

Neutral Citation Number: [2026] EAT 61

Case No: EA-2024-001083-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23 April 2026

Before :

THE HONOURABLE MR JUSTICE MANSFIELD

Between :

MR DARRON FOAT

Appellant

- and -

DEPARTMENT OF WORK AND PENSIONS

Respondent

Nabila Mallick (Direct Access) for the **Appellant**
Robert Moretto KC (instructed by the Government Legal Department) for the **Respondent**

Hearing date: 3 February 2026

JUDGMENT

SUMMARY

Disability Discrimination

The Claimant succeeded, in part, in a claim for disability discrimination and constructive unfair dismissal. His compensation was assessed at a separate remedy hearing in the sum of £373,936.69.

The Claimant appealed against four aspects of the award for disability discrimination; the Respondent cross-appealed on one issue. The EAT dismissed all grounds of appeal and allowed the Cross-Appeal.

ACAS Uplift: the Tribunal's reasons disclosed no error of law.

Assessment of future contingencies: the Tribunal reached an assessment that it was entitled to make on the evidence; its reasons adequately explained why it made the deduction of 50% from the future loss multiplier.

Deduction of PIP benefits from the award of compensation: There was no rule of law that provided that a state benefit provided for care costs could only be set off against a claim for damages for care costs. The PIP benefit was a sum received by the Claimant in consequence of the Respondent's unlawful act: but for the unlawful act it would not have been received. The Tribunal did not err in setting it off against the losses claimed. The Tribunal did not err in dismissing the care claims that were made, nor in failing to find that the Claimant's loss included everyday care losses which had not been claimed.

Loss of Bonus: The Tribunal did not err in failing to deal with a small claim for loss of annual bonus. The claim was not in the Claim Form or Schedule of Loss and was not properly before the Tribunal.

Cross-Appeal – gross/net figures for future loss multiplicand: the Tribunal used a gross salary figure for the future-loss multiplicand despite finding the future award would not be taxable in the Claimant's hands. The Claimant's argument that this was a deliberate choice could not be accepted – it is clear in the context of the Tribunal's reasons as a whole that this was an oversight. The EAT set aside the future loss of earnings award of £147,071.19 and substituted an award of £108,833.

The Honourable Mr Justice Mansfield:

Introduction

- 1 This is an appeal against a remedy decision of the Employment Tribunal sitting at London South (Employment Judge Dyal with Ms Carter and Mr Rogers) sent to the parties on 18 July 2024.
- 2 In an earlier liability decision, the Tribunal upheld complaints by the Claimant of four instances of harassment related to disability, culminating in constructive dismissal; unfair dismissal; one complaint of failure to make reasonable adjustments (relating to a failure to offer workplace mediation); and a failure to pay holiday pay. In its remedy decision, the Tribunal assessed compensation for the disability discrimination claims in the total sum of £373,939.69. Having made that assessment, it made no further order in respect of unfair dismissal.
- 3 The Claimant appeals against four aspects of the Tribunal's assessment of compensation. The Respondent cross-appeals against one further aspect of the assessment.

The Tribunal's Liability Decision

- 4 The Claimant was employed by the Respondent from May 1999. He was originally employed as an Administrative Officer and transferred to the fraud team in 2001. In 2002 he was promoted to Executive Officer, in the role of Investigations Officer. From 2008 he was based in Margate.
- 5 As the Tribunal found in its liability decision, the Claimant had a history of mental health problems of various kinds from 2008. He had an episode of mental ill-health that he attributed to work in 2012. The material events for the purposes of the claim commenced in 2016. These events culminated in Claimant's resignation on 3 May 2019. He resigned on notice, so that his employment terminated on 2 June 2019. The complaints regarding events in the period 2016 to 2019 were extensive. After a 6-day hearing the Tribunal made detailed findings upholding some, but not all, of the claims. The Tribunal found that the Respondent had subjected the Claimant to harassment related to disability in the following ways.

- a. Forbidding the Claimant from driving during work in February 2018.
 - b. The conduct of a meeting in April 2018. the Tribunal found that the purpose of the meeting was to tackle genuinely held concerns about the Claimant's conduct in the workplace, but the way in which it was conducted amounted to harassment.
 - c. Insisting that the Claimant attend a 12-month review meeting at the Ramsgate office in May 2019.
 - d. Constructively dismissing the Claimant. This was held to be both an act of harassment and also an unfair dismissal. The repudiatory breaches said to give rise to the constructive dismissal were the three earlier acts of harassment.
- 6 The Tribunal also upheld a complaint that a failure to offer workplace mediation was a breach of the duty to make reasonable adjustments.

The Remedy Decision

- 7 Following the liability decision there was a lengthy period of case management, leading to the remedy hearing which took place over three days in June 2024.
- 8 The ET awarded £373,936.69 compensation. The component heads of loss were set out in a table in the Tribunal's judgment. In summary they were as follows:
- a. Injury to feelings: £20,000
 - b. Pain, suffering and loss of amenity ("PSLA") arising from personal injury: £113,576.
 - c. Past Loss of earnings prior to dismissal: £4,717.41.
 - d. Total past financial loss: £49,004.03. This comprised loss of earnings, the cost of one item of medical equipment (a hoist) and the cost of counselling, less credit for past received state benefits.
 - e. Future Losses £130,492.28. This comprised future loss of earnings and pension loss, less credit for future state benefits.

- 9 The Tribunal then applied an ACAS uplift of 2% to all heads of loss.
- 10 The Tribunal made detailed findings as to the Claimant's state of health, its deterioration over time, and the causation of his condition. The Tribunal found that the Claimant had severe depression, anxiety and fibromyalgia. His mental health had declined steeply since February 2018. The prognosis, including the prognosis for a return to work, was poor. The Tribunal accepted expert medical evidence that the unlawful conduct had caused the Claimant's condition. However, it found that he had a pre-existing vulnerability which was relevant to the assessment of compensation. The medical evidence indicated a history of mental health problems. In a careful evaluation of the medical evidence as to pre-existing vulnerability, the Tribunal concluded:
- a. The Claimant had a vulnerability to depressive illness being caused by workplace stressors; the Tribunal noted that many workplace stressors did not involve unlawful conduct on the part of the employer.
 - b. The Claimant had a background enhanced vulnerability to fibromyalgia.
- 11 The Tribunal found that but for the unlawful acts, there was a 30% chance of the Claimant suffering depression or anxiety and/or fibromyalgia that was so serious his earning capacity and occupational prospects would have been destroyed. The Claimant sought to appeal the finding that there was a 30% chance of loss of earning capacity even if the unlawful acts had not occurred. That ground was subject to r.3(7) direction, so there is no live challenge to that finding.
- 12 In assessing PSLA, the Tribunal found that the injury fell within the category of severe psychiatric damage in the Judicial College Guidelines; it assessed the injury as falling just below the middle of the bracket. It assessed the fibromyalgia against the chronic pain guidelines and found the injury to be at the top of moderate bracket. After making an adjustment for the combined injury, it came to a figure of £113,576. For injury to feelings, the Tribunal made an award of £20,000, bearing in mind the sum it had awarded for PSLA.
- 13 The Tribunal rejected claims for aggravated damages and exemplary damages, finding that the thresholds for each form of damages was not met. In rejecting exemplary damages, the Tribunal found this was not a case where punishment of the Respondent was required;

it was not satisfied that the Respondent had committed conscious or contumelious wrongdoing.

- 14 The figure for past loss of earnings prior to dismissal was agreed between the parties. In assessing past loss of earnings from dismissal to the date of the remedy hearing the Tribunal took a net salary figure as at date of dismissal and assessed likely pay rises in subsequent years to reach a total for losses over the period (1 July 2019 to 20 June 2024). It then applied a 30% discount to reflect the chance that the Claimant's health would have broken down in any event. It held that no further discount was necessary to reflect other contingencies (Reasons paragraph 148).
- 15 The Tribunal then addressed miscellaneous past losses. It made an award for the cost of a hoist made necessary by the Claimant's fibromyalgia and made an award for claimed counselling costs, discounted by 20% to reflect the chance the counselling would have happened even without the Respondent's unlawful conduct. The Tribunal rejected claims for prescription costs and for the additional cost of a larger vehicle. It was not satisfied on the evidence as to what the true additional cost was.
- 16 In assessing future loss of earnings, the Tribunal took a conventional multiplicand/multiplier approach. The Claimant appeals, in effect, against the decision as to the multiplier in Ground 6. The Respondent cross-appeals as to the multiplicand.
- 17 The Tribunal accepted the Claimant's evidence that he planned to retire at 67. It calculated loss to age 67, subject to discount for life and non-life contingencies. For life contingencies, the Tribunal used the Ogden Tables 8th edition, age 58 at trial loss of earnings to 67, assuming a -0.25% discount rate. That yielded a multiplier of 8.81.
- 18 The Tribunal addressed non-life contingencies at paragraphs 157-165. It said that it must take account of the chance of the Claimant's health breaking down due to his underlying vulnerability in any event, which it had already quantified at 30%. At paragraph 158 it said that many other contingencies needed to be brought into account, for instance (i.e. not an exhaustive list): health breakdown for other reasons, earlier retirement, redundancy or lawful dismissal. To reflect these contingencies, it considered Ogden Tables Section B, noting that Table A in Section B would suggest a discount of 24% for a 54 year old with a retirement age of 65. That was the closest available table to the facts of the case. It held

a 24% discount would be too low, bearing in mind that the risk of the Claimant's health breaking down due to his existing vulnerabilities was 30%. At paragraph 163 it said:

We therefore need to make our own assessment of the non-mortality contingencies that is tailored to the Claimant's case, albeit drawing on some of the wisdom from the notes to the Ogden Tables. Doing that, and taking into account all of the non-mortality risks, we think the appropriate discount factor is 0.5. This is a broadbrush assessment that takes into account the risk of the Claimant's health breaking down in any event given his pre-existing vulnerability and all other non-mortality risks.

19 The Tribunal's table at paragraph 170 shows that it applied a multiplier of 8.81, but then discounted that by 0.5, so that the multiplier was, in effect, 4.405.

20 The Tribunal addressed the multiplicand (annual salary at the date of assessment) in paragraphs 166-169. It used a gross salary figure of £33,387.33. The use of a gross figure is challenged in the Respondent's Cross-Appeal.

21 After dealing with loss of pension the Tribunal turned to sums to be set off against the Claimant's losses. The treatment of state benefits (paragraphs 201-210) is central to Ground 5 of the appeal.

22 The Tribunal correctly recorded that the Claimant was in receipt of the following state benefits: Employment Support Allowance ("ESA"), Personal Independence Payment ("PIP") Care Component and PIP Mobility Component.

23 The Claimant accepted that it was necessary to give credit for past ESA against past loss of earnings but not future ESA against future loss of earnings. The Tribunal found that he needed to give credit for both past and future ESA (paragraph 204). There is no appeal against that finding.

24 The Tribunal dealt with PIP at paragraphs 209-210 as follows:

209. Ms Mallick's position is that the Claimant does not need to give credit for PIP. That is on the basis that it is a non-means tested benefit that is not related to employment or employment income but simply disability. While those are true and agreed descriptors of PIP, it does not follow that no credit needs to be given.

210. The analysis is the same as for ESA but with one additional point. Although in theory it is possible for someone to be in receipt of PIP, in this case there is no realistic scenario in which the Claimant could have remained in employment whilst in receipt of PIP. The nature of the health breakdown precluded that.

- 25 Accordingly, the Tribunal carried out a calculation of the ESA and PIP to be set off against past losses and the amount of those benefits to be set off against future losses, in tables between paragraphs 210 and 211. In doing so, it applied a 30% discount for contingencies for past loss and a 40% discount to future losses, for reasons explained at paragraph 206 which are not subject to challenge.
- 26 The Tribunal then addressed the ACAS uplift – the subject of Ground 4 of the appeal - and interest. Finally, the Tribunal considered grossing up for tax. It held that, apart from loss of earnings prior to dismissal, the award of compensation would not be taxable in the Claimant’s hands; therefore, it was not subject to grossing up. This was subject to challenge in Ground 8 of the appeal, but after a r.3(7) direction that ground is no longer live. The reasons dealing with grossing up are relevant to the Cross-Appeal.

Grounds of Appeal

- 27 The Notice of Appeal originally contained eight grounds. At the sift stage, HHJ Auerbach allowed four grounds to a full hearing and made a rule 3(7) direction regarding the other four. The Respondent has raised one ground by way of cross-appeal. In summary, the grounds are now as follows:
- a. **Ground 4:** the Tribunal erred in the application of the ACAS uplift.
 - b. **Ground 5:** the Tribunal erred in deducting PIP benefit from losses.
 - c. **Ground 6:** the Tribunal erred in its assessment of the multiplier for future losses.
 - d. **Ground 7:** the Tribunal erred in failing to deal with a claim for loss of annual bonus.

- e. **Cross-Appeal:** the Tribunal erred in using gross salary figures as multiplicand for future loss of earnings.

Ground 4: ACAS Uplift

- 28 The Tribunal found two breaches of the ACAS Code: failing to inform the Claimant that a disciplinary investigation would be commenced against Ms Skinner; and failing to give the Claimant a right of appeal against the grievance decision. It described the first as “*pretty minor*” and the second as “*more serious*”, given that the grievance was only partially upheld.
- 29 The Tribunal’s conclusion on the uplift was that in the ordinary course it would award an uplift of 7.5%, but that would lead to a sum that was disproportionate and not just and equitable. Instead, it reduced the uplift to 2%; that led to an award of £6,355.79.
- 30 Ms Mallick, for the Claimant, argues that although the Tribunal was entitled to consider the absolute value of the award in deciding what uplift to make, it erred in a number of ways:
- a. It gave inadequate reasons for its decision to reduce the percentage uplift.
 - b. It failed to have regard to the punitive element in considering the award.
 - c. It failed to consider its own factual findings in the liability judgment as to the Respondent’s conduct.
 - d. In effect, it applied a non-statutory ceiling to the uplift.
 - e. The amount of the uplift is perverse.
- 31 In my judgement, there is no error of law in the Tribunal’s decision as to the uplift.
- 32 First, the Tribunal correctly directed itself as to **Slade v Biggs** [2022] IRLR 216. It clearly had in mind the relevant principles. At the final sense check stage, it made an assessment of proportionality and whether the amount was just and equitable - as per Griffiths J’s guidance at stage (iv). It cannot be said that the Tribunal applied an artificial ceiling; it made an assessment in the circumstances of the case.

33 Second, I reject the argument that the Tribunal failed to have regard to the principle that there is a punitive element to an uplift. At paragraph 216, the Tribunal referred to **Acetrip v Dogra** UKEAT/0238/18/BA in the context of considering the absolute value of the award. The relevant paragraph in **Acetrip** (paragraph 103) expressly acknowledges the punitive element of the award:

There is, inevitably it seems to me, a punitive element to an adjustment award under these provisions, because the Tribunal is not simply compensating a claimant for an identifiable or quantifiable loss that he has suffered. The adjustment is bound, to a degree, to be reflective of what the Tribunal considers to be the seriousness and degree of the failure to comply with the ACAS Code on the employer's part. However, the fact that it has a punitive aspect to it makes it, it seems to me, all the more incumbent on the Tribunal to consider the absolute value of its award bearing in mind that, in fixing on the amount which it considers just and equitable, the Tribunal must have regard to justice and equity to both parties.

34 It cannot be said that the Tribunal failed to have regard to these principles. In assessing the seriousness of the unlawful conduct, the Tribunal held that the Respondent had behaved unreasonably. It formed an assessment of the Respondent's degree of culpability in dealing with the claim for aggravated and exemplary damages. It would have had that assessment in mind in considering what level of uplift would be just and equitable.

35 Third, I reject argument that the Tribunal failed to have regard to its own findings. It was not necessary to refer back to specific findings in the liability judgment or specifically indicate that it reminded itself of its findings. There is no requirement for it to do so. In **DPP Law Ltd. v Greenberg** [2022] IRLR 1016, paragraphs 57-58, the EAT said:

It is not legitimate for an appellate court or tribunal to reason that a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision. What is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind.

36 Those principles apply equally to evidence heard in earlier hearings and findings made at earlier stages of proceedings by the same Tribunal. In any event, it is clear from reading the remedy judgment as whole that the Tribunal had in mind its findings as to the breaches of the Code and their seriousness.

37 Fourth, the reasons are clear and adequate. They draw on the assessment of the evidence made in both the liability judgment and the remedy judgment. In what is an evaluative assessment for the Tribunal, its reasons adequately explain why it reached its decision on uplift.

38 Finally, it cannot be said that the decision is perverse. The Tribunal heard and assessed the evidence; it made careful findings in the liability judgment and also in the remedy judgment as to the Respondent's conduct, its culpability and the effect of that conduct on the Claimant. The amount of the uplift was a matter of evaluative assessment for the Tribunal.

39 I dismiss this ground of appeal.

Ground 5: PIP Deduction

40 The Claimant argues that the Tribunal erred in deciding that PIP should be deducted from past and future compensation, despite the payment representing a benefit to meet additional care needs for which the Claimant was not compensated by the Respondent. The purpose of PIP is to help with "extra costs of long-term illness". It is not, the Claimant argues, connected to the termination of employment. It is a reflection of the seriousness of the Claimant's deteriorating health. PIP would be payable regardless of whether the Claimant was working. The Claimant argues that the Tribunal erred in two ways:

- a. The PIP payment is not of like nature to loss of earnings; it cannot be deducted from a loss of earnings award. It could only be set off against heads of compensation that relate to care or mobility.
- b. The Tribunal failed to consider the true nature of the Claimant's losses in respect of which PIP compensated him: the value of care provided to the Claimant by his wife, "the nature of expenditure resulting from PIP" and his increased expenditure on a larger motor vehicle.

41 The Claimant acknowledges the principle against double recovery: that a Claimant cannot recover twice for the same loss. However, it is argued, that the rule operates only where a

benefit received correlates to a particular head of loss: any set off must be like for like. In this case:

- a. PIP is not of the same character as benefits designed to replace loss of earnings. It is a “care benefit award”.
- b. PIP cannot be set off against a loss of earnings claim.
- c. As a care and mobility allowance, PIP can only be set off against awards that related to care or mobility. The Claimant did not make a claim for the cost of everyday care. It is said that he did not do so as the Claimant was in receipt of PIP and the continuing payment of PIP would not be affected by the award of the Tribunal.
- d. The Claimant’s actual loss is greater than the loss he claimed. His actual loss included care needs for which he did not claim as he was in receipt of PIP. It was accepted on behalf of the Claimant that if he had made a claim for care needs PIP would have been deductible from compensation relating to that care.

The Respondent’s Position

42 The Respondent’s case, put simply, is that the Claimant claimed damages for having been caused injury by the Respondent’s unlawful action. He receives PIP because of his injury. If the unlawful action had not occurred, the Claimant would not have suffered the injury to his health. He would not therefore have received PIP. Comparing (1) the Claimant’s actual financial position now with (2) the “but for” position that he would have been in had the unlawful acts not occurred:

- a. On the one hand, the Claimant is not receiving earnings he would have received;
- b. On the other hand, he is receiving a benefit (PIP) which he would not have received.

The Nature of PIP

43 PIP comprises two components: a daily living component and a mobility component. The Claimant was in receipt of both components from 15 August 2019 onwards. A person’s

entitlement to each component depends on the extent to which a person's ability to carry out (respectively) daily living activities or mobility activities is limited by their physical or mental condition (**sections 77-81 Welfare Reform Act 2012**). The activities that are to be considered for the purposes of daily living activities and mobility activities are set out in **Part 2 of Schedule 2 of the Social Security (Personal Independence Payment) Regulations 2013**.

- 44 The parties agree that PIP is not means tested and that it could be paid to a person who is in work. It is payable to anyone who meets the entitlement criteria. It follows also that the Claimant's entitlement to PIP will not be affected by the award of compensation in these proceedings.

Compensation: Some first principles

- 45 The Tribunal correctly directed itself as to the basic legal framework for compensation at paragraphs 22-31. Of particular relevance to Ground 5:
- a. If the Tribunal finds that there has been a relevant contravention of the Equality Act 2010 it may order the Respondent to pay compensation to the Claimant. The amount corresponds to the amount that could be awarded by the County Court: section 124 Equality Act 2010.
 - b. The aim of compensation is to put the Claimant in the position he would have been in but for the unlawful conduct – **Ministry of Defence v Cannock** [1994] ICR 918.
 - c. When assessing discrimination/harassment it is necessary to ask what would have happened had there been no unlawful discrimination/harassment and to adjust the compensation appropriately in light of the answer: **Chagger v Abbey National plc** [2010] IRLR 47.

Can PIP be deducted against loss of earnings?

- 46 Ms Mallick argued that a benefit paid in respect of a claimant's care needs can only be set off against a claim for care related damages, not against a claim for loss of earnings. She relied on points arising from statutory provisions as to the deduction of benefits from

compensation payments, and on common law authorities as to the assessment of compensation.

47 As to the statutory provisions, Ms Mallick relies on sections 8 and 15 and Schedule 2 of the **Social Security (Recovery of Benefits) Act 1997** and the Department of Work and Pension’s Guidance document “**Compensation, Social Security Benefits and Lump Sum Payments**” (updated Sept 2014). She says this guidance suggests PIP cannot be set off against loss of earnings awards. She drew attention to the fact that PIP is not listed under “*Which benefits count for loss of earnings*”, but is listed under “*Which benefits count for cost of care*” and “*Which benefits count for loss of mobility*”.

48 However, the 1997 Act and the Guidance deal with the situation where, in certain personal injury claims, the Compensation Recovery Unit (“CRU”) recovers from the defendant the amount of benefit received by the claimant. Sums equal to recoverable benefits fall to be deducted from the compensation payable to the claimant because the defendant will have to pay an equivalent sum to the CRU. That scheme operates under the terms of its own statutory regime. There is no suggestion that regime applies in this case. The applicable rules under that scheme therefore shed no light on the relevant principles in this case. It is difficult to draw any assistance from the way in which that scheme is set up. I reject Ms Mallick’s submission that the 1997 Act and the Guidance are relevant to this case.

49 In the context of Employment Tribunal proceedings, the **Employment Protection (Recoupment of Benefits) Regulations 1996** do not apply to PIP. Neither party suggested that any assistance was to be gained from considering the scope and application of those Regulations.

50 The matter is to be addressed by the application of common law principles as to the assessment of damages. Ms Mallick relied on a series of cases relating to the question of whether state benefits are to be deducted from compensation awards. The principles to be derived from those cases need to be considered with care.

51 The leading case relevant to this issue is **Hodgson v Trapp** [1989] 1 AC 807. The Claimant suffered catastrophic injuries in a road accident. The claim included both damages for lost earnings and damages for cost of care. The Claimant was in receipt of attendance and mobility allowance. In assessing the damages for cost of care, the trial

judge did not deduct those benefits. The question for the House of Lords was whether the benefits should be deducted. It decided that they should.

52 It appears from the description of the benefits (page 818B) that they had many features in common with PIP: they were intended to meet costs of care.

53 At page 819E Lord Bridge said (my emphasis added):

My Lords, it cannot be emphasised too often when considering the assessment of damages for negligence that they are intended to be purely compensatory. Where the damages claimed are essentially financial in character, being the measure on the one hand of the injured plaintiff's consequential loss of earnings, profits or other gains which he would have made if not injured, or on the other hand, of consequential expenses to which he has been and will be put which, if not injured, he would not have needed to incur, the basic rule is that it is the net consequential loss and expense which the court must measure. **If, in consequence of the injuries sustained, the plaintiff has enjoyed receipts to which he would not otherwise have been entitled, prima facie, those receipts are to be set off against the aggregate of the plaintiff's losses and expenses in arriving at the measure of his damages.** All of this is elementary and has been said over and over again. To this basic rule there are, of course, certain well established, though not always precisely defined and delineated exceptions. But the courts are, I think, sometimes in danger, in seeking to explore the rationale of the exceptions, of forgetting that they are exceptions. It is the rule which is fundamental and axiomatic and the exceptions to it which are only to be admitted on grounds which clearly justify their treatment as such.

54 He went on to refer to the "*classic heads of exception to the basic rule*" as insurance benefits for which a claimant has paid and moneys received from the benevolence of third parties. He said (820D):

In *Hussain's* case it was necessary to examine the extent to which the analogy of the insurance exception to the general rule against double recovery could be pressed. Your Lordships now have to examine the question how far it is appropriate to treat statutory benefits as analogous to the proceeds of voluntary benevolence intended to alleviate the plight of the victims of misfortune.

55 Given that the claim did in fact involve a claim for care from which the benefits could be deducted, the House of Lords did not address the question of whether the benefits would have been deductible from the loss of earnings compensation. That was not the question with which it was concerned. The question was whether the benefit fell to be deducted

from compensation at all, or whether it was akin to arrangements made by the claimant himself (insurance) or the benevolence of third parties which were exceptions to the general rule that Lord Bridge had stated at page 819E.

56 At paragraph 823A-C and F Lord Bridge said:

In the end the issue in these cases is not so much one of statutory construction as of public policy. If we have regard to the realities, awards of damages for personal injuries are met from the insurance premiums payable by motorists, employers, occupiers of property, professional men and others. Statutory benefits payable to those in need by reason of impecuniosity or disability and met by the taxpayer. In this context to ask whether the taxpayer, as the “benevolent donor,” intends to benefit “the wrongdoer” as represented by the insurer who meets the claim at the expense of the appropriate class of policy holders, seems to me entirely artificial. There could hardly be a clearer case than that of the attendance allowance payable under section 35 of the Act of 1975 where the statutory benefit and the special damages claimed for cost of care a design to meet the identical expenses.

....

A separate and subordinate point was raised on behalf of the plaintiff in relation to the mobility allowance. It was submitted that the allowance was intended exclusively to meet the cost of providing transportation for the claimant whether by invalid carriage, car or otherwise. The only specific item of damages included in the judge’s award to the plaintiff in that sense was as sum of £2,000 for additional expenditure on a family car. It is submitted that this limits to £2,000 the amount of that may be deducted from the plaintiff’s damages in respect of mobility allowance. I am unable to read the phrase “enhanced facilities for locomotion” in section 37A(2)(b) of the Act of 1975 in the narrow and restricted sense necessary to support this submission. There is no doubt that the plaintiff qualifies for the full mobility allowance on the footing that her condition permits her to benefit from such enhanced facilities. The facilities may take a variety of forms and would certainly include whatever outings are provided for her by those who care for her. I see no reason why the whole of the mobility allowance should not be regarded, just as the attendance allowance, as available to meet the cost of her care generally and thus as mitigating damages recoverable in respect of that care.

57 It does not seem to me that **Hodgson** makes out Ms Mallick’s contention that benefits can only be set off against the type of head of loss to which those benefits relate. Lord Bridge did refer to deduction of benefits from a claim for damages for cost of care. However, that is not surprising as the House of Lords was addressing such a claim: a claim for deduction of a care related benefit from a claim for damages for cost of care. I do not understand Lord Bridge to have said that care related benefits could only be deducted from damages for care. The statement of basic principle at page 819E is sufficiently wide to require a

broader consideration of the net position, across heads of loss, when considering whether to deduct benefits that would not have been received but for the unlawful act.

- 58 Ms Mallick also relied on **Parry v Cleaver** [1970] AC 1, **Smoker v London Fire Authority** [1991] 2 AC 502 and **Longden v British Coal Corporation** [1998] AC 653. Each of those cases concerned the boundaries of the exceptions where a claimant is not required to give credit for benefits that he has paid for or contributed to himself: i.e. pensions and insurance benefits. They did not address the question arising under this ground. They do not take the matter any further.
- 59 In her Skeleton Argument, Ms Mallick relied on **Hilton International Hotels (UK) Ltd. v Faraji** [1994] IRLR 267, in which the EAT held that invalidity benefit can properly be characterised as an insurance type of benefit and as such did not fall to be deducted from unfair dismissal compensation. There are two difficulties with the reliance placed on **Hilton**. First, the case did not raise the same issue as this Claimant's case: it was a case following the **Parry/Smoker** line of cases about "insurance" type exceptions to the principle that sums received in consequence of an unlawful act must be set off against losses. Second, even on its own terms it is no longer good law. It was not followed in two subsequent EAT decisions: **Puglia v C James & Sons** [1996] IRLR 70 and **Morgans v Alpha Plus Security Ltd** [2005] IRLR 234.
- 60 In **Morgans** the EAT held that in assessing compensation for loss of earnings caused by an unfair dismissal, credit had to be given for incapacity benefit received by the Claimant during the period of loss. The essential reasoning was that the basis of compensation for unfair dismissal was reimbursement for loss suffered. Where a claimant has suffered a lesser loss by virtue of receipt of benefits which would not have been paid had he remained in employment, he must give credit for them (paragraph 22 of the judgment of Burton J). Burton J followed the judgment of Mummery J in **Puglia v C James & Sons** [1996] IRLR 70. In that case, Mummery J said that if no deduction were made for invalidity benefit, the result would be that an employee receiving compensation for unfair dismissal would find himself in a better position than if he had never been dismissed. Regard must be had to the loss sustained by the employee.
- 61 In oral submissions, Ms Mallick's position was that **Morgans** concerned (a) a claim for loss of earnings and (b) a type of benefit that was designed to replace earnings and which

is akin to (possibly a predecessor of) ESA, which she accepted fell to be deducted in this case. She sought to distinguish **Morgans** on the basis that benefits can only be deducted from a “like” head of loss.

62 In **Chief Constable of West Yorkshire Police v Vento (No. 2)** [2002] IRLR 177, the claimant succeeded in the Tribunal in a claim of a discriminatory dismissal. She was awarded compensation for loss of earnings, injury to feelings, aggravated damages and personal injury PSLA. When the respondent appealed, the claimant cross-appealed on the basis that the tribunal should not have deducted from her award state benefits paid by way of income support in respect of her children and mortgage interest. It was argued that the claimant’s compensation should not be reduced by a benefit paid for the claimant’s children or household.

63 In support of the argument that the benefit was properly deducted, the employer relied on the passage from Lord Bridge’s speech in **Hodgson** at page 819 (which I set out above) in support of proposition that damages for negligence are purely compensatory and it is the net consequential loss and expense which the court had to measure. It also relied on **Puglia**. The EAT accepted the employer’s argument. Wall J said (paragraph 44):

In our judgment, there is no error of law in the approach taken by the tribunal and, in the absence of any statutory provision relating to the recoupment of income support, we see no reason why [the claimant] should have the benefit of what we think would be an element of double accounting. On a practical level, it seems to us artificial to separate out the benefit which [the claimant] received for herself from that which she received for her children and in relation to her mortgage. Had she been in employment, she would, no doubt, have supported her children and paid her mortgage from her earnings. No doubt the money paid to her by way of benefit was used for these purposes. In these circumstances, it seems to us that there would be an element of double accounting were the respondent not now required to give credit for the benefits relating to her children and her mortgage.

64 **Clenshaw v Tanner** [2002] EWCA Civ 1848 was a claim for damages for personal injury arising out of a road traffic accident. The claim for damages included a claim for loss of earnings. The trial judge had made a deduction for 70% of the housing benefit received by the claimant during the period between accident and trial. He accepted that in principle the housing benefit was a benefit paid because the claimant had no income. He made a deduction of 70% consistent with an earlier finding that the claimant would have been out of work for 30% of the period between accident and trial.

65 On appeal, it was submitted by the claimant that there must be a correlation between the benefit received and a head of damages claimed. Reliance was placed on the passage in **Hodgson** where Lord Bridge had referred to the deduction of attendance allowance and mobility allowance as mitigating the damages recoverable in respect of cost of care. As to that submission, Kennedy LJ said (paragraph 29):

Obviously, there must be some correlation between the benefit received and the loss claimed before one can be deducted from the other. With that reservation I can see no reason why the general principle set out by Lord Bridge in *Hodgson v Trapp* should not be applied to housing benefit when, as here, it is sought to be set it against a claim for loss of earnings to date. But for the accident the claimant would have used part of his earnings to pay for his accommodation. Because the accident rendered him impecunious that liability was discharged for him by the local authority in the form of housing benefit. If, as is now contended, he is entitled to recover his loss of earnings in full without any liability to reimburse the local authority he is being overcompensated to the extent of the housing benefit, and I see no reason why the court should regard that as a just result.

66 He went on to consider the nature of housing benefit, before concluding, at paragraph 32:

Parliament has not expressly provided that housing benefit shall be disregarded. The benefit was payable because the claimant's qualifying need arose in consequence of the tort of which he was the victim. In my judgment, it must therefore follow as the judge found that the payments of housing benefit should be taken into account in reduction of the claim for loss of earnings to date.

67 Neither **Vento** nor **Clenshaw** are directly analogous. In both cases, the claimant became entitled to a benefit because of impecuniosity caused by the employer's unlawful act. The central rationale is that the claimant could not recover both (a) damages for his lost earnings and (b) a benefit that he would not have received had he not lost those earnings. However, in considering what benefits were relevant to be deducted, the court looked more widely than a benefit designed to replace lost income and made deduction for housing benefit (in **Clenshaw**) and income support paid in respect of the claimant's children (**Vento**).

68 In this case, the reason the Claimant received PIP was not because the Respondent had caused him a loss of income. Had that been the case, it would plainly not be possible to distinguish this case from **Vento** and **Clenshaw**. However, the case is analogous to those

cases on a broader level. The Claimant was in receipt of PIP only because of the Respondent's unlawful act. The Respondent caused the Claimant's injuries, and it was only because of those injuries that the Claimant received PIP.

69 None of the cases relied on by Ms Mallick clearly established the general proposition that benefits received can only be deducted from a "like" head of loss. On an application of the broad principle stated by Lord Bridge in **Hodgson**, as a result of the Respondent's act the Claimant is in receipt of a benefit that but for that unlawful act he would not have received. As Kennedy LJ put it in **Clenshaw**, the PIP in this case was payable because of the Claimant's "qualifying need" and that need arose in consequence of the tort of which he was the victim. There is a sufficient correlation between the benefit received and the loss claimed. I do not accept the argument that a particular benefit can only be set off against a particular type of head of loss. The authorities do not make that proposition out.

70 That leads me to the Claimant's second point, which is that the Claimant's actual loss was greater than that claimed: it encompasses care needs for which he did not claim as they were being met by PIP payments. The Claimant accepts that if such a care claim had been made (and proved) PIP would have been deductible from it. If that had happened, no deduction would have been made from the loss of earnings award, as the care losses and the PIP would cancel each other out.

71 There are two difficulties with that argument.

72 First, it is not right to say that no claim at all was made for costs of care. There was a claim for a hoist, for medicines, for counselling and (in part) for a larger car. The Claimant is wrong to say (Skeleton paragraph 45) that there was no claim for medicines: the Tribunal considered a claim for prescription charges and dismissed it. The Tribunal also considered and dismissed on the evidence the claim for additional car costs. It is simply wrong to say the Tribunal failed to consider the nature of increased expenditure on a larger motor vehicle.

73 Second, it is correct that no claim was made for the cost of everyday care of the Claimant. The Tribunal cannot be criticised for failing to consider the value of care provided by the Claimant's wife when no claim was made in respect of that. Equally, the Tribunal cannot be criticised for failing to regard the Claimant's PIP benefit as falling to be set off against a notional unclaimed loss for such care, so that none of the PIP fell to be set off against

loss of earnings. I accept the Respondent's submission that it is for the Claimant to claim, and prove, his losses. If he does not claim a particular loss, the Tribunal cannot assume that the loss was sustained. If the Claimant wished to argue that the Respondent's unlawful act had caused him a care need for which he was entitled to compensation, he could have claimed that. It cannot be assumed that the receipt of PIP necessarily entails the existence of such a loss. If a loss is to be subject of compensation, it should be claimed so that a respondent has the opportunity to challenge it, and the claim can be examined on the evidence.

74 In summary, I am not satisfied that there is a rule of law that prohibits PIP from being deducted from any head of loss other than cost of care or mobility costs; and I am not satisfied that the Tribunal erred in failing to recognise the full extent of the Claimant's loss. As a benefit received as a result of the Respondent's unlawful act that would not have been received but for that unlawful act, it falls to be deducted from the award of compensation. Accordingly I dismiss the appeal on Ground 5.

Ground 6: Contingencies

75 This ground attacks the Tribunal's decision to apply a 0.5 (i.e. 50%) discount to the future loss multiplier of 8.81, to reflect non-life (or non-mortality) contingencies. I have summarised the Tribunal's reasons for the 0.5 discount above. Its reasoning is essentially as follows:

- a. The Ogden Table figure only takes into account life expectancy contingencies.
- b. The Tables in Section B of the Ogden Tables give some guidance as to the assessment of non-life contingencies, albeit there is no specific table that covers the Claimant's situation (58 at assessment, retiring at 67, with significant pre-existing health vulnerability). The closest table would suggest at 24% discount, but that did not deal with a Claimant with pre-existing health vulnerabilities.
- c. The risk of the Claimant having a health breakdown in the absence of the Respondent's unlawful acts was 30%.
- d. There were other non-life contingencies which may lead to the termination of the Claimant's employment that should be taken into account.

- e. Assessing matters in the round, a discount of 50% to reflect all non-mortality contingencies was appropriate.

76 The Appellant argues that the Tribunal erred in a number of respects. It failed to give adequate reasons for its decision to make any discount, and for its selection of 50%; it failed to consider that it had a discretion not to make a discount; it failed to take account of contingencies in the Claimant’s favour, such as the chance of promotion and the chance of hikes in public sector pay.

77 The Respondent argues that the question of deduction for contingencies was a matter of assessment for the Tribunal and that it reached a decision that was open to it, for reasons adequately explained in the Reasons.

78 I reject the Claimant’s submissions:

- a. The Tribunal’s reasoning is clear. The Claimant’s challenge is no more than a disagreement with the decision.
- b. Given the risk factors it had identified, the Tribunal was right to make a discount for non-mortality contingencies in its assessment of compensation. Such contingencies are not accounted for in the main Ogden Tables. The Tribunal followed a normal process recognised by Section B of the Ogden Tables headed “*Contingencies other than Mortality*”, in considering a discount to the multiplier produced by application of the main tables. It did not err in failing to have regard to the fact that it could have chosen not to apply a discount. It plainly regarded a discount as appropriate; it was right to do so.
- c. The 30% discount for pre-existing vulnerability and the overall 50% discount are adequately reasoned.
- d. The level of discount was open to the Tribunal on the findings it had made. The Tribunal had heard the case at length over the course of the liability hearing and the remedy hearing. Taking the liability and remedy reasons as a whole the Tribunal considered arguments as to promotion prospect and the chance of public sector pay hikes. The Claimant had been an EO without promotion for 17 years. There was no specific claim for losses based on promotion, and no evidence of any particular

promotion in prospect. The Tribunal was not satisfied as to the evidence of future pay increases (Reasons paragraph 168-169). The Tribunal would have had the evidence well in mind in reaching its overall assessment as to the level of deduction from future loss to reflect contingencies.

79 I dismiss the appeal on this ground.

Ground 7: Failure To Address Bonus Claim

80 The Claimant argues that the Tribunal erred in failing to address at all a claim for an annual bonus, even though the claim was made out on the evidence and addressed by counsel in argument.

81 The particulars given in the Claimant's Skeleton Argument are for past loss from 2018 to 2024 in the total sum of £1443 – the annual bonus amount being between £145 and £500 in each year; and future loss calculated at an annual rate of £150 for 9 years (=£1443). That makes a total claim of £2793.

82 The Tribunal's Reasons do not address this bonus claim at all. The question is whether the Tribunal erred in failing to deal with it. The Claimant accepts that there is no mention of this bonus claim in the Grounds of Claim nor in the original or updated Schedule of Loss. The claim was raised for the first time in the Claimant's Skeleton Argument, dated 15 June 2024.

83 After the Liability Judgment there were two case management hearings to prepare for the remedy hearing, resulting on orders dated 11 May 2023 and 2 August 2023. In the May 2023 order the heads of loss were identified though at a high level – the heads included past loss of earnings and future loss of earnings. There was no specific mention of bonus. The Claimant was directed to serve an updated Schedule of Loss by 9 May 2024.

84 The updated Schedule of Loss was dated 24 May 2024, less than a month before the remedy hearing. It contained a detailed claim for loss of earnings (past and future) in the total sum of £499,648. The multiplicands used in calculating loss of earnings did not include a bonus component. As the bonus was not raised in the Schedule of Loss, it was not addressed in the Respondent's Counter-Schedule dated 6 June 2024.

- 85 The extent of the Claimant’s evidence about bonus in his remedy witness statement, dated 28 May 2024, was as follows. In a section headed “Age of Retirement” at paragraph 7 he said “*Whilst I have not claimed loss of bonus, I was paid a bonus for work. I was a good performer and would have been entitled to awards that have been made.*”.
- 86 The Respondent’s witness, Lynn Steele, provided a witness statement in which she addressed pay rises since the Claimant’s resignation. In addressing the pay rises that would have been applicable to the Claimant for each year from 2019/2020 she referred to an additional “*non-consolidated payment to recognise performance*”. She describes this as a “*gross full time equivalent non-consolidated performance award amount*” which was paid to all eligible Executive Officers.
- 87 The Claimant relies on **Z v Y** [2024] EAT 63 for the proposition that a Tribunal should not stick slavishly to an agreed list of issues where to do so would impair its core duty to hear and determine the case before it. By analogy, Ms Mallick argues that a Schedule of Loss is merely a case management tool; the fact that an item is missed out does not preclude the Tribunal making an award, particularly if there is evidence before the Tribunal to award it.
- 88 The Respondent argues that the Tribunal did not err in law in not making an award in respect of bonus, as no claim was made for it. It further argues that there was no evidence as to whether the Claimant would have met the criteria for the award each year. In any event, the sum claimed each year is very small and would have made no difference, particularly to the broad-brush assessment of future loss.
- 89 I accept the Respondent’s submissions on this ground of appeal. I accept that a Tribunal should not slavishly follow a list of issues and in the circumstances of a particular case it may need to operate its procedures with a degree of flexibility. However, it is important that the Tribunal decides the issues before it, and that the issues are clearly articulated in advance. A Schedule of Loss forms an important function in identifying the claims made and their basis of calculation. It allows the Respondent to understand the claim and to set out its own position in a Counter-Schedule. In a complicated and high value remedy hearing a Tribunal will usually have a range of issues of principle and fact to determine. It will then need to apply its findings in carrying out the calculations required to reach the figures it will award for various heads of loss. The overriding objective and the interests

of justice are generally not served if additional claims are allowed to be added in at the last minute without being properly articulated.

90 In this case, the updated Schedule of Loss served shortly before the hearing set out claimed figures for loss of earnings without any reference to a bonus component. The Claimant's witness statement made express mention of the fact that he had not claimed for bonus. If in due course he wished to change his mind in the light of the Respondent's evidence, the proper course would have been to apply to amend the Schedule of Loss. The effect of such an amendment would have been to make a very small upward adjustment to the lost earnings figure for each past year, and a very small upwards adjustment to the annual figure for future loss (the sum claimed is £150 per annum in future, as against a multiplicand of £33,387.33). No such application was made. The Tribunal did not err in law by failing to address a claim that was not properly before it.

91 I dismiss this ground of appeal.

Cross-Appeal: Gross/Net Salary For Future Loss Of Earnings

92 The Respondent's Cross-Appeal argues that the Tribunal erred in calculating future losses by using a gross figure for the multiplicand, rather than a net of tax figure.

93 The Tribunal had correctly used net figures for past loss from the date of dismissal onwards (paragraph 145). However, when it came to assess future losses from the date of the hearing, it used a gross salary figure as the multiplicand as can be seen from paragraph 170 and the table immediately following it. The appropriate net figure for the multiplicand should have been £24,706.62, rather than the gross figure of £33,387.33.

94 The Claimant accepts that £33,387.33 is a gross figure. He accepts that the net figures were appropriately used for past loss. The Claimant argues that the Tribunal purposefully exercised its discretion to use a gross figure for future loss in order to ensure that the Claimant was adequately compensated.

95 I do not accept the Claimant's submissions. The Claimant does not, now, argue that the proper tax treatment of the future loss period means that gross figures should be used. He simply argues that the Tribunal had a discretion as to whether to use gross or net figures in assessing the appropriate level of compensation. The Tribunal is not exercising a

discretionary power in assessing compensation: it is making an evaluative assessment of the losses that have been (and will be) suffered by a Claimant. While the Tribunal needed to determine the appropriate level of multiplicand, absent a difference in tax treatment, there can be no principled reason to use net figures for one period and gross figures for another.

- 96 The Tribunal did not say in its reasons that it was using gross figures for future loss for a particular reason; it did not explain why it was departing from its decision to use net figures for the earlier period. Indeed, its reasons do not acknowledge the change from net to gross at all. At paragraph 234-238 the Tribunal addressed grossing up for tax. It rejected an argument on behalf of the Claimant that future loss figures needed to be grossed up. It accepted the Respondent's argument that the compensation for future loss would not be taxable in the Claimant's hands by reason of the tax exemption in s.406 ITEPA 2003. There is no appeal by the Claimant against that finding. Given that finding, it is impossible to see why the Tribunal would have thought that compensation based on gross figures would have been appropriate. To award a sum based on gross salary that would not have been taxed in the Claimant's hands would have resulted in a windfall for the Claimant.
- 97 It is clear to me that the Tribunal simply made an error in failing to use the net figure for its future loss of earnings calculation. Over the course of 51 pages of detailed Reasons the Tribunal covered many complex issues, many of which required calculations to be carried out in the light of its findings. Regrettably, it made an error in failing to net down the multiplicand figure at paragraph 170 in the light of its finding as to the tax treatment of the compensation award at paragraph 238.
- 98 The only proper award for future losses that could have been made in the light of the Tribunal's findings is an award which used a net earnings figure as a multiplicand. There is no challenge to the method by which the Tribunal netted down gross figures in respect of the earlier period of loss. Applying that method the Respondent argues that the multiplicand should have been £24,706.62. Using the multiplier used by the Tribunal (8.81) that should have resulted in an award for future loss of earnings of £108,833, not £147,017.19. The Claimant did not advance an alternative figure. Nor did he suggest that the assessment needed to be remitted.
- 99 I accept the Respondent's submissions. I will allow the Cross-Appeal, set aside the Tribunal's future loss of earnings award (£147,071.19) and substitute an award of

£108,833.

Conclusion

100 In conclusion:

- a. I dismiss the appeal on Grounds 4, 5, 6 and 7.
- b. I allow the Cross Appeal, set aside the award for future loss of earnings of £147,071.19 and substitute an award of £108,833.

Postscript

101 I circulated an embargoed draft of this judgment to the parties, in the usual way, for suggested typographical corrections and for them to agree an order reflecting the judgment. There was initially some disagreement about the treatment of the ACAS uplift figure in the light of my decision to substitute a revised figure for loss of earnings. In the event the parties reached an agreement that the ACAS uplift figure would remain unchanged; the remaining arithmetic was agreed. I am grateful to the parties for their cooperation in agreeing figures for the Order that I will make. The agreed varied figures are:

- a. Future loss of earnings: £108,833 (instead of £147,071.19).
- b. Total future losses: £92,254.09 (instead of £130,492.28).
- c. Grand total for compensation: £334,933.73 (instead of £373,936.69).

102 All other figures in the Tribunal's judgment remain unaltered.