Neutral Citation Number: [2025] EAT 151

Case No: EA-2024-000081-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 October 2025

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

MS J DAVIDSON

Appellant

- and –

NATIONAL EXPRESS LIMITED

Respondent

- -
- -

Saul Margo (instructed by Ronald Fletcher Baker LLP) for the **Appellant**
Steve Peacock (of Weightmans LLP) for the **Respondent**

Hearing date: 18 September 2025

- -

JUDGMENT

SUMMARY

UNFAIR DISMISSAL

The claimant, a coach driver, was dismissed because she failed an alcohol test.

The tribunal found her dismissal to be unfair because (but only because) she did not receive a fair appeal. A complaint of wrongful dismissal failed.

The tribunal made (separately) a *Polkey* reduction to the compensatory award of 75% and a contributory-conduct reduction to both the basic and compensatory awards of 75%. It also applied an *ACAS-Code* uplift to the compensatory award of 10%.

Upon appeal, a number of *Meek* challenges to the tribunal's reasoning, said to have a bearing on *Polkey*, contributory conduct and/or wrongful dismissed, all failed.

However, the tribunal erred in its assessment of the underlying loss for the purposes of the compensatory award. The claimant, who was 61 at the time of dismissal, and 63 at the time of the tribunal's hearing, was in another job at a lower rate of pay. She claimed future loss up to age 70 on the basis that, of necessity, she intended to work up to that age. The tribunal limited the underlying calculation of future loss to the period up to the claimant reaching age 65, considering that to be just and equitable in all the circumstances. However, it was required, as best it could, to assess the future loss sustained by the claimant in consequence of the dismissal, and attributable to the action of the respondent. It failed to do so in a principled way. **Software 2000 Ltd v Andrews** [2007] ICR 825 and **Contract Bottling Ltd v Cave** [2015] ICR 146 considered.

The calculation of the underlying loss for the purposes of the compensatory award was accordingly remitted to the tribunal for fresh consideration.

HIS HONOUR JUDGE AUERBACH:

Introduction, the Tribunal's Decision and the Factual Background

1. The claimant in the employment tribunal was employed by the respondent from January 2016 as a PCV coach driver, air side, at Stansted airport. Such employees are required to take a breath test on arrival at work each day. Under the respondent's drugs and alcohol (D & A) policy an alcohol reading of 8mg per 100ml or above is regarded as unacceptable. When the claimant arrived at work on 26 June 2021 her test, taken at 03.50, registered 13mg per 100ml. Because of that, and in line with the policy, there was a second test, taken 20 minutes later. That showed 10mg. A third test after a further 15 minutes registered 8mg. That led, following a further investigation and then a disciplinary hearing, to the claimant's summary dismissal. Her internal appeal was unsuccessful.

2. The claimant pursued complaints of unfair and wrongful dismissal. Those were heard at East London by EJ Illing. The tribunal upheld the complaint of unfair dismissal, because (but only because) it concluded that the manager who heard the appeal had not fully considered the claimant's grounds of appeal, and the appeal meeting was flawed. The complaint of wrongful dismissal failed.

3. The tribunal decided that the compensatory award should be calculated by reference to the period until the claimant reached age 65. It decided that there was a 75% chance that a fair appeal would have been unsuccessful, so that there should be a *Polkey* reduction of her compensatory award of that percentage. It also decided that she had caused or contributed to her dismissal, such that the compensatory award should be reduced by a further 75%, and the basic award reduced by 75%. It also decided that the respondent had unreasonably failed to comply with the *ACAS Code of Practice 1* (2015) in respect of the appeal, and the compensatory award should be uplifted by 10%. The tribunal set out its calculations of the basic and compensatory awards, reflecting all of those decisions.

4. An application for reconsideration was upheld, in so far as the tribunal had used the date of birth 2 February 1960, whereas the claimant was born on 20 February 1960. That resulted in a small

increase in the compensatory award. Other grounds of reconsideration were rejected. In particular the tribunal remained of the view that it would be just and equitable to calculate the claimant's underlying loss of remuneration up to the (corrected) date of her 65th birthday. It also adhered to the previous percentages for the *Polkey* and contributory-conduct reductions, and the *ACAS Code* uplift.

5. In more detail, the factual background, which I take from the tribunal's decision, is as follows.

6. The tests on the day in question were carried out by the claimant's supervisor, Mr Fisher. Between each test the claimant went to the lavatory. On the first occasion when she returned she was drinking from a bottle of water. On the second she was eating a mint. She told Mr Fisher that she had had to visit the toilet a second time because she had a kidney infection. The claimant also told Mr Fisher that she had used Listerine and sanitising hand gel before leaving home.

7. Following the three tests, Mr Fisher sent the claimant home and telephoned the Operations Manager, Mr Tanswell, to tell him what had happened. Mr Fisher also prepared a contemporaneous statement in which he wrote that the claimant had told him that she had had three or four drinks the night before. Before the tribunal there were factual disputes as to whether it was true that she had said that, and/or whether she had also referred to vodka; and as to what Mr Fisher had said to Mr Tanswell on the subject. I will return to this.

8. An investigation was conducted by a duty manager, Mr Hales, including him considering Mr Fisher's statement and interviewing the claimant on 30 June 2021. She suggested to Mr Hales that the reasons for the failed tests were the Listerine, and antibiotics which she had started the night before, having been diagnosed with the kidney infection. She said that she could not drink on account of the antibiotics, had not done so the night before, and had not told Mr Fisher that she had. Mr Hales and the claimant both tested the effects of using Listerine. They registered initial scores, respectively, of 46mg and 44mg; but both registered zero upon retesting after 10 minutes. Mr Hales did a hand gel

test, scoring 6mg. Mr Hales concluded that there was a case to answer and suspended the claimant on full pay. His investigation report indicated that Listerine had been considered as a possible cause of the readings, but that testing had shown this not to be the case.

9. That led to a disciplinary hearing before Mr Tanswell. The claimant was warned that a possible outcome was dismissal and informed of her right to be accompanied. Mr Tanswell had reviewed the documents from Mr Fisher and Mr Hales, the test results and the D & A policy. The claimant was accompanied. She confirmed that the notes of her meeting with Mr Hales were accurate. During the course of the discussion the claimant said she had had Listerine in her car before she came to work. She confirmed that her "go to" drink is vodka. The tribunal found that, asked how alcohol got in to her system, she "stated that it could have been the night before, it has to have been the night before, I can't remember." The tribunal added that she said: "I must have had something" and, on being asked how much, "admitted to having only a couple." The claimant confirmed that the outcome of the Listerine test conducted by Mr Hales was that it was gone after 10 minutes.

10. After an adjournment Mr Tanswell indicated that there was a case to answer. He had taken into account the claimant's length of service, clean record and the seriousness of the offence. He did not believe that there were any extenuating circumstances but asked if she wished to give any mitigation. She said that she was having problems at home and that she had financial difficulties. The tribunal continued at [71]:

> **"Mr Tanswell gave the claimant his decision. In explanation he confirmed the following:**
>
> **71.1 that the claimant had failed the breath test on 3 occasions on 26 June 2021. This is not contested by the claimant.**
>
> **71.2 He had concerns as to how her evidence had changed in relation to drinking the night before, or not.**
>
> **71.3 That he believed that she had told Mr Fisher that she had had 3 or 4 vodkas the night before. Vodka is first recorded in the investigation meeting notes between the claimant and Mr Hales when the claimant admits to drinking vodka 2-days before the 26th June. I find that this decision supports the claimant's belief that there was a conversation between Mr Fisher and Mr Tanswell prior to the disciplinary meeting where Mr Fisher's concerns regarding vodka were discussed. I also find that Mr Tanswell would have been made aware of vodka**

> **being the claimant's drink from Mr Hale's meeting notes.**
>
> **71.4 That the control test with Listerine by her and Mr Hales showed that the results were different to those of the 26 June. The claimant accepted this result during the meeting with Mr Hales and with Mr Tanswell.**
>
> **71.5 That she was inconsistent during the disciplinary hearing as to whether she had had a drink or not and contrary to rule 2 of Driving Out Harm another company policy.**
>
> **71.6 That this was not about her being drunk, but about supplying a sample over the company's acceptable level.**
>
> **71.7 That an accident whilst under the influence could have serious consequences to her and the Company."**

11. Mr Tanswell dismissed the claimant. She appealed, setting out her points in initial grounds and a further letter. The appeal was heard by the Operations Development Manager, Mr Tierney. There was a meeting at which the claimant was accompanied. The tribunal said that for him the key issue was the Listerine. The notes supported that he offered to retake the Listerine test but the claimant refused. He concluded that Listerine had not had any bearing. The appeal was unsuccessful.

The Grounds of Appeal, Argument, Conclusions

12. The notice and original grounds of appeal were submitted prior to the tribunal's reconsideration decision. The judge who considered them on paper considered them all to be arguable. Although that was, in point of time, after the reconsideration decision had been given, it appears to me that she may not have had sight of it, as she did not refer to it. The respondent's Answer did, however, refer to, and rely upon, the reconsideration decision. Mr Margo, who appeared for the claimant, accepted that, in considering this appeal, account needs to be taken of the further reasoning on some aspects, set out in the reconsideration decision.

13. The grounds of appeal that were maintained and advanced before me, were narrowed and focused by Mr Margo, with a number of strands of the original grounds being abandoned. He also, without objection from Mr Peacock, who appeared for the respondent, clarified to which aspects of the tribunal's decision, each challenge was said to be relevant.

Meek *challenges – Grounds 1 and 4*

14. As I have described, the claimant was successful in her complaint of unfair dismissal, but not in her complaint of wrongful dismissal. Mr Margo contended that, in certain particular respects, the tribunal's decision was not *Meek*-compliant. The challenges that were ultimately maintained fell under the umbrella of the original grounds 1 and, overlappingly, 4. Each of these challenges was said to have a bearing on the *Polkey* issue (on the basis that, if the tribunal should have found the dismissal unfair for *additional* reasons, that would in turn have affected the *Polkey* assessment), the contributory-conduct issue and/or the decision that the claimant was not wrongfully dismissed. There were, in substance, four such challenges. I will consider these, each in turn.

Meek *(1) – whether the claimant admitted to Mr Fisher that she had drunk alcohol.*

15. In the course of its findings about the claimant's discussions with Mr Fisher on the morning of 26 June 2021 when he conducted the breath tests, the tribunal wrote:

> **"36. During the time in Mr Fisher's office, it is Mr Fisher's evidence that the claimant informed him that she had been drinking the night before. He says that she told him that she had had 3 or 4 drinks the night before and had had some vodka and a mixer. Mr Fisher's contemporaneous statement states that the claimant had said that she had been drinking the night before. It does not refer to vodka.**
>
> **37 This was an interview immediately following a failed alcohol breath test. I find that in admitting to Mr Fisher that she had been drinking the night before, she was admitting to having drunk an alcoholic drink.**
>
> **38 Mr Fisher also states that the claimant told him that she had washed her hair, sanitised her hands and used Listerine before leaving home. In evidence the claimant confirmed that washing her hair is part of her usual routine and that she regularly used Listerine at home, usually 2-hours before attending work. Mr Fisher states that he told the claimant that if they could affect the test, this would have dissipated within 5 – 10 minutes, which is why the company allows for longer between the re-tests.**
>
> **39 Following the failure of the third test, Mr Fisher sent the claimant home. This was in accordance with the company policy. He also telephoned Mr Graham Tanswell to inform him that the claimant had failed the test and been sent home. The claimant believes that Mr Fisher told Mr Tanswell that he believed that the claimant had been drinking vodka. It is Mr Fisher and Mr Tanswell's evidence that they did not discuss what the claimant had drunk but the call had been in accordance with operational procedures. I find that this call was in line with operational procedures in that the claimant had failed the breath test and had been sent home.**
>
> **40 Mr Fisher immediately prepared an investigation statement. He states that the claimant told him during his meeting with her that she had had 3 or 4 drinks the night before. He also stated that he believed that she was trying to influence the results by taking mints and visiting**

> **the toilet."**

16. Later in the decision, the tribunal wrote:

> **"126. I have found that I accept Mr Fisher's evidence in that the claimant admitted to drinking vodka before attending work on the 26 June 2021. I find that I accept Mr Fisher's evidence which was in the context of a conversation following the failure of three breath tests, which is supported in part by his contemporaneous statement. I conclude that there were reasonable grounds for the respondent to believe that the claimant had acted as alleged, the allegation being that she provided a positive breath test for alcohol."**

17. The first *Meek* challenge contends that the finding at [37], that the claimant admitted to having drunk alcohol the night before, was insufficiently explained. Mr Margo submitted that this had a potential bearing on *Polkey*, contributory conduct, and the wrongful-dismissal complaint. He relied on the fact that the claimant's evidence to the tribunal was that she had told Mr Fisher that she had drunk nothing but water. He submitted that the tribunal had failed sufficiently to explain why, on this point, it had preferred the evidence of Mr Fisher to that of the claimant.

18. My conclusion is as follows. The tribunal was considering what happened in the conversation in question in the context of the claimant having – which was not disputed as such – failed three breath tests for alcohol. Further, as well as hearing from the claimant and from Mr Fisher, the tribunal had before it Mr Fisher's contemporaneous statement, which recorded her having told him that "she had had 3 or 4 drinks the night before". In ordinary parlance, and particularly in this context, the natural meaning of "drinks" in a phrase of that sort, is "alcoholic drinks". The issue raised by this particular challenge is not whether the claimant specifically referred to vodka, but whether she, in so many words, admitted to having drunk alcohol. Having regard to the foregoing features, the tribunal's conclusion that she did was sufficiently explained.

Meek *(2) – whether Mr Tanswell was influenced by his prior discussion with Mr Fisher*

19. At [74] the tribunal said:

> **"I find that Mr Tanswell was not unfairly influenced by any prior conversation with Mr Fisher or Mr Hales in the making of his decisions and that he maintained an open mind during the**

hearing to listen to the claimant and consider her position."

20. This challenge contends that the finding that Mr Tanswell was "not unfairly influenced by any prior conversation with Mr Fisher" was insufficiently explained. (No issue is taken about the reference to Mr Hales.) Mr Margo submitted that at [71.3] (which I have set out above) the tribunal had made what amounted to a finding that, when Mr Fisher spoke to Mr Tanswell, on the day of the alcohol tests, Mr Fisher had told Mr Tanswell that he, Mr Fisher, was concerned that the claimant was drinking vodka. The tribunal had also recorded at [39] (also set out above) that the evidence of both Mr Fisher and Mr Tanswell had been that, on that call, they did not discuss what the claimant had drunk. Mr Margo accepted that must mean that they did not discuss the particular *type* of alcohol. But, he reasoned, the tribunal had, in substance, disbelieved that evidence. Against that background, it was incumbent on the tribunal further to explain its conclusion that Mr Tanswell was not influenced by "any prior conversation" with Mr Fisher, and had maintained an open mind.

21. My conclusions on this challenge are as follows.

22. First, once again, the context must be borne in mind. The claimant had failed three alcohol tests. The essential issue in the disciplinary process was whether that was because she had drunk alcohol, or there was some other cause. The issue was not, if it was because of alcohol, what type.

23. Secondly, the tribunal properly found that it was in accordance with protocol for Mr Fisher to have reported to Mr Tanswell that the claimant had failed the alcohol tests, as such. That plainly and obviously gave rise to a cause for concern that she had drunk alcohol, which was why, in accordance with procedure, there was required to be a further investigation.

24. Thirdly, in his contemporaneous note, Mr Fisher recorded that the claimant had told him that she had had 3 or 4 drinks the night before. The note was available to Mr Hales, and the claimant told Mr Hales that it was her case that it was not accurate. The notes of Mr Fisher and Mr Hales were also

considered by Mr Tanswell, and the claimant also had the opportunity to give her account to him. Mr Tanswell therefore knew, from Mr Fisher's note, that it was Mr Fisher's case that the claimant had admitted to him that she had drunk alcohol; and he knew that the claimant disputed that.

25. What this allegation added was that Mr Fisher, in the conversation, added that he suspected that the *type* of alcohol which, according to him, the claimant admitted having drunk, was vodka. However, by the time the matter came before Mr Tanswell, he also had Mr Hales's note, in which he recorded that she had told him that she had drunk vodka on 24th June (her point being that that had not caused her to fail a test the next day), and that on rest days she would drink either vodka or Southern Comfort. The tribunal recorded at [31] that, before Mr Tanswell, the claimant accepted that Mr Hales's note was accurate; and that she herself told Mr Tanswell that vodka was her "go to" drink.

26. It is in that context that the factual dispute about whether, when he reported to Mr Tanswell that the claimant had failed three alcohol tests, Mr Fisher told Mr Tanswell that he suspected that the claimant had been drinking vodka, fell to be considered by the tribunal.

27. Turning, then, to paragraph [71.3] the tribunal first identified that in his dismissal letter Mr Tanswell stated his belief that this was what she told Mr Fisher. What the tribunal then did is consider what light that may throw on the factual dispute as to whether, when they spoke, Mr Fisher had told Mr Tanswell that he was concerned that the claimant had drunk vodka. The tribunal recognised that Mr Tanswell saying this provided *support* for the claimant's belief on this issue, while also noting that Mr Tanswell was aware, from Mr Hales's note, that she herself had referred, when she spoke to him, to vodka being her preferred drink (or one of her two preferred drinks).

28. The very subject matter of the rest of that paragraph after the first sentence was, therefore, the factual dispute about whether Mr Fisher had referred to vodka when he spoke to Mr Tanswell. At [39] the tribunal had identified the evidence of Mr Fisher and Mr Tanswell about that. Here, it was

considering other evidence that could be said to support the claimant's case about it. The very reason it was considering that evidence was because it was a matter of factual dispute. I do not think, therefore, that the tribunal can have failed to have taken into account, when reaching its conclusion at [74], what the evidence of Mr Tanswell (and Mr Fisher) on the point had been.

29. The tribunal did not, to my reading, at [71.3] make a firm finding of fact on this point. That is reflected in the reference in paragraph [74] to "any" prior conversation with Mr Fisher. However, because it had recognised at [71.3] that there *was* some evidence to support the claimant's suspicion, what the tribunal conveyed at paragraph [74], was that it had therefore considered whether Mr Tanswell had approached his decision with an open mind, on the assumption that Mr Fisher had indeed, when he spoke to Mr Tanswell, mentioned his suspicion about vodka.

30. It is important to keep in mind that this was not, and could not be, a perversity challenge. It was a *Meek* challenge. Mr Tanswell was himself a witness. The tribunal had made detailed findings in its decision about what was said at the disciplinary hearing, including questions which Mr Tanswell had asked the claimant, and the things she said in particular on the subject of whether she had or had not been drinking alcohol. It had set out what he wrote in the dismissal letter about why he came to his conclusions, including what he said he made of the things that she had said during the course of the disciplinary hearing, and specifically, his concerns that her account had changed and she had been inconsistent. These overall findings were sufficient to explain the tribunal's conclusion that Mr Tanswell had maintained an open mind and considered what the claimant had said, even if, though they both denied it, Mr Fisher had mentioned his concern about vodka to Mr Tanswell.

Meek (3) – the tribunal's own conclusion about whether the claimant had consumed alcohol

31. The next challenge relates to the following finding at [98]:

> **"On the balance of probabilities, I conclude that the breath tests were positive because the claimant had consumed alcohol and that the most plausible reason is that she did consume alcohol on the evening before attending work."**

32. Mr Margo contended that this finding was insufficiently explained because the tribunal did not identify here what role, if any, its finding that the claimant had admitted to Mr Fisher that she had drunk alcohol played in this conclusion. This is said to be relevant to *Polkey*, contributory fault and wrongful dismissal. My conclusions are as follows.

33. The context for this conclusion was the finding that the claimant had failed three alcohol tests with the readings that the tribunal had set out. This paragraph formed part of a passage in which the tribunal was considering – for the purposes of its own factual finding – what the reason for that having happened was, and whether it was because the claimant had consumed alcohol the night before.

34. In the course of that passage the tribunal referred to the evidence as to the Listerine breath tests during the investigation with Mr Hales [89]. It also noted that there was evidence that in 2018 the claimant had taken a random breath test at a time when she was taking Amoxicillin, which she had not failed [90]. It went on to consider whether the test results could be explained by taking Listerine. Its conclusion was that Listerine could influence an alcohol breath test, but its influence is limited to "10 minutes or less" [95]. It went on to consider Amoxicillin, noting what had happened in 2018. It found that this had not influenced the test in question. [96]

35. The tribunal then turned to consider alcohol. At paragraph [97] it said:

> **"Additionally, I find that during the course of the interviews, the claimant's answers change. This is notable in the disciplinary interview and I find that the claimant's answers change from her "last alcoholic drink being the night before", to "I may have had a drink", to "I can't remember"."**

36. Paragraph [98] then followed. It was supported by full and clear reasoning. The tribunal found that the claimant had drunk alcohol: because of the test results, because it had eliminated Listerine and Amoxicillin as possible explanations, and because of the claimant's own changing answers in the course of the internal process. All of that properly explained its conclusion, on the

balance of probabilities, as to the explanation. There was no suggestion in this reasoning that it had taken into account, or that the balance had in its mind been tipped by, its finding that the claimant had admitted to Mr Fisher having drunk alcohol. The tribunal did not need to address that aspect in this passage, in order for its reasoning to be clear, understandable and sufficient.

Meek *(4) – the respondent's policy that 8mg/100ml is unacceptable.*

37. At [99] – [100] the tribunal found:

> **"99 The respondent operates a D&A Policy which provides that the level of alcohol in a breath test of 8mg/100ml is unacceptable. This is significantly below the national drink driving limit of 35mg/100ml. The respondent asserts that this low level is required to meet its obligations to the health and safety of passengers, employees and other colleagues in and around the airport and to minimise risk to all. All drivers are required to provide a breath test at a wall mounted alcolock machine before they are permitted to start work. I find that this is a reasonable course of action in the circumstances.**
>
> **100 The respondent's D&A policy and disciplinary policy both provide that the provision of a breath test that is positive for alcohol is gross misconduct, for which the sanction is summary dismissal. The disciplinary policy provides that the sanction will be dismissal on the grounds of gross misconduct unless there are exceptional circumstances."**

38. Mr Margo contended that what the tribunal had failed to do in this passage was explain why it considered that the respondent's policy of setting its acceptable limit at the level of not exceeding 8mg/100ml was reasonable or justified. He submitted that, given that this was well below the criminal limit, and that there was no suggestion that the respondent had put forward expert or any other evidence to support that level, the tribunal had failed to explain this conclusion.

39. As to this, the tribunal's findings included that (a) the respondent is a passenger-carrying coach operator; (b) the claimant worked as a PCV driver airside at Stansted; (c) all of the respondent's relevant polices were agreed with the recognised trade union [9]; (d) the level which the respondent regarded as acceptable was set out in its D & A policy, including that exceeding that level would result in dismissal for gross misconduct, but did allow for the possibility of exceptional circumstances [10] – [15]; (e) this was significantly below the "national" limit of 35mg, *but* that the respondent "asserts that this low level is required to meet its obligations to the health and safety of passengers,

employees and other colleagues in and around the airport and to minimise risk to all." [11][99]; and (f) the disciplinary policy gave "reporting for duty under the influence of alcohol" as an example of gross misconduct [18].

40. In light of all the foregoing, the tribunal was plainly entitled to conclude that the respondent's standards and requirements were clear, and that the claimant was plainly on notice of them, and that she was liable to be dismissed if she failed a test by reference to them. If the employee is fairly on notice as to the employer's requirements, and that they are liable to be dismissed for not meeting them, the scope to challenge a dismissal on the basis that dismissal was not reasonably open to the employer as a sanction is severely limited. The tribunal would have to conclude that the conduct in question was, on any view, so incontrovertibly and inherently innocuous and trivial, that no employer acting reasonably could have treated it as warranting dismissal. Further, the present challenge is not in any event a perversity challenge. It is a *Meek* challenge. The salient fact was that the respondent set its acceptable alcohol level clearly below the "national" limit (but above zero), not that it set it at 8mg rather than, say, 5mg or 20mg. Given all of the findings that I have described, at [39], in particular at (a), (b), (c) and (e), I do not think the tribunal needed to say anything further to explain why it considered that approach to be reasonable for the purposes of unfair dismissal law.

41. For the purposes of the wrongful-dismissal complaint, again, in light of those findings, I do not think the tribunal needed to say more to spell out why it considered that contravening this requirement fell to be regarded as a repudiatory breach. Nor, given all its findings, did it need to say more to explain why it considered that this was seriously culpable and blameworthy conduct.

42. For all of these reasons, all of the *Meek* challenges fail.

Grounds 2 and 3 – Polkey *and contributory fault*

43. Grounds 2 and 3 advanced further challenges to the conclusions that there should be a 75%

Polkey reduction and a 75% contributory-conduct reduction. However, in argument Mr Margo indicated that he did not maintain those grounds by way of any further or independent challenge to those conclusions, over and above the challenges that I have already considered. That being so, I therefore need to say no more about those grounds, save to say that the reasons why, in each case, the tribunal arrived at a particular reduction of 75% were, in my judgment, sufficiently explained.

Ground 5 – limiting the compensation period to the claimant's 65th birthday

44. A strand of ground 5, as originally framed, related to the original error regarding the claimant's precise date of birth; but Mr Margo acknowledged that that had been corrected in the reconsideration decision. The challenge raised by ground 5 which remained live, was to the tribunal's decision to limit the calculation of the claimant's compensation for lost remuneration, by reference to the period up to her 65th birthday, a decision to which it adhered upon reconsideration.

45. As I have noted, the claimant was born on 20 February 1960. So, on the date of her dismissal in July 2021 she was aged 61. At the time of the hearing before the tribunal in October 2023 she was aged 63. At the time of the reconsideration decision in May 2024 she was aged 64. She was seeking to be compensated on the basis that she intended to work to age 70.

46. The tribunal set out that, about two weeks after her dismissal by the respondent, the claimant began working for a company called Stephenson's of Essex; but, for reasons which the tribunal found reasonable, she left after three weeks and, about a week later, started at a company called Flagfinders. The tribunal in effect treated that change of employer as not breaking the chain of causation of loss.

47. The original decision divided the period from the date of dismissal of 14 July 2021 to the (assumed) date of the claimant's 60th birthday on 2 February 2025 into six sub-periods. At [156] it set out what would have been her hourly rate of pay with the respondent during each period. At [168] it set out the claimant's average net weekly pay with the respondent at the time of dismissal. At [169]

it set out her average weekly pay during her short time with Stephensons, and at [170] her current net weekly pay with Flagfinders, which it had used "throughout." It added: "No pay rise for this employer has been taken into account. I accept that there would be a rise in time."

48. The tribunal then proceeded to calculate the claimant's past and future loss of remuneration up to the assumed date of her 60th birthday on 2 February 2025. It appears that, for all of the first five periods, up to 31 December 2024, it used the actual rates that would have applied at the respondent, and the actual earnings at Stephensons and then Flagfinders. At [195] it considered period 6:

> **"This is from 1 January 2025 to the claimants 65th birthday. I am unable to take into account any potential pay rises from the claimant's current employer. I find that it is just and equitable in the circumstances to limit the award of future losses to this date."**

49. In her reconsideration application, as well as raising the error as to her date of birth, the claimant challenged the decision to limit the compensation period to her 65th birthday. She referred to her evidence that financial and personal commitments meant that she could not afford to retire before 70. She also asserted that, during the oral delivery of the decision, in an exchange with her counsel, the judge had said 65 was her state retirement age; whereas, for her, it was in fact 66.

50. In the reconsideration decision the judge took on board the error regarding the precise date of birth, and adjusted the award accordingly. The judge continued:

> "**27. Within the written reasons the claimant's 70th birthday is included as a key date, as this was the date to which she was seeking compensation.**
>
> **28. At the time of the hearing the length of time for which compensation should be awarded was considered, para 195. This was Period 6 for the compensation calculation. For this reconsideration I have considered whether it would be just and equitable to award further compensation. I have taken into account the following:**
>
> **a. The claimant's assertion that she will need to work until her 70th birthday.**
>
> **b. The pay rises that were scheduled to be awarded by the respondent.**
>
> **c. That there is no evidence of potential pay increases, whether by pay rise, promotion or change of employment.**
>
> **d. That an award has already been made for a period from dismissal in 2021 to February 2025.**
>
> **29. Within my original reasons, I was unable to take into account any pay increases for Period**

> **6, whether from the claimant's current employer or new employer at any point during the period being compensated for as no evidence was provided for this period of time. So, for the compensation period 6 and onwards, the claimant will have the benefit of the respondent's pay rises, whether or not her ongoing earnings increase or decrease.**
>
> **30. I have considered the claimant's position that she will need to work until her 70th birthday and this may, or may not, prove to be the case. I am satisfied that the award already provided is for a considerable period and there are many variables that could come into play during this time.**
>
> **31. I found that it was just and equitable to limit compensation to the claimant's 65th birthday in my original decision. It is accepted that the incorrect retirement age was referenced. I have taken to opportunity to review the length of the award and consider that an award for 2 ½ Years is a considerable award where account is taken for salary uplifts from the Respondent but not from the claimant's new employment. On reconsideration, I still find that it is just and equitable to limit compensation to this date.**
>
> **32. I am satisfied that an award to the claimant's 65th birthday is just and equitable in all of the circumstances, which I have given above and there is no reason for me, nor is it in the interests of justice, to vary or revoke the original decision."**

51. The judge went on to acknowledge that she had made an error in stating the claimant's state retirement age; but this did not give rise to any further reason for revisiting the award, and she remained satisfied that an award up to the claimant's 65th birthday was just and equitable.

52. In summary, this ground challenges the tribunal's adherence to the cut-off age of 65 as having no principled or reasoned basis; and it contends that the tribunal failed to engage with the claimant's case that she intended to work until age 70. My conclusions on this ground are as follows.

53. The starting point is that section 123(1) **Employment Rights 1996** provides that the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances "having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer." It is therefore not sufficient for a tribunal merely to refer to what it considers just and equitable. It has to have regard to the loss sustained "in consequence of the dismissal"; and so it needs to evaluate that loss, as best it can.

54. In this case the tribunal treated the move from Stephensons to Flagfinders as not breaking the chain of causation. The claimant's remuneration at Flagfinders had been, and was, at the time of the

original adjudication, and at the time of the reconsideration, at a lower rate than she would have enjoyed at the respondent. The tribunal therefore needed to come to some view as to her future loss. How should it have approached that task?

55. In an oft-cited passage in **Software 2000 Limited v Andrews** [2007] ICR 825 at [54] the EAT (Elias P presiding) set out the approach to be taken to a *Polkey* assessment. Such an exercise inherently involves some uncertainty, because it is concerned not with what did happen but with what would or might have happened. The assessment of future loss is concerned with predicting what *will* happen, in the future; but it too has an inherent element of uncertainty. Both are facets of the overall task of assessing compensation applying the words of section 123(1); and some of the observations made in **Andrews** are of more general application. In particular, as with *Polkey*, so with future loss, in deciding what are matters of "impression and judgment" the tribunal must "have regard to any material and evidence which might assist it in fixing just compensation". That is so, even if there are limits to the extent to which it can confidently predict, in relation to *Polkey*, what might have been, or, in relation to future loss, what will happen in the future. In both exercises "[t]he mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence".

56. In **Contract Bottling Ltd v Cave** [2015] ICR 146 the EAT (Langstaff P) specifically considered the approach to be taken in relation to future loss. After reviewing a number of factors that might, in a given case, have a bearing on that, it observed at [18]: "As I have indicated, the position in most cases will necessarily involve a number of imponderables. They will vary heavily from case to case and from employee to employee. But the fact that many matters are imponderable does not mean to say that a Tribunal should not grapple with them insofar as it can."

57. As noted, the particular variables or factors that are most significant to the future-loss assessment will vary from case to case. In the present case the claimant was, at the time of adjudication, in ongoing employment, but at a lower rate of remuneration than with the respondent.

The key issue, having regard to her age, was how long she might go on working. The tribunal had to do the best that it could to come to some fair assessment of that question, having regard to such evidence as it had that might cast some light on it, and applying its industrial common sense.

58. One strand of that evidence was the claimant's evidence that she presently *intended* to go on working to age 70, because she considered that her financial and personal circumstances necessitated that. The tribunal needed to evaluate that evidence as part of its overall consideration of this issue. It also needed to consider whether, even if it accepted that this was her *current* intention, that might change in the future; and whether, whatever her intentions, they might be thwarted at some point by other contingencies of life, such as declining or ill health, or other circumstances beyond her control.

59. In the present case, in my judgment the tribunal failed sufficiently to grapple with that task. First, it is clear that, in the reconsideration decision, the judge did not regard the claimant's state retirement age, which she took on board was 66, as a significant date. That milestone does not contribute to the explanation of why the judge adhered to the age of 65 as the cut-off point. What, then, were the factors that did contribute to the decision upon reconsideration?

60. Firstly, in the original decision, at [195], and in the reconsideration decision at [28(c)] and [29], and again at [31], the judge appears to have attached significant weight to the fact that she was unable to take into account any pay increases for period 6 onward, whether from Flagfinders or any new employer; and so the judge reasoned that the claimant "will have the benefit of the respondent's pay raises, whether or not her ongoing earnings increase or decrease."

61. However, there are a number of difficulties with that reasoning. Firstly, and fundamentally, the tribunal seems to have proceeded on the basis that this consideration meant that it was just and equitable to limit the underlying loss period to 65 on the assumption that the gain to the claimant from overestimating the net loss from period 6 onwards (because potential pay increases with Flagfinders

were not factored in) would offset any future loss that might accrue after age 65. But to proceed on that basis was, as Mr Margo put it in submissions, to mix apples and pears; and the tribunal does not appear to have had any concrete or reasoned basis for concluding that this supported the particular age of 65 as somehow striking the right balance between these two factors.

62. That concern is reinforced by the reflection that, even if the tribunal knew the rate that the respondent would be paying for the whole of 2025, but did not know that for Flagfinders, the period of overcalculation would, it seems to me, be limited, potentially, to one year. The tribunal, it would appear, did not know what increases *either* company would or would or would not be paying after the end of 2025. But, in any event, as it decided to limit its award by reference to the period ending on 20 February 2025, it was, at worst, only overcalculating it in respect of the short period up that date; and it is hard to see how *that* could properly justify restricting the award to that same period.

63. The tribunal also appears to have taken into account, in the reconsideration decision, the absolute length of the period of the whole award. At [28(d)] it specifically referred to the award that it had already made for the period from dismissal in 2021 to February 2025, and at [31] it referred to an award for "2 ½ years" being a "considerable award". Though it is not entirely clear, 2 ½ years would appear to relate to the period of past loss of earnings up to when the original written decision was promulgated in December 2023. That creates the impression that, in considering how far forward to make an award for future earnings, the tribunal was influenced by the absolute length of the period already covered by its award of past earnings. But, again, that was not a principled approach.

64. In the reconsideration decision at [30] the tribunal observed that it "may or may not prove to be the case" that the claimant would work to age 70, as there were "many variables that could come into play during this time". That shows the tribunal recognising the element of uncertainty; but there is no sign that the tribunal attempted at all, to factor in to its decision, some evaluation of what these variables might be, and their potential impact, however broad-brush it might have had to be.

65. Rather, reading the reasoning overall, the tribunal appears simply to have decided to stick with the cut-off of the claimant's 65th birthday on the basis of an overall feel, in light of the period covered by such an award, and that there would be some element of underestimate because of the pay-increase factor, that this was just and equitable; but without grappling, as best it could, with making a reasoned assessment of the future loss arising from the dismissal by the respondent. That approach to future loss was not in accordance with the exercise required by section 123(1). I conclude that it made a principled error in this regard, and so ground 5 succeeds.

Outcome

66. In light of ground 5 having succeeded, the tribunal's calculation of the compensatory award must be revisited by it, by looking afresh at the assessment of the underlying past and future loss. I have referred at this point to revisiting past loss, and not just future loss, because time has passed since the reconsideration decision and some more time will inevitably pass before the tribunal makes its fresh decision upon remission. The opportunity should therefore be allowed, for the evidence as to the claimant's actual earnings up to date, and current employment position, and any other evidence that may be relevant to the revised assessment, to be updated before the award is freshly determined. Beyond that, I leave further case management to the tribunal.

67. Both counsel agreed that, in the event that this appeal succeeded to any extent, remission should be to the same judge if possible; and I will so direct.

68. As all other grounds having failed, other aspects of the tribunal's decision, in particular as to the percentage of the *Polkey* and contributory-conduct adjustments (and the *ACAS-Code* adjustment), the basic award, and the dismissal of the wrongful dismissal complaint, remain undisturbed.