

Neutral Citation Number: [2025] EAT 179

Case No: EA-2024-000438-AT

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 05 December 2025

**Before:**

**HIS HONOUR JUDGE JAMES TAYLER**

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**Between:**

**DR JAMES MULLEN**

**Appellant**

**- and -**

**MELIAN DIALOGUE RESEARCH LIMITED**

**Respondent**

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**Laurene Veale** (instructed by Slater and Gordon Lawyers) for the **Appellant**  
No attendance or representation for the **Respondent**

Hearing date: 26 November 2025

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**JUDGMENT**

## **SUMMARY**

### **Unfair Dismissal, Whistleblowing, Protected Disclosures**

The Employment Tribunal erred in its assessment of remedy for complaints of protected disclosure detriment and dismissal. The matter is remitted to a differently constituted Employment Tribunal.

**HIS HONOUR JUDGE JAMES TAYLER:**

**The issues**

1. This appeal raises issues about the assessment of compensation in successful complaints of protected disclosure dismissal and detriment.

**The parties**

2. The parties are referred to as the claimant and respondent as they were before the Employment Tribunal.

**Non-attendance of the respondent**

3. The respondent instructed Peninsula Business Services Ltd (“Peninsula”) in this appeal. Peninsula lodged an Answer and Cross-Appeal.

4. On 7 October 2025, Peninsula notified the EAT that they were ceasing to act and provided contact details for the respondent’s current director. By an email dated 28 October 2025, the claimant’s solicitors stated that they had not been able to agree a bundle with the respondent, because correspondence sent by post to the respondent’s director had been returned/refused. Correspondence from the EAT was also returned undelivered from the respondent as refused. The EAT had not received any communication from the respondent since Peninsula ceased to act. There was no attendance or representation for the respondent. I have no reason to believe the respondent is unaware of this hearing. I concluded that the respondent has chosen not to attend and that I should hear the appeal in the respondent’s absence.

**The judgment appealed**

5. This is an appeal against the remedy judgment of Employment Judge Professor A C Neal, sitting with members after a hearing in February 2024. The judgment was sent to the parties on 28 February 2024.

6. The claimant had succeeded in complaints of unfair dismissal for the reason that he had

made protected disclosures and of protected disclosure detriment. So far as is relevant to the appeal, compensation for unfair dismissal was subject to reductions under the **Polkey** principle and on the basis that the claimant had failed to fully mitigate his loss. The Employment Tribunal did not give any decision in respect of a claim that the claimant had sustained loss by way of expenses incurred in setting up a new business. The Employment Tribunal rejected a claim for aggravated damages. The Employment Tribunal erroneously made an award for injury to feelings in respect of unfair dismissal that is the subject of a cross-appeal conceded by the claimant.

### **Preparation for the hearing in the Employment Tribunal**

7. The respondent did not properly cooperate with the claimant or the Employment Tribunal in preparing for the hearing. The respondent suggested that they would call 10 witnesses. Because of the number of witnesses the respondent stated they intended to call, the Employment Tribunal fixed a ten day hearing to determine liability only. The respondent failed to exchange witness statements in accordance with case management orders made by the Employment Tribunal and did not provide full disclosure. This resulted in an application for an unless order on 24 January 2024 that was not determined prior to the hearing. A statement was provided from Dr Jim Coke, at the time the sole director of the respondent, just before the hearing.

8. At the commencement of the hearing the claimant applied to strike out the response or that the respondent should not be permitted to rely on its late witness statement. The application was refused on the basis that such penalties would be disproportionate because the parties were ready to progress with the hearing. The Employment Tribunal did not examine the asserted default by the respondent in detail.

9. Because the ten day listing, for liability only, had been predicated on the basis that the respondent would call 10 witnesses it was agreed, to use the time available efficiently, that

remedy would also be determined at the hearing, if appropriate. The witness statements had been drafted dealing only with liability. It was agreed that the claimant's Counsel could ask supplementary questions during examination in chief about remedy issues and that the respondent's cross-examination would also deal with remedy.

10. The respondent disclosed substantial quantities of further documents during the hearing.

11. Having heard the evidence, including relatively limited evidence relevant to remedy, the Employment Tribunal gave a judgment on liability, holding that the claimant had been unfairly dismissed. The dismissal was automatically unfair being for the reason, or principal reason, that the claimant had made protected disclosures. The Employment Tribunal also held that the claimant had been subject to detriment done on the grounds of having made protected disclosures.

12. Neither party requested written reasons for the liability judgment. It is understandable that the claimant did not do so because he was successful and would have been reluctant to request written reasons that the respondent might seek to challenge in an appeal. I was provided with a detailed note that the claimant's Counsel took of the hearing and judgment. The notes were taken carefully and are reasonably comprehensive, but understandably are less complete where Counsel was speaking herself.

13. I appreciate that the Employment Tribunal has wide case management powers and that the approach adopted was agreed with the parties, but there would have been much to be said for dealing with liability first, potentially including any matters that might go to **Polkey** or contribution remedy issues, and then dealing with any other evidence necessary to determine remedy, once the liability decision had been given. The assessment of remedy must be founded on proper findings of fact based on relevant evidence. It is often helpful to take stock of the situation after the liability decision has been given to decide whether any additional evidence

is required to determine remedy.

14. The respondent did not dispute the underlying figures in the schedule of loss, updated by the claimant at the hearing.

15. After the liability hearing there were discussions about new documentation that had been provided by both parties, but the witnesses were not recalled to give further evidence. The remedy issues were discussed with the Employment Tribunal and submissions made by Counsel. Because the claimant was not recalled he did not give evidence about the new documentation. It is easy for an Employment Tribunal that has undertaken the heavy lifting in determining liability to adopt a more relaxed approach to the evidence needed to determine remedy. That is an error to be avoided because equal forensic scrutiny should be applied to determining remedy, which for many claimants is what it is all about. The assessment of remedy usually requires conjecture about what would have happened in the future but nonetheless must be founded on evidence.

### **Appeals to the EAT**

16. Pursuant to section 21 of the **Employment Tribunals Act 1996**, an appeal lies to the EAT only on a question of law.

17. In **Brent London Borough Council v Fuller** [2011] ICR 806, Mummery LJ considered the role of the EAT, at paragraphs 28 to 30:

28. The appellate body, whether the Employment Appeal Tribunal or this court, must be on its guard against making the very same legal error as the tribunal stands accused of making. An error will occur if the appellate body substitutes its own subjective response to the employee's conduct. The appellate body will slip into a similar sort of error if it substitutes its own view of the reasonable employer's response for the view formed by the tribunal without committing error of law or reaching a perverse decision on that point.

29. Other danger zones are present in most appeals against tribunal decisions. As an appeal lies only on a question of law, the difference between legal questions and findings of fact and inferences is crucial. **Appellate bodies learn more from experience than from precept or instruction how to spot the difference between a real question of**

**law and a challenge to primary findings of fact dressed up as law.**

**30. Another teaching of experience is that, as with other tribunals and courts, there are occasions when a correct self-direction of law is stated by the tribunal, but then overlooked or misapplied at the point of decision. The tribunal judgment must be read carefully to see if it has in fact correctly applied the law which it said was applicable. The reading of an employment tribunal decision must not, however, be so fussy that it produces pernicky critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid. [emphasis added]**

18. More recently, the approach to be adopted by the EAT was reiterated by the Court of Appeal in **DPP Law Ltd v Greenberg** [2021] IRLR 1016.

19. Sedley LJ held in **Anya v University of Oxford** [2001] ICR 847:

26. ... The courts have repeatedly told appellants that it is not acceptable to comb through a set of reasons for hints of error and fragments of mistake, and to try to assemble these into a case for oversetting the decision. No more is it acceptable to comb through a patently deficient decision for signs of the missing elements, and to try to amplify these by argument into an adequate set of reasons. Just as the courts will not interfere with a decision, whatever its incidental flaws, which has covered the correct ground and answered the right questions, so they should not uphold a decision which has failed in this basic task, whatever its other virtues.

### **Polkey (Ground 1)**

20. The compensatory award may be reduced pursuant to section 123(1) **Employment Rights Act 1996** (“ERA”):

123(1) Subject to the provisions of this section and sections 124, 124A and 126, the amount of 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.

21. There may be a reduction in compensation insofar as it is just and equitable in all the circumstances, having regard to the extent to which the loss sustained was attributable to the actions taken by the employer. This can result in a “**Polkey reduction**”, where it is determined

that there is a likelihood, or certainty, that the employee would have been dismissed in any event. The Employment Tribunal must assess whether the employer would have dismissed and whether the dismissal would have been fair.

22. In such circumstances, the Employment Tribunal assesses whether the respondent could have concluded that the conduct occurred and fairly dismissed as a result: see, for example, **O'Donoghue v Redcar and Cleveland Borough Council** [2001] IRLR 615 and **Hill v Governing Body of Great Tey Primary School** [2013] ICR 691 at [24]:

A 'Polkey deduction' has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer *would* have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.

23. There must be an evidential basis for the predictive exercise of assessing whether to make a **Polkey** deduction and, if so, deciding the percentage; **Contract Bottling Ltd v Cave** [2015] ICR 146 in which Langstaff J (P) held:

21 I draw attention to these factors to place the assessment of a *Polkey* contribution in context, but also to demonstrate that it is inevitably an exercise about which there can be no absolute and scientific certainty. It is a predictive exercise. Evidence is needed to inform the prediction. It is important that a tribunal should spell out, as best it can, what factors it takes into account in determining why it adopts a particular percentage. However, there can be no legitimate ground for criticising a particular percentage unless it is manifestly less than or more than the percentage which might have seemed proper or unless it is simply unreasoned. This is because, of its very nature, justifying 20% rather than 25% (as the case may be, or some slightly higher or some slightly lower percentage) is not susceptible of detailed reasoning. It is, and has to be, a process of assessment. Part of my reasoning in setting out all the various factors which

can intersect is to show how much a matter of art, as Mr Robinson-Young put it, this is rather than a matter of science.

24. In assessing the chance of a fair dismissal HHJ Peter Clark suggested in **Whitehead v**

**The Robertson Partnership** EAT/0331/01:

22... In answering what we have earlier described as the explicit question it is, we think, incumbent upon the Employment Tribunal to demonstrate their analysis of the hypothetical question by explaining their conclusions on the following sub-questions:

1. what potentially fair reason for dismissal, if any, might emerge as a result of a proper investigation and disciplinary process. Was it conduct? Was it some other substantial reason, that is a loss of trust and confidence in the employee? Was it capability?

2. depending on the principal reason for any hypothetical future dismissal would dismissal for that reason be fair or unfair? Thus, if conduct is the reason, would or might the Respondent have reasonable grounds for their belief in such misconduct even although the Employment Tribunal found as a fact that misconduct was not made out for the purposes of the contribution argument; alternatively, if for some other substantial reason, was that a sufficient reason for dismissal: similarly, capability.

3. even if a potentially fair dismissal was available to the Respondent, would he in fact have dismissed the Appellant as opposed to imposing some lesser penalty, and if so, would that have ensured the Appellant's continued employment?

25. Despite the challenges involved, the Employment Tribunal should generally carry out the **Polkey** analysis if the necessary evidence is available. In **Andrews v Software 2000 Ltd**

[2007] IRLR 568, having summarised the authorities Elias J held:

The following principles emerge from these cases:

(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example,

have given evidence that he had intended to retire in the near future).

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the tribunal's assessment that the exercise is too speculative. However, it must interfere if the tribunal has not directed itself properly and has taken too narrow a view of its role.

...

(7) Having considered the evidence, the tribunal may determine:

(a) That if fair procedures had been complied with, the employer has satisfied it – the onus being firmly on the employer – that on the balance of probabilities the dismissal would have occurred when it did in any event. The dismissal is then fair by virtue of s.98A(2).

(b) That there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly.

(c) That employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in the *O'Donoghue* case.

(d) Employment would have continued indefinitely.

However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored.

26. To make a **Polkey** reduction the Employment Tribunal must be persuaded by the respondent that there is a chance that the claimant would or might have been fairly dismissed by it, rather by some other putative reasonable employer.

27. A **Polkey** reduction is not appropriate where the claimant is guilty of conduct that might only have merited some lesser sanction than dismissal. That is a point that is worth remembering especially where an employee with no previous disciplinary record is asserted to have been guilty of some relatively minor misconduct. An Employment Tribunal cannot make a small **Polkey** deduction merely to reflect the fact that an employee might have been subject to some disciplinary sanction short of dismissal.

28. The Employment Tribunal held:

#### “POLKEY” DEDUCTION

36. Submissions have been made in relation to a so-called “Polkey” reduction to reflect the chance (if any) that the Claimant would have been dismissed in any event had the Respondent acted fairly. This is a reference to the opinions of Their Lordships in the House of Lords case of *Polkey v. A.E. Dayton Services Ltd*, [1988] ICR 142. The Tribunal has also had regard to observations in the case of *Gover v. Propertycare Ltd*, [2006] EWCA Civ 286 – particularly the observations of Buxton LJ at paragraphs 18 and 19 of his judgment, setting out his views on the propositions advanced by the Appellant and set out in paragraph 16 of the judgment, which led to dismissal of the appeal.

37. The submissions on the “Polkey” point as put forward by Counsel for the Claimant were summarised at paragraphs 119 and 120 of her Skeleton Argument. In particular, she submits that:

R has not proven that C would have been fairly dismissed in any event. There was no fair reason for dismissal. Further, JC’s evidence made it clear that he had little knowledge of what a fair process for dismissal looked like, and in any event R had no disciplinary policy or procedure let alone a performance management procedure. Therefore even if in the remote hypothetical future a fair reason for dismissing C did appear, there is no evidence to suggest a fair process would have been followed. There is no basis for a Polkey reduction in this case.

38. With all due respect to Counsel for the Claimant the Tribunal disagrees.

(1) There were potentially “fair reasons” to dismiss in the mind of the Respondent in the lead up to the dismissal. Those included **the Claimant’s performance (in particular, as regards “money” and “research that comes in”)** as evidenced by the transcript of the meeting on 10 August 2022 which was covertly recorded by the Claimant [B/203-4]. **The Claimant has accepted during cross-examination that there was also “an issue relating to the French consultant”** addressed at that meeting and that **two “complaints” had been received about the Claimant (one of which was a complaint by reference to the protected characteristic**

**of race**). The Tribunal has found, for reasons set out in its judgment on liability delivered on the afternoon of Day 8, that those potential reasons were overtaken by the impact of the Claimant's disclosures contained in his email of 8 August 2022, and that the principal reason for the eventual dismissal of the Claimant was the making of the protected disclosures.

(2) **The evidence** – most notably the transcript of the covertly recorded conversation on 10 August 2022 – **does not support the proposition that Dr Coke “had little knowledge of what a fair process for dismissal looked like”**. It is clear from the content of that transcript (in the last paragraph at page 203 of the Bundle) **that Dr Coke had raised a number of “concerns”, and that he was expressing to the Claimant that “we’ve come to the end of the road”**. The reasons for that were put explicitly to the Claimant: “it’s a no-show in terms of money in terms of research that comes in, it’s 5 months and you’ve produced 4100 pounds in billings”. It is also clear from the language used that Dr Coke was then undertaking what he described as “a protected conversation” – agreed by both parties to be an apparent reference to the provisions of Section 111A of the Employment Rights Act 1996. The expression “without prejudice” is then used. The Tribunal has no direct evidence of what was then discussed between Dr Coke and the Claimant, since the recorded content between “05:05:01” and “18:50:32” have been omitted. The only indication about that is a comment inserted into the transcript reading “Everything related to dismissal”. This has already been commented upon by the Tribunal in their judgment on liability, given that Section 111A of the Employment Rights Act 1996 only applies to cases of “Section 94 unfair dismissal”, and does not apply in the case of “whistleblowing dismissal” under Section 103A of the 1996 Act. **However, everything – including the terminology adopted – points to Dr Coke having been prepared (including in respect of procedural requirements) for the meeting on 10 August 2022 by an adviser with knowledge in the field of employment law.**

(3) While it is not denied by the Respondent that there was “no disciplinary policy or procedure let alone a performance management procedure”, that fact, taken together with the matters set out above, cannot in the view of the Tribunal be said to lead inevitably to the conclusion that “there is no evidence to suggest a fair process would have been followed”.

39. The Tribunal has sought to draw assistance from the “principles” set out by Elias P. in the case of *Software 2000 Ltd. v. Andrews and others*, [2007] UKEAT 0533\_06\_2601, which, in turn, were derived after consideration of significant judgments in cases such as the Scottish decision in *King v. Eaton (no. 2)*, [1998] IRLR 681, the judgment of Pill LJ in *Scope v. Dr Carol Thornett*, [2006] EWCA Civ 1600, and the *Gover* case already referred to, in addition to the House of Lords opinions in *Polkey* itself. These were set out at paragraph 54 of the judgment: ...

**40. In the view of the Tribunal there is evidence before them on which it can be said that the Claimant would or might have ceased to be employed**

**in any event had fair procedures been followed.** Having regard, in particular, to the matters set out above at paragraph 38, and taking into account what Dr Coke said in the course of his cross-examination, **the Tribunal is of the view that there is a real, albeit relatively small, prospect that the Claimant in this case might have ceased to be employed in any event had fair procedures been followed.** The Tribunal does not consider that the already mentioned poor quality of much of the evidence in this case renders their task “so riddled with uncertainty that no sensible prediction based on that evidence can properly be made”. In undertaking that task, this Tribunal recognises that there are limits to the extent to which the Tribunal can confidently predict what might have been. It follows, therefore that – as recognised by Elias P in *Software 2000 Ltd* – a degree of uncertainty is an inevitable feature of the exercise.

**41. Having regard to those warnings, therefore, the Tribunal has formed the view that the “real, albeit relatively small, prospect that the Claimant in this case might have ceased to be employed in any event had fair procedures been followed” should be reflected in the award of compensation. The Tribunal is of the view that it would be just and equitable to reduce the award of compensation to the Claimant by 10% to reflect that finding. [emphasis added]**

29. The Employment Tribunal referred to there being fair reasons to dismiss in the mind of the respondent. The Employment Tribunal did not analyse the reasons. The Employment Tribunal did not state which of the potentially fair reasons they might have been and whether this respondent would have fairly dismissed the claimant for some or all of the three reasons identified.

30. The Employment Tribunal referred to performance, in particular, as regards “money” and “research that comes in”. The Employment Tribunal provided no more detail about these generic descriptions. The claimant had strongly argued that the concerns about his performance were not based on accurate material. It is probably safe to assume that the Employment Tribunal had in mind capability as a potentially fair reason for dismissal. But the Employment Tribunal did not assess what fair process this respondent might have adopted and what would have been established had such a fair process been applied. The Employment Tribunal did not analyse what, if any, chance there was that this employer would have fairly dismissed the claimant for poor performance, in circumstances in which there had been no prior warning about performance.

31. The Employment Tribunal next referred to “an issue relating to the French consultant” without identifying what the issue was or why it might have resulted in this employer fairly dismissing the claimant. The issue appears to have been about a consultant who did not have a UK bank account through which she could be paid, the respondent having resiled from an earlier contention that her employment was “illegal”. It is likely that the Employment Tribunal had in mind conduct as a potentially fair reason for dismissal. However, there is no analysis of why this incident meant there was a prospect that this employer would have fairly dismissed the claimant for misconduct. The claimant was not cross-examined to any significant extent about this issue.

32. The Employment Tribunal referred to “complaints” that had been received about the claimant, one of which was “a complaint by reference to the protected characteristic of race”. The complaints made by consultants had been rejected by the respondent, including an assertion of racism, and no action was taken against the claimant. The claimant strongly denied the allegations. There was no analysis by the Employment Tribunal of why these issues might have resulted in the respondent fairly dismissing the claimant.

33. There is nothing to suggest that the Employment Tribunal concluded that the three matters taken together might have resulted in a fair dismissal.

34. The Employment Tribunal did not explain why it assessed the chance of a fair dismissal as 10%. Reading the judgment overall the Employment Tribunal thought that there was a little smoke, but found no fire. The Employment Tribunal did not identify a proper evidential basis for the determination of a 10% reduction.

35. The first ground of appeal succeeds.

### **Mitigation (Ground 2b)**

36. The approach to mitigation was summarised by Langstaff J (P) in **Lindsey v Cooper Contracting Ltd** UKEAT/0184/15, [2016] ICR D3 (at para 16):

(1) **The burden of proof is on the wrongdoer;** a Claimant does not have to prove that he has mitigated loss.

(2) **It is not some broad assessment on which the burden of proof is neutral.** I was referred in written submission but not orally to the case of *Tandem Bars Ltd v Pilloni* UKEAT/0050/12, Judgment in which was given on 21 May 2012. It follows from the principle — which itself follows from the cases I have already cited — that the decision in *Pilloni* itself, which was to the effect that the Employment Tribunal should have investigated the question of mitigation, is to my mind doubtful. If evidence as to mitigation is not put before the Employment Tribunal by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works: providing the information is the task of the employer.

(3) **What has to be proved is that the Claimant acted unreasonably; he does not have to show that what he did was reasonable** (see *Waterlow, Wilding and Mutton*).

(4) **There is a difference between acting reasonably and not acting unreasonably** (see *Wilding*).

(5) What is reasonable or unreasonable is a matter of fact.

(6) **It is to be determined, taking into account the views and wishes of the Claimant as one of the circumstances,** though it is the Tribunal's assessment of reasonableness and not the Claimant's that counts.

(7) **The Tribunal is not to apply too demanding a standard to the victim; after all, he is the victim of a wrong. He is not to be put on trial as if the losses were his fault when the central cause is the act of the wrongdoer** (see *Waterlow, Fyfe* and Potter LJ's observations in *Wilding*).

(8) **The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.**

(9) In a case in which it may be perfectly reasonable for a Claimant to have taken on a better paid job that fact does not necessarily satisfy the test. It will be important evidence that may assist the Tribunal to conclude that the employee has acted unreasonably, but it is not in itself sufficient. [emphasis added]

37. After his dismissal the claimant had set up a business that at the time of the hearing had not permitted him to take any income for 14 months. The Employment Tribunal referred to the limited evidence:

19. The Claimant's position is, essentially, that he is entitled to continue with devoting the entirety of his efforts to turning his "boutique consultancy" into a profitable going concern – which has not yet been achieved, but which is "expected" to meet that ambition some time in the Spring of 2026. The Tribunal

is satisfied that evidence has been adduced – both by way of reliance upon (the very limited) documentary materials and through cross-examination on Day 3 (forming the basis for extended comments on Day 9 in the light of further newly-disclosed financial material in relation to “Laurel Research Consulting Limited”) – upon which the Respondent is entitled to rely when seeking to resist the proposition that the Claimant has mitigated his loss.

38. The Employment Tribunal held:

28. Having considered the way in which matters developed in the eighteen months since the Claimant’s dismissal, **the Tribunal has formed the view that for the first six months the Claimant acted reasonably in devoting the entirety of his efforts to the new “boutique consultancy”**. The Tribunal therefore finds that for the period from the effective date of termination until the end of February 2023 **the Claimant discharged his duty to mitigate as required by Section 123(4) of the Employment Rights Act 1996**.

29. Thereafter, however, the Tribunal is of the view that the Claimant did not act reasonably in his insistence that only personal income generation through some contractual arrangement (no evidence of which has been produced to the Tribunal) with “Laurel Research Consulting Limited” should continue to be the appropriate and only course for him to take. While recognising – as has been pointed out in numerous earlier cases – that this exercise is not “scientific” in the sense of reaching “exact” figures – **the Tribunal is of the view that it was not reasonable for the Claimant not to look to exploiting his skill-set, in what was for him a familiar market, in a manner which would be complementary to the aspirations harboured in relation to the success of the new venture**.

30. **While it was not reasonable to devote the entirety of his time to that venture, the Tribunal finds that it would have been reasonable to continue with the devotion of efforts to the new venture while also expending a proportion of the Claimant’s efforts on generating personal revenue** as a research consultant in much the manner of his previous activity in January 2022. The Tribunal also finds that the developing picture of income generation – which continued to be zero – called for regular reappraisal of the situation and the appropriate course of action over time.

31. **In consequence, the Tribunal finds that for the three months between 1 March and 31 May 2023 the Claimant did not act reasonably in devoting his activities entirely to “Laurel Research Consulting Limited”**. An appraisal of the financial situation at that time called for some “complementary” action and there was a complete failure to make any effort to address that problem. The Tribunal makes a deduction of 50% of the loss for that period to reflect its view that devotion of half of the Claimant’s efforts to nurturing the new venture would have been reasonable, but no more.

32. **In the view of the Tribunal a further reappraisal was called for at the end of that period, and a deduction of 75% of the loss between 1 June and 31 August 2023 is made to reflect its view that devotion of 25% of the**

**Claimant's efforts to nurturing the new venture would have been reasonable, but no more.**

**33. Finally, with effect from 1 September 2023 and onwards the Tribunal finds that the Claimant did not act reasonably in relying exclusively, or at all, upon his relationship with the start-up "boutique consultancy" project to provide him with income to mitigate his loss following his dismissal by the Respondent. No award is therefore made for the period from 1 September 2023 or for claimed "future loss".**

34. In summary, therefore: (1) The Tribunal finds that the Claimant's gross loss during the 78 weeks up to the date of computation was £51,012 (taking the gross weekly pay to be £654); (2) The Claimant fully mitigated his loss during the period between the effective date of termination (18 August 2022) and 28 February 2023. The amount of that loss is £18,308.00p; (3) The Claimant acted unreasonably in not fully mitigating his loss between 1 March 2023 and 31 August 2023 and the Tribunal makes a deduction of 50% in the award. The amount of that loss is £4,250.00p; (4) The Claimant acted unreasonably in not fully mitigating his loss between 1 June 2023 and 31 August 2023 and the Tribunal makes a deduction of 75% in the award. The amount of that loss is £2,125.00p; (5) The Claimant acted unreasonably in not mitigating his loss from 1 September 2023 onwards and the Tribunal makes no award in respect of the loss from that date onwards.

35. The total award for loss of income, subject to the deduction reflecting failure by the Claimant to mitigate his loss, is therefore £24,683.00p.

39. The claimant's Counsel's note of the cross-examination of the claimant about his new venture demonstrate that it was very limited:

AW you started your boutique consultancy when you left R // yes

AW was that the plan all along? // no

AW did you take anyone with you // I did not

AW Did anyone follow you // In September I invited several people who had been fired or resigned from R to join on a training contract.

AW One of them being Mr Cumes or Dr Mitchell // Mr Cumes yes

[AW – Mr Willams, Solicitor Advocate for the respondent; answers after //]

40. It appears that the assessment of the Employment Tribunal was based on the documents disclosed during the hearing. None of the matters the Employment Tribunal relied upon were put to the claimant. While it is correct that his Counsel did not apply to recall the claimant, nor did the respondent. It was for the respondent to establish that the claimant had acted

unreasonably and so failed to mitigate his loss. The burden was firmly on them. It was substantively unfair on the claimant for these findings to be made that very substantially reduced his compensation without him having an opportunity to deal with the issues that the Employment Tribunal raised, largely of their own motion. The reasons also demonstrate, on a fair reading, that the Employment Tribunal, despite having properly directed itself as to the law, looked to the claimant to prove that he had acted reasonably in setting up his own business, whereas it was for the respondent to prove that he had acted unreasonably.

41. Ground 2(b) succeeds.

**Expenses of starting new business (Ground 3)**

42. The Employment Tribunal failed to determine the claim for compensation to cover the costs of the claimant establishing his new business. Ground 3 succeeds.

**Injury to feeling (Cross Appeal and Ground 4)**

43. The claimant accepts that there was no jurisdiction for the Employment Tribunal to make an award for injury to feelings in respect of the dismissal. An award could only be made in respect of the detriments short of dismissal. The cross-appeal is allowed. The appropriate sum to be awarded for injury to feelings will have to be determined on remission. The claimant's Counsel correctly points out that the claimant could not properly be criticised for not having dealt with injury to feelings in his witness statement, because the witness statements were drafted when it was thought that the hearing would determine liability only. The claimant had given extensive oral evidence about the injury to his feelings. The Employment Tribunal was entitled to note that "[t]here is no suggestion of psychiatric injury and no evidence has been adduced to support that or any other medical condition". However, it is important to note that does not necessarily preclude a significant award of injury to feeling, while it would preclude an award for personal injury. The appropriate **Vento** band and level of award will be for the Employment Tribunal to consider on remission. The Employment Tribunal might gain

some assistance from the guidance I gave in **Shakil v Samsons Ltd** [2024] EAT 192, [2025]

I.C.R. 425:

20. Application of the Vento guidelines (as updated by the relevant presidential guidance) generally requires that the employment tribunal:

20.1 Identify the discriminatory treatment for which an award of injury to feelings is to be made;

20.2 Hear evidence from the claimant about any injury to feelings caused by the discriminatory treatment;

20.3 Make findings of fact about the injury to feelings suffered by the claimant because of the discriminatory treatment;

20.4 Identify the relevant guidelines applicable to the award;

20.5 State the band the injury to feelings award falls within;

20.6 Explain why the injury to feelings falls within that band;

20.7 Explain where within the band the injury to feelings award falls and why the specific award was made.

44. In **Shakil** I emphasised the importance of considering the relevant Presidential Guidance that updates the awards.

45. The cross-appeal succeeds.

#### **Aggravated Damages (Ground 5)**

46. An Employment Tribunal can award aggravated damages in a protected disclosure complaint where the employer, in committing the statutory tort, has acted in a manner that is “high-handed, malicious, insulting or oppressive”: **Alexander v. Home Office**, [1988] ICR 685.

47. The claimant relied on a combination of actions he contended were taken by the respondent:

47.1. failing to respond to the claimant’s Subject Access Request

47.2. serving on the claimant particulars of what was described as a High Court

claim against him for £600,000

47.3. making what were said to be baseless accusations of negligence and racism that were expanded on in oral evidence by Dr Coke

47.4. reporting the claimant to the Police for accessing his former work email

47.5. Dr Coke referring to the claimant in evidence as “stupid” and “a liar”

48. The claimant asserts that the Employment Tribunal failed to consider the combination of these factors. That was important because some were considerably more promising than others. It was also necessary for the Employment Tribunal to make sufficient findings of fact to enable it to assess whether an award of aggravated damages should be made.

*Subject Access Request*

49. The Employment Tribunal failed to investigate this allegation on the basis that a complaint could be made to the Information Commissioners’ Office. I do not consider that is relevant to the question of whether the respondent behaved in a manner that was high-handed, malicious, insulting or oppressive. While the Employment Tribunal stated that the conduct of the respondent “does not appear to come anywhere near the kind of behaviour which might give rise to an award of aggravated damages” there is no explanation for that analysis or consideration of this complaint in the context of the other actions of the respondent. The Employment Tribunal did not consider the claimant’s assertion that the decision in **Base Childrenswear Ltd v Otshudi** UKEAT/0267/18, in which the EAT accepted that a failure to respond to a grievance could be the basis for an award of aggravated damages, supported the contention that failure to respond to a Subject Access Request could potentially support the making of an award of aggravated damages.

*The claim against the claimant*

50. The respondent told the claimant that a claim for £600,000 had been issued against him in the High Court. Prior to the hearing in the Employment Tribunal the respondent had not

provided any evidence of the claim, as a result of which it was argued by the claimant that the assertion that a claim had been brought against him was fraudulent. On the third day of the hearing, the respondent disclosed a claim that had been issued in the County Court, incorrectly under Part 9 of the Civil Procedure Rules. The Employment Tribunal stated:

59. The Tribunal is in no position, not least given the quality of the evidence before it, to undertake any assessment of the authenticity of the documents produced in relation to potential proceedings in the Durham County Court. It is merely noted that an allegation of “fraud” or “forgery” in the course of judicial proceedings is a particularly serious matter. In this case, there appears to have been little or no supporting evidence to underpin the allegations made by and on behalf of the Claimant.

60. In any event, if a party is minded to embark upon civil proceedings for alleged wrongs (such as, for example, alleged breach of fiduciary duty) that is a matter for them. It is not for this Tribunal to even comment on the strengths/weaknesses of some putative cause of action, let alone to impute the motives of any potential claimant in such proceedings.

51. While there might be circumstances in which there are extant legal proceedings in which it would be inappropriate to consider whether the bringing of the proceedings support a claim for aggravated damages while they are ongoing, the respondent had not pursued the claim and so it was incumbent on the Employment Tribunal to consider whether the claim had been issued to intimidate the claimant, as he asserted, and amounted to high-handed, malicious, insulting or oppressive conduct.

*Accusations of negligence and racism*

52. The Employment Tribunal held:

65. Once again, the Tribunal is of the view that there is nothing in these matters to suggest that an award of “aggravated damages” would be appropriate, even if “improper conduct” on the Respondent’s part could be established. The issues concerned formed part of the legitimate response by the Respondent to the claims brought by the Claimant – however much the Claimant may dispute the accuracy of their content.

53. The Employment Tribunal did not decide whether the allegations made against the claimant were true or false. That was a necessary component of the analysis because the claimant’s assertion was that the making of false allegations was the behaviour of the

respondent that was high-handed, malicious, insulting or oppressive. There could be circumstances in which a party claiming aggravated damages on the basis that false allegations have been made fail on the evidence presented to establish that the allegations are false, but that does not appear to be the basis upon which the claim was refused by the Employment Tribunal in this case. The claimant had given extensive evidence to support his contention that the allegations were false and that assertion was not determined.

*Reporting the claimant to the Police*

54. The claimant accepted that he had accessed his work email to obtain evidence after leaving the respondent's employment and that this would generally be improper. The claimant's assertion was that the respondent contacted the Police to intimidate him and discourage him from pursuing his claim in the Employment Tribunal.

55. The Employment Tribunal held :

72. Once again, the Tribunal needs to say very little about this submission. If an "absolutely terrifying" experience was suffered by the Claimant in his police interview under caution the reason for that lay entirely at his own door. The Claimant stated in the course of his cross-examination that: "I accept that under normal circumstances that would be improper". However, he then went on to justify his action because "there was no alternative left open".

73. The Tribunal is unanimously of the view that there is nothing in this submission which would justify an award of "aggravated damages".

56. The Employment Tribunal failed to determine the claimant's assertion that the report to the Police was vexatious and was designed to deter him from pursuing his claim against the respondent. There had been no attempt to resolve the issue with the claimant or his solicitors before the Police were involved. Having investigated the matter the Police decided to take no further action on the complaint. The Employment Tribunal also failed to address the Claimant's counsel's submission that the claim was supported by *Bungay v Saini* UKEAT/0331/10/CEA, in which the EAT upheld an award of £6,500 in aggravated damages when an employer, after claimants brought Employment Tribunal claims, made malicious complaints to the police that

the claimants had obtained property by deception.

*Comments by Dr Coke*

57. The Employment Tribunal held:

74. The Claimant’s final submission in support of his claim to an award of “aggravated damages” relates to the tenor and content of responses given by Dr Coke during the course of cross-examination by Counsel for the Claimant. This submission, which is very limited, is set out at paragraph 110 of the Skeleton Argument prepared on behalf of the Claimant.

75. The Tribunal can deal with this shortly. It has already been observed in the reasons given for the judgment on liability delivered on the afternoon of Day 8 that relations between the parties have been consistently fraught, to the point where the Tribunal regards both parties as having been in serious breach of their obligations under Rule 2 of The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (as amended). That Rule provides:

Overriding objective

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable —

- (a) ensuring that the parties are on an equal footing;
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and
- (e) saving expense.

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

76. The Tribunal has noted a disturbing failure on the parts of the parties to “cooperate generally with each other and with the Tribunal” in the preparation for this hearing. That attitude has manifested itself in late additional disclosure by both sides, incomplete documentation being produced, and various accusations being made against parties and individuals.

77. So far as the cross-examination of Dr Coke is concerned, while the Tribunal noted the forthright views forcefully expressed by the witness, it is of the view that these did not go beyond the normal “cut and thrust” which is to be expected in the adversarial world of the English Employment Tribunals. There is nothing in the Claimant’s submission to warrant an award of “aggravated damages”.

58. The Employment Tribunal was highly critical of the claimant but did not explain in the judgment anything that he or his representatives had done that breached the overriding objective. The respondent had failed to provide witness statements until just before the hearing and had produced large amounts of late disclosure. The Employment Tribunal failed properly to address the claimant’s assertion that Dr Coke had deliberately insulted him. The Employment Tribunal did not address the argument that, in reliance on **Governing Body of St Andrew’s Primary School v Blundell** UKEAT/0330/09/JOJ, the manner in which the claimant’s capabilities were criticised at the remedies hearing could potentially found an award of aggravated damages

*Overall*

59. Bringing proceedings in the Employment Tribunal is often daunting. While a respondent is entitled to defend their position robustly, if the respondent goes beyond mounting a legitimate defence and seeks to intimidate a claimant into withdrawing a claim by making false allegations, that could potentially found an award of aggravated damages. For example, were it to be held that the respondent had falsely asserted that they would seek £600,000 damages against the claimant and that a disingenuous complaint was made to the Police, in an attempt to intimidate the claimant into withdrawing his claim, that could, possibly together with the other matters raised by the claimant, support an award of aggravated damages.

60. Ground 5 succeeds.

**Disposal**

61. The appeal and cross-appeal are allowed. The Employment Judge has now retired and I consider that the errors in the judgment were substantive. It is important that the claimant is

confident that the matter will be considered afresh. I have concluded that, having regard to the principles in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, the remission should be to a differently constituted Employment Tribunal.