Section 207 A (2) of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("the 1992 Act") provides as follows:

> **"(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—**
> **(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,**
> **(b) the employer has failed to comply with that Code in relation to that matter, and**
> **(c) that failure was unreasonable,**
> **the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%".**

57. In the present case, the ET recorded that a claim had been made for an uplift in both cases, but noted:

> **"What that alleged failure was is not obvious to me, is not set out in the claimant's claim and was not referred to in his evidence or in Mr Perhar's submissions." (see para. 100 ET Judgment)**

58. The Claimants draw my attention to para. 9 of the Acas Code, which provides that, if there is a disciplinary case to answer, the employee should be notified of this in writing and the notification should provide sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. They also rely on para. 12 ,which details what should occur at any disciplinary meeting, and they

make reference to other, more general, aspects of the Code relating to potential penalties other than dismissal.

59. Although the Claimants have thus articulated at this hearing their complaints in relation to the process and how that did not comply with the Acas Code, according to the Respondent's notes from the ET hearing, the exchange between the Employment Judge and the Claimant's counsel on this point was limited, as follows:

> **"EJ Remedy? Quite a lot of detail, uplifts etc, breach of the ACAS Code? Which bit?**
> **And our counsel recorded "not put!""**

That note is obviously incomplete and does not really assist me with such detail as might have been given in the response from the Claimants' counsel. From the ET's understanding, however, that response cannot have assisted it greatly in terms of pointing it to the relevant provisions of the Acas Code said to have been transgressed.

60. In this regard, the Respondent relies on the EAT decision in **Pipe Coil Technology Limited v Heathcote** UKEAT/0432/11, in which Mr Justice Supperstone held that an ET does not have to consider making an award under s207A of the **1992 Act** unless a party specifically asks it to do so. In that case, he dismissed a cross-appeal by the claimant on the basis that the ET had failed to award an uplift for failure to follow the Acas Code; the claimant's counsel (Mr Anderson) had cross-examined, and made submissions, on the issue, but a claim had not been expressly raised:

> **"24. In his closing outline submission Mr Anderson submitted that the Respondent had acted in breach of the ACAS Code of Practice Disciplinary and Grievance Procedures 2009 in various respects. This submission properly followed his cross examination of the Respondent's witnesses, when he put it to them that there had been a dismissal in breach of the procedures and guidelines set out in the ACAS Code. … Mr Anderson also referred to the ACAS Code in his closing oral submissions ... However, there was no claim before the Tribunal that the compensatory award should be increased pursuant to section 207A of the 1992 Act. By the use of the word "claim", we do not intend to convey that there needed to be a formal claim; the matter needed, however, to be raised expressly before the Tribunal, in our judgement. No submissions were made on the Claimant's behalf before the Tribunal that the compensation should be increased pursuant to section 207A. The Tribunal cannot be criticised in the**

> **circumstances for not dealing with the point of their own motion. In our judgment, it is too late for this claim to be made in this appeal."**

61. As that extract from the judgment in **Pipe Coil** makes clear, however, the difficulty in that case is that, whilst there was reference to the Acas Code having been breached in such a way as might go to the question of fairness of the dismissal, there had not been a specific claim that the compensatory award should be subject to an uplift as a result. That is different from the present case: this is not a case in which the question of an Acas uplift had not been raised; indeed, it had been raised and claimed by both Claimants in their schedules of loss. More than that, Mr Ali - albeit at a time when he was not represented – had specifically raised the issue in his ET1 Form, both in relation to the appeal and, on a broad reading of what he was saying, in relation to the investigation.

62. As Ms Urquhart has acknowledged in her oral submissions, there are various findings made by the ET in this case which might suggest that it had found breaches of the Acas Code, including in the ways referred to by Mr Ali in his claim, that is, relating to the fairness of the appeal and the investigation. She says, however, that the difficulty was that the Claimants' counsel did not specify (given the evidence that had been heard) which were the relevant parts of the Acas Code that it was said had been breached.

63. I bear in mind that, when the Claimants' counsel was making his closing submission, he did not have the benefit of the ET's rulings on liability: the ET heard evidence and considered submissions in relation to *all* aspects of the claims - on both liability and remedy - and then reserved its Judgment. That said, it seems to be fair to say that the ET may not have been greatly assisted by the Claimant's representative at the hearing on this point. Even if that was the case, however, this was still an element of the Claimants' claims, and some specificity had been provided in Mr Ali's case. Moreover, whilst the Claimants' submissions were made without knowing what the ET would find on liability - so there was an element of the unknown - the ET

had the benefit of knowing the conclusions it had reached when it came to consider the question of whether the claims for an uplift should be allowed. No concession had been made regarding those claims and, in my judgement, the ET ought properly to have asked itself whether, on its findings, there were provisions in the Acas Code that had not been complied with. If it answered that question in the affirmative, it would have needed to go on to consider whether that had been unreasonable and, if so, as to what uplift (if any) should be made. If, in reaching that decision, the ET considered any unfairness arose for the Respondent – given the way the Claimants' case had been articulated at the hearing – provision could have been made to allow for further submissions in this regard.

64. The ET failed, however, to take those steps, notwithstanding the fact that there was a claim before it in this regard in each of the Claimants' claims. I consider that to be an error. It is not something that I can rectify on the appeal because this is a matter of assessment for the ET and I will therefore have to remit this issue to the ET to undertake that task. Given that I am asking the ET to complete the task of determining remedy in this matter, my preliminary view would be that it should be remitted to the same Employment Judge, if that is at all possible. I will, however, allow the parties to address me further on that issue, should they wish.

4) The prescribed element

65. Where a claimant has received state benefits, such as universal credit, the **Employment Protection (Recoupment of Benefits) Regulations 1996 SI 1996/2349** ("the Recoupment Regulations") apply, so as to ensure that there is not a double recovery for the prescribed period if the claimant is then entitled to an award of compensation.

66. In this case, the ET found that both Claimants had received universal credit for some part of the time for which they were entitled to compensation. Accordingly, it was bound to treat this as the prescribed time in respect of which the recoupment provisions would apply.

67. At the oral hearing it has been clarified that the appeal on this point is really limited to Mr Gavli's concern that the benefits he received in part related to his wife; he says that a reduction pursuant to the **Recoupment Regulations** in his case should only have been by half. If, however, that is a point that is properly raised in Mr Gavli's case, then it would seem to be an issue that must relate to the notice served on the Respondent by the Department for Work and Pensions ("DWP"). The ET was concerned only with the compensatory award, from which benefits would stand to be deducted; the ET was *not* concerned with the particular break-down of benefits which might then be the subject of a Notice of Recoupment served by the DWP. More generally, this was not a matter that appears to have been raised before the ET and I can see no basis for thinking that it erred, either in the approach that it adopted or in the order it made. I therefore dismiss this Ground of Appeal.

5) Pension loss

68. The fifth Ground of Appeal again relates specifically to Mr Gavli's case, and to his claim for pension loss.

69. The difficulty identified in this regard by the ET once more related to how the Claimant's case was put before it. As it noted, whilst this had been included as a possible element in Mr Gavli's schedule of loss, it had been said this would be confirmed ("*TBC*"), but this did not happen. As Mr Gavli fairly accepted before me, that may have reflected an error on his part or on the part of his lawyers.

70. The Respondent makes the point that it is for a claimant to prove his loss. It contends that Mr Gavli did not do so, despite being legally represented, because he offered no evidence as to this head of loss. Moreover, as the Respondent notes, the guidance document "**Employment Tribunals Principles for Compensating Pension Loss**" 4th edition 2019 states, at para. 6.3, that

professionally represented claimants should avoid using the phrase "to be confirmed" in a schedule of loss and should provide an actual sum. The Respondent further observes that it was open to Mr Gavli to set out a sum of some sort, because the Respondent had itself provided him with the relevant calculations.

71. Accepting the criticisms made of the way in which Mr Gavli's case was presented before the ET, I note that in its counter schedule, the Respondent accepted that if, compensation was due to be paid to Mr Gavli, employer pension contributions would be valued at £1,223.95 per year. Although Mr Gavli might not have specified the sum claimed under this head, it thus does not seem to have been a point in dispute between the parties and it seems to me that that was a relevant matter that the ET ought properly to have taken into account: a claim had been made in Mr Gavli's case for pension loss that he was unable to calculate at the time he had drawn up his schedule of loss (a not-unusual occurrence) but that particular element of claim was not in dispute and the ET had the relevant figure from the Respondent in the counter schedule. It would be unjust to deny Mr Gavli that element of compensation for the time the ET found he was entitled to be compensated, when it was not in dispute between the parties.

72. In reaching this conclusion I observe more generally that, if a party does not expressly pursue a point, they may not be entitled to complain if the ET does not address it. That said, the ET should, in turn, be careful not to assume a point has been conceded when it has not. More specifically, when the point at issue is, on a proper analysis, in fact not in dispute between the parties, the ET may properly make a finding on that element of the claim, notwithstanding a failure to deal with the point in final submissions. That may, after all, simply reflect the fact that there is no disagreement between the parties that needs to be addressed.

73. I therefore allow this Ground of Appeal. It seems to me that it may well be that an amount of compensation can be agreed between the parties in this regard and, if so, my final order can

represent that; if that is not something that can be dealt with by agreement at this stage then, as I am remitting this matter to the ET in any event, it can be addressed by the ET on remission.

Additional Points

74. Although not raised in the Grounds of Appeal, in the Claimants' skeleton argument, further complaint was made in relation to Mr Gavli, that his overall compensation had been less than one month's pay from his former employment and that he had suffered prejudice in seeking alternative employment because of his dismissal from the Respondent. In oral submissions, a similar point was taken on Mr Ali's behalf, again relating to the low level of compensation awarded when the ET had found that the Claimants had been unfairly dismissed.

75. Even if I were to give permission for these matters to be raised by way of additional, amended Grounds of Appeal, there is no merit in them. The Claimants are seeking to go behind the permissible findings of fact made by the ET on this issue. Whilst I recognise the Claimants' genuine sense of grievance in relation to the awards of compensation made, the ET did not err in its approach to these questions; it took into account the evidence that it heard from the Claimants, as to the losses that they had suffered, and obviously had very much in mind the criticisms it had made of the Respondent as to the unfairness of these dismissals. Whilst the ET would have been well aware of the impact of that unfairness on the Claimants, it was also entitled to have regard to what it knew about the local economy at the relevant time and was entitled to scrutinise the evidence before it as to the Claimants' attempts to find alternative employment in the context of what it knew to be the case as to the local labour market. In doing so, the ET did not accept the Claimants' evidence as to their attempts to find alternative employment or as to any difficulties they said they had experienced. That was a finding of fact that the ET was entitled to make on the evidence before it.

76. These additional points do not raise any arguable error of law and the EAT could have no jurisdiction to seek to interfere with the ET's findings of fact in this regard. I do not, therefore, give permission to amend the Grounds of Appeal, and I would not accept that any proper point has been raised.

Disposal

77. On that basis, the Order that I make is that the appeal is allowed on two points: (1) in relation to the Acas Code of Conduct, which will need to be remitted to the ET; (2) in relation to pension loss in Mr Gavli's case, which, if that cannot be agreed between the parties, will also be the subject of remission.

78. Having given my Judgment in this matter, I invited the parties to address me on the terms of the Order for remission.

79. For the Respondent, Ms Urquhart has said that it would seem appropriate to remit this matter to the same Employment Judge. The Claimants, however, resist this and contend that it should be remitted to a different Employment Judge, in particular in relation to the question of pension loss.

80. I remind the parties that my finding in relation to pension loss is limited to the Ground of Appeal before me; that is, in relation to Mr Gavli's case and on the basis that the sum in question was not in dispute between the parties, as having been set out in the Respondent's counter schedule. In those circumstances, I would have hoped that it would have been possible for the parties to agree a figure in that regard but, as that does not seem to be something that can be achieved at this stage, I will remit that point to the ET along with the question of the Acas uplift. As for whether remission should be to the same ET or to a differently-constituted tribunal, I bear in mind the guidance given in **Sinclair Roache and Temperley v Heard and Fellows** UKEAT/0168/05 on this question. There has been no question as to this ET's professionalism

and, indeed, the decision reached - finding in favour of the Claimants in relation to liability - demonstrates an even-handedness that should not cause either side any concern. I also have regard to the fact that there are many aspects of the Judgment which have not been criticised and that the points on which this appeal has been allowed really relate to a need to complete the task on remedy rather than any substantive error on the part of the ET. I note that there has been some delay in determining this appeal, but not so much as to cause me any concern that the ET would not be able to fairly quickly remind itself of this case, and to use its notes, to deal with these outstanding matters, which might hopefully be addressed by way of submissions rather than requiring further oral evidence. On that basis, it would be proportionate if the same ET could deal with the matter. To the extent therefore that it remains practicable for this matter to be restored before the same ET, that is what I order.