Neutral Citation Number: [2026] EAT 74

Case No: EA-2025-000787-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 22 May 2026

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

DHL Services Limited

Appellant

- and -

Pawel Ignatowicz

Respondent

- -
- -

Victoria Brown (instructed by DAC Beachcroft LLP) for the **Appellant**
Pawel Ignatowicz the **Appellant** in person

Hearing date: 6 May 2026

- -

JUDGMENT

SUMMARY

Unfair Dismissal

The Employment Tribunal held that the claimant had been unfairly dismissed as a result of posts relating to a workplace grievance he made on Facebook. The Employment Tribunal found that the claimant had contributed to his dismissal by 10% and ordered reinstatement. The Employment Tribunal did not consider whether the qualified right to freedom of expression should affect its approach. The Employment Tribunal erred in law in its assessment of contributory conduct and whether to order reinstatement. The relevant legal principles are considered. The matter was remitted to the Employment Tribunal, including the freedom of expression issue.

HIS HONOUR JUDGE JAMES TAYLER:

The issues

1. The issues in this appeal are whether the Employment Tribunal erred in its assessment of contributory conduct and by ordering reinstatement of the claimant who was unfairly dismissed because of posts on Facebook.

The judgment appealed

2. The appeal is against a judgment of Employment Judge Platt, sitting with members. The hearing was held remotely from Midlands West Employment Tribunal from 24 to 28 March 2025. Judgment was sent to the parties on 22 April 2025. Two grounds, 4 and 5, concerning remedy have been permitted to procced to a full hearing.

The key facts

3. I take the facts from the judgment of the Employment Tribunal, with some reference to documents in the bundles provided by the parties.

4. The claimant commenced employment with the respondent on 5 March 2017, as a Warehouse Colleague.

5. The Employment Tribunal noted that there was no specific reference to the respondent's email and internet policy in the claimant's contract of employment. The claimant was not trained on the email and internet policy and had not read it until it was sent to him during an investigation into his social media posts. The Employment Tribunal summarised the relevant provisions of the email and internet policy, and the claimant's knowledge of them:

> 12. The respondent has an email and internet usage policy. This sets out provisions about use of social media. It sets out that employees should be aware that content posted on the internet is considered to be in the public domain and is not private. Guidelines are provided for employees about use of social media. **Para 5.2 of the policy sets out some rules including that social media should not be used in a way that damages the respondent's business reputation – even indirectly**, comment about sensitive business related topics, that if they identify themselves as employees it should be stated that their views do not represent those of the respondent and that if an employee is concerned about the appropriateness of a posting they should refrain from making it. [emphasis added]
>
> 13. In the Tribunal's experience the policy is in line with common standards set out in

> companies social media policies. We note that the policy was issued on 1 April 2006 and the latest update is recorded as being 19 July 2023. We note that this date was after the claimant made all the relevant social media posts. The respondent has not provided evidence of the version of the policy that was sent to the claimant in 2017. There is no list of the policies and procedures that were sent to the claimant in 2017 and none of the respondent's witnesses could give direct evidence about what was sent to the claimant. **We have no evidence of what policies or links were sent to the claimant** as referenced in the offer of employment letter that he signed on 24 February 2023.
>
> 14. **The claimant said he was never sent the policies and procedures and that he did not read them until the investigation meeting. We find that they were available on request from HR.**
>
> 15. **We find that the claimant was not trained on the social media policy**. The respondent's evidence was that this training was not required. We find that the claimant did not read the social media policy until he was sent it as part of the investigation process. We find that the claimant was not sent the email and internet policy that we have in the bundle (because this version is dated 19 July 2023). **We do not have any evidence about what was sent to him in 2017 and what the policy may or may not have included at that time.**
>
> 16. **Clause 5.4 of the 2023 version of the email and internet usage policy sets out that employees should refrain from posting offensive and discriminatory comments, insults or obscenities and that employees may be required to remove posts that are in breach of the policy**. [emphasis added]

6. The respondent's disciplinary and grievance policy provides a non-exhaustive list of examples of gross misconduct, which does not refer to breach of the email and internet policy.

7. The claimant is a graduate and wanted to obtain an administrative role that might allow him to progress in his career. The claimant applied to be a Warehouse Administration Clerk. The claimant attended an interview on 24 April 2023. The recruiting manager was Paulina Chmielewska. The claimant was unsuccessful in his application.

8. The claimant's interactions with Ms Chmielewska made her uncomfortable. The dates are a little hard to follow, but the gist is clear:

> 20. **On 5 May 2023 the claimant had stated to Ms Chmielewska that he wanted to add her as a friend on Facebook**. She did not respond to this request.
>
> 21. At this request, on 10 May 2023 Ms Chmielewska met with the claimant to give him some feedback following the interview.
>
> 22. **On 11 May 2023 the claimant asked whether Ms Chmielewska he could have a further meeting with in two years' time. Ms Chmielewska's evidence that this referred to the claimant having asked her to go on a date with him at their meeting on 10 May 2023, a request she did not feel comfortable with.** [emphasis

added]

9. The claimant submitted a grievance about the recruitment process on 31 May 2023.

10. On 6 June 2023, the claimant posted his written grievance on Facebook and added some comments at the end of the post ("the 6 June post"):

> it is written in the scripture last will be the first so why am I always the last? **In capitalism it is the employer who decides who is suitable for the job capitalism is a dictatorship of capitalists.** According to the Mark's point of view there is a theory about proletarian dictatorship. So why only the capitalists who are not the majority have the room for making the decisions not the proletariat or the working class who is the majority? **The conclusion is that capitalist dictatorship is evil and it has to be destroyed.** And also it is said vox populi vox dei" it continued to say "I also think it's time to say God could you do something about my problem please? Let's see what happens next. I will also send it to the conservative party and Labour Party it might be the time for the government and politicians to create some legislation to tackle that issue. [emphasis added]

11. Ms Chmielewska was told about the post some time before 9 June 2023. Ms Chmielewska reported it to her manager. The claimant was not instructed to take down the post.

12. On 9 June 2023, the claimant posted again on Facebook ("the 9 June post"). The post referred to "paranormal occurrences". The claimant referred to the recruitment process:

> **Both meetings were run by manager who has got all most similar surname in comparison to Chmielnicki.**

13. The claimant referred to his battle against "usurers". The claimant concluded:

> Today I have to add two occurrences: the surname of Sienkiewicz appears twice as author of the book "Witch wire and sword" and then as CEO of CPFIE the usury fighters and second after **I wrote about Chmielnicki, the manager who had two meetings with me has similar surname to Chmielnicki.)**
>
> **I hope that those are the signs that confirm that very soon all my enemies will be destroyed. God could you make sure that my enemies are destroyed as soon as possible please?** [emphasis added]

14. The Employment Tribunal stated of this post:

> He comments that the manager has a similar surname to Chmielnicki. He did not specifically name the manager. The post refers to other paranormal occurrences he had experienced. The post concluded by the claimant that he hoped these were signs that God would destroy his enemies. **The claimant's evidence was that he was merely comparing the surnames of the manager and the historical figure. We accept the claimant's evidence that it was his intention to compare the surnames. Chmielnicki is a controversial historical figure in Polish history as he was**

> **responsible for a massacre of Jewish and Polish people.** The post does not refer to the respondent by name or the manager by name. **The tribunal finds that Ms Chmielewska was told by colleagues about the post and the significance of the historical figure. She was upset by this**. [emphasis added]

15. The claimant attended a grievance hearing on 23 June 2023, conducted by Andrew Harkness. The grievance was not upheld.

16. On 11 July 2023, the claimant was invited to attend an investigation meeting in respect of 6 June 2023 Facebook post. The letter did not tell the claimant to remove the 6 June post but did attach the email and internet policy and the disciplinary and grievance policy.

17. On 15 July 2023, the claimant made another post on Facebook ("the 15 July post"). The post referred to email scammers and the claimant stabbing his "voodoo doll". The post concluded:

> **So my message to those who are sending those scam emails and all of my other enemies is: Congratulations you just diged the graves for you own children [**emphasis added]

18. The Employment Tribunal held of this post:

> The final sentence stated "congratulations you just diged the graves of your own children". **This post was not about the respondent and was expressing his frustration about cyber criminals and scammers which he had been a victim of. It has nothing to do with the claimant's employment**. [emphasis added]

19. The Employment Tribunal did not analyse the wording that the message was for those who were sending scam emails "and all of my other enemies" in the context that the claimant's previous messages potentially suggested that he considered some staff of the respondent as his enemies.

20. An investigation meeting took place on 18 July 2023. The investigating officer was Tatian Vaduva. It was decided that an allegation about 6 June post should proceed to a disciplinary hearing.

21. The claimant took down the 6 June post shortly after the investigation meeting. The claimant was not asked to take down the 9 June or 15 July posts.

22. The claimant was invited to attend a disciplinary hearing by letter dated 19 July 2023. On 18 July 2023, the claimant was sent the relevant email and internet usage policy, disciplinary and grievance policy, a copy a screenshot of the 6 June post and the investigation notes. The disciplinary charge related only to the 6 June post .

23. The disciplinary meeting was held before Jurgita Lebedevaite, Shift Manager, on 31 July 2023. The Employment Tribunal described the disciplinary meeting:

> 34. The disciplinary meeting lasted over two hours, and the claimant was given the opportunity to raise the points he wanted to raise. **The claimant made the point he wasn't aware he was not allowed the post the content. There was no investigation into whether the claimant had received the email and internet usage policy or not. She didn't question why he had not been told to remove the post.** The claimant explains he did not intend to cause damage to the company and had removed the post. He explained his frustration about how he had not been successful in the recruitment to an administrative role. The company did not put forward any evidence of actual damage caused by the post to the claimant at the meeting they merely invited him to imagine the damage he might have done. **The claimant apologised and acknowledged that he had caused a problem. He stated he wanted to fix the problem and said he wouldn't do it again. The claimant raised some of the problems he was experiencing outside of work in relation to cyber-crime and he showed a doctor's letter about the impact these experiences had on him.** The letter was dated 2022. [emphasis added]

24. Ms Lebedevaite decided to dismiss the claimant. The Employment Tribunal held of the reason for the dismissal:

> 35. After an hour's adjournment the dismissing officer informed the claimant of her decision. She decided to summarily dismiss the claimant. **She stated the reasons for her decision as the derogatory content on social media undermining the company's reputation and that it also had the potential to create a negative impact on employee morale and the overall work environment.** The dismissing officer made the decision to dismiss **based on the 6 June 2023 post but accepted in evidence that she had the 9 June 2023 post in the back of her mind. She maintained it was not the reason for the decision. We find that it did influence her decision**. [emphasis added]

25. The Employment Tribunal found that the reason for dismissal was based on the contents of the 6 June and 9 June posts.

26. The written decision was sent to the claimant on 31 July 2023.

27. The claimant appealed on 2 August 2023.

28. At about this time, on an unspecified date I was told was in August 2023, the claimant posted again on Facebook with details about his appeal ("the first August post"). The post included the email address of Klaudia Gil who had been appointed as the appeal officer. The post was referred to by the Employment Tribunal, but without mentioning a passage about Ms Lebedevaite:

> **Also if Hearring Manager Jurgia Lebedevaite is doing such crucial mistakes**, there is suspicion, that **the decision has been made by person either incompetent or with**

> **not fully good mental health**. [emphasis added]

29. The appeal meeting took place on 14 August 2023. The appeal was dismissed by letter dated 15 August 2023. The Employment Tribunal held of the reasons for the rejection of the appeal in addition to the 6 June post:

> **Ms Gil was aware of the posts on 9 June 2023 and the post on 15 July 2023 and the fact that the claimant has posted about his dismissal and the content of his appeal. This was part of her reasoning for the decision to uphold the appeal.** There is no evidence that she considered a lesser sanction. [emphasis added]

30. The Employment Tribunal expressly found that Ms Gil took account of the 6 June , 9 June , 15 July and the first August posts. The Employment Tribunal was scathing of the appeal:

> 46. We find that the appeal was not a genuine attempt to engage with the points raised by the claimant and to consider his appeal.

31. There were two further posts in August 2023, that it appears were before the Employment Tribunal. It is not clear whether they predated the appeal hearing and, if so, were known of by Ms Gil and taken into account.

32. The second August post stated:

> **Yes but the union guy said that I should apologize, remove the posts and promise that it will not happen in the future and I have done this and they still dismissed me.** One guy said join union and everything will be ok. But those advices from unions don't always work. **So I went to conclusion that if tactics doesn't work then change tactics. I went to the conclusion that it might be better to say: I have been dismissed unfairly I wont my job back or else I will put all my posts on FB back again.** Two guys advised me that its not going to work, so for now I removed the posts. Or I can say: I have been dismissed unfairly **I wont my job back or else I will not be able to predict how I will behave due to poor mental health** [emphasis added]

33. The third August post stated:

> **I might even go to the conclusion that if at 31.08.2023. the company x rejected my proposals to fix the problem** (remove the content and promise not to put the content in the future about company x) the company might not be interested in me to remove the content. **This could result in the content to be put back on social media and also new content** about how an employee with 5 years of service has been treated. That's why I believe that not reaching a reasonable solution between me and the Company x might prove costly to both sides. **If the company really cares about its reputation the reasonable solution of the problem would be a peaceful solution where I would agree to remove the content and not put the content in the future and in exchange I would get my job back**. [emphasis added]

The decision of the Employment Tribunal

34. The Employment Tribunal rejected complaints of direct sex discrimination, direct religion or belief discrimination and victimisation.

35. The Employment Tribunal upheld the complaint of unfair dismissal:

> 98. The reason for the claimant's dismissal was his conduct by reference to him having made a post on Facebook on 6 June 2023.
>
> 99. The tribunal considered the statutory wording in section 98 and the three-part test in *Burchell*.
>
> 100. The tribunal is concerned that the second limb of the *Burchell* test in particular has not been met. The tribunal does not consider that there were reasonable grounds to sustain a belief that the claimant had committed gross misconduct by posting on Facebook on 6 June 2023.
>
> 101. The reasons for this are as follows:
>
> > 101.2 Based on the evidence before it, **the tribunal concluded that the claimant had not been sent the relevant email and internet usage policy or a link to it**.
> >
> > 101.3 **The claimant had not been trained on the social media guidelines**, it was assumed he knew what the policy was which was not a reasonable position to take in the circumstances.
> >
> > 101.4 **The respondent did not follow the policy and ask the claimant to remove the Facebook post of 6 June 2023**. He was not asked to do this at any stage. There was a delay between the discovery of the post and the invitation to the investigation hearing during which he was not asked to remove the post.
> >
> > 101.5 **Breach of the social media is not given as an example of gross misconduct in the disciplinary policy**.
> > 101.6 **The claimant was not suspended** and there was no evidence that this was considered.
> >
> > 101.7 **The respondent did not investigate the example of different treatment highlighted by the claimant in his appeal.** The tribunal considered the respondent's submissions on this point and noted the similarities between the example given by the claimant and his circumstances and that the example mitigated dismissal to a final written warning.
> >
> > 101.8 **There does not appear to have been a proper consideration of the mitigation** put forward by the claimant.
> >
> > 101.9 **The respondent appears to have ignored that the claimant did remove the 6 June 2023 post when he became aware it might breach the email and internet usage policy** at the investigation stage.
> >
> > 101.10 **There is no evidence that the respondent considered a lesser sanction** than summary dismissal despite the claimant having a clean

disciplinary record and a reasonable period of service.

101.11 **There could be no reasonable belief that 15 July 2023 post was anything to do with the respondent** which could reasonably have supported the decision to dismiss.

101.12 **There was little evidence of detrimental impact** on the respondent caused by the post. The most that could be said was that it caused disquiet and gossip amongst colleagues in the warehouse.

101.13 **There was no evidence that the post had attracted the attention of the wider public**. Three people commented on the post and six people liked it.

101.14 **The information posted did not disclose any information which could reasonably be considered to be particularly sensitive or confidential.**

102. Section 98(4) requires the tribunal to consider whether the dismissal fell within the range of reasonable responses available to an employer and must not substitute its view for that of the employer.

103. **The tribunal accepts that the respondent followed the correct procedural steps as set out in the ACAS code of practice. However, the tribunal concludes that the respondent did not sufficiently engage with the substance of the matters being decided.**

104. **We find that the respondent did not take into account mitigating factors**: it did not consider the claimant's length of service, his clean disciplinary record, the explanation given by him, his apology, the fact he removed the post and the other things happening in the claimant's life at the time in particular in relation to him being a victim of cyber-crime.

105. **The respondent did not adequately explain to the tribunal why it felt the post was derogatory and why it was felt to reveal sensitive information that was damaging to the respondent or its business. We find there were no reasonable grounds for this belief.**

106. **The tribunal has considered whether in the circumstances of the claimant's case whether dismissal feel within a range of reasonable responses available to an employer and has concluded that in light of the factors identified above, that it was not.** No reasonable employer in these circumstances would have summarily dismissed the claimant.

107. The tribunal acknowledges that the process does not have to be perfect. However, in this case, the process was followed closely. It is the substance of the decision and the reasons for it which fall outside of the band reasonable responses of a reasonable employer in the circumstances of this case. [emphasis added]

Remedy

36. The Employment Tribunal went on to assess remedy. So far as is relevant to this appeal, the Employment Tribunal held that the claimant had contributed to his dismissal by 10% and ordered

reinstatement. The Employment Tribunal did not consider whether the qualified right to freedom of expression should affect its construction and/or application of the relevant provisions. I will consider the reasoning of the Employment Tribunal when analysing the grounds of appeal.

The law in respect of contributory conduct

37. A person who is unfairly dismissed may be awarded basic and compensatory awards.

38. Compensation can be reduced where the employee has contributed to the dismissal.

39. Section 122(2) **Employment Rights Act 1996** ("**ERA**") provides for a possible reduction in the basic award:

> (2) Where the tribunal considers that **any conduct** of the complainant **before the dismissal** (or, **where the dismissal was with notice, before the notice was given**) was **such that it would be just and equitable to reduce or further reduce the amount of the basic award** to any extent, **the tribunal shall reduce** or further reduce that amount accordingly. [emphasis added]

40. The conduct must have occurred before the dismissal or if the dismissal was with notice, before the notice was given. Section 122(2) does not require that the conduct was causative of the dismissal or that the respondent knew about the conduct at the time: **Renewi UK Services Ltd v Pamment** EA-2021-000584. A reduction can only be made if it is just and equitable to do so and to such extent as is just and equitable. It is for the Employment Tribunal to assess the nature of the conduct and whether it is culpable or blameworthy such as to make it just and equitable to make a reduction: **Nelson v BBC (No.2)** [1980] ICR 110.

41. Section 123(6) **ERA** provides for a possible reduction of the compensatory award:

> (6) Where the tribunal finds that **the dismissal was to any extent caused or contributed to by any action of the complainant**, it **shall reduce** the amount of the compensatory award **by such proportion as it considers just and equitable** having regard to that finding. [emphasis added]

42. The Employment Tribunal must find as a fact that the employee engaged in culpable or blameworthy conduct. That conduct must have caused or contributed to the dismissal and so the employer must have known about it at the time. If the Employment Tribunal finds that there is such conduct it must reduce the compensatory award by such amount as it considers just and equitable:

Swallow Security Services Ltd v Millicent UKEAT/0297/08/JOJ. The reduction can potentially range from 100%, if clearly reasoned: **Friend v Civil Aviation Authority** [2001] EWCA Civ 1204, [2001] IRLR 819, to 0%: **N Notaro Homes v Keirle** [2024] EAT 122, [2024] IRLR 875.

43. There are a number of significant similarities and differences between reductions for contributory conduct of the basic award under section 122(2) **ERA** and the compensatory award under section 123(6) **ERA**:

> (1) when applying both sections, the Employment Tribunal must make an objective assessment of whether the employee was guilty of conduct that was culpable or blameworthy – the assessment is for the Employment Tribunal rather than the employer
>
> (2) under section 122(2) **ERA** the link between the conduct and dismissal is temporal – the conduct must have occurred before dismissal (or if dismissal was on notice before notice was given) – the employer need not have dismissed because of the conduct, or even have known about it at the time of dismissal
>
> (3) under 123(6) **ERA** the link between the conduct and dismissal is causal – the dismissal must have been caused or contributed to by the conduct – the employer must have known about the conduct and it must have been taken into account in the dismissal

44. A point that arises in this appeal is whether conduct that occurs between dismissal (or giving notice of dismissal) and the rejection of any appeal against dismissal, can be considered in assessing contribution.

45. I have concluded that the answer depends on whether one is considering reduction to the basic award under section 122(2) **ERA** or to the compensatory award under section 123(6) **ERA**.

46. A reduction for contributory conduct under section 122(2) **ERA** requires that the conduct occurred before the dismissal or, if the dismissal was on notice, before notice was given. Accordingly, conduct that occurs after notice of dismissal is given cannot be taken into account when considering whether a reduction for contributory conduct can be made under section 122(2) **ERA**. It would be inconsistent with the focus on the temporal connection between the conduct and dismissal, or the giving of notice, if conduct after dismissal but before an appeal could be taken into account, because the conduct would necessarily occur after dismissal, or the respondent giving notice of dismissal.

47. I have concluded that a different approach applies to section 123(6) **ERA**, in respect of which

the focus is on the causal link between the conduct and dismissal. In considering the fairness of dismissal, account can generally be taken of things that only came to light during an appeal hearing.

In **West Midlands Co-Operative Society Ltd. v Tipton** [1986] A.C. 536, Lord Bridge held:

> Under section 57 of the Act of 1978 there are three questions which must be answered in determining whether a dismissal was fair or unfair: (1) What was the reason (or principal reason) for the dismissal? (2) Was that reason a reason falling within section 57(2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held? (3) Did the employer act reasonably or unreasonably in treating that reason as a sufficient reason for dismissing the employee?
>
> As to question (1), Cairns L.J. in *Abernethy v. Mott, Hay and Anderson* [1974] I.C.R. 323, in a passage approved by Viscount Dilhorne in the *Devis* case, said, at p. 330:
>
> > "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee. If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason. He may knowingly give a reason different from the real reason out of kindness..."
>
> The reason shown by the employer in answer to question (1) may, therefore, be aptly termed the real reason. Once the real reason is established the answer to question (2) will depend on the application of the statutory criteria to that reason. Then comes the crucial question (3): did the employer act reasonably or unreasonably in treating the real reason as a sufficient reason for dismissing the employee? Conduct of the employee unrelated to the real reason for dismissal obviously cannot affect the answer to this question. This, and no more than this, is what the *Devis* case decided. But I can see nothing in the language of the statute to exclude from consideration in answering question (3) "in accordance with equity and the substantial merits of the case" evidence relevant to show the strength or weakness of the real reason for dismissal which the employer had the opportunity to consider in the course of an appeal heard pursuant to a disciplinary procedure which complies with the statutory Code of Practice. The apparent injustice of excluding, in relation to this question, misconduct of the employee which is irrelevant to the real reason for dismissal is mitigated, as I have earlier pointed out, by the provisions relating to compensation in such a case. But there is nothing to mitigate the injustice to an employee which would result if he were unable to complain that his employer, though acting reasonably on the facts known to him when he summarily dismissed the employee, acted quite unreasonably in maintaining his decision to dismiss in the face of mitigating circumstances established in the course of the domestic appeal procedure which a reasonable employer would have treated as sufficient to excuse the employee's offence on which the employer's real reason for the dismissal depended. Adopting the analysis which found favour in *J. Sainsbury Ltd. v. Savage* [1981] I.C.R. 1, if the domestic appeal succeeds the employee is reinstated with retrospective effect; if it fails the summary dismissal takes effect from the original date. **Thus, in so far as the original dismissal and the decision on the domestic appeal are governed by the same consideration, sc. the real reason for dismissal, there is no reason to treat the effective date of termination as a watershed which separates the one process from the other. Both the original and the appellate**

> **decision by the employer, in any case where the contract of employment provides for an appeal and the right of appeal is invoked by the employee, are necessary elements in the overall process of terminating the contract of employment. To separate them and to consider only one half of the process in determining whether the employer acted reasonably or unreasonably in treating his real reason for dismissal as sufficient is to introduce an unnecessary artificiality into proceedings on a claim of unfair dismissal calculated to defeat, rather than accord with, the "equity and the substantial merits of the case" and for which the language of the statute affords no warrant.** [emphasis added]

48. For section 123(6) **ERA** to apply, the actions of the complainant must be known to the employer and must have caused or contributed to the dismissal. Any action taken into account at the appeal stage must have, as a matter of fact, caused or contributed to the decision to reject the appeal and to uphold the dismissal. But in such circumstances the conduct does cause or contribute to the "overall process of terminating the contract of employment" as referred to by Lord Bridge in **Tipton** and I can see no reason in principle why it cannot result in a reduction of compensation under section 123(6) **ERA**. Alternatively, such conduct might be relied on in considering what compensation is just and equitable for the purposes of section 123(1) **ERA**.

The analysis of the Employment Tribunal

49. The Employment Tribunal dealt very briefly with contribution:

> 109. The respondent submits that any compensation should be reduced to take account of contributory fault. The tribunal finds that **the claimant was blameworthy in that he chose not to keep his grievance inside the company** while it was dealt with. He chose to replicate the content on Facebook. However, he was not asked to take this down until the investigation meeting. The respondent did not act in accordance with its own policies when it did not ask the claimant to take down the Facebook post. We therefore find it is just and equitable to reduce the compensatory award by 10%. [emphasis added]

50. The Employment Tribunal only took account of the fact that the claimant had publicised his grievance.

The appeal

51. The respondent challenges the decision on contribution on the following ground:

> 11. Ground 4: the Tribunal's conclusion in respect of the claimant's contributory fault being limited to 10% was perverse.

> 11.1. The Tribunal limited its analysis to the fact of posting the content of the grievance online. This failed to take into account the severity of the additional language in the post which was not included in the grievance ("capitalists dictatorship is evil and it has to be destroyed") and the later social media posts, which were relevant by the appeal stage at the latest.

Analysis

52. For the purpose of assessing any reduction of the basic award pursuant to section 122(2) **ERA**, the Employment Tribunal should have analysed whether the claimant was guilty of any culpable or blameworthy conduct in respect of the 6 June post, the 9 June post and/or the 15 July posts, all of which predated the dismissal on 31 July 2023, such that it would be just and equitable to reduce the amount of the basic award. It is not necessary that the posts were taken into account as part of the reason for dismissal.

53. For the purpose of any reduction in the compensatory award, pursuant to section 123(6) **ERA**, the Employment Tribunal should have analysed the extent to which some or all of the 6 June post, the 9 June post, the 15 July post and any of the August posts caused or contributed to the dismissal by being taken into account at the disciplinary or appeal hearing and, if so, decreased the compensatory award by such proportion as it considered just and equitable having regard to that finding.

54. Ground 4 is upheld and the assessment is remitted to the Employment Tribunal.

The law in respect of reinstatement

55. Section 113 **ERA** provides for orders for reinstatement or re-engagement. In this appeal we are only concerned with reinstatement.

56. Section 116(1) **ERA** provides:

> 116.— Choice of order and its terms.
>
> (1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—
>
> (a) whether the complainant wishes to be reinstated,
>
> (b) whether it is practicable for the employer to comply with an order for reinstatement, and

(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

57. The provision sets out the required stages of analysing reinstatement. The Employment Tribunal is required to take into account:

(1) whether the complainant wishes to be reinstated

(2) whether it is practicable for the employer to comply with an order for reinstatement

(3) if the complainant caused or contributed to some extent to the dismissal, whether it would be just to order reinstatement

58. In **British Council v Sellers** [2025] EAT 1, [2025] IRLR 238, Mrs Justice Eady held:

> 42. … In determining whether to make a reinstatement or re-engagement order, s 116 thus provides that the ET must take into account three matters, which can be conveniently summarised as follows: (a) the complainant's wishes; (b) practicability, and (c) contributory fault. At this stage, there is a neutral burden of proof: these are issues for the ET itself to resolve, having regard to the circumstances of the case before it.
>
> The complainant's wishes
>
> 43. The first mandatory consideration under s 116 ERA thus relates to any expression of view by the complainant: whether they wish to be reinstated (s 116(1)(a)), or as to the nature of any re-engagement (s 116(3)(a)). In respect of the former, although a complainant might want to be re-employed, it may well be they would not wish to be reinstated to their former job; this would be an obviously relevant consideration mitigating against reinstatement. Section 116(3)(a) is phrased more widely: assuming the employee does not wish to be reinstated, or the ET has determined not to make such an order, the ET is required to have regard to any wish expressed by the complainant as to the nature of a re-engagement order. That might be relevant to a number of matters; from whether the ET should make such an order, to the particular terms it might direct. Of course, a complainant might not express any view about these matters, but, if they do, this is something the ET is required to take into account.
>
> Practicability
>
> 44. The second matter the ET is required to take into account is whether it is practicable for the employer to comply with an order for reinstatement or re-engagement (other than that the latter might require the ET to consider practicability in relation to a successor or associated employer, this obligation is expressed in identical terms for either type of order). **'Practicable' in this context means the employee's reinstatement or re-engagement is not merely possible but is capable of being carried into effect with success**: *Coleman v Magnet Joinery Ltd* [1975] ICR 46, at p 52B-C, approved by the Court of Appeal in *Kelly v PGA European Tour* [2021] ICR 1124, per Lewis LJ at para 8. Under s 116, **the ET is inevitably making a prospective judgment – on a neutral burden of proof – as to the practicability of compliance. A further opportunity to consider this issue can arise if an order is made but the**

employer fails to comply; in those circumstances, s 117 ERA provides for an award of compensation and for the making of an additional award unless the employer can satisfy the ET (applying the civil standard of proof) that compliance with the order was not practicable (s 117(4)).

45. **Practicability is a question of fact for the ET, to be determined at the date when it is making the order**, which **may require it to deal with circumstances that are different to those that prevailed at the date of dismissal**. Determining practicability requires, however, **a real world assessment of that which is practical, not simply that which is possible**: *Rao v Civil Aviation Authority* [1992] ICR 503 EAT at p 513 (affirmed by the Court of Appeal at [1994] ICR 495), and it has been seen as 'contrary to the spirit of the legislation' to make an order for re-instatement (or re-engagement) which would result in a redundancy process or significant overmanning (*Cold Drawn Tubes Ltd v Middleton* [1992] ICR 318 EAT), albeit that this will always be a question to be determined on the specific facts of the case in question (hence the decision of the EAT in *Highland Fish Farmers Ltd v Gavin Thorburn and anor* UKEAT/1094/94, upholding the ET majority decision in that case).

46. **Moreover, although it is undertaking an objective assessment, the ET must keep in mind that the relationship has to work in human terms, considering the question of re-employment from the perspective of that particular employer** (*Kelly v PGA*, per Underhill LJ at para 69). Although this is often phrased as an issue of trust and confidence (whether that is on the part of the employer, see *Central & North West London NHS Foundation Trust v Abimbola* UKEAT/0542/08, or the employee, see *Nothman v London Borough of Barnet (No. 2)* [1980] IRLR 65), the real point is that **it is unlikely to be practicable to order that an employee returns to work for an employer where such confidence is absent** (again see per Underhill LJ in *Kelly v PGA*). **Where an employer genuinely and rationally believes it can no longer have confidence in the complainant as one of its employees (whether that is because of the view it has formed about the complainant's ability to do the work, or because it believes they have acted in a way that means they can no longer be trusted), that will be a relevant consideration in determining practicability**: *United Lincolnshire Hospitals NHS Foundation Trust v Farren* [2017] ICR 513 EAT at para 40; approved by the Court of Appeal in *Kelly v PGA*. **It will not, however, be sufficient for the employer to simply assert a lack of confidence: practicability will not be determined on the basis of emotion, assertion, or speculation, and the ET will scrutinise whether the stated belief is genuinely and rationally held** (*Farren*, para 42). That said, **the focus at this stage is not on the process by which a particular decision was reached, but on the material before the ET, which will enable it to assess whether re-employment is likely to be effective**.

47. Applying this test of practicability, **where the employer genuinely believes that the complainant has acted in such a way that their re-employment is not tenable, that belief is not to be disregarded simply because it was founded upon a flawed investigation**; after all, given that the ET has already held the dismissal was unfair, it is highly likely it will have found that the employer failed to carry out a reasonable investigation. Thus, in *Wood Group Heavy Industrial Turbines Ltd v Crossan* [1998] IRLR 680, accepting that the finding of unfair dismissal was predicated on there having been insufficient investigation into the alleged misconduct (taking and dealing drugs at work), the EAT nevertheless ruled that, given the employer's genuine belief

in the substance of the allegations, it was not practical to order Mr Crossan's re-engagement:

> '… It may seem somewhat incongruous that where a tribunal goes on to categorise the investigations into the belief as unfair or unreasonable, nevertheless, the original belief can found a decision as to remedy and the practicality of re-engagement, but it is inevitable to our way of thinking that when allegations of this sort are made and are investigated against a genuine belief held by the employer, it is difficult to see how the essential bond of trust and confidence that must exist between an employer and employee, inevitably broken by such investigations and allegations can be satisfactorily repaired by re-engagement or upon re-engagement. **We consider that the remedy of re-engagement has very limited scope and will only be practical in the rarest cases where there is a breakdown in confidence as between the employer and the employee. Even if the way the matter is handled results in a finding of unfair dismissal, the remedy, in that context, invariably to our minds will be compensation.**'

48. In *Crossan*, the nature of the misconduct in issue was plainly a relevant consideration: if the employer genuinely believed that the employee was taking and dealing drugs at work, it is hard to see how it would be practical to require him to be re-employed. Where, however, reliance is placed on what is said to be a breakdown in relations, the position may be more nuanced. Thus, in *Oasis Community Learning v Wolff* UKEAT/0364/12, **the EAT upheld an order for re-engagement where, notwithstanding the employer's view of Mr Wolff's previous intemperate behaviour, the ET had been entitled to consider that re-employment into a different part of the organisation, dealing with different managerial personnel, was likely to be effective**. **More generally, the question of practicability is not to be answered by reference simply to the views of the relevant dismissing officer; the ET is required to assess the practicability of re-employment from the perspective of the employer, the views of which may not be represented by one particular manager.** As Her Honour Judge Tucker observed at para 99 London *Borough of Hammersmith v Keable* [2022] IRLR 4, EAT:

> 'In our view, it does not automatically follow, particularly in an organisation as large as the Council, that because the dismissing officer … genuinely believed that the Claimant had been guilty of misconduct, that the Council, as an employer, had lost trust and confidence in him. …'

49. **Context will, however, always be key**. In *ILEA v Gravett* [1988] IRLR 497, the EAT considered it was of little relevance to the question of practicability that the employer (the largest education authority in the country) had a vast variety of posts into which Mr Gravett could be fitted: any of those posts would inevitably mean Mr Gravett would be involved in the care of young children and, given that ILEA genuinely believed him guilty of alleged sexual offences involving a 13 year old girl, re-engagement was not a practical option.

Contributory fault

50. By sub-para 116(3)(c) ERA, it is further provided that the ET shall take into account:

> 'where the complainant caused or contributed to some extent to the dismissal,

> whether it would be just to order his re-engagement and (if so) on what terms'

(there is an identical requirement under sub-para 116(1)(c) (dealing with reinstatement), albeit that does not require the ET to go on to consider the terms of the order).

51. In the present case, the ET appears to have understood that, under sub-para (c), it was required to make a finding as to whether the claimant had, as a matter of fact, caused or contributed to his dismissal:

> '78. … I am required to consider whether the claimant contributed to his dismissal …'

Going on to hold that:

> '83. Withdrawing a positive case of contributory fault does not relieve the tribunal of its duty to consider contributory fault. …'

And characterising this as an:

> '95. … obligation to consider contributory fault.'

52. We do not, however, agree that is what sub-para (c) requires. **In our judgement, while it is plainly correct that, in considering whether to make a reinstatement or re-engagement order, the ET is bound to take into account any finding of contributory fault, this provision does not require it to make such a finding. That, we consider, is clear from the wording of sub-s (c): the mandatory requirement comes after the comma; it is only where the complainant has caused or contributed to the dismissal** (so: if, but only if, that fact has been established) **that the ET is required to take that into account in determining whether it would be just to order re-engagement.** [emphasis added]

The analysis of the Employment Tribunal

59. The Employment Tribunal held:

> 136. **The claimant wished to be reinstated, had maintained that position throughout** and explained why. He had been unable to obtain a role since his employment ended which was comparable to his role at the respondent. In particular the location was convenient for him and the pension was significantly better.
>
> 137. **The Tribunal considered the matter of practicability and approached this from a common-sense perspective so as not to over analyse the word practical. The Tribunal concluded that reinstatement was capable of being carried out with success. At this stage the Tribunal is making a provisional determination or assessment on the evidence** following the approach in *Port of London Authority v Payne*. The Tribunal **notes the lack of specific information provided by the respondent as to the impracticability of reinstating the claimant. For example it did not have information about the number of staff in the warehouse working as warehouse operatives, the claimant's team in particular or turnover of staff. There was no clear explanation provided as to why it would be impractical to reinstate the claimant, simply that there were no current vacancies at the site.** We

> conclude it might be inexpedient to reinstate the claimant but not that it is impractical to do so. The respondent provided information about future business plans which pointed to a reduction in the workforce overall over time and plans to relocate staff to Daventry from Rugby. This does not prevent reinstatement now and if the claimant is redundant in future he would be dealt with in the same way as other members of staff.
> 138. **The Tribunal has considered the claimant's relationships with colleagues. The respondent is a large employer and the individuals involved were not working side by side with each other. The Tribunal accepts that there is a possibility that Ms Chmielewska may come into contact with the claimant, but the Tribunal anticipate that this contact would likely be minimal and could be managed by clearly setting out to the claimant the future standards of conduct expected**.
>
> 139. **The Tribunal does not consider that relationships with colleagues have been irretrievably soured by making the post.** The claimant apologised and acknowledged some regret about his actions. **We did not find that the conduct demonstrated irretrievable strife, rather the Tribunal considers that with some support from Human Resources to ensure all parties involved understand the expectations of them and with appropriate training on social media usage, that the relationship can be repaired.** The Tribunal heard no evidence to suggest that the respondent had any concerns about the claimant's ability to do his job and the Facebook post for which he was dismissed had no impact on the job. **The Tribunal found that there was no reasonable belief that the claimant had committed gross misconduct. The Tribunal is not satisfied that the respondent has a rational belief trust and confidence has broken down and the relationship is irretrievable.**
>
> 140. The Tribunal made a reduction of 10% to the compensatory award to reflect the claimant's contribution to his dismissal. **The Tribunal did not find that the nature of contributory conduct to be such that it prevents reinstatement being practicable.**
>
> 141. **The Tribunal did consider the claimant's conduct during litigation. We observed that the claimant made many comparisons between the respondent, his circumstances, historical events and historical figures. His comments were not always well-considered but we did not find the claimant intended to be malicious. We did not find that the claimant's conduct during the litigation assisted us in reaching our decision on reinstatement.** [emphasis added]

The appeal

60. The respondent asserts:

> 12. Ground 5: the Tribunal erred in its consideration of reinstatement by:
>
> (a) failing to take into account the claimant's conduct during the litigation;
> (b) substituting its own view on whether there should have been a breakdown in trust and confidence in considering practicability and/or failing to give sufficient reasons on this issue; and/or
>
> (c) reaching a perverse conclusion.

61. I consider that the Employment Tribunal erred in law in failing to consider whether the

claimant's conduct during litigation was such that the respondent genuinely and rationally believed that it could no longer have confidence in him. All the Employment Tribunal said was that it was not assisted by consideration of the claimant's conduct in the litigation. For instance, the claimant had likened the actions of the respondent's staff to that of the Nazis. The claimant's conduct in the litigation had to be assessed in considering the practicability of reinstatement as of the date of the hearing.

62. The Employment Tribunal used language much of which demonstrates that the members of the Employment Tribunal considered whether they thought that reinstatement was practicable, rather than whether the respondent genuinely and rationally believed it could no longer have confidence in the claimant. It was incumbent on the Employment Tribunal to consider how the staff of the respondent had been affected by the 6 June post, the 9 June post, the 15 July post, the August posts and the claimant's conduct in the litigation.

63. The remission of the assessment of contribution means that any change in the level of contributory conduct found will have to be taken into account when deciding whether to order reinstatement. I note that, at paragraph 104, the Employment Tribunal incorrectly considered whether the contributory conduct was such that it prevents reinstatement being practicable. That is not the correct test. The Employment Tribunal was required to consider whether, having regard to the claimant's contribution to his dismissal, it would be just to order his reinstatement.

64. Ground 5 is upheld and the issue of reinstatement is remitted to the Employment Tribunal.

The remission

65. The parties agree that the remission should be to the same Employment Tribunal. When assessing the practicability of reinstatement, the Employment Tribunal will need to consider the situation as it is at the date of the remitted hearing. Unfortunately, the claimant has made further comments, that may be thought to be wholly unacceptable.

66. In November 2023, the claimant posted stating:

> I think that every time when someone wins Employment Tribunal for unfair dismissal or discrimination the punishment for managers who conducted unfair dismissal or

> discrimination should be like that: … [link to video]
>
> On your knees lower and then there should be several slaps in face with the stick.

67. In correspondence with the EAT on 22 September 2025, the claimant stated:

> In nowadays system in corporate fascism I saw at least 2 satanic bitches who were grinning like that. It was the dismissing managers

68. In correspondence with the EAT on 22 December 2025, the claimant suggested that one of his managers was involved in theft.

69. The Employment Tribunal will have to consider these comments, and any other relevant matters relied on by the respondent, in assessing whether the respondent genuinely and rationally believes it can no longer have confidence in the claimant, such that reinstatement is not practicable.

70. A matter that was not considered in the judgment of the Employment Tribunal, presumably because it was not raised, was the qualified Convention right to freedom of expression. This potentially could be relevant to the interpretation of the provisions dealing with contribution and reinstatement; see in the context of considering the fairness of a dismissal: **X v Y (Employment: Sex Offender)** [2004] EWCA Civ 662, [2004] I.C.R. 1634. This is a matter to which the claimant referred in general terms in his skeleton argument but upon which I did not hear any detailed argument. It will be incumbent on the respondent to ensure that the relevant provisions and authorities are before the Employment Tribunal as it will be a live issue when the Employment Tribunal redetermines contribution and whether to order reinstatement or re-engagement.