



EMPLOYMENT TRIBUNALS

Claimant: Mrs K Farmer
Respondent: Fresh Cut Video Ltd
Before: Employment Judge McCooey

REPRESENTATION:

Claimant: Mr Okhiria, Consultant
Respondent: Mr Megara, Solicitor

RECONSIDERATION JUDGMENT

The respondent's application dated 12 February 2026 for reconsideration of the remedy judgment dated 6 February 2026 is refused.

REASONS

1. This reconsideration application was regrettably only forwarded to me on the 15 June 2026, despite it being sent, along with an application for payment to be stayed, on 12 February 2026. This was due to an administrative error. I apologise to the parties for the lengthy delay they have experienced in the determination of this application.
2. On 23 June 2026, I invited parties to make written submissions regarding the recent case of **KJ v British Council [2026] EAT 46**, in its consideration of **Abbey National Plc v. Chagger [2009] EWCA Civ 1202**, as that case post-dated the respondent's application and was relevant to the issues under review. Both parties provided helpful written submissions which I have carefully considered.
3. Following a 4-day final hearing between 1-4 December 2025, the claimant was successful in her claims of automatically unfair dismissal and pregnancy discrimination. Her claim for failure to deal with a flexible working request was dismissed. The claimant requested written reasons, dated 28 January 2026. The liability judgment (LJ) was not appealed, nor reconsideration requested, by either party.

4. A remedy hearing took place on 2 February 2026 at which oral evidence was heard and a reserved judgment handed down. The respondent's present application to reconsider the remedy judgment was made promptly within time.

Law

5. Under Rule 68 of the Employment Tribunal Rules of Procedure 2024, a Judgment may be reconsidered if it is "necessary in the interests of justice to do so".
6. In making that decision, the Tribunal must give effect to the overriding objective to deal with cases "fairly and justly" (Rule 3). This allows a broad discretion to determine what "the interests of justice means" in any particular case, and in relation to both parties, not just the applicant. Finality of proceedings is an important consideration alongside the applicant's reasons for reconsideration.
7. For the purpose of this application, in **Chagger**, Underhill P stated at [88] that where dismissal of the claimant was found to be discriminatory, the correct question to ask is:
"What would have happened if the claimant had not been discriminatorily dismissed: that formulation plainly requires consideration of whether the same dismissal might have occurred but on legitimate grounds."
8. When considering compensation for unlawful discrimination under sections 119 and 124 of the 2010 Act, the EAT in **KJ v British Council** said, in making the **Chagger** assessment: *"it is necessary to remove all of the discriminatory conduct. In other words, it is necessary to consider what would have happened to the Claimant had none of the discriminatory conduct occurred"*
9. It also confirmed that a discrimination claim should be treated for compensation purposes as a claim in tort: **Essa v Laing Ltd [2004] ICR 746**.

Discussion

10. There is no reasonable prospect of the original decision being varied or revoked for the following reasons:
11. The respondent's application centres on arguments that were ventilated at the liability and remedy stage. The fact-finding stage of my liability judgment found that ultimately, the claimant was not dismissed for performance concerns or data breaches, as the respondent suggests, but her pregnancy and pregnancy-related absence. I considered Mr Pill's reasons for dismissal (para 99-100) and gave reasons for rejecting those at (para 107 – 138 and 148 – 155). This is material to the respondent's **Chagger** argument and the resulting period of loss. I address the respondent's precise arguments below.
12. The discriminatory wrongs established at the liability stage are, using the wording of the List of Issues:
 - 5.1.1 Invite the Claimant on January 29, 2024, to a disciplinary meeting highlighting purported concerns with her performance;
 - 5.1.2 Assert that the Claimant had fallen short of required standards of performance;
 - 5.1.3 On 2 February 2024, lock the Claimant out of her work email and other

devices, which meant that she could not access her documentation (including financial details and work related documents) and was prevented from speaking with the external HR in relation to the disciplinary meeting;

5.1.4 Disregard the claimant's fit note from their GP and expressed health concerns on 5 February 2024;

5.1.6 Dismiss the Claimant on 19 February 2024.

13. The focus in this case for remedy purposes is primarily on what the respondent would have done had the discriminatory conduct not occurred, rather than the claimant's plans; on her case, she would have liked to have remained with the respondent until at least the conclusion of her fixed term contract of three years. I did not award the full loss period she sought, instead awarding 11 months of lost earnings; and 10 months of maternity leave pay for reasons set out in the RJ.

The Respondent's additional evidence

14. The respondent sent a 36-page reconsideration bundle which contained additional evidence that the respondent sought to rely on in this reconsideration application. It was not adduced at the full merits hearing or at the remedy hearing, the stated reason being because it was subject to legal privilege. This evidence included an email chain between Mr Magara and Mr Pill dated 23 January 2023 -12 February 2024 and it is said that legal privilege is waived strictly for the limited purpose of this application, namely, *"to provide contemporaneous insight into the Respondent's state of mind regarding the seriousness of alleged data breaches and the realistic prospect of dismissal for non-discriminatory reasons, for the purposes of the Chagger counterfactual analysis"*.
15. Other evidence included Mr Young's termination letter dated 24 April 2024, with a disciplinary report attached, and various screenshots of communications sent around March/April 2023, the latter being some time prior to the events complained of, and presumably to challenge the long-term viability of the claimant's position prior to her becoming an employee in September 2023.
16. Whilst I appreciate that decisions regarding whether to waive privilege can be sensitive, I do not consider this new evidence to be admissible. The material was in the respondent's possession at the time of the FMH and the remedy hearing, when the 730-page remedy bundle was finalised. It should have been adduced prior to findings being made in either or both of those hearings. There was no sufficiently good reason put forward as to why it was not, particularly given that the waiving of privilege was explored in respect of other documents on Day 1 of the FMH. The decision was ultimately a tactical one for the respondent to make. It would not be in accordance with principles of finality, procedural fairness or the overriding objective to now admit that evidence at this late stage.
17. In any event, I do not consider any of the contents contained in the new material sufficiently decisive or determinative to otherwise warrant its admission now in the interests of justice.

Application

18. The respondent's application centres on:
- i. The assessment of injury to feelings; and
 - ii. the counterfactual assessment of loss under *Chagger*.

19. The respondent submits that, *“the judgment proceeds on a materially incomplete evidential footing such that the resulting award cannot safely stand”*. As mentioned, the decision was based on the evidence that was provided by parties and adduced as admissible at the time of the liability and remedy judgment.

i. Injury to feelings

20. Here it is said: *“the Tribunal’s reasoning does not demonstrate that it undertook the necessary analysis of causation required in discrimination compensation”*. Further, *“the Tribunal was required to distinguish distress caused by dismissal from distress arising from other significant, independent stressors that were clearly evidenced before it, including a prior miscarriage and the claimant’s mother’s diagnosis of cancer requiring surgery in April 2024”*.

21. The respondent relies on the following to argue for a reduction of the £18,000 injury to feeling award: a) Anxiety flowing from a previous miscarriage; b) Distress arising from serious parental illness; c) General pregnancy-related vulnerability; d) Distress directly attributable to the discriminatory act.

22. These factors were considered. Regarding the miscarriage, the tortious “eggshell skull” rule applies, and the respondent must take their victim as they find them, provided the causal link to the discriminatory acts are established. I considered that the claimant may have been more vulnerable to stress due to her previous miscarriage but I found that the distress itself at the relevant time was caused by the discriminatory dismissal and its process. This was based on the claimant’s oral and written evidence about her distress during January and February 2024 following each stage of that process. For example, on receiving the email dated 29 January 2024 inviting her to a probationary review meeting, the claimant writes: *“what was meant to be the happiest time in my life, became the worst time in my life in a split second.”* I do not consider that, apart from the discriminatory acts, she was otherwise anxious about her pregnancy because of her prior miscarriage. It was the process itself and it being conducted without regard for her health that caused the distress. Another claimant may have been more resilient, but I must consider the injury to feelings of this particular claimant.

23. Regarding her mother’s illness, that matter is different. It had been an ongoing distressing event and was mentioned as the reason the claimant took leave to visit South Africa in January 2024. This was prior to the pregnancy disclosure and the dismissal process that followed. Her mother’s surgery was in April 2024 after the dismissal. I have already factored in any separate distress caused by the claimant’s mother’s illness and not attributed that distress to the calculation of the current injury to feelings award, which is less than the £33,000 sought by the claimant.

ii. Chag/loss period

24. Here the respondent focuses on my reasons for rejecting the submission that the claimant’s data breaches would have led to her immediate dismissal based on comparative treatment with Mr Young.

25. The application cites Mr Young’s ongoing grievance, which Peninsula advised needed resolving before disciplinary action was progressed. This was said to be the reason why his dismissal did not occur immediately. Secondly, in Mr Young’s case Peninsula had advised that downloading confidential material was gross misconduct and disciplinary remained the expected outcome for Mr Young. However, this was not the

advice that Mr Pill was given regarding the claimant's data breaches. Mr Pill's oral evidence at the FMH was, whilst he disagreed with their approach, he ultimately took Peninsula's advice contained in their final report and dismissed the claimant for the reasons they set out, which did not focus on data breaches. This was an issue that was ventilated at trial and at the remedy hearing. I gave reasons as to why I did not find the breaches would have led to the swift dismissal of the claimant as the respondent suggests at paras 76-79, 87-90, 128-132 LJ, and paras 29-38 RJ. It is not open to the respondent to relitigate this disputed matter.

26. A further point made by the respondent is: *"Thirdly, and critically, the Respondent expressly informed the Tribunal that there existed legally privileged contemporaneous communications between Harry Pill and the Respondent's legal advisers which demonstrated that Harry Pill was minded to dismiss both Mr Young and the Claimant for gross misconduct arising from the data breach, subject to procedural steps. Those communications were referred to in submissions but not placed before the Tribunal at the remedy hearing, in circumstances where privilege had not at that stage been waived."*
27. As set out above, it was a tactical decision for the respondent as to whether to waive legal privilege to admit documents; it cannot meaningfully rely on documents that were not admitted for scrutiny by the other party and Tribunal in the usual way.
28. In any event, material differences remain between Mr Young and the claimant which diminishes the usefulness of their comparison; the data breaches themselves were different; the advice from Peninsula about those breaches was different; the relationship and history Mr Pill had with each of them was different; there was an animosity between Mr Young and Mr Pill which was not the case between the claimant and Mr Pill (para 105, LJ). Further, the exchanges now sought to be relied on about the data breaches postdate the pregnancy disclosure; I have already discussed the element of predetermination I found in the chronology of events and Mr Pill's approach to performance issues and data breaches following that disclosure (eg para 73 and 109 LJ).
29. For these reasons, I consider that the liability and remedy judgment does sufficiently address the matter of what would have happened absent the discriminatory conduct. In particular, whether the claimant would have been dismissed by the respondent before October 2025. My LJ and RJ address why I do not consider the performance concerns and data breaches would have led to immediate or swift dismissal in the way said by the respondent.
30. Regarding the counterfactual analysis, I acknowledged in those judgments that the respondent did have some performance concerns that pre-dated the pregnancy disclosure and are separate from the discriminatory conduct. I found however that, absent the discriminatory conduct regarding the claimant's pregnancy and pregnancy-related absence, the respondent's concerns would have prompted a PIP or review for a 6-month period, as that period and next step was mentioned in Mr Pill's probation review document; and a probation extension was mentioned by Peninsula and Mr Pill to his mother as the next step regarding later absence concerns (paragraphs 55 and 59, LJ).
31. I do not consider that PIP/review would have begun immediately upon the claimant returning from her 6-week sickness absence in March 2024. The claimant's absence

from the office was a clear problem for the respondent, based on their email to Peninsula, even though it was in the context of pregnancy. In the counterfactual analysis, I do not consider, absent the discriminatory conduct, that the respondent would have started the PIP/review process until the claimant returned from maternity leave in October 2025, bearing in mind she had a GP sick note for 6 weeks following the pregnancy disclosure and may have experienced further pregnancy-related absences from the office prior to birth at the end of July 2024.

32. Furthermore, another reason why I consider immediate implementation of the PIP/review unlikely in the counterfactual analysis, is that the 6 month review would have had to be underway for 4 months, before being paused during the claimant's 10 month maternity leave period, with the remaining two months having to resume upon her return. I do not consider that the more likely scenario. Therefore, October 2025 was the earliest date by which I considered the claimant would have been dismissed on legitimate grounds. I also considered that the claimant could not evidence a causal link between her financial losses and the discriminatory conduct beyond October 2025.
33. Accordingly, the application is refused and the Remedy Judgment under reconsideration is confirmed.
34. For the avoidance of doubt, payment of the award has effectively been stayed pending determination of the application. I do not award any further interest during this period, the delay being outside of the respondent's control and a stay having been requested pending determination.

Approved by:

Employment Judge McCooey

1 July 2026

JUDGMENT SENT TO THE PARTIES ON
1 July 2026

FOR THE TRIBUNAL OFFICE

Notes

All judgments (apart from judgments under Rule 51) and any written reasons for the judgments are published, in full, online at <https://www.gov.uk/employment-tribunal-decisions> shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here:

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