Neutral Citation Number: [2026] EAT 96

Case No: EA-2025-SCO-000023-SH

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 29 June 2026

Before :

THE HONOURABLE LADY POOLE

- -

Between :

PROFESSOR ROYA SHEIKHOLESLAMI **Appellant**

- and –

THE UNIVERSITY OF EDINBURGH **Respondent**

- -
- -

Simon Gorton KC (instructed by Direct Access) for the **Appellant**
Alice Stobart, Advocate (instructed by Anderson Strathern) for the **Respondent**

Hearing date: 18 June 2026

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JUDGMENT

SUMMARY

Topics: unfair dismissal (11), disability discrimination (12)

After extensive litigation, the appellant was found entitled to a substantial award in respect of a variety of claims including unfair dismissal and discrimination. The appellant appealed the tribunal's decisions to (1) apply only a 2.5% ACAS uplift to the award under section 207A of the **Trade Union and Labour Relations (Consolidation) Act 1992** (2) decline to gross up certain elements of the award for tax.

Held:

(1) the issue of the ACAS uplift had been remitted by necessary implication when earlier remedy findings were set aside on appeal. The tribunal was entitled to reconsider the appropriate percentage in the light of the new total of the award. The tribunal had correctly stated and applied the law governing the ACAS uplift, its decision was not perverse, and nor had it given inadequate reasons for it.

(2) In relation to grossing up, the tribunal had properly applied the principle in **British Transport Commission v Gourley** [1956] AC 185 that the appellant should be put in the same position, so far as can be done by an award of money, as they would have been had breaches of duty not happened. There were a variety of heads of compensation in what had been a complex case, and a lack of clarity as to the proper application of chapter 3 of part 6 of the **Income Tax (Earnings and Pensions) Act 2003** to aspects of the award. In the circumstances of this particular case, the tribunal's pragmatic solution, acknowledging the **Gourley** principle applied but not at that stage grossing up disputed areas of the award, and instead recording an indemnity by the respondent together with the ability for the appellant to apply further to the tribunal should that prove necessary, did not disclose any error of law.

THE HONOURABLE LADY POOLE:

Background

1. This appeal is about the appropriate level of an award made by the Employment Tribunal ("**ET**"). Two issues are raised. The first is the amount of an ACAS uplift to the award (a percentage increase to compensation where there has been unreasonable failure to comply with relevant ACAS Codes of Practice). The second is grossing up of aspects of the award (increasing an award to take account of tax or deductions which may be payable on it). The EAT is grateful to parties for their submissions, and the documentation submitted to it both in advance and after the hearing of the appeal, all of which have been taken into account.

2. The background to the dispute is that the appellant was formerly employed by the respondent. She held the Chair of Chemical Process Engineering. From January 2010 she was on sick leave. She was later dismissed, with her employment terminating with effect from 12 April 2012. She brought a claim in the ET in 2012. Ultimately, after considerable procedure, the ET found the appellant's dismissal to be unfair. The ET also found that the appellant had been the subject of victimisation, and discrimination arising from disability and by failure to make reasonable adjustments. The consequences of what happened to the appellant have been catastrophic for her health, immigration and financial status, and her life in general. They are still being felt by her.

3. There have been many judgments in the ET and Employment Appeal Tribunal ("**EAT**") relating to the appellant's claims. Two judgments of the ET dated 15 March 2017 (the "**first liability judgment**") and 15 May 2019 ("**the second liability judgment**") made liability findings, with a visit to the EAT in between. A judgment of the ET dated 1 June 2020 considered the question of remedy and ACAS uplift, in the light of the liability findings (the "**2020 decision**"). The judgment was varied on 7 July 2020 after reconsideration (the "**2020 reconsideration decision**"). The 2020 decision was appealed to the Employment Appeal Tribunal ("**EAT**"), which was the appellant's second appeal to

the EAT in connection with her claim. The EAT on 31 May 2022 upheld certain parts of the 2020 decision, set aside other parts, and remitted the case to a different ET (the "**2022 EAT decision**"). After remission, and following at least three further decisions of the ET including a decision of 26 October 2023 (the "**2023 decision**"), the appellant was found to be entitled to a much larger sum of money than the 2020 decision had awarded. This appeal is against one of the ET judgments on remedy, dated 31 January 2025, which made a revised award (the "**2025 decision**"). An application for reconsideration resulted in an additional award of interest, and a revocation of a deduction to take account of accelerated receipt in respect of future economic loss in a decision dated 19 February 2025 (the "**2025 reconsideration decision**").

4. Now in 2026, some parts of the appellant's award are no longer in dispute. These include some matters decided in the 2020 decision and not appealed, including a basic award for unfair dismissal, holiday pay, discrimination arising from failure to make reasonable adjustments, and a partial award for victimisation. Their rough total was a little under £20,000.

5. However, the compensatory award for unfair dismissal, and award for discrimination arising from disability (including economic loss caused by discrimination and victimisation and injury to feelings), have proved controversial. The 2022 EAT decision remitted the amounts of awards connected with those aspects of the claim to the ET for rehearing, resulting in the ET making much higher awards, and other aspects of compensation being agreed. Nevertheless parties remain in dispute about the appropriate level of an ACAS uplift and grossing up.

The ACAS uplift

The underlying issues

6. The 2020 decisions applied an uplift of the maximum rate of 25% to some parts of the award, but not others. (The ET did not explain why it took this selective approach, but its omission of parts of the award from application of the ACAS uplift was never appealed). The 2020 decision added an ACAS uplift of £62.50, at 25% of a compensatory award of £250. The 2020 reconsideration decision

added an ACAS uplift of £6,250 to an award of £25,000 for discrimination arising from disability, also at 25%, the ET having realised that award also fell within schedule A2 of the **Trade Union and Labour Relations (Consolidation) Act 1992** ("**TULRCA**") discussed further below. The total ACAS uplift at that time was therefore £6,312.50. The ET also stated that the 25% uplift would apply to "a monetary sum equivalent to 8 months NHS benefits" (para (v)). That sum was found to be £23,156 in the 2025 decision (paras 10 and 18), which at 25% would have resulted in an uplift of £5,789. On that basis, the value of the ACAS uplift awarded as a result of the 2020 decisions was in the region of £12,000, on an award totalling under £100,000.

7. The 2025 decision, together with the 2023 decision, raised the overall level of the tribunal award significantly. The award, net of the ACAS uplift, now totals over £1.7m. The ET applied an ACAS uplift of 2.5% to parts of the award, of £742,776.51, being an uplift of £18,569.41. The ET also said that it would apply that uplift to the agreed loss of pension of £411,318 and future economic loss of £64,616.73 if asked by parties to do so. The uplift on the new award is calculated by the respondent (including pension and economic loss) at £33,258.15, if at 2.5%; and by the appellant at a little under £30,000. If the uplift were to be at 25% on the new award, the respondent calculates it at £332,581.56. There is no dispute that the difference between a 25% uplift and a 2.5% uplift is substantial.

8. The appellant argues, in summary, that the ET erred in law in not applying a 25% uplift to the award made in the 2023 and 2025 decisions. The respondent argues that the ET did not err in law.

Governing law

9. Section 207A of **TULRCA** makes provision for awards by an ET to be increased where there has been an unreasonable failure to comply with an ACAS Code of Practice. It provides, insofar as relevant:

> "(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

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

10. Schedule A2, referred to in section 207A(1) **TULRCA**, contains a list of proceedings where ACAS uplifts may apply to awards. The list includes unfair dismissal claims, and claims under sections 120 of the **Equality Act 2010** (the "**EqA**") (discrimination etc in work cases). Claims of discrimination arising from disability, victimisation, and failure to make reasonable adjustments fall within section 120 of the **EqA** (because they are within section 39, part 5, of the **EqA**, so within the statutory wording). The claims within the present proceedings fall within Schedule A2 of **TULRCA** (referred to in section 207A(1)), and so it was open to the ET to apply an ACAS uplift.

11. The maximum uplift is 25%, but it is for the ET to set the percentage appropriate to a particular award. The touchstone, in the statutory wording, is that the ET may apply an uplift "if it considers it just and equitable in all the circumstances to do so". Consistently with justice and equity, ACAS uplifts may have compensatory and punitive aspects **(Secretary of State for Justice v Plaistow** 2021 47 WLUK 37 para 90). The compensatory element reflects the harm and the loss to an employee of an opportunity which might, for example, have resulted in them persuading an employer not to dismiss them (**Plaistow** para 90), but there must not be double counting with other compensatory elements of the award (for example injury to feelings; **Slade v Biggs** 2022 IRLR 216 at para 77). The punitive element is to punish the employer for not having followed a relevant ACAS Code.

12. Uplifts must reflect "all the circumstances". The nature and gravity of breaches is relevant (**Wardle v Credit Agricole Corporate and Investment Bank** [2011] ICR 1290 at paras 19 and 27, **Bannerjee v Royal Bank of Canada** [2021] ICR 406 paras 4-5, **Slade** at para 77). Nature and gravity

may encompass factors such as the degree of culpability, motivation, and the extent of the breaches of the Code. The effects of the breach on the employee is one of the circumstances, although double counting with compensation should be avoided.

13. The overall size of an award is also relevant to the size of the ACAS uplift awarded (**Wardle** paras 15 and 17, **Acetrip v Dogra** [2019] 3 WLUK 802 para 92, 94 and 99-101, **Plaistow** para 88). It is an error of law not to consider the absolute value of an award being made at least in cases involving larger sums (**Plaistow** para 88). The principle of proportionality is part of the just and equitable analysis. The law sets itself against sums which would not command the respect of the general public, and very large payments for procedural wrongdoings are at risk of doing just that (**Wardle**, para 17). If compensation is modest, then that factor is unlikely to affect the ET's analysis, but in other cases the size of an award can be a highly material consideration. So, for example, where an award was in excess of £2m the ET was justified in restricting an ACAS uplift to 2% (**Wardle** para 14-15). Before the ET, the respondent relied on a 2016 ET case called **Jhuti v Royal Mail Group Ltd**, submitting that an uplift of 0.5% had been awarded. On the other hand, in **Rentplus v Coulson** [2022] EAT 81, a case in which procedure before dismissing an employee was found to be a complete sham, an uplift of 25% was upheld (para 56) (although the overall level of the award is not clear from the judgment). The appellant also referred to the case of **SPI Spirits (UK) Ltd v Zabelin** [2023] EAT 147, in which an award of approximately £1.6m was made by the ET, and the EAT did not find there had been an error in law in it including an ACAS uplift of 20% (para 103). It can be seen that the percentage level of the ACAS uplift has varied considerably between decided cases.

Was the ET entitled to consider the level of the ACAS uplift in the 2025 decisions?

14. The appellant first argues that the ET should have applied the 25% uplift determined in the 2020 decisions, and it was not open to it to decide for itself the applicable percentage of uplift in 2025. The appellant submits that issue was not appealed, reconsidered or remitted, relying among

other things on **Aparau v Iceland Frozen Foods** [2000] ICR 341, so there was no jurisdiction in the ET to consider the appropriate percentage of the uplift. The respondent argues that, on the contrary, the level of the ACAS uplift was remitted to the ET and it properly determined it.

15. In **Aparau** it was held that once proceedings in the ET had been disposed of by a final decision, there was no power to reopen them generally, in cases in which the EAT remitted only specific issues. Jurisdiction was limited to the issues remitted. There is some doubt in the present case whether the ET had yet reached a "final" decision in 2020, and whether **Aparau** applies at all, because the ET had left some quantum matters open. Assuming it does, it is relevant that **Aparau** recognises that an issue remitted may by "necessary implication" involve decisions on related matters (Mance LJ at 352A-B).

16. It is necessary to go back to the 2020 decision read with the 2020 reconsideration, to understand what the EAT remitted to the ET in 2022. In relation to the claims of the appellant which succeeded, the 2020 decisions awarded the following:

Unfair dismissal	£2850 basic award and £250 compensatory award, with an ACAS uplift of £62.50 to the compensatory award (25%)
Holiday pay	£8241.52
Discrimination by failure to make reasonable adjustments	£2000 plus interest
Victimisation	£2000 plus interest
Disability discrimination	£25,000 plus interest plus a monetary sum equivalent to 8 months NHS benefits plus interest, plus (after reconsideration) ACAS uplift of £6,250 on the £25,000 and 25% on the 8 months of benefits.

17. The ET applied the ACAS uplift only to the disability discrimination and compensatory awards for unfair dismissal. The ET noted the submission of the respondent that regard had to be had to the amount of the award to be uplifted and thus, if the total amount of the award is substantial, the uplift if made should be small (**Chagger v Abbey National plc** [2009] EWCA Civ 1202) (at para 42). The ET then awarded an uplift of £62.50 at 25% on a £250 loss of employment rights (para 89).

In the 2020 reconsideration decision, the ET added a further ACAS uplift of £6,250 to the disability discrimination award (25% uplift on an award of £25,000), together with an uplift to be calculated on the 8 months of NHS benefits.

18. The 2022 EAT decision states, in the disposal section (para 55, bold type added):

"The parts of the [2020 decision] dealing with (a) basic award; (b) holiday pay; (c) injury to feelings awards for victimisation and failure to make reasonable adjustments; and (d) the refusal to make a separate solatium award **are all unaffected** by the conclusions set out above. I will, however, **set aside the remaining parts of the remedy judgment and remit** for a re-hearing before a differently constituted Tribunal **the following three issues**:

a. the amount of any compensatory award due in respect of the respondent's unfair dismissal of the claimant;
b. the amount of any other economic loss caused to the claimant by the respondent's disability discrimination and victimisation referred to in the first and second liability judgments; and
c. the amount of any injury to feelings award due in respect of discrimination arising from disability (section 15 EA) in terms of the second liability judgment."

19. The 2022 EAT decision does not expressly mention the ACAS uplift in its remit. However, what is clear is that all parts of the 2020 decision, other than those listed in (a) to (d) of the first part of para 55 of the EAT's decision, were set aside. The numbering in paragraph 55 of the 2022 EAT decision is mildly confusing, because it uses the same letters twice, albeit differentiated by punctuation. Nevertheless, the decisions in 2020 applied the ACAS uplift only to parts of the award (and the omission of other parts was never appealed). What is clear from the second part of para 55 is that all of the parts of the award affected by the ACAS uplift were remitted to the ET; the compensatory award for unfair dismissal (remitted by the EAT in para 55 a.), the NHS benefits award (remitted by the EAT in para 55 b.) and the disability discrimination award (remitted by the EAT in

para 55 c.). Those parts of the decision, including the references to the ACAS awards, had been set aside because they were not within the matters listed by the EAT (in para 55 (a) to (d)) which were unaffected. The ET was going to have to reconsider the issue of the compensatory award and awards for disability discrimination afresh. The EAT finds that it was a necessary implication, in those circumstances, that the ET was also to reconsider the ACAS uplift on those elements of the award. That finding is made on the basis of the terms of the EAT remittal and its natural implication, against the background of the law governing ACAS uplifts. Section 207A awards, which Parliament intends to occur when it is "just and equitable", are to be calculated in the light of the whole sum to which they apply (**Wardle**, **Acetrip** and **Plaistow)**. Another matter remitted by necessary implication, not expressly mentioned by the EAT, was interest on the remitted awards.

20. Because of the finding that the issue of the ACAS uplift was included in the remit to the ET by necessary implication, it is not necessary to consider in detail the appellant's other arguments about lack of jurisdiction. In brief, the appellant placed some reliance on estoppel by record, but that particular doctrine is not part of Scots law. Scots law does have a doctrine of *res judicata*, but that tends to apply in relation to a later case being brought where an earlier case conclusively decided the point. It is helpful to keep in mind the underlying purpose, which is to prevent duplication and abuse. This is the same case, not a different one, and given that the EAT had overturned the parts of the 2020 decisions to which the ACAS uplift had been applied, there is no earlier conclusive finding determining amounts of ACAS uplifts in relation to the award. Further, given the scope of the remit by the EAT to the ET, it is irrelevant that no reconsideration of the percentage level was applied for by the respondent. Although some reliance was placed by the appellant on the case of **Bannerjee**, the EAT notes that the outcome of that case is consistent with this case. In both cases the EAT has rejected procedural arguments, and found that the ET has been entitled to reconsider the ACAS uplift. That is consistent with the intention of the statutory provision under which it arises (**TULRCA** section 207A) that any uplift should be just and equitable, which includes consideration of the overall level of the award.

21. Finally, the EAT notes that even if that is wrong, and the findings in the 2020 decisions about the ACAS uplift are binding, it is difficult to see how that assists the appellant. The findings in the 2020 decision and 2020 reconsideration decision were not limited only to the percentage uplift, but also set out the actual amounts that were found to be due by way of uplift, as well as specifying an uplift on NHS benefits. As set out above, together with sums in the 2020 reconsideration decision, the ACAS uplift due was a little over £10,000 (an uplift on a compensatory award for unfair dismissal of £62.50, an uplift on an award for disability discrimination of £6,250, and a 25% uplift on 8 months of NHS benefits). The appellant cannot cherry pick and accept only the parts of those findings relating to the ACAS uplift which are favourable to her (the percentage level), while ignoring the ET's other findings about the overall monetary value of the ACAS uplift it thought was appropriate. Returning to the amount of the ACAS uplift in 2020 would result in an award considerably less than the sums due to the appellant in respect of the ACAS uplift after the 2025 decision and further agreement.

Did the ET err in law in its approach to the ACAS uplift and its reasons?

22. Given that the ET was entitled to consider the ACAS uplift for itself in 2025 because that matter had been remitted to it, the next question is whether it erred in law in its approach to the ACAS uplift.

23. The EAT starts by reminding itself of the approach it should take to the decision of the ET. Decisions should be read fairly and as a whole. The ET does not have to identify all evidence relied on in reaching findings, nor does it have to express every step of reasoning in any greater level of detail than to be **Meek** compliant. Where the ET has correctly stated the legal principles to be applied, an appellate court or tribunal should be slow to conclude it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found (**DPP Law v Greenberg** [2021] EWCA Civ 672 paras 57-58). The EAT adds that in a case in which there have been a number of judgments with a potential bearing on the issue of the ACAS uplift, reading a judgment fairly and as a whole may involve taking into

account earlier decisions, particularly where the ET has referred to them in a later decision (in this case, in para 17 of the 2025 decision). It would be a waste of time and resources if it had to keep repeating findings already made and referred to.

24. In the 2025 decision under appeal, the EAT correctly noted the legal principles which it was applying, by mentioning **TULRCA** section 207A and the just and equitable test (para 14). If there was any doubt about that, the ET had also identified them in the 2023 decision (para 26). The ET correctly stated that before determining the level of any ACAS uplift, the ET needs to know and take into account the size of any award and its overall value when applying an uplift (para 16); and again, if there was any doubt about that, it had already been noted in the 2023 decision (para 64). It is also evident that the ET was aware it had to consider the nature and gravity of breaches, because it stated that a breach of the ACAS Code was to be taken seriously, in particular in a case such as that one in which it was found by a previous ET that there was a failure to follow any procedure in the claimant's dismissal and grievance (para 17).

25. The language used by the ET does not indicate that it wrongly applied those principles. On the contrary, the ET expressly referred to the just and equitable test when making its decision (paras 18, 20 and 21). It noted that a breach of the ACAS Code is to be taken seriously, in particular in a case such as this where it was found by the previous ET that there was failure to follow any procedure in the claimant's dismissal and grievance. That was a finding that there was a failure to follow any procedure in the appellant's dismissal and grievance in the context of a discussion about the ACAS Code (para 17), from which it is reasonably inferred that the ET had found that all relevant provisions of the ACAS Code of Practice on disciplinary and grievance procedures 2009 had not been followed. Given that clear finding, the ET did not have to set out in any more detail exactly which provisions had not been complied with. The first and second liability judgments, referred to by the ET, set out the ET's findings on the respondent's complete failure to take forward any grievance procedure, because they believed the appellant instead wanted to reach a settlement. They also made express findings that the respondent failed to follow the ACAS Code in relation to the dismissal. A complete

failure to follow the ACAS Code on disciplinary and grievance procedures in relation to the dismissal (details of which were the subject of findings in the first and second liability judgments) includes failure to establish all the facts, inform the appellant, hold a meeting at which she could be accompanied, take the decision and give the opportunity to appeal. In relation to the grievance, it entails that there had been failures to hold a meeting to discuss the grievance where the appellant could be accompanied, to take a decision about appropriate action, and to allowing the grievance to be taken further if not then resolved. These are all matters within the ET's expert knowledge of which it can be taken to be aware. The EAT finds that the nature and gravity of the breaches were taken into account by the ET, and noted to be serious (para 17).

26. Further, it is clear that the ET endeavoured to take into account the total level of the award before it, including agreed elements (paras 18-19 of the 2025 decision). The award on matters before the ET in 2025 covered past economic loss, injury to feelings, bank, bankruptcy and NHS costs, and the ET stated that it would also apply the uplift to the agreed loss of pension and future economic loss if asked to do so. Although at para 18 the ET appears not to have taken into account certain sums that had been awarded in 2020 and not set aside on appeal in 2022, at least some of which appear to be for matters within the terms of schedule A2 **TULRCA**, those were not matters that had been remitted to it. In any event, in the context of the size of the revised award, those sums were unlikely to have had a significant effect on the appropriate uplift. There is nothing in the ET's decision to suggest it did not take into account the serious effects of the respondent's behaviour on the appellant. That matter was clearly in the ET's mind because had been considering compensation awards more generally, and it is reasonably inferred from the level of the compensation awards made that it considered those effects were serious. Given that the ET was not entitled to double count in making its award, nothing more needed to be said.

27. Applying these principles, the ET found a percentage uplift of 2.5% for the ACAS uplift was appropriate on £742,776.51, resulting in an uplift of £18,669.41. It also correctly rejected the appellant's argument that it was bound to apply a 25% uplift rather than consider the uplift for itself

(paras 15-16), for reasons already set out above. If the uplift the ET said it would award on pension and future economic loss if asked is added, the total value of the ACAS uplift is somewhere in the region of £30,000.

28. The EAT will be reluctant to second guess an ET's decision about percentage uplifts, because it is often a decision on facts which are unlikely to be as fully apparent on appeal as they were to the fact-finding tribunal (**Slade** para 77). The level of 2.5% awarded in the 2025 decision was significantly less than the 25% previously awarded, but the overall level of the amount of the ACAS uplift had increased considerably. It is clear from cases discussed above a wide range of decisions are available to the ET on the appropriate level of the ACAS uplift. There have been cases (**Rentplus**, **SPI Spirits (UK) Ltd)** where, even in awards involving large amounts of compensation, there has also been a percentage uplift towards the higher end of the range. Equally, cases such as **Wardle** and **Chagger** have taken a more cautious approach, in the region of the percentage the ET ordered in this particular case. In those circumstances, while the respondent conceded this uplift was on the low side, it cannot be said that it was perverse. Further, read as a whole, the reasons (referred to in the discussion above) were proper and adequate to explain the ET's decision and why the appellant did not win on her submissions in relation to the ACAS uplift, even if the appellant disagrees with that decision.

Grossing up

29. The second ground of appeal is that the ET erred in law and/or acted perversely in not making an award gross to the claimant, and instead making an award of net losses in respect of elements of the compensatory award that would attract tax. The appellant argues that the ET ought to have grossed up the award, applying principles in the case of **British Transport Commission v Gourley** [1956] AC 185, and that it failed to give adequate reasons for failing to do so. The respondent on the other hand argues that the ET did not err. In short, there is an issue over whether aspects of the award

are taxable, including aspects of the disability discrimination award. This is partly because some of the whole award appeared to be due to discriminatory conduct pre-termination, so not in consequence or connected with termination, and accordingly not within the taxation provisions in chapter 3 of part 6 of the **Income Tax (Earnings and Pensions) Act 2003** ("**ITEPA**"). There is also an exception for disability payments under section 406. The respondent argues that if the award is made gross and the statutory exemption applies, then the appellant would be over compensated. HMRC had been approached but had indicated to the respondent no decision would be made by HMRC about taxation of the award until the case had been decided in full. The pragmatic solution in those circumstances, applying the principle in **Gourley,** was not to make a gross award, but instead to order payment of certain elements net, while documenting the ability of the appellant to apply to the ET for reconsideration if HMRC sought to find her liable to tax. The ET had not erred in so finding.

Governing law

30. The principle in **Gourley** is that the injured person should be placed in the same financial position, so far as can be done by an award of money, as they would have been had breaches of duty not happened (p206). To ignore the tax element as it affects awards would be to act in a manner which is out of touch with reality (p 203). Damages were therefore reduced to take account of the tax an employee would have paid on gross earnings. **Gourley** also notes that in general damages must be decided by the application of reasonable common sense (p210). Although **Gourley** was a personal injuries case, it has for some time been recognised that the approach is transferable to compensatory awards in employment cases.

31. **ITEPA** governs how awards on termination of employment will be taxed, and **Gourley** indicates that the effects of **ITEPA** should be taken into account by the ET. Chapter 3 of part 6 of **ITEPA** is headed "payments and benefits on termination of employment etc". Section 401 applies chapter 3 of **ITEPA** to:

> "payments and other benefits which are received directly or indirectly in consideration or in consequence of, or otherwise in connection with—

(a) the termination of a person's employment…"

Section 403 has the effect that if a payment within section 401 exceeds a threshold of £30,000, it counts as employment income. The amount of an award falling within section 401 exceeding £30,000 will therefore be subject to tax. If an award made by the ET is over £30,000 and subject to tax within **ITEPA**, then it may have to be grossed up by a figure representing notional tax, to take account of the employee's liability for tax.

32. Not all aspects of ET awards fall within section 401 **ITEPA** and become subject to tax. In **Yorkshire Housing v Cuerden** (Appeal UKEAT/0397/09/SM) it was found that awards for psychiatric injury and injury to feelings related back to a failure to make reasonable adjustments, not termination of the employment which was some time later (para 28). They were not payments received in consequence or connection with termination of employment, so did not become taxable by virtue of section 401 and 403 **ITEPA**, and did not fall to be grossed up (see also Harvey on Industrial Relations and Employment Law (Division L Chapter 6 para [915.01]).

33. HMRC has an internal manual with passages concerning compensation for discrimination and for hurt feelings, recognising distinctions between the tax position of different elements of awards. It states that awards may have separate elements, such as loss of earnings, injury, or injury to feelings, and each element has to be considered separately. Elements of compensation for discrimination which represent loss of future earnings are said to be connected with termination of employment, and subject to section 401 **ITEPA**. However, if aspects of an award are for a historic loss, such as injury to feelings before termination, there is no connection with termination of employment and section 401 will not apply.

34. There are also various statutory exemptions from the application of chapter 3. These include section 406 **ITEPA** which provides as follows:

> "(1) This Chapter does not apply to a payment or other benefit provided—
> (a) in connection with the termination of employment by the death of an employee, or
> (b) on account of injury to, or disability of, an employee.
> (2) Although "injury" in subsection (1) includes psychiatric injury, it does not include injured feelings".

Accordingly, even if a payment is made on account of disability of an employee, if it is for injured feelings, it will not fall within the section 406 exemption. Further, a payment made by an employer may be found not to be made "on account of disability", and accordingly not within the meaning of section 406 (**Horner v Hasted (HM Inspector of Taxes)** [1995] STC 766). HMRC's internal manual cites **Horner** for a two stage test for the application of section 406; there must be an identified medical condition that disables or prevents the employee from carrying out the duties of the employment, and the payment must be made on account of that disability and nothing else (so it would not apply for example where the employer was unaware of the disability on termination).

35. The ET should take care that its approach to tax does not put the claimant in either a better or a worse financial position than if dismissal had not occurred. The ET's Presidential Guidance Note 6 on Remedy states that "where it is clear" that the claimant will have to pay tax on the sum award, the ET will award a higher figure, calculated so that tax can be paid and the claimant will receive the net sum which properly represents the loss (para 28). But it is also recognised that the ET are not accountants and so a "broad brush" is often applied (Principles for Compensating Pension Loss, 4th Ed 2021, para 2.42).

The 2025 decision

36. The ET accepted that the appellant should not be disadvantaged by the requirement to pay tax on a sum awarded to her that had been calculated to compensate for net financial loss (2025 decision para 22). The parties had differing positions on what tax would be due on the award, and whether that would in any event be met by the respondent. The ET found that it did not have a clear understanding of what tax would fall to be paid (para 24). It did not consider it in the interests of justice to gross up. It expressly said "It will remain open to the parties to return to the Tribunal in the event that it is necessary to gross up any award to take account of tax to be paid by the claimant to HMRC and in respect of which the respondent has failed or refused to make payment". In the 2025 reconsideration decision, the ET declined to reconsider grossing up, on the basis that there was no

reasonable prospect of the judgment being varied or revoked in respect of the findings concerning grossing up.

The EAT's decision

37. The **Gourley** principle does not state that all awards must be grossed up. Rather, it requires the ET to have regard to tax consequences attaching to an award, when seeking to put the claimant in the position they would have been but for wrongful acts which have been found to have happened. The ET did so and did not err in law in applying the **Gourley** principle.

38. In many cases the tax position on an award will be sufficiently clear, and the ET will gross up aspects of awards, in accordance with the Presidential Guidance referred to above. In the present case, there is currently no such clarity in respect of some aspects of a relatively complex award. Chapter 3 of part 6 **ITEPA** subjects certain payments and benefits on termination of employment to tax. Some aspects of the award may not be in consequence of or connected with termination, for example failure to make reasonable adjustments, and so fall outwith the taxation burden imposed by sections 401 and 403 **ITEPA**. Other aspects which are received in connection with termination of employment may fall within the disability exception in section 406(1)(b) **ITEPA**. The appellant argues they will not, because the appellant was dismissed on 11 January 2012 due to her work permit running out, rather than because of disability. However, the wording of section 406(1)(b) **ITEPA** exempts payments from the taxation burden imposed by Chapter 3 "on account of injury to, or disability of, an employee", other than injured feelings. It is evident that the award includes sums for disability discrimination. Whether any elements of the award were within the wording of the section 406(1)(b) requires an analysis of what the ET made those awards for, and not consideration only of one of the adminicles of evidence before the ET. The ET did not err in saying that the tax position was unclear and ultimately a matter for HMRC. The ultimate arbiter will be HMRC, the tax tribunals and appellate courts, should that prove necessary.

39. The appellant argues no undertaking was given by the respondent to meet relevant tax

liabilities if the award was not grossed up. Those submissions are rejected. The respondent stated in writing as part of submissions to the ET prior to the 2025 decision that "if it transpires that the award is asserted to be taxable beyond the unfair dismissal and injury to feelings award, then the respondent is required as the appellant's employer to account to HMRC for the unpaid PAYE…". Earlier submissions were also incorporated in that final submission, which were dated 20 October 2024. Paragraph 27 of those earlier submissions stated "at the original remedies hearing the respondent made it clear that it would pay the net sum awarded to the appellant and it would deal with HMRC as to whether there was any tax liability on the payment, paying the same if it was ultimately determined by HMRC that tax was payable". At paragraph 36 it was stated that "the respondent will discharge the tax…should HMRC challenge the position, which is a challenge to the respondent in its discharge of its PAYE obligations, and if it is successful in that challenge, the respondent will pay that tax liability and indemnify the appellant against any tax liability. The claimant is then not placed at any risk. The Tribunal Judgement can record this". The ET duly recorded that "The respondent has given an undertaking that they will indemnify the claimant in respect of any tax liability arising from payment of the Tribunal award" and "It will remain open to the parties to return to the Tribunal in the event that it is necessary to gross up any award to take account of tax to be paid by the claimant to HMRC and in respect of which the respondent has failed or refused to make payment" (paras 23 and 24 of the 2025 decision).

40. In deciding how best to put the appellant in the position she would otherwise have been, in a case in which the tax position was uncertain, the ET was entitled to have regard to the lack of clarity as to the tax position. It was also entitled to have regard to the undertaking it had recorded, and the ET's rules allowing applications for reconsideration. The ET's solution for how to implement the **Gourley** principle and ensure the appellant was neither over nor under compensated was a sensible and pragmatic one, in keeping with the dictum in **Gourley** that damages should be decided by the application of reasonable common sense.

41. The ET did not therefore "refuse to make a **Gourley** award" as suggested by the appellant.

On the contrary, the ET expressly recognised the principle in **Gourley** was applicable (para 22). It explained the way in which that principle was to be given effect (paras 23 to 24). The appellant is able to understand from that explanation why her arguments about grossing up did not succeed at this stage of her case. The ET's reasons were proper and adequate. Should HMRC find that aspects of the award are taxable, and the respondent fails to make relevant payments in breach of the undertaking, then at that stage further application may be made to the ET, and the appellant's arguments may well succeed. However, at this stage, and in the particular circumstances of this case, the ET did not err on a point of law in relation to its decision about grossing up.

Conclusion

42. The grounds of appeal do not succeed. The appeal is refused.

43. In concluding, the EAT observes that, even though the appellant has suffered great hardship and been found entitled to a substantial award of compensation, only part of that compensation has been paid. The respondent told the EAT this was because of issues raised by a trustee in bankruptcy involved in the appellant's sequestration (from which the appellant submits she was discharged some time ago). Objection is made to the respondent paying over sums directly to the appellant, because a multiplepoinding action is to proceed in the Sheriff Court to determine the appropriate destination of sums awarded. As elements of the compensation awarded to the appellant show, the ET has found the bankruptcy was a consequence of unlawful actions of the respondent in dismissing the appellant, related to complications with the appellant's immigration status restricting access to public funds and NHS treatment without charge. The appellant initially brought her claims in 2012. It is clear from the awards made it has been recognised in the ET and EAT that the appellant was unfairly dismissed and discriminated against. Given how long the appellant has been waiting to receive all compensation properly due to her, the EAT observes that it is in the interests of justice for any outstanding matters to be resolved as early as possible.

Postscript

44. The hearing of the appeal in this case was on 18 June 2026. Following the hearing, by a deadline of 25 June 2026, parties provided the EAT with lists of figures relating to the award and ACAS uplift. Copies were also provided of the first and second liability judgments, together with lists of relevant passages. All of the additional material was considered and taken into account by the EAT. After the EAT had reached its decision and prepared this judgment and associated order, which were about to be issued, on 29 June 2026 the appellant emailed the EAT (on her own behalf rather than through any representative).

45. In the appellant's email she said that "on reflection, the claimant is not pursuing the argument of the order of interest and uplift". The email went on to say she wished to highlight that parties are bound by a judgment not appealed or reconsidered such as the July 2020 judgment, and disputed certain of the figures and summary of relevant passages provided by the respondent. She drew the EAT's attention to parts of the liability judgments having been highlighted on behalf of the appellant. She also stated that "the important point is to note that quantum of uplift [in 2020] was £10,512.50 and [in 2025] would be about £30,000 which means the same misconduct attracted substantially lower percentages solely because the Claimant has suffered greater financial loss which is an error of law".

46. To the extent that any parts of the email seek to raise further grounds of appeal, the EAT refuses to allow amendment of the grounds of appeal on which leave was granted. It is not in the interests of justice to reopen matters at this stage of proceedings in such a long running case. Further, although the appellant states she is not pursuing "the argument of the order of interest and uplift", she does not state she is withdrawing the appeal. In those circumstances the appropriate course is to issue this judgment and associated order in determination of the appeal before the EAT.