Neutral Citation Number: [2026] EAT 107

Case No: EA-2025-000810-AS

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27 July 2026

Before:

THE HONOURABLE MR JUSTICE CAVANAGH

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Between:

RUSSELL CHERRINGTON **Appellant**

- and –

UNIVERSITY OF DERBY **Respondent**

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Professor Alan Bogg (instructed by **Doyle Clayton Solicitors**) for the Appellant
Paul Wilson (instructed by **Veale Wasbrough Vizards LLP**) for the Respondent

Hearing date: 21 May 2026

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JUDGMENT

SUMMARY

Unfair Dismissal and Human Rights

The Appellant was a University Lecturer who was dismissed for gross misconduct, after a disciplinary hearing found that he had used inappropriate and unprofessional language when speaking to students. The Appellant contended that the Employment Tribunal erred in law in that the ET failed to interpret the test for unfair dismissal, as set out in section 98(4) of the Employment Rights Act 1998 in accordance with Art. 10 of the European Convention on Human Rights, which protects academic freedom of expression. The Appellant said that the ET should have considered the potential impact of Art. 10 of its own motion, even though he did not specifically refer to Art. 10 in his ET1 or in his evidence or submissions before the ET.

The EAT rejected this argument. The EAT found that, in the circumstances of this case, the Art. 10 issue did not "shout out" from the Appellant's pleaded case and/or the way that he presented his case. The EAT considered **X v Y** [2004] EWCA Civ 662; [2004] ICR 1634; Moustache **v Chelsea and Westminster NHS Foundation Trust** [2025] EWCA Civ 185; [2025] ICR 1231; and other authorities.

The EAT also found that ETs are not required to consider the potential impact of Convention Articles "as a matter of course" in every unfair dismissal case, and are not required to consider the potential impact of Art. 10 in every case which is concerned with a dismissal for reasons related to speech. The EAT considered **Langston v Cranfield University** [1998] IRLR 172; **Small v The Shrewsbury and Telford Hospitals NHS Trust** [2017] EWCA Civ 882; and **Whitaker v (1) White Rose Academies Trust; (2) Luminate Education Group** (EAT, unrep, 27 January 2026), and other authorities.

The Appellant contended, in the alternative, that, even though the Art. 10 argument had not been advanced at the ET, he should be permitted to advance it on appeal. The EAT rejected this argument. The EAT considered **Secretary of State for Health v Rance** [2007] IRLR 665, and other authorities.

Finally, the Appellant contended that the ET had erred in law in failing to take account of section 43(1) of the Education (No 2) Act 1986, in force at the relevant time, which dealt with freedom of speech in the academic context. This ground, too, was rejected. The ET had taken account of successor provisions to section 43(1), contained in Part A1 of the Higher Education and Research Act 2017 ("the 2017 Act"), inserted into that Act by section 1 of the Higher Education (Freedom of Speech) Act 2023. These provisions were broadly similar to those in section 43(1) and, if anything, reinforced the importance of freedom of speech. The Appellant had drawn the 2023 Act provisions to the attention of the appeal panel and the ET in the mistaken belief that they were in force at the relevant time.

Accordingly, the appeal was dismissed.

THE HONOURABLE MR JUSTICE CAVANAGH:

1. This is an appeal against the judgment of the Employment Tribunal (Employment Judge Price, sitting alone), sitting at Nottingham. The ET found that the Appellant's claim of unfair dismissal was not well-founded and dismissed his claim. The judgment was sent to the parties on 25 April 2025 and followed a three-day hearing between 24 and 26 March 2025. On 11 August 2025, permission to proceed to a full appeal was granted by Andrew Burns KC (sitting as a judge of the Employment Appeal Tribunal) on four out of the five Grounds in the Appellant's Notice of Appeal.

2. The Appellant was employed by the Respondent University ("the University") as a Senior Lecturer in Media and Film. He was summarily dismissed for gross misconduct on 3 May 2024, after a disciplinary hearing found that he had used inappropriate and unprofessional language when speaking to students.

3. At the heart of the Appellant's appeal is the contention that the ET erred in law in failing to interpret the test for unfair dismissal set out in section 98(4) of the Employment Rights Act 1996 ("the ERA 1996") in accordance with Article 10 of the European Convention on Human Rights ("ECHR"), which protects academic freedom of expression. He submits that the ET erred in law in failing to consider the fairness and proportionality of his dismissal by reference to Art. 10. It was accepted on behalf of the Appellant, who represented himself before the ET, that he did not expressly refer to or rely upon Art. 10 in his ET1, or in submissions made at the ET hearing, but he submits that the ET was nevertheless under a duty to consider and take account of Art. 10 when determining whether or not his dismissal was unfair for the purposes of section 98(4).

4. In the alternative, the Appellant submits that, even if the ET did not err in law in failing to take Art. 10 into account when deciding whether he was unfairly dismissed, this is an exceptional case in which the EAT should permit the Art. 10 argument to be advanced on appeal, even though it was not relied upon at the ET.

5. The Appellant further submits that, if the ET had taken Art. 10 into account, it would have found that his dismissal was unfair. Accordingly, he invites the EAT to set aside the ET's judgment and to find that he was unfairly dismissed by the University. In the alternative, he invites me to allow the appeal and to remit the case to a differently-constituted ET.

6. There is one ground of appeal which is not related to Art. 10. This is that the ET erred in law because, when deciding whether the Appellant's dismissal was unfair, the ET failed to consider section 43(1) of the Education Act (No 2) 1986 ("the 1986 Act"), which applied to the University at the relevant time. This provided that a higher education establishment such as the University was required to take such steps as were reasonably practicable to ensure that freedom of speech within the law was secured for members, students and employees of the establishment and for visiting speakers. Once again, the Appellant accepts that he did not refer to section 43(1) in his pleaded case or during the hearing.

7. The University submits that the ET was under no obligation to take Art. 10 into account, in circumstances in which it was not referred to or relied upon by the Appellant. The University further submits that this is not an exceptional case in which a party should be allowed to rely upon an argument on appeal which was not relied upon at the ET. If, contrary to the University's primary argument, the EAT decides to permit the Art. 10 argument to be advanced, the University said that the case should be remitted to the ET for further findings of fact and argument on the Art. 10 issue. It is the University's case that it would not be fair or practicable for the EAT to decide the Art. 10 point itself, when the University did not have the opportunity to lead evidence that was relevant to it, as the University would have done had it appreciated that Art. 10 was in issue at the ET hearing. However, if, contrary to the University's submission, the EAT considers that it should deal with the Art. 10 point itself, the University submits that the EAT should find that the Appellant's dismissal was still fair, and so should dismiss the appeal.

8. The University further submits that the ET did not err in failing to take section 43(1) into account, in circumstances in which the Appellant did not refer to or rely upon it. Also, the University points out that the ET did take account of the successor provisions to section 43(1), contained in Part A1 of the Higher Education and Research Act 2017 ("the 2017 Act"), inserted into that Act by section 1 of the Higher Education (Freedom of Speech) Act 2023 ("the 2023 Act"). These provisions, which came into effect on 1 August 2025, and so which were not in force at the time of the Appellant's dismissal, were drawn to the ET's attention by the Appellant. With effect from 1 August 2025, section 43(1) no longer applies to registered higher education providers such as the University, having been replaced, so far as such establishments are concerned, by Part A1 of the 2017 Act. The 2023 Act provisions are broadly similar to section 43(1).

9. Accordingly, the issues that have to be decided on appeal are as follows:

(1) Did the ET err in law by failing specifically to consider and take into account Art. 10 of the ECHR when deciding whether the Appellant's dismissal was fair?;

(2) Alternatively, even if the ET did not err in law in this regard, should the Appellant be permitted to rely upon the Art. 10 argument on appeal?;

(3) If the EAT answers "yes" to (1) or (2), should the EAT substitute a finding that the Appellant's dismissal was fair, as the Appellant contends for, or should the EAT remit the case for determination by a different ET, as the University contends for?;

(4) Did the ET err in law by failing to consider and take account of section 43(1) of the 1986 Act?; and

(5) If so, what consequences should follow?

10. The Appellant has been represented before me by Professor Alan Bogg, and the University by Mr Paul Wilson. I am grateful to them for their helpful submissions, both those made orally and those made in writing. I should add that the original grounds of appeal were drafted by different counsel. The four grounds for which permission to proceed were given were not in quite the same terms as the issues that I have identified in paragraph 9, above, but by the time of the hearing, it was clear that these were the issues that were raised by the appeal. Although this judgment does not

follow exactly the same structure as the grounds of appeal, it addresses the points that were raised in the grounds.

11. It is important to emphasise at the outset what this appeal is not about. There is no ground of appeal that, leaving aside the failure to take account of Art. 10 and/or section 43(1), the ET erred in law in its finding that the Appellant's dismissal was fair. In particular, there is no contention that, applying the normal principles that apply in unfair dismissal cases, the ET's conclusion was perverse, either by reference to severity of sanction or procedural unfairness. The Appellant was refused permission to rely upon a ground of appeal to the effect that the ET erred in law and/or failed to provide adequate reasons when identifying the reason for dismissal. The only remaining issues in this appeal are concerned with whether the Appellant's dismissal was unfair because of the operation of Art. 10 and/or because of a failure to take account of section 43(1).

The relevant facts, including allegations of inappropriate and unprofessional language which led to the Appellant's dismissal

12. The following account is taken from the ET's judgment, the letter of dismissal, and the appeal outcome letter.

13. Prior to the complaints that gave rise to his dismissal, the Appellant had an unblemished disciplinary record. He had received training on the University's policies, including its Equality, Diversion, and Inclusion Policy and a policy document entitled "How We Work".

14. At the time of the events that led to the complaints against him, the Appellant taught students in the second and third year of the Film and High End TV Programme at the University. The Head of School was Mr Justin Burns, and the Dean of the College of Arts, Humanities & Education was Professor Alex Molasiotis. At the time, there was a dysfunction in the management of the school, and this was having an adverse effect on delivery and on staff and student relationships. The Programme had scored poorly on the National Student Survey. In November 2023, the Appellant

had emailed a senior colleague with a vote of no confidence in Mr Tom Craig, who was the Programme Leader.

15. On 30 November 2023, Professor Molasiotis and Mr Burns invited students on the Programme to a meeting to address the concerns raised in the survey. Complaints were made by students about the nature and quality of the teaching on the course, including, but not limited to, the Appellant's teaching. Particular complaints were made by students about remarks and comments made by the Appellant.

16. Four students who were part of the second-year cohort of students which the Appellant was teaching subsequently provided written accounts of statements that the Appellant was alleged to have made. The Appellant was told about these complaints at a meeting with Mr Burns and a representative from HR on 18 December 2023, and he was told that he was to be suspended from student-facing activities and should work from home.

17. An investigation meeting took place on 23 January 2024, attended by the Appellant, accompanied by a trade union representative, Dr Broome. The meeting was chaired by Mr Burns and he was accompanied by a HR representative. In that meeting, the Appellant provided Mr Burns with a list of eight students who he said could speak to his teaching and how he treated students. These students were not contacted by the University. The students who had complained against the Appellant were asked to provide, and provided, further written particulars of their accounts. A further investigation meeting took place on 20 February 2024. Mr Burns provided an investigation report dated 26 March 2024, and, on 29 March 2024, the Appellant was told that he would face a disciplinary hearing, chaired by Professor Molasiotis. The written accounts of the students were provided to the Appellant, unredacted. The Appellant objected to Professor Molasiotis chairing the disciplinary hearing, but the University's Head of HR refused his request for a different Chair.

18. The disciplinary hearing took place on 22 April 2024. The Appellant attended, accompanied by Dr Broome. Professor Molasiotis chaired the hearing, and was the decision-maker, subject to ratification, in the event of a decision to dismiss, by the University's Vice-Chancellor. Mr Burns attended as investigating officer. Three members of HR were also present. The Appellant provided his response to the allegations. Professor Molasiotis decided that it was not necessary to speak to the eight witnesses whom the Appellant had put forward because it was not suggested that they were direct witnesses to the alleged inappropriate comments and because he did not consider that he should weigh what might have been positive accounts of the Appellant against the allegations of inappropriate and unprofessional language. The Appellant suggested that the students who had made the complaints against him may have colluded and embellished or misquoted his language due to their dissatisfaction with the course.

19. The hearing was reconvened on 29 April 2024 so that Professor Molasiotis could deliver his decision. He informed the Appellant that he would be summarily dismissed for gross misconduct.

20. The findings upon which Professor Molasiotis reached his decision were set out in in the formal letter of dismissal, dated 3 May 2024, from Professor Kathryn Mitchell, Vice-Chancellor of the University. The findings of matters that were considered to be gross misconduct, in breach of the University's Equality, Diversity, and Inclusion and How We Work Policies, which Professor Molasiotis said were each corroborated, were that:

> (1) The Appellant used misogynistic and divisive language, in that he only, or almost exclusively, referred to women in the class as "females". The Appellant had said that he only did this at the start of the semester, because he did not know students' names, and did not do so thereafter;
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> (2) The Appellant had used misogynistic language, whilst giving feedback about a music video, in that he had said that the main actress was not attractive enough for the role. The Appellant had acknowledged that he said something like this but did not see any harm in it;
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> (3) The Appellant had used transphobic language, when referring to a student who was transitioning as a "troublesome trans kid". The Appellant had denied using this phrase

but had acknowledged that he had used the example of a student who was transitioning as an analogy to suggest that, regardless of background, he would help students as long as they do the work; and

(4) The Appellant had used ableist language in that, when reviewing a script for a project development module involving a character with autism, the Appellant had remarked that Universities were becoming a care home for people with disabilities. The Appellant had denied using these words.

21. Professor Molasiotis also made findings of misconduct, rather than gross misconduct, which he again said were corroborated, as follows:

(5) The Appellant had said, jokingly, "If you had worn that nail polish back in the day, you would have been called a puff." The Appellant admitted that he said this, but as a joke; and

(6) When a student had said they were stressed and were not sleeping, the Appellant said words to the effect that this was good because it shows that they were working hard and it was part of what University is. The Appellant said that this had been taken out of context and was not directed at a particular student.

22. The dismissal letter referred to a number of other uncorroborated examples of inappropriate statements.

23. Professor Molasiotis considered and rejected the possibility that the students had colluded and/or had made the allegations because they were dissatisfied with their course. He decided that the volume and similarity of the allegations of inappropriate language, including some uncorroborated allegations, meant that they could not be explained as the result of general dissatisfaction about the course.

24. Professor Molasiotis considered whether a sanction short of dismissal was appropriate. He took account of the Appellant's long service and accepted that he had not intended to cause harm. However, he noted the profound impact that the Appellant's actions had on the students and took account of the Appellant's lack of insight into his actions. He concluded that he had no confidence that the Appellant could return to his role without the risk of further incidents occurring. He

recommended the Appellant's dismissal for gross misconduct. This recommendation was accepted and implemented by Professor Mitchell, the Vice-Chancellor.

25. The Appellant appealed against the decision to dismiss him. The appeal panel consisted of three independent Governors of the University. The appeal panel dismissed the Appellant's appeal, and he was notified of this on 17 June 2024.

26. The Appellant relied on three main grounds of appeal: that the decision to dismiss him was unduly harsh; that he had not been given the opportunity to address issues prior to the implementation of formal action; and that his dismissal was a breach of the 2023 Act.

27. As for the first ground, the appeal panel found that the sanction was not unduly harsh because, despite having received relevant training, the Appellant had engaged in behaviour towards the students that was discriminatory, and created an unsafe learning environment, and there could be no confidence that the behaviour would not be repeated. At the appeal hearing, the Appellant acknowledged that some of what he said might have caused upset, and that there was a lapse in standards which may have caused discomfort to the students. He said that he had been unable to apologise because, since the allegations had first been put to him, the disciplinary proceedings had been underway, and he was asked to keep the process confidential. He said that he would have apologised if someone had told him to do so. The Appellant continued to dispute that he said all of the words that were ascribed to him, but the appeal panel decided, on the balance of probabilities, that he had said the words alleged. The appeal panel said that, in its view, the exact words were less significant than the fact that the Appellant repeatedly gave messages that caused discomfort to students and created a hostile and offensive environment.

28. As for the second ground, the appeal panel did not consider that informal action would have been sufficient.

29. So far as the third main ground of appeal is concerned, the outcome letter said as follows:

> "You state that your dismissal constitutes a breach of the Higher Education (Freedom of Speech) Act 2023. In the hearing you suggested that the University had not had regard for this at all, both in general and in relation to your case. I explained that I knew this not to be the case in the hearing, knowing that there was existing policy provision as well as extensive work to prepare for the forthcoming act that sought to amend and strengthen the existing duties. Notwithstanding that, we understood that you had not previously raised this proposal. We did consider your argument, and we did not consider it to be applicable in your case. The law protects free speech within the law and as such does not mean anyone can say anything and will be protected by the law. In your case your language was discriminatory and amounted to harassment related to certain protected characteristics as defined by the Equality Act 2010."

30. The Appellant also made three procedural points at the appeal hearing. He said that he had not been given the opportunity to review and confirm the notes of previous meetings in the disciplinary process; that Professor Molasiotis should not have been involved because he lacked objectivity; and that evidence should have been taken from the eight witnesses put forward by the Appellant, even though it was not suggested that they were witnesses to the particular events that had led to the disciplinary allegations. The appeal panel rejected each of these procedural objections.

The Appellant's pleaded case and the way his case was put at the ET

31. It is not in dispute that the Appellant did not expressly rely upon Art. 10, either in his pleaded case or at the hearing before the ET, but it is nevertheless necessary to begin by looking at how his case was put, both in his pleaded case and at the hearing.

32. The ET1 was drafted by the Appellant himself. It is, with respect to him, obvious that the document was not drafted by a person with any legal knowledge or experience. There is, for example, a reference to "constructive dismissal" when this does not arise as there was an actual dismissal. The grounds in the ET1 consisted mainly of the Appellant's narrative of events. It appears from the contents of the ET1 that the grounds of complaint were mainly if not exclusively procedural in nature. The conclusion section of the document says that the students had not themselves complained and

the complaints were solicited by the University; that the University did not follow its own procedures in its Staff Disciplinary Policy and Procedure; that the investigation was unfair, in particular because the University did not speak to the Appellant's witnesses; there was no impartiality in the investigation or disciplinary procedure; and the University had failed to provide support for the Appellant by seeking to rectify the issues without going to the extent of dismissing him.

33. In the narrative part of his grounds, the Appellant said that the allegations of inappropriate comments were untrue or distorted. He said that the further allegations against him had come as the result of a questionnaire sent to selected students, not including his eight student witnesses, and there were 17 questions all of which sought negative information rather than positive information. He said that Mr Craig was involved in this after the Appellant had reported his poor behaviour. He said that the criticisms of his behaviour should have been handled informally in accordance with the provisions of the Staff Disciplinary Policy and Procedure. He complained that the disciplinary process had not taken account of the good things he had done. He said that the criticism that he had displayed inappropriate attitudes towards women and other groups was grossly unfair, given that, he said, only three students had come forward and he had eight students who could speak in his favour. He said that Professor Molasiotis should not have chaired the disciplinary hearing because he was not impartial.

34. The only reference to severity of sanction or to free speech issues came in the Appellant's reference to his grounds of appeal, which included that the decision to dismiss was disproportionately harsh and "my dismissal constitutes a breach of the Higher Education (Free Speech) Act 2023." As I have said, there is no reference to human rights or to Art. 10, or to section 43(1) of the 1986 Act.

35. It is clear from the University's Grounds of Resistance that it did not understand that the Appellant was relying upon Art. 10 or raising any Art. 10 issue.

36. There was no preliminary hearing or a pre-agreed list of issues in advance of the ET hearing. However, at the outset of the hearing EJ Price discussed the issues with the parties and agreed with them a list the issues which he had to determine, which are set out in paragraph 13 of the ET judgment. This list included the standard set of issues that need to be considered in an unfair dismissal case, including the matters that need to be considered, pursuant to section 98(4) of the ERA 1996, when deciding, if the reason was misconduct, whether the University acted reasonably in all of the circumstances in treating that as a sufficient reason to dismiss the Appellant.

37. The bundle at the ET hearing was 553 pages long. The ET heard from the Appellant, Dr Broome, and another witness called by the Applicant. An uncontested witness statement was read. Professor Molasiotis, Mr Burns, and one other witness gave evidence for the University.

38. The Appellant provided the ET with an opening statement at the hearing. I was shown a copy during the EAT hearing. The opening statement was 4 pages long. There was no reference in this statement to Art 10. or to freedom of speech more generally. The points made in the Appellant's opening statement were about procedural unfairness. He referred to a number of reasons why he said that his dismissal had been procedurally unfair. These included, but were not limited to, that: he was not forewarned about the complaints against him before the meeting on 18 December 2023, at which he was suspended; Professor Molasiotis's involvement gave rise to the appearance of bias; he should have been allowed to call his eight witnesses; and the appeal procedure was inadequate. There was no specific mention of the contention that the sanction of dismissal fell outside the range of reasonable responses, but the Appellant made reference to his unblemished record.

39. The Appellant provided a written witness statement for the ET hearing, dated 21 February 2025. In his witness statement, the Appellant provided his narrative of events and again contended that his dismissal had been unfair for a number of procedural reasons. The main thrust of the points made in the witness statement was that the process had been unfair and biased against him. However,

the Appellant also denied that the matters alleged were capable of amounting to gross misconduct. At paragraphs 9 and 10 of his witness statement, the Appellant said:

> "9. Russell Cherrington says he never used the words "Troublesome Trans Kid", he suggests this a is weaponised comment, also that there is miss-remembered storytelling going on as when stories are retold things are added to them.
>
> 10. Russell Cherrington states that other statements have been added to, that he had adult conversations and never intended upset from one on one anecdotes about his own life and journey as a filmmaker and academic, **Russell Cherrington feels this is a freedom of speech issue**." (Emphasis added)

40. In a section at the end of his witness statement, entitled "Closing Statement", the Appellant made nine points. In the main, they made allegations of procedural failings and bias. However, the fifth point was:

> "Russell Cherrington has been denied the use of freedom of speech as an academic, he has been persecuted in relation to the word 'female', leading to severe trauma and a nervous breakdown."

41. At the end of the hearing before the ET, the Appellant provided written closing submissions. The complaints made in the closing submissions, which were four pages long, were, with one exception, entirely about a number of alleged aspects of procedural unfairness. The Appellant referred to six case law authorities, all of which were concerned with procedural unfairness.

42. The exception is that, on page 4 of the document, the Appellant said:

> "I submit Academic Freedom of Speech
> … How We Work Document UOD
>
> 2.1.7 Maintain, promote and protect the principle of academic freedom of speech and take all reasonable steps to ensure that academic employees have the ability within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions, without placing themselves in jeopardy of losing their jobs or privileges."

43. I will return shortly to the passage in the ET's judgment in which EJ Price refers to the Appellant's reference in his oral submissions to freedom of speech.

44. The conclusion at the end of the Appellant's closing submissions did not refer to freedom of speech. It stated as follows:

> "The evidence presented clearly demonstrates that the University of Derby failed to adhere to the principles of the Burchell Test, resulting in an unfair dismissal of Russell Cherrington. The lack of procedural fairness, improper use of disciplinary procedures, and denial of supportive representation at suspension meeting have severely impacted Russell Cherrington's ability to defend himself against the charge of gross misconduct."

The ET's judgment

45. I should emphasise once again that there is no contention in this appeal that the findings of fact made by the ET were perverse or were unsupported by the evidence. Leaving aside the points made about Art. 10 and section 43, there is no ground of appeal on the basis that the finding that the Appellant was dismissed for misconduct was not open to the ET. Similarly, there is no ground of appeal on the basis that the ET's decisions (1) that the procedure followed was procedurally fair, and (2) that, in all the circumstances, the decision to dismiss the Appellant fell within the range of reasonable responses open to a reasonable employer, were perverse or, for some other reason, were wrong in law. There is no suggestion that there is any defect in the reasoning of the ET, apart from the challenges based on Art. 10 and section 43.

46. In the original Grounds of Appeal, the Appellant contended that the ET erred in law and/or failed to provide adequate reasons when identifying the reason for dismissal. At the sift stage, Andrew Burns KC refused to allow this ground of appeal to proceed. He was plainly right to do so. It was hopeless. EJ Price provided a full, clearly-reasoned, and impressive judgment, running to 135 paragraphs over 26 pages. The EJ directed himself carefully and correctly on the law relating to unfair dismissal and analysed the authorities that were cited to him in a way that was impeccable. He also made detailed findings of fact. So far as the limited number of contested facts was concerned, he set out the parties' competing submissions and his conclusions on them, explaining the evidence that led to those conclusions. I have set out the most important findings of earlier in this judgment.

The ET carefully applied the law relating to unfair dismissal to the facts of the case and came to a conclusion which, subject to the Art. 10 and section 43 points, the ET was plainly entitled to reach. The ET gave detailed reasons for its conclusion that the dismissal was fair.

47. The ET found that:

(1) The reason for dismissal was conduct, namely the inappropriate and unprofessional language which the Appellant was alleged to have used towards students;

(2) The decision to dismiss the Appellant was made by Professor Molasiotis;

(3) Professor Molasiotis had a genuine belief that the Appellant had committed the misconduct of which he was accused;

(4) A reasonable employer could conclude that Professor Molasiotis's role in chairing the disciplinary hearing did not give rise to actual or apparent bias, and the University acted within the band of reasonable responses by appointing him to chair the disciplinary hearing;

(5) Professor Molasiotis had reasonable grounds for holding the belief that he did that the Appellant had committed the misconduct of which he had been accused. The ET noted that, during the investigation process and the disciplinary hearing, the Appellant had at times accepted that discussion of the kind alleged were had, albeit that he denied making some of the specific remarks attributed to him or contended that the remarks had either been embellished (or "untrue details added to the stories"), distorted in their retelling or taken out of context;

(6) Professor Molasiotis had a reasonable basis for rejecting the Appellant's contention that there had been collusion between the students who had made the allegations against him through their interaction on social media, and for rejecting the Appellant's contention that the complaints against him had been solicited;

(7) At the time that the University (through Professor Molasiotis) had reasonable grounds upon which to base its genuine belief that the Appellant was guilty of the misconduct of which he had been accused. The University had carried as much investigation as was reasonable. In particular, the University had not acted unfairly by not interviewing or speaking with the eight students who the Appellant said could offer a "balanced" view about him, his teaching, and his behaviour: the University acted reasonably in deciding that it should not weigh what may have been positive accounts of the Appellant against the allegations of inappropriate and unprofessional language;

(8) The decision to dismiss the Appellant was within the range of reasonable responses open to a reasonable employer. The EJ reminded himself that it was irrelevant whether he would have taken the decision to dismiss. He concluded that the University was entitled to characterise the inappropriate and unprofessional language towards the students as gross misconduct, because the University's Disciplinary Policy identified that improper behaviour towards students is a matter that the University may regard as gross misconduct. He was reinforced in his view by the How We Work policy which

emphasised the need to adhere to principles of equality and diversity and warned that breach of that policy might, in serious cases, lead to dismissal. The University was also reasonably able to take account of the impact that the misconduct had on the students. Still further, when considering what sanction was appropriate, the University was entitled to take account of the Appellant's response to the allegations, and to treat two aspects of that response as being relevant in this regard: the relative lack of contrition – as the Appellant did not give an unqualified apology but said that he would apologise if it was found that he said something improper, and the fact that Professor Molasiotis did not have confidence that the Appellant would not engage in similar behaviour in future in light of this response. These factors meant that it was reasonable to dismiss, even though it was recognised that there had been no malice in the Appellant's actions, and even though the Appellant's previous record was unblemished;

(9) There was no procedural unfairness which rendered the Appellant's dismissal unfair: the University had acted reasonably in moving straight to the disciplinary process, without seeking to resolve the issue informally; it was not unfair that the Appellant was not told in advance what the meeting on 18 December 2023 would be about; the decision to suspend the Appellant on 18 December 2023 did not render his dismissal unfair; the failure to make notes of the meeting on 18 December 2023 did not render the dismissal unfair; and

(10) The appeal process did not render the dismissal unfair. The ET pointed out that the Appellant did not attack with any great vigour the appeal process or decision. The procedure followed in the appeal was fair, and the appeal panel properly considered each of the three grounds relied upon by the Appellant.

48. It is clear from the ET's judgment that the Appellant did not advance a case or make any submissions on the basis that his dismissal amounted to a breach of his Art. 10 rights (and it is not suggested on his behalf that he did so). Art. 10 was not mentioned and so the EJ was not invited to consider if and, if so, how far, Art. 10 should have an impact upon the ET's decision as to whether the Appellant's dismissal was unfair. It follows that the ET was not asked to consider, and did not consider, whether Art. 10 was engaged by the disciplinary action against the Appellant; or, if so, whether the treatment was prescribed by law; whether the treatment was an unlawful interference with the Appellant's Art. 10 rights; and whether, if so, this rendered the Appellant's dismissal unfair under section 98(4) in circumstances in which it would not otherwise be unfair.

49. On the other hand, it is clear that the Appellant mentioned freedom of speech, albeit briefly, at the ET hearing. This is mentioned in the section of the judgment that deals with the third ground

of appeal at the appeal hearing, namely that the dismissal was a breach of the 2023 Act. The ET said the following, at paragraphs 132-134 of the judgment:

> “132. As to the third matter, this was not – save as to a brief exchange in cross examination concerning ‘free speech’ more broadly - pursued in the course of the evidence. It was not a matter that was put by the Claimant to any of the Respondent’s witnesses. However, in submissions, the Claimant did submit that the Respondent’s actions were contrary to the important principle of academic free speech and, in particular, drew my attention to clause 2.1.7 of the How We Work policy, which I reviewed.
>
> 133. As regards the Higher Education (Free Speech) Act 2023 relied on in the Claimant’s grounds of appeal, I note that the relevant provisions (in particular s.1) of that Act are not yet in force. Consequently, I do not find that the Respondent could have acted in a manner that breached that Act. Nonetheless, this matter was however expressly considered by the appeal panel. Although the appeal panel did not (as, indeed, it would rarely be necessary for a disciplinary panel or appeal panel to do in order to act fairly) grapple with the (ostensible) legal complexities of legislation that may have competing interests, it was, in my view, reasonable for the appeal panel to determine that the language that the Claimant was found to have used could constitute harassment and/or be discriminatory in nature. Having reached that determination, I consider there was no unfairness in the appeal panel placing little ‘weight’ on this ground of appeal.
>
> 134. Lastly, as regards whether the Respondent’s actions were contrary to the clause that the Claimant drew my attention to in the course of the hearing (2.1.7 of the How We Work policy), I find that they were not. The specific clause provides that members of the governing council and the vice chancellor’s executive are expected to “maintain, promote and protect the principle of academic freedom, and take all reasonable steps to ensure that academic employees have the ability within the law to question and test received wisdom, and to put forward new ideas and controversial or unpopular opinions without placing themselves in jeopardy of losing their jobs or privileges”. In my view, the Respondent did not act contrary to that requirement by subjecting the Claimant to a disciplinary process in this case. This is for the following reasons. First, I bear in mind in determining whether the Claimant’s dismissal was rendered unfair by reason of this alleged breach that the Claimant did not specifically contend during the disciplinary process that the Respondent had contravened this clause of the policy. Second, I find that the Respondent did not act unreasonably in determining that the inappropriate and unprofessional language comprising the alleged misconduct could not reasonably be characterised as testing received wisdom, putting forward new ideas or controversial or unpopular opinions. Further, I consider that the qualifying phrase ‘within the law’ could encompass obligations that the University had as a provider of Higher Education to the student body under the Equality Act 2010. Those obligations include, under s.96, that a governing body of such an institution must not discriminate against a student in the way it provides education for the student. Where the Respondent determined that any expression of unpopular opinion would not be ‘within the law’, it would not be acting contrary to this policy by failing to, ostensibly, maintain, promote or protect the principle of academic freedom.”

The relevant statutory provisions and Article 10

50. Section 98(4) of the ERA 1996 provides:

> “(4) Where the employer has fulfilled the requirements of subsection (1) [potentially fair reason], the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.”

51. Article 10 of the ECHR states, in relevant part:

> “*Freedom of expression*
>
> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers….
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

52. Article 14 deals with the prohibition of discrimination. Art. 14 states:

> *“Prohibition of discrimination*
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

53. Article 17 states:

> “*Prohibition of abuse of rights*
>
> Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of

any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

54. Section 3(1) of the Human Rights Act 1998 ("HRA") provides that:

"3 **Interpretation of legislation**

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

55. Section 6 provides:

"(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right….

(3) In this section "public authority" includes (a) a court or tribunal…."

56. Section 7 provides that a person who claims that a public authority has acted in a way which is made unlawful by section 6(1) may bring proceedings against the authority under the Human Rights Act 1998 in the appropriate court or tribunal.

57. Regulation 3 of the Employment Tribunal (Rules of Procedure) Regulations 2024 (SI 2024/1155) states:

"**Overriding objective**

3.— (1) The overriding objective of these Rules is to enable the Tribunal to deal with cases fairly and justly.

(2) Dealing with a case fairly and justly includes, so far as practicable—(a) ensuring that the parties are on an equal footing,

(b) dealing with cases in ways which are proportionate to the complexity and importance of the issues,

(c) avoiding unnecessary formality and seeking flexibility in the proceedings,

(d) avoiding delay, so far as compatible with proper consideration of the issues, and

(e) saving expense.

(3) The Tribunal must seek to give effect to the overriding objective when it—

(a) exercises any power under these Rules, or

(b) interprets any rule or practice direction.

(4) The parties and their representatives must—

(a) assist the Tribunal to further the overriding objective, and

(b) co-operate generally with each other and with the Tribunal."

58. Regulation 41 provides:

41.—(1) The Tribunal may regulate its own procedure and must conduct any hearing in the manner it considers fair, having regard to the overriding objective.

(2) The Tribunal must seek to avoid undue formality and may itself question the parties or any witnesses so far as appropriate in order to clarify the issues or elicit the evidence.

(3) The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts….

ISSUE 1: Did the ET err in law by failing specifically to consider and take into account Art. 10 of the ECHR when deciding whether the Appellant's dismissal was fair?

59. I will consider in turn the following questions:

(1) Is the question whether a claimant's dismissal engaged Art. 10 relevant to the consideration of unfairness for the purposes of section ERA 1996, section 98(4)?;

(2) If the answer to (1) is "yes", did the ET err in law in the present case by failing to raise and consider Art. 10?

Can the question whether a claimant's dismissal engaged Art. 10 be relevant to the consideration of unfairness for the purposes of section ERA 1996, section 98(4)?

60. The short answer is "yes". This was not disputed by the University, but it is nevertheless helpful to review the main authorities on this issue, because the principles set out therein will assist in deciding whether the ET erred in law in this case in failing to deal with the Art. 10 issue.

61. The leading authority on the interrelationship between Convention Articles and claims for unfair dismissal under section 98(4) of the ERA 1996 is the judgment of the Court of Appeal in **X v Y** [2004] EWCA Civ 662; [2004] ICR 1634. In that case, a claimant who was a charity worker had

been dismissed for gross misconduct after being convicted of an offence of gross indecency with another man in a public lavatory, and failing to notify his employer of the conviction. The offence had not been committed at work. Before the ET, the claimant contended that his dismissal had been in breach of Arts. 8 (right to family and private life) and 14 (prohibition of discrimination) of the ECHR. Before the Court of Appeal, counsel for the claimant submitted that the case raised important questions about the nature of the test for fairness of dismissals where a Convention right is engaged by the dismissal complained of. The Court of Appeal found, on the facts, that Arts. 8 and 14 were not engaged and so issues of incompatibility with the ECHR did not arise, but the Court took the opportunity to give guidance on the approach that ETs should take to Convention rights in the context of unfair dismissal.

62. Mummery LJ gave the lead judgment of the Court of Appeal. At paragraph 49 he said:

> "49. This judgment is confined to considering the scope and effect of article 8 and the impact, if any, that it has on the facts of this case via section 3 of the HRA. It also attempts to give some practical guidance to employment tribunals, which have to deal with unfair dismissal cases day in, day out, often without the help of submissions on legal issues from professional representatives. Some unfair dismissal cases naturally attract arguments based on Convention rights and the HRA: the employee dismissed for refusing, on religious grounds, to work on a particular day (article 9); the employee dismissed for engaging in party politics (article 10); or the employee whose activities, even in the privacy of his own home, may constitute a criminal offence and lead to dismissal (article 8). In general, whenever HRA points are raised in unfair dismissal cases, the employment tribunals should properly consider their relevance, dealing with them in a structured way (though not necessarily at great length), even if it is ultimately decided that they do not affect the outcome of the claim for unfair dismissal."

63. At paragraph 57 of his judgment, Mummery LJ said that section 3 of the HRA requires the ET, so far as it possible to do so, to read and give effect to section 98 and the other relevant provisions in part X of the ERA 1996 in a way which is compatible with the Convention rights in Art 8. and Art 14. This applies whether the employer is a public sector body (to which the HRA directly applies, by operation of section 6) or a private sector employer, in relation to whom section 3 requires the same approach (see paragraphs 57 and 58, per Mummery LJ, and paragraph 66, per Dyson LJ).

64. Mummery LJ addressed the question of how section 3 of the HRA affects the interpretation of section 98 in cases falling within articles 8 and 14 at paragraph 49 of his judgment.

65. He said:

> "It is not easy to provide a short and simple answer to this question. I have, however, concluded that in some cases it has some effect. The effect is more accurately described as oblique, rather than as directly or indirectly horizontal. By a process of interpretation the article 8 right is blended with the law on unfair dismissal in the ERA, but without creating new private law causes of action against private sector employers under the HRA or the ERA.
>
> (1) In discharging its duty under section 3 of the HRA to read and give effect to section 98 of the ERA in a way which is, so far as it is possible, compatible with article 8, the employment tribunal will be well aware that section 98 does two things: (a) it identifies reasons on which an employer is permitted to rely to justify a dismissal; and (b) it sets the general objective standards to be applied by the employment tribunal in determining whether the dismissal was fair or unfair.
>
> (2) That question of fairness depends on whether, in all the circumstances, the employer acted reasonably or unreasonably in treating the reason (e g conduct) as a sufficient reason for the dismissal and on the equity and substantial merits of the case.
>
> (3) Lord Woolf CJ pointed out, in giving the judgment of the court in **Poplar Housing and Regeneration Community Association Ltd v Donoghue** [2002] QB 48 , 72, para 75, that:
>
>> "(a) Unless the legislation would otherwise be in breach of the Convention section 3 can be ignored (so courts should always first ascertain whether, absent section 3, there would be any breach of the Convention).
>>
>> "(b) If the court has to rely on section 3 it should limit the extent of the modified meaning to that which is necessary to achieve compatibility.
>>
>> "(c) Section 3 does not entitle the court to legislate (its task is still one of interpretation, but interpretation in accordance with the direction contained in section 3) ..."
>
> (4) It is not immediately obvious, on a reading of section 98 without reference to a particular set of facts, as to how it could be incompatible with, or be applied so as to violate, article 8 and article 14 and so attract the application of section 3. Considerations of fairness, the reasonable response of a reasonable employer, equity and substantial merits ought, when taken together, to be sufficiently flexible, without even minimal interpretative modification under section 3, to enable the employment tribunal to give effect to applicable Convention rights. How, it might be asked, could the proper application by the employment tribunal of the objective standards of fairness, reasonableness, equity and the substantial merits of the case result in the determination of a claim for unfair dismissal that was incompatible with article 8?

(5) In general, the reasonable expectation is that a decision that a dismissal was fair under section 98 would not be incompatible with article 8 or article 14. There would be no need to invoke section 3 in order to achieve a result compatible with articles 8 and 14. In such cases section 3 can be ignored.

(6) There may, however, be cases in which the HRA point could make a difference to the reasoning of the tribunal and even to the final outcome of the claim for unfair dismissal. I shall now consider the possible application and effect of section 3 of the HRA in such cases.

(7) As explained earlier, a dismissal for a conduct reason may fall within the ambit of article 8. A reason for a dismissal is "a set of facts known to the employer, or ... beliefs held by him, which cause him to dismiss the employee": **Abernethy v Mott, Hay and Anderson** [1974] ICR 323, 330b. The relevant set of facts may relate to the employee's private life. Take, by way of example, an extreme case involving the more straightforward position of a public authority employer. An employee of a public authority is dismissed for eating cake at home or in his lunch break at work. That is the set of facts constituting the conduct of the employee within section 98(2)(b) of the ERA. The decision to eat cake is, in general, a private one. It is difficult, though not impossible, to conceive of a justification under article 8(2) for the employer's interference with respect for private life by dismissal for that reason. It is possible that in some circumstances the interference with a person's right to eat cake is necessary, legitimate and proportionate.

(8) In the case of a public authority employer, who is unable to justify the interference, the dismissal of the employee for that conduct reason would be a violation of article 8. It would be unlawful within sections 6 and 7 of the HRA. If the act of dismissal by the public authority is unlawful under the HRA, it must also be unfair within section 98, as there would be no permitted (lawful) reason in section 98 on which the public authority employer could rely to justify the dismissal. In that case no question of incompatibility between section 98 and the Convention right would arise.

(9) Taking the same set of facts, save for the substitution of a private sector employer, it would not be unlawful under the HRA for the private employer to dismiss the employee for eating cake, as a private employer is not bound by the terms of section 6 of the HRA not to act incompatibly with article 8. It is, however, difficult to conceive of a case, in which the unjustified interference with respect for private life under article 8 (by dismissal for eating cake) would not also be an unfair dismissal under section 98. Put another way, it would not normally be fair for a private sector employer to dismiss an employee for a reason which was an unjustified interference with the employee's private life. If that is right, there would, in general, be no need for an applicant to invoke article 8 in order to succeed on the unfair dismissal claim and there would be no question of incompatibility between section 98 of the ERA and article 8 to attract the application of section 3 of the HRA.

(10) If, however, there was a possible justification under section 98 of the dismissal of the cake-eating employee, the tribunal ought to consider article 8 in the context of the application of section 3 of the HRA to section 98 of the ERA. If it would be incompatible with article 8 to hold that the dismissal for that conduct reason was fair, then the employment tribunal must, in accordance with section 3, read and give effect to section

98 of the ERA so as to be compatible with article 8 . That should not be difficult, given the breadth and flexibility of the concepts of fairness used in section 98.

(11) As already indicated in the short answer, no question of incompatibility in fact arises in this case, whether the employer is a public authority or in the private sector. On the facts found by the employment tribunal the case does not fall within the ambit of article 8. Issues of incompatibility with article 8 and article 14 do not arise. There is no obligation to apply section 3 or section 6 of the HRA. The employment tribunal was entitled to conclude that it "did not have to go into the minutiae of whether there is or is not compliance with the [HRA]", i e whether there was justification or incompatibility."

66. Then, at paragraph 64, Mummery LJ said:

"64. As indicated earlier, it is advisable for employment tribunals to deal with points raised under the HRA in unfair dismissal cases between private litigants in a more structured way than was adopted in this case. The following framework of questions is suggested.

(1) Do the circumstances of the dismissal fall within the ambit of one or more of the articles of the Convention? If they do not, the Convention right is not engaged and need not be considered.

(2) If they do, does the state have a positive obligation to secure enjoyment of the relevant Convention right between private persons? If it does not, the Convention right is unlikely to affect the outcome of an unfair dismissal claim against a private employer.

(3) If it does, is the interference with the employee's Convention right by dismissal justified? If it is, proceed to (5) below.

(4) If it is not, was there a permissible reason for the dismissal under the ERA which does not involve unjustified interference with a Convention right? If there was not, the dismissal will be unfair for the absence of a permissible reason to justify it.

(5) If there was, is the dismissal fair, tested by the provisions of section 98 of the ERA, reading and giving effect to them under section 3 of the HRA so as to be compatible with the Convention right?"

67. The correct approach was summarised, more recently, by the EAT in **Q v Secretary of State for Justice** UKEAT/0120/19/JOJ (HHJ Auerbach), at paragraph 80:

"…whether the case involves a public or a private employer, the Tribunal must, in deciding whether the dismissal is fair or unfair, come to its own view as to whether the imposition of the sanction of dismissal involved a disproportionate and unjustified interference with Convention rights, or not. If it did, then this will take the dismissal outside the band of reasonable responses. If not, then this feature of the case will not do so. That will be the position regardless of whether the employer had a duty of its own, whether, if so, it applied its mind to the question, and, if it did, whatever

> conclusion it came to. It is always the Tribunal's conclusion that, ultimately, must decide the point."

68. The above cases were concerned with whether the sanction of dismissal was fair. Where the issue is whether the dismissal was procedurally fair, it is unlikely that the fact that a Convention article is engaged will make a difference to the appropriate test: **Turner v East Midlands Trains** [2012] EWCA Civ 1470; [2013] ICR 525 (CA) ("**Turner**"). In **Turner**, at paragraph 52, Elias LJ said that, like Mummery LJ in **X v Y**, "I find it very difficult to see how a procedure which could be considered objectively fair if adopted by a reasonable employer could none the less be properly described as an unfair procedure within the meaning of Art. 8". At paragraph 56, having referred to **Sanchez v Spain** [2012] 54 EHRR 872, Elias LJ said (in the context of procedural fairness) that "Strasbourg therefore adopts a light touch when reviewing human rights in the context of the employment relationship. It may even be that the domestic band of reasonable responses test protects human rights more effectively…" and, at paragraph 57, "I am satisfied that so far as procedures are concerned, the domestic test of fairness does not fall short of the procedural safeguards required by Article 8".

69. Two observations should be made at this stage.

70. First, as a public university, the University is a public authority, and so section 6 of the HRA applies to it. However, as **X v Y** makes clear, it does not matter whether or not an employer is a public or private sector body, for the purposes of the interrelationship between the Convention and the law of unfair dismissal. The same approach applies to both.

71. Second, **X v Y** was not concerned with Art. 10. It was concerned with Arts. 8 and 14. **Turner** was concerned with Art. 8. However, there can be no doubt that the guidance given in that case applies equally to cases in which the question is whether Art 10. is engaged by a claimant's dismissal.

This is made clear by the language of paragraph 64 of the judgment in **X v Y**, which refers to all Convention rights, without distinction.

72. There have also been a number of EAT cases in which the question of the interplay between Art. 10 and the law of unfair dismissal has been considered.

73. In a case that was decided some time before **X v Y**, **Pay v Lancashire Probation Service** [2004] ICR 187, the EAT (HHJ McMullen QC and members) considered a claim for unfair dismissal by a probation officer who had been dismissed for performing shows at various hedonist and fetish clubs. He claimed that his dismissal infringed his rights to a private life under Art. 8 and his right to freedom of expression under Art. 10. The EAT said that where an ET was considering a complaint of unfair dismissal against a public authority employer, it should interpret the phrase "reasonably or unreasonably" in section 98(4) as including "having regard to the applicant's Convention rights". The EAT decided that the ET had been right to find that there was no breach of the claimant's Art. 10 rights, because any interference with that right by the dismissal was necessary and justified under Art 10(2).

74. The interrelationship between Art 10 and the law of unfair dismissal was also considered by the EAT in **Hill v Governing Body of Great Tey Primary School** [2013] ICR 691 ("**Hill**"). In **Hill**, a school dinner assistant told a child's parents that she had seen the child being ill-treated in the playground by other parents. She was suspended for breach of confidentiality and, after she contacted the press and repeated what she had told the parents, she was dismissed. She claimed automatic unfair dismissal for making protected disclosures, or "whistleblowing", contrary to section 103A of the ERA 1998, and, alternatively, unfair dismissal under section 98(4). The ET rejected the claimant's whistleblowing claim, but upheld her claim for "ordinary" unfair dismissal on the basis that the dismissal had been procedurally unfair. At a remedies hearing, the ET reduced the claimant's

compensation by 80%, to reflect the ET's assessment that there was an 80% chance that if a fair procedure had been followed she would have been dismissed in any event.

75. The central issue at the EAT in **Hill** was whether the claimant was prevented by issue estoppel from raising Art. 10 at the remedies stage, because the ET had ruled against her Art. 10 argument at the liability hearing. That issue is of no relevance to the present case, but, in its judgment the EAT (Langstaff P. and members), made observations about the interplay between Art. 10 and unfair dismissal. At paragraph 35, Langstaff P said:

> "35. In **X v Y** [2004] ICR 1634 Mummery LJ set out at para 64 the structured approach which he suggested employment tribunals should adopt when dealing with points raised under the 1998 Act in unfair dismissal cases between private litigants. That is informative. In the present case, however, the school was not a private litigant. It is a public authority. As such, it owes and owed a duty directly to secure the freedoms protected by the European Convention . An employment tribunal has no jurisdiction to consider a claim under the 1998 Act for breach of article 10 : it is not one of the jurisdictions statutorily assigned to it. The article is none the less relevant, for if dismissing the Appellant for speaking out to parents and press, and thereby lowering the reputation of the school, would be to penalise her for exercising the freedom to which she was entitled under article 10 , the fact that the school is a public authority and had a duty to ensure she had that freedom would be relevant in assessing the fairness of what occurred…."

76. At paragraph 89, Langstaff P. said that decisions applying Art. 10 are fact-specific.

77. It is therefore clear that, where Art. 10 is engaged, the question whether a dismissal would amount to breach of an employee's Art. 10 qualified right to freedom of expression may be relevant to the question whether the employee has been unfairly dismissed.

Did the ET err in law in the present case by failing to raise and consider Art. 10?

78. The cases referred to above were all cases in which the claimant had sought to rely before the ET upon the relevant Convention Article or Articles. So far as I am aware, there has been no case so far in which the question that arises in the present appeal has been considered, namely whether an

ET has an affirmative duty to refer to and consider Convention Articles in unfair dismissal claims, even if the parties do not refer to them, and, if so, in what circumstances.

The parties' arguments

79. On behalf of the Appellant, Professor Bogg accepted that the Appellant had not expressly relied upon Art. 10 either in his ET1 or at the hearing before the ET. However, he submitted that the ET had erred in law in failing to address and to deal of its own motion with the question whether Art. 10 had an impact on the fairness of the Appellant's dismissal.

80. Professor Bogg said that Art 10 is engaged in every unfair dismissal case that involves "speech" issues. Professor Bogg made clear, though, that he was not going so far as to submit that ETs have a duty, of their own motion, to refer to and consider Art. 10 in every "speech" case, even if the point is not taken by the claimant. He said that such an argument would be "revolutionary.". Professor Bogg made clear that the was not submitting that whenever a Convention issue might arise in a case, the ET has a duty to take the point and to deal with it of its own volition, even if it was not raised by the party.

81. So far as Art. 10 was concerned, Professor Bogg acknowledged that, in most "speech" cases, Art. 10 would be relevant only "conceptually" and would have no relevance in practice, because in the generality of cases the requirements of Art. 10 will align with the standard approach to unfair dismissal claims in accordance with section 98(4). In such cases, there would be no need to adopt the structured approach that is referred to in **Moustache**, below, for unfair dismissal cases in which Convention Articles are engaged.

82. However, he submitted that the ET was under a duty to make reference to and to consider Art. 10 in this case, because it cried out to be dealt with by the ET in light of the way that the case had

been put and in all of the circumstances of the case. What makes this case different is the nexus between speech and academic language.

83. He said that an ET must take a point of its own motion, even if not expressly raised by a party, if it plainly arises on an objective reading of the claim, read in its proper context, and/or the issue cries out for resolution. Another way of saying essentially the same thing is that there are some issues that must be considered by an ET as a matter of course, and these issues are those that cry out for resolution.

84. Professor Bogg submitted that, in the present case, the question of whether Art. 10 had an impact upon the fairness of the dismissal plainly arose by implication in light of the way that the Appellant's claim was pleaded and argued and/or it cried out for resolution. This was because: (1) this was a claim for unfair dismissal in the context of academic speech; and (2) whilst the Appellant had not specifically mentioned Art. 10, he had expressly referred in his evidence and submissions to "freedom of speech". Furthermore, Professor Bogg submitted that it was relevant, in this regard that the Appellant was a litigant in person; that there had been no Preliminary Hearing in the case and no list of issues had been identified in advance of the hearing; and that the omission of any reference to Art. 10 was not the result of a tactical decision by the Appellant.

85. On behalf of the University, Mr Wilson accepted that Art. 10 could be relevant to the question whether a dismissal was unfair for the purposes of section 98(4) of the ERA 1998, but he submitted that the ET did not err in law in the present case in failing specifically to address Art. 10. He submitted that the mere facts that the Appellant was a University lecturer and his dismissal resulted from things that he was alleged to have said in the course of his employment did not mean that the ET had an affirmative duty to refer to and consider Art. 10. The Appellant's reference to "freedom of speech" did not mean that he had raised Art. 10 by implication and there was nothing in the circumstances of

the case that meant that the question of the impact of Art 10. on the fairness of the Appellant's dismissal cried out for resolution.

The case-law on circumstances in which an ET should consider an issue of its own motion

86. There at two strands of authority that are relevant to this issue.

(1) Where, though not pleaded or identified in the agreed list of issues, an issue "shouts out" from the claim form, or, for some other reason, the fundamental duty of fairness makes it necessary and essential that the issue should have been raised and considered by the ET

87. The first strand emphasises that the ET must act impartially, and must deal with the case on the basis of the issues as pleaded and as set out in the list of issues. It is a matter for the ET's discretion as regards the level of assistance or intervention to be provided in a particular case. It will only rarely be the case that an ET will err if it does not take a point that is not pleaded by a party and is not in the list of issues. Essentially, the only circumstances in which this might be so would be if the issue, though not expressly stated, "shouted out" from the claim form, when read in context, or where, for some other reason, the fundamental duty of fairness makes it necessary and essential that the issue should have been raised and considered. An ET has a wide level of appreciation in this regard, and an appeal court will not normally interfere with the ET's exercise of judgment unless the ET has acted perversely and fundamentally unfairly by failing to identify and then to deal with an issue, if it is not set out in the party's pleaded claim and in the list of issues.

88. The leading authority in relation to the first strand is **Moustache v Chelsea and Westminster NHS Foundation Trust** [2025] EWCA Civ 185; [2025] ICR 1231 ("**Moustache**"). In **Moustache**, the claimant brought a claim of disability discrimination in relation to treatment during the course of her employment, mainly relating to the way in which her employer had treated her after a hip replacement operation. She was subsequently dismissed on ill-health grounds and brought a claim for unfair dismissal. The claimant was unrepresented. Both the claim for disability discrimination

whilst in employment, and the claim for unfair dismissal were dismissed. The EAT held that the ET should have identified and determined a further claim, namely a claim that the claimant's dismissal was an act of unlawful disability discrimination, even though it had not been pleaded and had not been included in the agreed written list of issues for the final hearing. The Court of Appeal allowed the respondent's appeal. The claimant had not pleaded that her dismissal was an act of unlawful disability discrimination, and the ET had not acted perversely or fundamentally unfairly (which amounts to the same thing) by failing to identify of its own motion that there such a claim should be identified and determined (judgment, paragraphs 48-62).

89. Giving the judgment of the Court, Warby LJ addressed the question of the nature and scope of the ET's duty to identify and determine issues in the proceedings, where the parties have agreed a list of issues, at paragraph 32 and ff of his judgment. He said that four general points should be borne in mind: (1) the proceedings in the ET are adversarial; (2) the issues raised by the parties are those which emerge clearly from an analysis of their statements of case, i.e. pleadings matter, and the ET is not required to engage in an elaborate or complex interpretative exercise; (3) where a party seeks the ET's ruling on an issue that emerges from an objective analysis of the statements of case (and falls within its jurisdiction), the ET has a duty to address that issue; and (4) the ET's role is arbitral and not inquisitorial or investigative. It must perform its functions impartially, fairly and justly, and in accordance with the overriding objective. Warby LJ said, at paragraph 37:

> "[The ET] may consider it appropriate to explore the scope of a party's case by way of clarification. That may, in particular, be considered appropriate in the case of an unrepresented party. Whether to do so is however a matter of judgment and discretion which will rarely qualify as an error of law such that the EAT can interfere. The ET has no general duty to take proactive steps to prompt some expansion or modification of the case advanced by a party where that might be to their advantage. These propositions emerge clearly from a series of decisions of this court and the EAT."

90. At paragraph 38, Warby LJ referred to the general principles that had previously been identified by the Court of Appeal in **Drysdale v Department of Transport (Maritime and**

Coastguard Agency) [2014] EWCA Civ 1083; [2014] IRLR 892 ("**Drysdale**"). Drysdale was a case in which a claimant's lay representative (his wife), had announced part-way through the hearing that his claim was withdrawn. He later sought to resile from this. The issue for the Court of Appeal was whether the ET had failed to take adequate steps to ensure that the claimant had taken a properly considered decision to withdraw his claim. The Court of Appeal held that the ET had acted within its margin of appreciation in failing to query the decision to withdraw. The Court summarised the relevant principles at paragraph 49, as follows:

> "(1) It is a long-established and obviously desirable practice of courts generally, and employment tribunals in particular, that they will provide such assistance to litigants as may be appropriate in the formulation and presentation of their case.
>
> (2) What level of assistance or intervention is "appropriate" depends upon the circumstances of each particular case.
>
> (3) Such circumstances are too numerous to list exhaustively, but are likely to include: whether the litigant is representing himself or is represented; if represented, whether the representative is legally qualified or not; and in any case, the apparent level of competence and understanding of the litigant and/or his representative.
>
> (4) The appropriate level of assistance or intervention is constrained by the overriding requirement that the tribunal must at all times be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided.
>
> (5) The determination of the appropriate level of assistance or intervention is properly a matter for the judgment of the tribunal hearing the case, and the creation of rigid obligations or rules of law in this regard is to be avoided, as much will depend on the tribunal's assessment and "feel" for what is fair in all the circumstances of the specific case.
>
> (6) There is, therefore, a wide margin of appreciation available to a tribunal in assessing such matters, and an appeal court will not normally interfere with the tribunal's exercise of its judgment in the absence of an act or omission on the part of the tribunal which no reasonable tribunal, properly directing itself on the basis of the overriding objective, would have done/omitted to do, and which amounts to unfair treatment of a litigant."

91. At paragraph 40 of the judgment in **Moustache**, Warby LJ said that, given that an agreed list of issues amounts to an express agreement that the ET should conduct proceedings in a particular way, an ET will usually be entitled to confine its attention to issues in the list. He said that there are, however, two types of case in which it may be necessary in the interests of justice to depart from an

agreed list of issues. The first is where a pleaded claim has been omitted from the list in circumstances that do not amount to an abandonment of the claim. The second is where the claim has not been pleaded but the fundamental duty of fairness makes it necessary and essential that it should be raised and considered.

92. Warby LJ gave as an example of the second category a case in which there was a claim which, whilst not expressly identified in the claim form, was "plainly being asserted" and "shouted out" from the particulars of claim which should have been treated as including such a claim. Warby LJ said that there was an example of this in **McLeary v One Housing Group Ltd** (EAT, unrep, 6 February 2019). In **McLeary**, the claimant, who was a litigant in person at the ET, claimed disability discrimination during employment and constructive unfair dismissal, but she did not claim that her constructive dismissal was an act of disability discrimination contrary to section 39 of the Equality Act 2010. Warby LJ said that the ratio of **McLeary** was that the ET should have addressed and dealt with a claim of constructive dismissal arising from acts of discrimination for two alternative reasons: first, that such a claim was made on an objective reading of the ET1 in its proper context, and, second, that, even if the claim was not clearly pleaded, then, on the facts of the case, the claim was so obvious that it was perverse of the ET not to identify it (**Moustache**, paragraph 42). In **McLeary**, HHJ Auerbach said that "Generally, it must be left to the appreciation of the Employment Judge, whether, or how, a point of this sort needs to be proactively raised or addressed. The EAT should be slow to second guess the Judge's approach, and a wide margin of appreciation should be allowed. The **Drysdale** guidance is the touchstone."

93. At paragraphs 44 and 45 of his judgment in **Moustache**, Warby LJ referred to the judgment of the Court of Appeal in **Mervyn v BW Controls** [2020] EWCA Civ 393; [2020] ICR 1364. In that case, adopting the language of HHJ Auerbach in **McLeary**, the Court of Appeal concluded at paragraph 42, that it had "shouted out" from the contents of the claimant's particulars of claim that,

on a proper analysis, she was alleging that she had been constructively dismissed, even though this was not mentioned in the agreed list of issues.

94. I should also refer to a judgment of the Court of Appeal in a case which preceded **Moustache**. This was **Mensah v East Hertfordshire NHS Trust** [1998] IRLR 531. In **Mensah**, Peter Gibson LJ said, at paragraph 28:

> "…I would strongly encourage industrial tribunals to be as helpful as possible to litigants in formulating and presenting their cases. It is always good practice for industrial tribunals to clarify with the applicant (particularly if appearing in person or without representation) the precise matters raised in the IT1 which are to be pursued and to seek confirmation that any others so raised are no longer pursued. It must be for the judgment of the particular industrial tribunal in the particular circumstances of the case before it whether of its own motion it should investigate any pleaded complaint which it is for the litigant to prove but which he is not setting out to prove…..The EAT had done precisely what …should not be done, namely to erect what is a matter for the judgment of the industrial tribunal into a duty leading to a conclusion that an error of law has been committed when that duty has not been complied with. There was no such duty and accordingly there was no error of law."
>
> Sir Christopher Slade said, at paragraph 36:
>
> "I too would strongly encourage industrial tribunals to be as helpful as possible to litigants in formulating and presenting their cases, particularly if appearing in person. There must, however, be a limit to the indulgence which even litigants in person can reasonably expect. The desirability in principle of giving such assistance must always be balanced against the need to avoid injustice or hardship to the other party on the particular facts of each case. This in my judgment is a very good reason for holding that the manner and extent of such assistance should generally be treated as a matter for the judgment of the tribunal and not as subject to rigid rules of law."

95. There has been a recent EAT authority in which the principles as set out in **Moustache** have been applied. The case is **Whitaker v (1) White Rose Academies Trust; (2) Luminate Education Group** (EAT, unrep, 27 January 2026) ("**Whitaker**"). In **Whitaker**, the claimant, a litigant in person, brought multiple complaints against two respondents. These included claims that he had suffered detrimental treatment on the grounds of protected disclosures, unfair dismissal by reason of protected disclosures, and unlawful deductions from wages. The claims against the second respondent were predicated on the claimant being a worker or an employee of the second respondent. At a Preliminary

Hearing, the ET found that the claimant was not an employee or a worker of the second respondent, and so all of his claims against that respondent were dismissed. The agreed list of issues, agreed at a case management hearing before the Preliminary Hearing, had said that the relevant issue was whether the claimant was an employee of the second respondent for the purposes of section 230 of the ERA 1996 and/or a worker of the respondents within the meaning of section 83 of the Equality Act 2010 (this was an error and the EAT accepted that the issue, as understood by all concerned, was whether the claimant was a worker of the second respondent under section 230(3) of the ERA 1996). Before the EAT, the claimant, now represented, claimed that the ET erred in failing also to consider whether he was a worker of the second respondent because he fell within the extended definition of "worker" for the purposes of protected disclosure claims that is set out in section 43K(1)(a)of the ERA 1996. This extended definition covers those who do not fall within the definition of a worker as defined in section 230 but who worked for a person in circumstances in which he was introduced or supplied to do that work by the third person, and the terms on which he was engaged to do the work were in practice substantially determined not by him but by the person for whom he works or worked, by the third person, or both of them.

96. At the EAT, counsel for the claimant accepted that at no point in the pleadings or at the Preliminary Hearing had it been suggested that the claimant sought to rely, in the alternative, upon the suggestion that he was a section 43K(1)(a) worker of the second respondent. But it was submitted that the pleaded facts supported this conclusion, or, alternatively, that the issue should have been considered as a matter of course. HHJ Auerbach rejected these submissions. He found that, on a fair and objective reading of the claim, the claimant had advanced a claim on the basis that he was a section 230(3) worker, and did not advance an alternative case that he was a section 43K(1)(a) worker. He also found that, applying the test as laid down in **Moustache** and **Drysdale**, the ET had not erred by failing to identify and consider the section 43K(1)(a) argument of its own motion. HHJ Auerbach bore in mind the fact that the claimant represented himself at the Preliminary Hearing (though he had

been represented by solicitors at the time that his ET1 was drafted), and the importance of the ET being and appearing to be impartial. He emphasised the wide margin of appreciation that ETs have in deciding what assistance to provide to litigants in a given case. Consideration of the section 43K(1)(a) argument would have required a different evaluative judgment, and additional findings of fact, beyond those that were required for the section 230(3) argument. The section 43K(1)(a) argument did not "shout out", and it was not one that it was necessary for the ET to raise (judgment, paragraph 49).

97. A general warning about the risks of an ET entering the arena by providing assistance to a litigant was sounded by Langstaff P. in **Dundee City Council v Malcolm** (UKEATS/0019/15, 9 February 2016, unrep.):

> "18. A second principle is that it is not for a tribunal to make a case for a litigant. However much a tribunal feels that a litigant is not making the best case that litigant could, given the facts as they appear to the tribunal, it cannot step into the shoes of the litigant and make for itself any case which it appears could have been advanced successfully in the light of that material. To do so would be to enter the arena. It would be to abandon impartiality. It would run counter to the very essence of the accusatorial procedure. Although litigants who are not lawyers might not know what precise legal label might categorise their cases, they will know what it is that they are complaining about. The line between making a case which is not being advanced by a party, on the one hand, and helping that party to articulate clearly that which they are complaining about on the other may be fine, but it is critical. A tribunal's duty to be fair to both sides means it cannot enter the contest on behalf of either one. It must listen to the cases made for each, and must not substitute a case of its own."

(2) <u>Where the issue should have been considered "as a matter of course"</u>

98. The second strand of authority begins with **Langston v Cranfield University** [1998] IRLR 172 (HHJ Peter Clark and members, "**Langston**"). In that case, an unrepresented claimant brought a claim for unfair dismissal by reason of redundancy. The sole reason relied upon for the unfairness of his dismissal was that the selection process was not fair. His claim failed, and he appealed, arguing that the ET erred in failing to consider whether there had been adequate consultation prior to his

dismissal, and whether the employer had failed to consider the possibility of alternative employment. The EAT accepted that the claimant had not raised the issue of pre-dismissal consultation or consideration of alternative employment, but said, at paragraphs 30 to 32:

> "30. (4) Where an applicant complains of unfair dismissal by reason of redundancy we think that it is implicit in that claim, absent agreement to the contrary between the parties, that the unfairness incorporates unfair selection, lack of consultation and failure to seek alternative employment on the part of the employer.
>
> 31. (5) Because there is now no onus on either party to establish the reasonableness or unreasonableness of the dismissal under s.98(4) it is for the industrial tribunal to determine that question 'neutrally'.
>
> 32. (6) In these circumstances we think it is incumbent on the industrial tribunal to consider each of the three questions mentioned in (4) above, in the same way that an industrial tribunal will consider the threefold **Burchell** test in an appropriate conduct case. It is desirable that at the outset of the hearing the live issues are identified by the industrial tribunal."

99. From these relatively small beginnings, in an ex tempore judgment, a principle has been recognised that, in very limited circumstances, an ET is obliged to consider an issue as a matter of course, even if it is not raised by the parties and is not in the list of issues. **Langston** was applied in **Mrs Bukola Osinuga v BPP University Legal Team** [2022] EAT 53 (Bourne J and members), another case on very similar facts to **Langston** in which an ET had failed to consider consultation in a claim for unfair dismissal for redundancy. It was also applied in **Bugden v The Royal Mail Group Ltd** [2024] EAT 80 (Matthew Gullick KC) in a case in which the ET had failed to address whether the employer should have considered redeployment in an unfair dismissal claim arising out an ill-health dismissal.

100. The approach in **Langston** was endorsed by the Court of Appeal in **Small v The Shrewsbury and Telford Hospitals NHS Trust** [2017] EWCA Civ 882. In that case, an ET had determined that the claimant's dismissal had been an unlawful detriment on "whistleblowing" grounds, contrary to section 47B of the ERA 1996. At the remedies hearing, he claimed compensation for loss of earnings up to his projected date of retirement, if, as anticipated, and but for his unlawful dismissal, his

engagement on a series of temporary assignments had been replaced by a permanent appointment. In its remedies judgment, the ET did not accept that the claimant would have been given permanent employment up to retirement, but assessed loss of earnings on the basis that, but for his dismissal, he would have remained employed on temporary assignments for another 16 months. The ET did not award any future loss of earnings beyond that end date. On appeal, the claimant argued that the ET erred in that it had failed to assess loss by reference to the well-known decision of the Court of Appeal in **Chagger v Abbey National plc** [2009] EWCA Civ 1202; [2010] ICR 397 ("**Chagger**"). **Chagger** established that loss of earnings for discriminatory dismissal was not limited to the future earnings that would have been received from the respondent, if the claimant had not been dismissed: a claimant was also entitled to "stigma damages", that is damages for the consequences of any disadvantage that he or she suffers on the labour market. It was common ground that the claimant, who was a litigant in person, had not advanced a "**Chagger**" claim. The EAT dismissed the appeal on the basis that the existence of the **Chagger** claim was not sufficiently obvious for the Tribunal to have been under any obligation to consider it if it was not expressly raised by the claimant. The Court of Appeal disagreed. Underhill LJ said that passages in the claimant's witness statement for the remedies hearing made clear that he considered that he would suffer a long-term loss as a result of the stigma of his dismissal, and, in these circumstances, the ET should have considered a **Chagger** claim. In the circumstances of the case, the ET should have considered a **Chagger** claim on the basis of the evidence before it as "a matter of course". However, Underhill LJ made clear that he was not saying that it will always be the case that an ET will be obliged to consider a **Chagger** claim or a stigma claim (judgment, paragraph 14).

101. In his judgment, Underhill LJ referred to paragraph 22 of the judgment of the EAT, in which Langstaff P. said:

> "I would go so far as to say that it is important where there are litigants in person, ever more familiar in Tribunals, that a Tribunal should approach what is a matter of such

> familiarity as the redundancy questions addressed in **Langston v Cranfield** or the unfair dismissal liability criteria addressed in **Burchell and Iceland Frozen Foods** or in general terms the heads of loss identified in **Norton Tool v Tewson** in dealing with compensation. But this approach is one which is not of universal application. It applies only where the principle is so well-established that an Industrial Tribunal might be expected to consider it as a matter of course."

102. At paragraph 12 of the Court of Appeal's judgment, Underhill LJ said:

> "12. It is convenient to say at this stage that, irrespective of whether Langstaff P was right in his eventual conclusion, I would endorse the observations which I have quoted about the importance of an employment tribunal taking for itself points which arise, in his phrase, "as a matter of course", irrespective of whether they have been taken by the parties before them."

103. In **Whitaker**, HHJ Auerbach considered whether the ET should have considered, as a matter of course, whether the Appellant qualified as a worker, vis a vis the second respondent, pursuant to section 43K(1)(a). He found that the ET was under no obligation to do so. He said, as regards the "matter of course" strand of authority:

> "54. The categories of issue to which the general "matter of course" approach has been said, over the decades, to apply, are limited and few. In **Remploy Ltd v Abbott** UKEAT/0405/14 misgivings were expressed even about **Langston**, which was described as a high-water mark, and some of the practical difficulties which may arise from such an approach were canvassed. All of the established categories of which I am aware concern the approach to the application of a specific single particular statutory test, such as section 98(4) or section 123(1) of the 1996 Act.
>
> 55. **Small** does not take matters any further. It was concerned with the heads of loss falling under the umbrella of compensation for a contravention of section 47B . Further, Underhill LJ (Lloyd Jones LJ concurring) held at [14] that the **Chagger** or stigma head of loss should have been considered by the tribunal in that case "on the basis of the particular material before it". Although Underhill LJ added the words "as a matter of course", he also expressly stated that he was not saying that it would always be so, only that it was so in that case. I therefore do not think this authority in fact adds anything to the general jurisprudence on the general categories of "matter of course" case.
>
> 56. I conclude that none of the established examples involves a tribunal being required as a matter of course to consider separate provisions of the statute which the party concerned has not in fact relied upon, and which set out a distinct legal test from that which the case presented to the tribunal requires it to apply. I consider that the EAT should be very circumspect before extending the list beyond those long-established and familiar categories in which the point in question is to be regarded as being ordinarily a

> sub-strand of the issues falling under the umbrella of the particular statutory provision which the tribunal is applying in the given case.

104. I respectfully agree with these observations of HHJ Auerbach. I agree with HHJ Auerbach that, whilst Underhill LJ used the phrase "matter of course" in **Small**, and approved the general "matter of course" principle as set out in **Langston**, **Small** is not itself a case in which that principle was applied. The Court of Appeal in **Small** was not saying that at every compensation hearing in an unfair dismissal case in which loss of earnings was being claimed, an ET must consider **Chagger** or stigma damages, even if they are not claimed. Underhill LJ made clear that **Chagger** damages should have been considered in **Small** because of the particular circumstances of the case. In my view, **Small** is best regarded as an example of the "shouts out" line of authority. The same applies to **Bugden**. It follows, if I am right, that the only examples of the "matter of course" principle that the appellate courts have so far identified are the need to consider consultation and consideration of alternative employment in redundancy unfair dismissal cases; the unfair dismissal liability criteria addressed in **British Home Stores v Burchell** [1980] ICR 303 (CA) and **Iceland Frozen Foods v Jones** [1983] ICR 17 (EAT); and the general heads of loss identified in **Norton Tool v Tewson** [1972] ICR 501 (NIRC) in dealing with compensation. A suggestion that the "matter of course" principle applied to the question whether a party was prevented from relying on a point by "**Henderson v Henderson**" estoppel was rejected by the EAT (HHJ Auerbach) in **Angard Staffing Solutions Ltd and another v Kocur and others** [2020] ICR 1541.

105. In my judgment, appellate courts should be very cautious about extending the categories of issues which ETs are obliged to consider as a matter of course, even if the issue is not raised by the parties. There is a risk that unreasonable burdens will be imposed on ETs and that too many appeals will be triggered by a failure to deal with a particular issue, even where there has been no unfairness and no harm has been done. An example of this was considered by the EAT (HHJ Beard) in **Hesham Elhalabi v Avis Budget UK** [2025] EAT 11. In that case, which was a claim for unfair dismissal in

which the claimant had been dismissed on conduct grounds, the claimant (who had been a litigant in person in the ET) argued that the ET had erred in law by not raising of its own motion the fact that the claimant had not been notified in advance of the disciplinary charge before the disciplinary meeting. HHJ Beard rejected this argument. He pointed out that the "matter of course" issues have mainly been related to redundancy claims. He said that it would be too burdensome a task to require of an ET that it consider every potential matter of procedure where there might be a fault (judgment, paragraph 35).

The relationship between the two strands of authorities

106. There is a difference in subject-matter between the two strands of authority, which may explain why they have developed separately. The first strand deals with cases in which the question is whether the ET should, of its own volition, have addressed and dealt with a completely different and discrete cause of action or source of legal rights from those that were relied upon by the Appellant. So, for example, in **Moustache**, the question was whether the ET should have considered whether the claimant's dismissal amounted to unlawful discriminatory discrimination, even though this claim had not been pleaded. In **Whitaker**, the question was whether the ET should have considered whether there was a separate statutory "gateway" through which the claimant qualified for worker status, even though this had not been pleaded. In contrast, in the cases in the second strand, the question is whether the ET should have addressed an issue of law and/or fact which was relevant to the cause of action that had been pleaded, but which had not been raised by the party concerned. However, in my view the considerations identified in **Moustache** and the other cases in the first strand are relevant also in cases in which the ground of appeal is that the ET was obliged, of its own volition to consider some point of law or fact that was relevant to the cause of action as pleaded, even if it had not been mentioned by the party concerned. In contrast, if the contention is that the ET should have addressed a different type of claim from that which was relied upon by the Appellant, then only the **Moustache** strand of authority is relevant: there are no cases in which it can be said that "as a matter of course"

the ET should have dealt with a different cause of action that was not pleaded or relied upon by a claimant.

The questions that this Appeal Tribunal must consider, in light of the authorities

107. In the present case, the Appellant is not contending that the ET failed to refer to and consider an entirely separate and new cause of action from the one that was expressly pleaded. His claim, was, and remains, solely that he was unfairly dismissed. The Appellant is not making a free-standing claim under section 6 of the HRA. Rather, it is the Appellant's case that, when deciding whether he was unfairly dismissed, the ET should have considered whether Art. 10 was engaged and, if so, whether this made a difference to the question whether he was unfairly dismissed. In other words, he says that the approach to unfair dismissal in a case such as this is different from the approach in a "standard" unfair dismissal case, because Art. 10 is engaged and provides him with special protection for his free speech rights. As Mummery LJ put it in **X v Y**, Convention rights are "blended" with the law of unfair dismissal as set out in section 98. In this circumstances, the Appellant's challenge on appeal is perhaps more closely related to the second strand of authorities than the first, but, as I have said, the principles as set out in the first strand are also potentially of relevance.

108. In light of the authorities, this Appeal Tribunal must consider the following questions (in this order):

(1) Did the issue whether Art. 10 is relevant to the Appellant's unfair dismissal claim "shout out" from the way that his claim was pleaded and advanced? This is a "perversity" test: did the ET act perversely in failing to recognise that the Art. 10 issue shouted out from the way his case was presented;

(2) If not, was the ET obliged "as a matter of course" to consider whether Art. 10 was relevant to the Appellant's claim for unfair dismissal?; and

(3) Again if not, on the facts of the case, was the ET's failure to address Art. 10 fundamentally unfair to the Appellant?

(1) Did Art. 10 "shout out" from the way that the case was pleaded and presented?

109. As I have said, Professor Bogg did not suggest that the Appellant expressly referred to Art. 10 in his Claim Form, or that Art. 10 was referred to in the agreed list of issues. It plainly was not. However, he submitted that the need to consider Art. 10 shouted out, when the Claim Form was considered in light of the factual background, the Appellant's evidence, and the way that he advanced his case before the ET. Accordingly, he submitted the ET erred in law in failing to deal with the Art. 10 issue.

110. I am unable to accept this submission. The starting point is that the Court of Appeal in **Moustache** made clear that an ET has a wide margin of appreciation in relation to which points it does or not take of is own motion. It is only if the ET's failure to take a point was perverse that the appellate court should intervene. It is also clear from **Moustache** and the other authorities on the first strand that it is not necessary, for the perversity test to apply, that the ET actually went through the thought process of considering whether to take the point of its own volition or not. The perversity test applies whether or not the point actually occurred to the ET.

111. In the present case, the Art. 10 issue did not shout out from the pleadings or the way in which the Appellant presented his case. The main thrust of the Appellant's claim for unfair dismissal was that his treatment by the University had been procedurally unfair. This aspect of his claim did not give rise to any particular issue under Art. 10. It is true that the Appellant referred, both in his appeal to the University Governors and in the ET proceedings, to the contention that his dismissal was an infringement of his freedom of speech. However, it was clear from the context in which this point was made that the contention was that the Appellant's dismissal infringed the freedom of speech rights conferred by paragraph 2.1.7 of the University's How We Work Policy, and by the 2023 Act. (I should add that it is true that section A1(13) of the Higher Education and Research Act 2017, as amended by the 2023 Act, says that references to freedom of speech in section A1 are to the freedom to impart ideas, information and opinion that is referred to in Art. 10, but I think that it would expect

too much of a reasonable ET to expect this to prompt an investigation into whether Art. 10 makes a difference in this case, especially where there is no indication that section A1(13) was drawn to the ET's attention.)

112. Looked at it in its wider context, it is not the case that any reasonable ET would have inferred from the fact that the Appellant's unfair dismissal claim related to things that he had said in his capacity as a university lecturer that the Appellant must have been contending that Art. 10 had an impact upon the fairness of his dismissal. As Professor Bogg rightly acknowledged, in most cases where a claimant was dismissed for speech related reasons, no issue concerned with Art. 10 will arise. Put another way, in the great majority of speech cases, Art. 10 will have no impact upon the fairness of a dismissal and so will not need to be considered by the ET. The fact that a claimant is dismissed for a speech reason does not in itself mean that it shouts out that Art. 10 must be taken into account. In **X v Y**, at paragraph 49(5) (set out above), Mummery LJ said that, in general, the reasonable expectation is that a decision that a dismissal was fair under section 98 would not be incompatible with Art. 8 or Art. 14. Mummery LJ said that, in such cases, section 3 of the HRA can be ignored. Similarly, in general the reasonable expectation would be that a decision on normal principles that a dismissal was fair under section 98 would not be incompatible with Art. 10. It follows that, in most speech cases, unless it is specifically raised by a party, Art. 10 can be ignored.

113. Was there anything about the context of the present case which should have alerted any reasonable ET to the possibility that this case fell within the category of cases in which Art. 10 should be considered before a decision on the fairness of the dismissal was taken? In my judgment, the answer is "no". The mere fact that the Appellant was a university lecturer, and was dismissed for a reason connected with his speech, cannot mean that it automatically follows that Art. 10 must be considered. Each case is fact-specific. In the present case, the Appellant was not dismissed because he was expressing unpopular or unfashionable views in the course of his teaching or his academic

work. Rather, the reason relied upon by the University was that it had been satisfied that he had used language with his students which could constitute harassment and/or be discriminatory in nature. The appeal panel concluded that he had repeatedly given messages that caused discomfort to students and created a hostile and offensive environment. The ET found that the reason for dismissal was conduct, namely the inappropriate and unprofessional language which the Appellant was alleged to have used towards students. None of this clearly flags up that the ET must consider Art. 10 issues relating to academic freedom. The decision to dismiss the Appellant was based on findings of four incidents that the University regarded as amounting to gross misconduct and two further incidents which the University treated as misconduct. They are set out at paragraphs 21 and 22, above. Of those six incidents, five of them were incidents of misogynistic, transphobic, able-ist, homophobic, and/or, boorish, and hostile treatment of students which were very far removed from the type of issue that might trigger concerns that the Appellant was being punished for exercising his rights of free speech in the academic context. The other incident, in which the Appellant said that an actress was not good-looking enough to appear in a music video, might, at a stretch, be regarded as an expression of opinion on a matter that was relevant to his academic specialism, but the fact remains that, taken as a whole, the reasons put forward for the Appellant's dismissal were not such as should have alerted any reasonable ET to the need to consider and take Art. 10 into account. This was a case that was concerned with dismissal because of inappropriate behaviour towards students, and so the question whether the dismissal might have a "chilling" effect on academic enquiry or expression did not arise.

(2) In this case, was the ET obliged, "as a matter of course" to consider whether Art. 10 was relevant to the Appellant's claim for unfair dismissal?

114. This question can usefully be considered in three stages.

115. First, does an ET have an obligation, in every unfair dismissal case, to consider of its own motion whether a Convention Article may be relevant to the claim, even if the point is not taken by any party? I refer to Convention Articles, rather than to Art. 10 specifically, because there are, of

course, other Convention Articles which might be relevant to the decision whether a claimant has been unfairly dismissed. In particular, Art 8 (right to private life), Art. 9 (freedom of thought, conscience and religion), and Art. 14 (protection from discrimination) might be relevant in a particular case.

116. If such an obligation exists, it will be of the greatest possible importance. It would impose an affirmative duty on every ET which deals with any unfair dismissal claim, regardless of the circumstances. It would mean that, in any case, if an ET failed to consider of its own motion whether there might be rights under a Convention Article which are relevant to the claim for unfair dismissal, it would err in law and would open up a ground of appeal.

117. I am satisfied that no such obligation exists. Indeed, as I have already made clear, Professor Bogg on behalf of the Appellant does not argue for any such wide-ranging obligation. To impose such an obligation would go much further than the law in relation to "matter of course" issues as set out in **Langston**, **Small** and **Whitaker**. It would mean that ETs would have a positive duty to consider Convention Articles even in cases where, on any reasonable view, no Convention issues arise. That cannot possibly be right.

118. The second stage in the analysis is whether ETs have such a positive obligation to consider the potential impact of Art. 10 in any unfair dismissal case in which the Appellant was dismissed for a speech-related reason. Once again, Professor Bogg did not go so as far as this in his submissions. I consider that he was right not to do so. In my view, that would impose an excessive, unreasonable and perhaps impossible burden on ETs. The Court of Appeal has made clear, in **X v Y**, that, even in most speech cases, no issues relating to Art. 10 will arise that need the case to be dealt with in any way differently from the way that a standard unfair dismissal claim is dealt with. It follows that, in the majority of cases, no purpose would be served by the ET considering the potential impact of Art. 10. Furthermore, there will be cases in which it is not immediately apparent whether the facts give

rise to any speech issues at all, such that Art. 10 might be engaged. It would be wrong, in my view, to require ETs in effect to "triage" cases in order to work out whether the ET should be considering Art. 10, regardless of whether the parties make reference to it. It is also necessary to bear in mind that if such an obligation exists in relation to speech cases and Art. 10, then a similar "matter of course" obligation must also exist in relation to "family and private life" issues for the purposes of Art. 8. I do not see that there is any principled basis upon which an ET is under an obligation, as a matter of course, to consider whether Art. 10 applies in speech cases, but is not under an obligation to consider whether Art. 8 applies in cases in which the Appellant's conduct in his or private life is at issue. Potentially, a similar obligation would arise in relation to other Convention Articles. Still further, consideration of the impact, if any, of Convention Articles on claims for unfair dismissal would potentially require analysis of complex and difficult legal questions. This is a world away, in my view, from the very limited types of straightforward and well-established issues which the appellate courts have, so far, held that ETs must consider of their own volition in accordance with the "matter of course" principle.

119. In my opinion, to extend the "matter of course" principle so as to require ETs in speech cases to consider whether Art. 10 is engaged and makes a difference would be to go very much further than the principle has ever gone before, and no such extension should be adopted. The "matter of course" principle should be limited to the most basic and standard building-block issues for claims of unfair dismissal.

120. This leads me on to the final stage of the analysis of this issue. This is whether there is a sub-set of speech cases in which ETs should as a matter of course consider whether Art. 10 is engaged and is relevant. In my judgment, the answer is plainly "no". The premise of the "matter of course" principle is that there are some issues that are so well-established and deeply embedded in the law and practice relating to unfair dismissal that they should be considered in every case of redundancy

or conduct dismissal, as the case may be. Once an ET is being asked to filter the cases, so as to decide whether, on the basis of the nature of the claim and the evidence relied upon, a particular issue should be taken up by the ET of its own motion, this ceases to be a question of the operation of the "matter of course" principle. If the question whether an affirmative duty to consider a point depends on the facts and circumstances of the particular case, it is not something that can be said to arise as a "matter of course" in a general category of cases. Rather, this brings the issue into the first strand of authority, set out above, concerning the **Moustache** principle. It is really just another way of saying that, in light of the way that the case was pleaded and presented, any reasonable ET would have flagged up and considered Art. 10. I have already considered and rejected this argument in the preceding section of this judgment.

(3) Was the ET's failure to address Art. 10 fundamentally unfair to the Appellant?

121. In my judgment, this is really just another way of putting point (1). In **Moustache**, Warby LJ said that it would be fundamentally unfair to a claimant if the ET failed to address a point which shouted out from the case as presented, even if it was not expressly pleaded. I have already addressed and rejected the Appellant's argument on this basis. The only other example of fundamental unfairness that was referred to by Warby LJ was where a pleaded claim has been omitted from the list of issues in circumstances that do not amount to an abandonment of the claim. That does not arise here. Warby LJ emphasised that ETs must be, and must be seen to be impartial, and that the process followed by ETs is arbitral and not inquisitorial or investigative. ETs must be careful to avoid giving the impression that they are seeking to assist one party or the other. Most importantly, for present purposes, the Court of Appeal in **Moustache** made clear that ET's have a margin of appreciation in relation to how far they provide assistance to one of the parties, and that their failure to raise issues or to investigate matters will be an error of law only if the ET has acted so unreasonably that no reasonable ET would have so acted. In other words, it is a perversity test.

122. In the present case, I am satisfied that the ET did not act perversely in failing to raise and consider whether Art. 10 was relevant to its consideration as to whether the Appellant's dismissal was unfair. As I have said, the thrust of the claim was that the Appellant's dismissal had been procedurally unfair. He also denied that he said the things that he was alleged to have said (or denied that the tone and context of the conversations had been properly reported by the complainants). He did refer to breaches of his freedom of speech, but this was clearly in the context of the University's Policy on the matter and the points that he had made at his appeal hearing in relation to the 2023 Act. I do not think that the ET can be criticised for failing to raise Art. 10 of its own motion, let alone that its failure to do so was perverse.

123. It is true that the Appellant was representing himself as a litigant in person, and it will have been obvious to the ET that the Appellant had no particular legal knowledge. However, there are limits to the extent of the assistance that ETs should give to litigants, even if they are litigants in person and, in all the circumstances of this case, the fact that the Appellant was a litigant in person did not mean that the ET's failure to address Art. 10 was an error of law. ETs have no general duty to seek out expansions or modifications of a party's case, even if that party is a litigant in person. I do not consider it to be significant that there was no preliminary hearing at which a list of issues was agreed. The fact remains that, sensibly, EJ Price agreed a list of issues with the parties at the beginning of the hearing. There is no reason to think that, if a list of issues had been agreed at an earlier stage, it would have included reference to Art. 10. It is also true that the Appellant's failure to raise Art. 10 was not the result of a deliberate tactical decision on his part, but this does not of itself mean that the ET's failure to do so was perverse. Equally, the University's failure to mention it was not the result of a tactical decision: the University had no reason to think that this was going to be an issue in the case.

Conclusion on Issue (1)

124. For these reasons, I conclude that the ET did not err in law by failing specifically to consider and take into account Art. 10 of the ECHR when deciding whether the Appellant's dismissal was fair. I should add that certain sections of Professor Bogg's grounds of appeal and skeleton argument advanced the appeal on the basis that the ET's analysis of the question whether the Appellant had been unfairly dismissed was tainted or infected by the fact that the ET had derogated from and/or had impermissibly failed to apply Art. 10. With respect, in my view this was just a different way of advancing the points that I have already addressed and rejected. If I am right that the ET did not err in law in failing specifically to consider Art. 10 in circumstances in which the ET was not invited by either party to do so, then the ET's conclusion was not tainted or affected in the manner contended for by the Appellant. As I have said, in many cases, including many speech cases, consideration of Art. 10 will not make a difference to the outcome of the case.

125. I should make clear that, in reaching this conclusion, I am not seeking to dismiss or to minimise the significance of arguments based on Convention Articles in particular claims for unfair dismissal in which the Articles have been specifically pleaded or referred to in the list of issues. This appeal is concerned with a different issue, namely the circumstances in which an ET might err in law if it fails to raise and address an argument based on a Convention Article, even though neither party sought to rely on it.

ISSUE 2: Should the Appellant be permitted to rely upon the Art. 10 argument on appeal?

The law

126. Paragraph 8.13.1 of the EAT Practice Direction (2024) states that "The EAT generally will not consider an argument that was not advanced before an Employment Tribunal."

127. In **Secretary of State for Health v Rance** [2007] IRLR 665, the EAT (HHJ McMullen QC) summarised the principles which govern the question whether the EAT should permit a party to advance a point for the first time at the appeal stage as follows, at paragraph 50 of its judgment:

> "(1) There is a discretion to allow a new point of law to be argued in the EAT. It is tightly regulated by authorities; **Jones v Governing Body of Burdett-Coutts School** [1988] IRLR 531 (CA), paragraph 20.
>
> (2) The discretion covers new points and the re-opening of conceded points; ibid.
>
> (3) The discretion is exercised only in exceptional circumstances; ibid.
>
> (4) It would be even more exceptional to exercise the discretion where fresh issues of fact would have to be investigated; ibid.
>
> (5) Where the new point relates to jurisdiction, this is not a trump card requiring the point to be taken; **Barber v Thames Television plc** [1991] IRLR 236 EAT Knox J and members at paragraph 38; approved in **Jones**. It remains discretionary.
>
> (6) The discretion may be exercised in any of the following circumstances which are given as examples:
>
> (a) It would be unjust to allow the other party to get away with some deception or unfair conduct which meant that the point was not taken below: **Kumchyk v Derby City Council** [1978] ICR 1116 EAT Arnold J and members at 1123
>
> (b) The point can be taken if the EAT is in possession of all the material necessary to dispose of the matter fairly without recourse to a further hearing. **Wilson v Liverpool Corporation** [1971] 1 WLR 302, 307, per Widgery LJ.
>
> (c) The new point enables the EAT plainly to say from existing material that the Employment Tribunal judgment was a nullity, for that is a consideration of overwhelming strength; **House v Emerson Electric Industrial Controls** [1980] ICR 795 at 800, EAT Talbot J and members, followed and applied in **Barber** at paragraph 38. In such a case it is the EAT's duty to put right the law on the facts available to the EAT; **Glennie** paragraph 12 citing **House** .
>
> (d) The EAT can see a glaring injustice in refusing to allow an unrepresented party to rely on evidence which could have been adduced at the Employment Tribunal; **Glennie** paragraph 15.
>
> (e) The EAT can see an obvious knock-out point; **Glennie**, paragraph 16.
>
> (f) The issue is a discrete one of pure law requiring no further factual enquiry; **Glennie** para 17, per Laws LJ.
>
> (g) It is of particular public importance for a legal point to be decided provided no further factual investigation and no further evaluation by the specialist Tribunal is required; Laws LJ in **Leicestershire** para 21

(7) The discretion is not to be exercised where by way of example;

(a) What is relied upon is a chance of establishing lack of jurisdiction by calling fresh evidence; **Barber** para 20 as interpreted in **Glennie** para 15.

(b) The issue arises as a result of lack of skill by a represented party, for that is not a sufficient reason; **Jones** para 20.

(c) The point was not taken below as a result of a tactical decision by a representative or a party; **Kumchyk** at page 1123 , approved in **Glennie** at para 15.

(d) All the material is before the EAT but what is required is an evaluation and an assessment of this material and application of the law to it by the specialist first instance Tribunal; **Leicestershire** para 21.

(e) A represented party has fought and lost a jurisdictional issue and now seeks a new hearing; **Glennie** para 15. That applies whether the jurisdictional issue is the same as that originally canvassed (normal retiring age as in **Barber**) or is a different way of establishing jurisdiction from that originally canvassed (associated employers and transfer of undertakings as in **Russell v Elmdon Freight Terminal Ltd** [1989] ICR 629 EAT Knox J and members). See the analysis in Glennie at paras 13 and 14 of these two cases.

(f) What is relied upon is the high value of the case; **Leicestershire** para 21."

128. In **Mr J Biddulph v Eastern Counties Leather (In Partnerships)** [2025] EAT 56, I said, at paragraph 49:

"It is clear from **Rance**, and from the authorities cited in that judgment, that the mere fact that a new point will not require any additional evidence does not mean that it should be permitted to be advanced on appeal, though the burden of persuading the Appeal Tribunal that a new point should be permitted is significantly higher where the new point requires new findings of fact. Even where no new evidence will be required, it will only be in an exceptional case that a litigant will be permitted to rely upon a point of law that was not argued below. Paragraph 8.13.1 of the current EAT Practice Direction 2024…. state[s] that the EAT generally will not consider an argument that was not advanced before an Employment Tribunal. In the case of **Glennie v Independent Magazines (UK) Ltd** [1999] IRLR 719 , referred to in **Rance** , Laws LJ said that:

"It is a general principle of the law that it is a party's duty to bring forward the whole of his case at the proper time."

129. In one of the cases referred to by HHJ McMullen QC in **Rance**, **Leicestershire County Council v Unison** [2006] IRLR 810 (CA), at paragraph 15, Laws LJ cited a passage from **Blackpool,**

Fylde and Wyre Society for the Blind v Begg (EAT, unrep, 31 March 2005, HHJ McMullen QC and members, "**Begg**"), in which the EAT said:

> "The high value of the claim and the fact that it involves construction of a domestic statute against a European Directive are not, in themselves, exceptional circumstances."

Discussion

130. In my judgment, applying the principles of law referred to above, the Appellant should not be granted leave to rely upon the Art. 10 point at the EAT for the first time. Though reliance upon the Art. 10 point does not amount to reliance upon a new and separate cause of action, it does nevertheless amount to an attempt to rely upon a new point that was not argued below. The Appellant is contending that if the ET had read and applied section 98(4) in light of Art. 10, it would and should have found that he was unfairly dismissed. The Appellant is relying on a legal argument that was not advanced below.

131. **Rance**, and the cases collected there, demonstrate that it is only in an exceptional case that the EAT will allow a new point to be taken which could have been taken below, but was not. This applies even if the Appellant is a litigant in person. The present is not such an exceptional case. There is, and could be, no suggestion of deception or unfair conduct on the part of the University. Though the Art. 10 point involves legal argument, it is not a pure point of law. Consideration of the Art. 10 point would require the ET to undertake a number of evaluative judgments, including (as identified by Mr Wilson in his skeleton argument):

(a) Was the aim that led to the Claimant's dismissal an aim failing within the aims set out in Art. 10(2)?;

(b) Was the dismissal pursuant to that aim prescribed by law (this may require consideration of the Appellant's contract of employment, the University's policies, and the protections against discrimination and harassment in the Equality Act 2010)?;

(c) Was the aim sufficiently important to justify the dismissal?;

(d) Was the dismissal rationally connected with the aim?;

(e) Could a lesser measure have been applied without unacceptably compromising the achievement of the legitimate aim?; and

(f) Did the extent to which the dismissal contributed to the legitimate aim outweigh the effect of the dismissal on the Appellant?

132. A further question that would need to be addressed is whether consideration of Art. 10 on the facts of this case any impact upon the standard test for unfair dismissal has that is applied under section 98(4).

133. Furthermore, I accept Mr Wilson's submission that if the Art. 10 point had been raised by the Appellant at the ET, the University would have led additional evidence about the academic context, the protections given to freedom of speech at the University, the reasons for the University's policy on free speech, and whether it is consistent with Art. 10, the terms of the Appellant's contract of employment, the extent to which the grounds for the Appellant's dismissal gave rise to issues of freedom of speech, the University's aims in conducting the disciplinary action (which Mr Wilson said would include fulfilling its duty of care and protecting students from discriminatory conduct, maintaining the discipline of the University's staff, encouraging students not to disengage from their studies, maintaining students' confidence in the University, and protecting the University's reputation), and the reasons why a lesser sanction would not have been enough to meet the University's legitimate aims. It is true that some of these issues were explored at the hearing before the ET and in the ET's judgment, but the fact remains, nevertheless, that it is very likely that the University would have presented its evidence in a different way if Art. 10 had been at the forefront of the case. Therefore, this new point is one that would require further factual investigation and a factual evaluation by a specialist tribunal (see **Leicestershire County Council v Unison**). By the same token, the EAT is not in possession of all the material necessary to dispose of the case (see

Wilson v Liverpool Corporation). These factors are strong reasons why leave to take the point for the first time on appeal should not be given.

134. The fact that the Art. 10 point involves construction of a domestic statute in the light of Convention rights is not, of itself, an exceptional reason why a new point should be taken on appeal. The fact that the new point in **Begg** involved construction of a domestic statute in light of European legislation was not regarded as an exceptional reason in that case. In **Barton v Greenwich RLBC** (UKEAT/0041/14/DXA, unrep.), the EAT (HHJ Serota QC) refused to permit an appellant to raise an Art. 10 point for the first time at the EAT, and there was no suggestion in the judgment in that case that special principles applied to new points that were concerned with Convention rights, or with Art. 10 in particular (see judgment, paragraph 90).

135. I should mention the judgment of the EAT in **Wandsworth London Borough Council v Vining** (UKEAT/0234/13/LA, unrep, HHJ Peter Clark, "**Vining**"), though it was not cited or referred to by counsel in the present appeal. The case concerned two officers of the Parks Police. They were dismissed for redundancy by the local authority. An ET found that they were not in "police service" for the purposes of sections 200(2) of the ERA 1996 and section 280(2) of the Trade Union and Labour Relations (Consolidation) Act 1992, and so they were unable to claim unfair dismissal and their union was precluded from bringing claims for a declaration and protective awards arising from failure to consult with the union about the redundancies. The local authority appealed. Before the appeal was heard, the Court of Appeal held, in a different case, **McKinnon v Redbridge LBC** [2014] EWCA Civ 178; [2014] ICR 834, that, as a matter of interpretation of section 200, ERA 1996, parks police officers were police officers and so could not bring claims for unfair dismissal. This prompted the claimants in **Vining** to change tack. They applied to amend their respondent's notices in the appeal to contend, for the first time, that Arts 8, 11 and 14 of the Convention, and Directive 98/59/EC required courts and tribunals to interpret sections 200(2) and 280(2) in such a way as to confer rights

to claim unfair dismissal on the parks police claimants, and rights to claim declarations and protective awards for failure to consult their trade union. HHJ Peter Clark allowed them to amend their claims and so to take the new points, including new Convention points, for the first time on appeal. At paragraph 6 of his judgment, HHJ Peter Clark said:

> "6. The special feature of the present case is that the new points which Ms Criddle wishes to take in support of Judge Zuke's decision below involve consideration of Convention rights under the ECHR , incorporated into domestic law by the Human Rights Act and Community rights, particularly under Directive 98/59/EC . The obligation on domestic courts to consider Community rights (and by extension Convention rights) was considered by Lord Walker in **Revenue and Customs v Stringer** [2009] ICR 985: see paragraphs 57 to 58."

136. I do not read HHJ Peter Clark's ruling in **Vining** to mean that if a new point is concerned with Convention rights, then the EAT should invariably allow it to be taken for the first time at the EAT hearing. The decision to allow the new points to be heard in **Vining** was based on the particular circumstances of that appeal, which included, crucially, that the new Convention points were pure points of law which did not require any further factual enquiry: see judgment, paragraph 9). If, contrary to my reading of his judgment, HHJ Peter Clark was saying that, by parity of reasoning with the approach that then existed in relation to new points of EU law, the EAT should automatically allow new points to be raised on appeal if they were concerned with Convention rights, then I respectfully disagree. The passage in Lord Walker's speech in **Stringer**, referred to by HHJ Peter Clark, was solely concerned with EU law issues. Lord Walker referred to a principle of EU law, to the effect that national courts are required to consider relevant issues of Community law even if not raised at the right time by the parties: see **Peterbroeck Van Campenhout & Cie, SCS v Belgium (C-312/93)** [1996] 1 CMLR 793. This principle is specific to EU law. There is no similar principle which applies to appeals on which an issue of Convention rights is taken for the first time at the appellate level, at least where the party is not making a free-standing claim based on Convention rights, but is arguing that a domestic law provision should be interpreted in the light of Convention rights. In other words, the principle which, pre-Brexit, applied to the taking of EU law points for the

first time on appeal did not apply by extension to Convention points. I should make clear once again that Professor Bogg did not seek to rely upon HHJ Peter Clark's observation at paragraph 6 of his judgment in **Vining**, and did not contend that there was a principle or rule of law that points of interpretation of domestic law, based on Convention rights, may automatically be taken for the first time on appeal. He did not suggest that the principles as laid down in **Rance** do not apply to cases involving Convention rights.

137. For these reasons, I refuse leave to take the Art. 10 point for the first time in the EAT.

ISSUE (3): If the EAT answers "yes" to (1) or (2), should the EAT substitute a finding that the Appellant's dismissal was fair, as the Appellant contends for, or should the EAT remit the case for determination by a different ET, as the University contends for?

138. As I have found that the ET did not err in law by failing to consider the impact of Art. 10 on the Appellant's claim for unfair dismissal, and as I have refused leave to take the point for the first time on appeal, this issue does not arise. It is not necessary for me to consider the detailed submissions that were made to me on Art. 10 and its potential impact in this case. If I had reached a different conclusion, I would have remitted the case to the ET. As the question of remittal does not in fact arise, it is not necessary for me to deal with the arguments on the merits of the Art. 10 point that were addressed to me at the appeal hearing. I have strong doubts about whether the outcome would have been any different if the ET had taken Art. 10 into account, but I do not need to decide this issue. Notwithstanding those doubts, this is not a case in which I could have been sure what the outcome of the case would have been if the Art. 10 point had been raised and dealt with at the ET hearing (see **Jafri v Lincoln College** [2014] EWCA Civ 449; [2014] ICR 920). Moreover, it would be unfair to decide the issue at EAT level, without remitting it to the ET to give the University the opportunity to lead additional evidence. The shape of the case before the ET may well have been very different if Art. 10 was front and centre. Accordingly, if I had found that the ET had erred in

law in failing to raise the Art. 10 point of its own motion, or I had allowed the Appellant to take the Art. 10 point for the first time in the EAT, I would have remitted the case to the ET for redetermination.

ISSUE (4) Did the ET err in law by failing to consider and take account of section 43(1) of the 1986 Act?

139. I can deal with this issue very much more briefly than I have dealt with the Art. 10 issue.

140. At the time of the Appellant's dismissal, section 43(1) of the 1986 Act was in force. Section 43(1) provided:

> "43.— **Freedom of speech in universities, polytechnics and colleges**.
>
> (1) Every individual and body of persons concerned in the government of any establishment to which this section applies shall take such steps as are reasonably practicable to ensure that freedom of speech within the law is secured for members, students and employees of the establishment and for visiting speakers."

141. There is no dispute that section 43(1) applied to the University at the time of the Appellant's dismissal. Section 43(1) did not confer an untrammelled right to free speech. Rather, it conferred a right to freedom of speech "within the law". The extent to which the section 43(1) obligation overlaps with Art. 10 was considered by Lieven J in **R (ota University of Sussex) v The Office for Students and The Free Speech Union Ltd** [2026] EWHC 984 (Admin). It is not necessary to deal with that issue here.

142. With effect from 31 August 2025, section 43(1) was repealed so far as it applied to a university in England. Section 43(1) continues to apply in England to any institution of higher or further education which is maintained by a local authority and to any institution within the further education sector. Section 43(1) continues to apply to universities in Wales.

143. So far as universities in England are concerned, including the University, and with effect from 31 August 2025, section 43(1) was replaced by section 1 of the 2023 Act, which inserted a new section A1 into the 2017 Act.

144. Section A1 provides, in relevant part:

> "**A1 Duty to take steps to secure freedom of speech**
>
> (1) The governing body of a registered higher education provider must take the steps that, having particular regard to the importance of freedom of speech, are reasonably practicable for it to take in order to achieve the objective in subsection (2).
>
> (2) That objective is securing freedom of speech within the law for—
>
> (a) staff of the provider,
>
> ….
>
> (4) The grounds referred to in subsection (3)(a) and (b) are—
>
> (a) in relation to an individual, their ideas or opinions;
>
> (b) in relation to a body, its policy or objectives or the ideas or opinions of any of its members.
>
> (5) The objective in subsection (2), so far as relating to academic staff, includes securing their academic freedom.
>
> (6) In this Part, "academic freedom" , in relation to academic staff at a registered higher education provider, means their freedom within the law—
>
> (a) to question and test received wisdom, and
>
> (b) to put forward new ideas and controversial or unpopular opinions,
>
> without placing themselves at risk of being adversely affected in any of the ways described in subsection (7).
>
> (7) Those ways are—
>
> (a) loss of their jobs or privileges at the provider;
>
> (b) the likelihood of their securing promotion or different jobs at the provider being reduced.
>
> ….
>
> (13) In this Part— references to freedom of speech are to the freedom to impart ideas, opinions or information (referred to in Article 10(1) of the Convention as it has effect

for the purposes of the Human Rights Act 1998) by means of speech, writing or images (including in electronic form)"

145. Section A2 provides that the governing body of a registered higher education provider must, with a view to facilitating the discharge of the duties in, inter alia, section A1(1), maintain a code of practice setting out the provider's values relating to freedom of speech and an explanation of how those values uphold freedom of speech.

146. Section A3 provides that the governing body of a registered higher education provider must promote the importance of academic freedom for academic staff of registered higher education providers.

147. The University is a higher education provider for the purposes of the 2017 Act (see section 83).

148. The Explanatory Notes to the 2023 Act said that the Act included a range of measures aimed at strengthening the duties regarding freedom of speech previously imposed by section 43 of the 1986 Act. It is clear that this was done by imposing more specific obligations than the general duty to promote freedom of speech that was set out in section 43(1) of the 1986 Act.

149. At the appeal hearing before Governors of the University, the Appellant relied upon the provisions of the 2023 Act which were concerned with freedom of speech. This was no doubt because he did not appreciate that, whilst the provisions of the 2023 Act which related to academic freedom of speech had been enacted, they were not yet in force. The Governors did not pick this up either, and so considered whether the dismissal of the Appellant would constitute a breach of the freedom of speech provisions in the 2023 Act. The Governors decided that it would not (see paragraph 29, above). In his claim in the ET, the Appellant again specifically relied upon the free speech provisions of the 2023 Act. EJ Price was aware that this was not yet in force. He said so at

paragraph 133 of the ET judgment (paragraph 49, above) but he nonetheless went on to consider the argument and decided that the appeal panel had been entitled to conclude that the Appellant's dismissal had not infringed his rights to freedom of speech (see judgment, paragraphs 133 and 134).

150. So what does this ground of appeal amount to? The Appellant is contending that the ET erred in law in failing to consider a statutory provision which the Appellant did not himself rely upon before the ET, because of his mistaken belief that the 2023 Act, rather than the 1986 Act, was the governing provision. EJ Price was right to say that the 2023 Act was not in force, but it is clear from the ET's judgment that this did not lead the ET simply to ignore the question whether the Appellant's dismissal was in breach of his rights to freedom of speech. The ET considered this question and decided that the University had been entitled to conclude that dismissal would not be an unlawful breach of the Appellant's free speech rights. It is not possible to tell from the ET's judgment whether EJ Price was aware that, though the relevant part of the 2023 Act was not in force, a predecessor provision of a broadly similar nature had been in force at the relevant time.

151. In these circumstances, it is not necessary to conduct a detailed analysis of the questions whether the ET erred in law in failing specifically to refer to section 43, or whether the Appellant should be permitted to raise the section 43 point at the appellate stage. There is a much simpler and more straightforward answer to this aspect of the Appellant's appeal. This is that the ET's failure specifically to mention section 43 made absolutely no difference whatsoever to the ET's analysis or to the outcome of the case. The ET considered whether the Appellant's dismissal was in breach of the University's freedom of speech obligations and decided that it was not. The ET was plainly well aware that the University had a duty to promote and protect freedom of speech for University employees.

152. If it were necessary to consider the tests for whether the ET erred in law in failing specifically to address section 43, the answer is plainly "no". It would be unrealistic to expect that an ET would

be aware of section 43 of the 1986 Act, unless it was drawn to the ET's attention. It is a specific provision which applies to a specific group of employers and employees. ETs cannot be expected to be aware of such provisions in their metaphorical memory-banks. The question whether section 43 affected the fairness of the Appellant's dismissal did not shout out from his pleaded case, and it was not something that the ET was obliged to consider as a matter of course. There was no fundamental unfairness in the ET not dealing specifically with section 43, given that the Appellant had directed the ET towards a different provision altogether, and given that the ET did take the University's obligations regarding freedom of speech into account. Nor is this an exceptional case in which the EAT should allow the section 43 point to be taken for the first time on appeal. Even if it was, it would be absolutely clear that it would have made no difference to the outcome of the case before the ET if section 43 had been drawn to the attention of the ET, and so the failure to consider section 43 would not be a good reason to allow the appeal and set aside the ET's judgment.

ISSUE (5): If the section 43 point succeeds, what consequences follow?

153. As the section 43 point has failed, this does not arise.

Conclusion

154. For these reasons, the appeal is dismissed.