

Neutral Citation Number: [2026] EAT 138

Case No: EA-2024-000216-JOJ

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 20 August 2026

Before:

HIS HONOUR JUDGE BARKLEM

Between:

MR HADI KHANAFAER

Appellant

- and -

SINGLE HOMELESS PROJECT

Respondent

The **Appellant** appeared in person
Ms M Bouffe (instructed by Devonshires Solicitors) for the **Respondent**

Hearing date: 11 August 2026

JUDGMENT

SUMMARY

Unfair Dismissal

An employer conceded that a dismissal was unfair because of procedural defects in a redeployment process following a trial period of redeployment.

That failure was not mentioned in the ET's judgment following a remedies hearing, which applied a 100% deduction to both basic and compensatory awards.

The claimant had been placed on special paid leave and was not required to do any work. However, he obtained full time work with another charity. The respondent learned of this other work only after the claimant had been dismissed.

Sections 122(2) and 123(6) of the ERA 1996 were engaged. The former provides that, as to a basic award, if the tribunal considers that any conduct of the complainant **before the dismissal** (emphasis added) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce that amount accordingly.

Section 123(6) deals with a compensatory award and provides, that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

As the respondent discovered that the complainant had been working full time for the other charity only after the dismissal, that conduct could not have caused or contributed to it, and the ET erred in law in making a deduction to the compensatory award on that basis.

Although the basic award could have been the subject of a deduction by reason of conduct occurring before the dismissal, even if unknown to the respondent, the ET drew no distinction between the two legal tests and the decision was therefore quashed in full and sent for a rehearing.

It behoves an ET dealing with such a situation to follow the four stage test set out by Langstaff J in *Steen v ASP Packaging Ltd* 2014 ICR 46, set out in the EAT's judgment.

HIS HONOUR JUDGE BARKLEM:

1. In this judgment I shall refer to the parties as they were before the Employment Tribunal. This is an appeal against the decision of a tribunal sitting at Watford, EJ Ford sitting alone, following a hearing in October 2023. The appeal was permitted to proceed on limited grounds by HHJ Auerbach following a hearing under rule 3(10) of the EAT Rules. The claimant represented himself at the hearing. He was clearly well prepared and on top of his case. Grounds of appeal had been settled by counsel who had attended neither below nor at this hearing. Ms Bouffe of counsel represented the respondent below as well as before me.

2. I have been provided with helpful skeleton arguments augmented by oral arguments. A number of points which I find determinative were not set out in great clarity in the grounds of appeal and only the claimant's skeleton argument grappled with the point I make below as to the distinction between sections 122 and 123 of the Employment Rights Act 1996. I have had careful regard to the written and oral submissions of the parties.

3. I can set out the background relatively briefly. The claimant had been employed by the respondent, a charity dealing with homelessness as its name suggests, since August 2019. He worked as a team leader at a site in Newham. Following a tendering exercise the respondent lost the contract at Newham and the appellant's role would normally have transferred to the new provider under the Transfer of Undertakings Regulations. However, he declined that transfer and instead applied for a different role with the respondent as a service manager in Almington.

4. The respondent's policy was that when an individual moved to a different role, he or she would be subject to a six month probationary period. In the event, the probationary period did not go well and the claimant was not confirmed in post. He appealed but that was unsuccessful. In accordance with its procedures, the respondent sought to find an alternative role for the claimant and

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one specific role was put forward to him for consideration. Whilst consideration was being given to an alternative role, the claimant was given special paid leave requiring him not to carry out any duties in the interim.

5. Further, and at his request, by an email dated 7 April 2022, Anna Shaw, the HR manager, agreed as follows:

“Thanks for your call just now. As discussed you may take up additional work with another employer during the time you are not with SHP provided that you are available for meetings with SHP and available to return to work should this be requested of you.”

6. A meeting took place on 21 June 2022, the claimant having been advised in advance that a possible outcome of the meeting would be the termination of his employment. The contents of that meeting and its outcome were in dispute but the tribunal held that the claimant was notified of his dismissal at the conclusion of the meeting because, although a vacancy of service manager had arisen and had been notified to the claimant, he had not expressed any interest in it and there were no other redeployment opportunities available.

7. A letter dated 1 July 2022 had been written confirming the dismissal but due to an administrative error, this was not sent until 1 August 2022. That was the first time that the claimant was notified of a right to appeal which he did not exercise. He had maintained that when he received this letter, this was the first that he was aware that he had been dismissed but that was rejected by the ET, a factual finding not appealed.

8. In his ET1, the claimant made extensive reference to what he said was a flawed probationary process resulting in dismissal (which, by inference, clearly flowed from that process) as being unfair. There was no reference at all in the ET1 to the process of seeking redeployment which followed the failure of the probationary period.

9. The claimant told me at the hearing that following the (admittedly) flawed probationary

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process and his failed appeal, he had lost trust and confidence in the respondent. He said that he had established at the tribunal hearing, (which Ms Bouffe accepted) through cross-examination of the respondent's HR manager, Ms Shaw, that he was under no contractual obligation to engage with the redeployment exercise which the respondent had been undertaking.

10. He told me that he had not sought special paid leave and was simply awaiting what he regarded as his inevitable dismissal before bringing an unfair dismissal claim because he understood that, were he to leave voluntarily as a result of the respondent's conduct he would have had to bring a claim for constructive dismissal which he had been told (probably correctly) was more difficult to establish before an ET. This chimes entirely with the documented view taken by Ms Shaw of his failure to engage at the time.

11. In August 2023, solicitors acting for the respondent wrote to the Employment Tribunal saying as follows:

“Having now reconsidered the documentary evidence and the assertions made by the claimant, the respondent admits that the claimant was unfairly dismissed because of procedural unfairness. While the respondent maintains that it had a fair reason to terminate the claimant's employment, it acknowledges that there were breaches of its probation review policy that made the claimant's dismissal procedurally unfair.”

The letter made clear that there was a dispute as to the date of termination and that basic and compensatory awards should be reduced to nil by reason of the conduct “leading up to the dismissal on 21 June 2022”.

12. On 7 June 2022, the claimant had started working for another homeless charity, Centrepont, as a service manager. That organisation had sought a reference from the respondent which subsequently established the date on which the claimant had started there. The claimant had been asked in advance of the hearing before the ET to provide a copy of his employment contract with Centrepont. He produced a redacted version at the hearing and the tribunal had to consider the question of disclosure.

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13. The decision of the tribunal is relatively short and it is helpful to set out the relevant findings of the tribunal so far as relevant to this appeal. These are at paragraphs 15 to 34 of the decision. There are a number of typographical and/or transcription errors and the text below is as it appears in the decision

“15 Balancing the submissions that I heard from the claimant with regards to disclosure, I decided that I would disclose to the respondent key elements of the contract that I considered to be relevant to the claim. When I indicated to the claimant the clauses of the contract that I intended to disclose the respondent he did not raise an objection. Of most importance here is clause 2.4 of the claimant’s employment contract with Centre Point which sets out as follows:

“During the continuance of your employment with the company you will, unless prevented by incapacity, devote the whole of your time and attention and ability to the business of the organisation and will not without the prior written consent of the Company engage in any other business activity or employment (whether paid or unpaid). Such consent will not be unreasonably withheld provided that there is no conflict, either actual or potential, with the work of the Company and/or your own job performance.”

16. The wording of the above clause is quite clear; it sets out in unequivocal terms the claimant must devote the whole of his time to his employer for his employer Centre Point for whom he was working as a Service Manager on a full-time basis. The contract identified that the claimant commenced his employment with Centre Point on 7 June 2022 which overlaps with the time that the claimant said that he was employed by the respondent.

17. I heard evidence from the claimant and Ms Shaw. I found Ms Shaw to be a straightforward, open and reliable witness. She was prepared to accept failings in practice or procedure that could have weighed significantly against the respondent. By contrast, I found the claimant to be combative and at times dismissive and further, unreasonable when confronted with a factual matrix or chronology that did not support his claim. Critically, I did not consider the claimant to be a reliable witness in so far as his account of the meeting that took place between him and Ms Shaw on 21 June 2022. That meeting I find to be the critical issue within the claim because if I accept the claimant’s account of that meeting then inevitably I would be bound to find in his favour. However, and for the reasons that I give in this judgment, I preferred the evidence of Ms Shaw and accept that her note of the meeting although recovered late in these proceedings, represents a contemporaneous note of what was discussed between she and the claimant. Accordingly, I make the following findings of fact.

Findings of fact

Date of notice

18. While the claimant disputes the evidence of Ms Shaw’s contemporaneous note he has failed to put forward a basis as to why he does. Where there are differing accounts, the existence of such a note can prove to be clear evidence of what actually happened on an occasion. In this case, the note coupled with Ms Shaw’s actions before and after the meeting,

including sending an email to the claimant entitled “Invite to a termination meeting”, leads me to a finding on the balance of probabilities that the claimant was notified of his dismissal for the first time on 21 June 2022 and not 1 August 2022. I find it inconceivable that the Ms Shaw would have held a meeting with the claimant and not discussed his dismissal after having sent him an email which clearly indicated that the purpose behind the meeting was to do that very same thing. While Ms Shaw’s evidence around this clear, cogent and credible I found the claimant’s explanation as to what was discussed during the meeting to be incoherent and incredible particularly when he was addressing what was (in his view) discussed in the meeting.

Secondary employment

19. While the respondent has conceded unfair dismissal it has asked that I consider a 100% reduction in the claimant’s award of basic and compensatory compensation on the basis of his alleged dishonesty formed on two basis, namely “Polkey” and under section 122(2) of the Employment Rights Act 1996 ie, a just and equitable basis.

20. Of the reasons given by the respondent I have specifically been asked to find that the claimant failed to inform the respondent that he had been appointed to a role with another employer and that he had, in doing so, acted in breach of his contract in that he misled the respondent.

21. I had again, I had the benefit of hearing evidence from the claimant on this point. The thrust of his evidence was that he had spoken to Ms Shaw and that that discussion had led to an explicit authorisation for him to work for another employer. Ms Shaw’s evidence was that it was well known within the sector within which the respondent operated that workers would work for other operators within the sector on a part-time ad hoc basis. She described this working as secondary employment and it was that this that she had in mind when she provided authorisation to the claimant to obtain secondary employment. The claimant disputed this and appeared to assert that there had been ambiguity around the definition of secondary working such that it was open to him to interpret Ms Shaw’s permission to work for another employer as permission to accept and work in a second full-time role for another employer.

22. Further, the claimant relied on the fact that he was on special paid leave and that with notice he could attend the respondent when required. However, it is my finding that clause 2.4 of his contract with Centre Point makes clear that he was required to devote his entire time to that employer’s work. I find it inconceivable that the obvious conflict or incompatibility between the contracts that he had with the respondent and with Centre Point both of which required him to work full-time and exclusively for each entity. Plainly, we would not have been able to do this but in evidence the claimant insisted that he would have been able to do so pointing out that he would have been able to have made himself available to the respondent during the period after the 7 June 2022 if he was provided with sufficient notice. I found this to be a difficult point to accept as reflecting the true state of affairs.

23. I find that during the course of a number of interactions with Ms Shaw the claimant was asked specifically as to whether or not he had obtained another job. During the course of the meeting on 21 June he was asked about this and simply side-stepped the question. It is now part of the respondent’s case that the claimant knowingly misled the respondent on this issue.

24. When asked why he did not inform the respondent as to his employment with Centre Point, the claimant responded that he was simply not asked. In cross examination by Miss Bouffé he was asked as to the reason why he did not tell anybody at the respondent about this and he said that he had been authorised to work for Centre Point on a full-time basis.

25. I simply do not accept that evidence. Accordingly, I find, on the balance of probability, that the claimant was knowingly obtuse about the nature of his employment with Centre Point and did so because he derived a financial benefit from receiving special paid leave from the respondent while being employed by Centre Point. In making this finding, I reject the claimant's submission that he was expressly authorised to take up an exclusive, full time role, with another employer, by Ms Shaw. I find it irrelevant the fact that he had not asked for special paid leave and reject the submission that it was in the respondent's interest to pay him special paid leave. The claimant's case in this regard started to unravel following my order of the disclosure of the claimant's contract of employment (see above) and specifically clause 2.4 which makes clear that the claimant was considered a full-time worker of Centre Point. Accordingly, I find that the claimant's submission that he was able to perform his role for the respondent and Centre Point at the same time (or within the same time period) to be without foundation or credibility.

26. Given my findings, it follows that the claimant's claim of unlawful deductions must fail. I find that the claimant's employment was terminated on 21 June 2022 and not 1 August 2022. This means that the claimant received his notice pay from 21 June 2022 (albeit subject to deduction).

27. Secondly, the claimant's claims of an unlawful deduction also fails. He was working for Centre Point during the period that he makes this claim and not the respondent. The point was made clearly by Ms Bouffe who pointed out that in respect of 20 June 2022 when the claimant accepts that he took annual leave from Centre Point he was also being paid by the respondent, which serves to underline the point that not only was he absent from the respondent but the reason for his absence was his obligation to Centre Point and not to the respondent. It follows that I find that the respondent was lawfully entitled to deduct pay from the claimant for the period 7 June 2022 to 21 June 2022.

28. Thirdly, given the claimant was dismissed on 21 June 2022, he would not be eligible for a bonus payment of £400. This claim therefore fails.

29. Fourthly, and lastly, I must give consideration to the respondent's application that the claimant's award of damages for unfair dismissal be reduced by 100%. As I have found, the claimant deliberately chose not to disclose this vital piece of information to the respondent and did so in circumstances where he knew that it would be of financial benefit to him to avoid disclosure of this fact. I considered that failing to be serious and I considered that it would be appropriate to consider reducing his award by virtue of his conduct.

30. Section 123(6) of the Employment Rights Act 1996 states that:

“Where the tribunal finds that the dismissal was to any extent caused or contributed by an action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding”.

31. What the appellate courts have subsequently determined is that the tribunal must have

a consideration as to when is a reduction for contributory conduct appropriate. In *Nelson v BBC (No.2)* [1980] ICR 110, CA, the Court formed the view that it would never be just and equitable to reduce a successful complainant's compensation unless the conduct on his or her part was culpable or blameworthy. Put another way, if a person is blameless, it can neither be just or equitable to reduce his or her compensation on the ground that he or she caused or contribute to the dismissal. In *Nelson*, the Court of Appeal said that the conduct could also include conduct which was perverse, foolish, bloody-minded or merely unreasonable in all of the circumstances.

32. I consider that the claimant's conduct in refusing to disclose the fact of his new employment to have been unreasonable. It is obvious that had he disclosed this information to Ms Shaw she would have terminated his employment immediately. I consider that the claimant is entirely blameworthy for this fact and cannot justify his conduct by relying on his perception of the authority he says he had received from Ms Shaw to work for Centre Point as secondary employment. There is also the possibility that had the claimant may have engaged with the respondent's redeployment process he may not have obtained the job with Centre Point. Clearly, his motivation to engage with that process diminished from 7 June 2022. Consequently, I find on the balance of probabilities, that the respondent's decision to ultimately dismiss the claimant was due in consequence of the claimant's conduct during the course of the redeployment process and his failure to engage with it.

33. Given my findings and particularly my findings with regard to the claimant's conduct, I find that it would be just and equitable to reduce the claimant's award in respect of unfair dismissal. I find that the claimant had attempted to mislead the respondent for his personal gain. This is a serious finding to make and, on that basis, I order that there be a 100% reduction of the claimant's award meaning that he will not receive anything as compensation in respect of the finding of unfair dismissal in his favour.

34. Accordingly, I order that all claims are dismissed."

14. I turn to the grounds of appeal which have been permitted to proceed. There is a degree of overlap between them and the comments which follow may deal with more than one ground. Ground 1 submits that the tribunal erred in its identification of the reason for the claimant's dismissal and argues that, where someone is dismissed from their role for failing their probation and placed on the redeployment list, the reason for their dismissal is failing their probation, not failing to gain another role. The analogy is given of a redundancy situation: where a person's role is redundant, redundancy is the reason for dismissal rather than the failure to secure another role within the employer. This error, it is said, fed significantly into the tribunal's finding on contributory fault.

15. Ground 3 deals with the deduction for contributory fault. Ground 4 was withdrawn. Ground 5 deals with the legitimacy of working for Centrepont while on special paid leave and Ground 6 deals

with the lack of a distinction between the basic and the compensatory awards.

16. I asked Ms Bouffe to explain how the concession as to unfair dismissal by reason of admitted procedural failings in connection with the probationary process, was connected to the matters which follow and which are said by the respondent to have been part of the reasons for the dismissal. She told me that this was a concession not drafted by her and she was not able to expand on it further. It is surprising that the behaviour of the respondent, in terms of the procedure which was accepted by it to have led to an unfair dismissal, and its affect on the claimant's actions thereafter, do not feature in the decision.

17. Paragraph 33 of the tribunal's reasons purport to find that the decision to dismiss the claimant was "due in consequence of the claimant's conduct during the redeployment process and his failure to engage with it". That is, with respect, entirely at odds with the respondent's concession that dismissal was unfair by reason of its failure to abide by the probationary process.

18. Although at paragraph 20 the tribunal indicated that it had been asked to consider a reduction in the claimant's basic and compensatory award on two bases, namely Polkey and under section 122(2) of the ERA 1996, there is no further reference in the judgment as to what, if anything, was advanced and/or determined in relation to Polkey.

19. The tribunal made reference to **Nelson** at paragraph 32 in the context of conduct being culpable or blameworthy. It did not cite the dictum at page 123(b), namely:

"It is a serious matter for a claimant who has succeeded on the complaint of unfair dismissal to have his compensation reduced at all on the ground that he contributed to his dismissal by his own conduct. It is an exceptionally serious matter when the reduction is as large as made in this case, namely 60%."

20. As may be seen from the decision, the tribunal reduced to nil - a 100% deduction - on both elements of compensation under sections 122(2) and 123(6) of the ERA. The former provides that

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as to a basic award, if the tribunal considers that any conduct of the complainant **before the dismissal** (emphasis added) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

21. Section 123(6) deals with a compensatory award and provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

22. As Langstaff J said in **Steen v ASB Packaging Ltd** 2014 ICR 46 EAT from paragraph 10 to 14:

“10. The two sections are subtly different. The latter calls for a finding of causation. Did the action which is mentioned in section 123(6) cause or contribute to the dismissal to any extent? That question does not have to be addressed in dealing with any reduction in respect of the basic award. The only question posed there is whether it is just and equitable to reduce or further reduce the amount of the basic award to any extent.

11. The application of those sections to any question of compensation arising from a finding of unfair dismissal requires a tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault, (2) having identified that it must ask whether that conduct is blameworthy.

12. It should be noted in answering this second question that in unfair dismissal cases the focus of a tribunal on questions of liability is on the employer’s behaviour, centrally its reasons for dismissal. It does not matter if the employer dismissed an employee for something which the employee did not actually do, so long as the employer genuinely thought that he had done so. But the inquiry in respect of contributory fault is a different one. The question is not what the employer did. The focus is upon what the employee did. It is not upon the employer’s assessment of how wrongful that act was; the answer depends what the employee actually did or failed to do, which is a matter of fact for the Employment Tribunal to establish and which, once established, it is for the Employment Tribunal to evaluate. The tribunal is not constrained in the least when doing so by the employer’s view of wrongfulness of the conduct. It is the tribunal’s view alone which matters.

13. The tribunal must ask for the purposes of section 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did not do so to any extent there can be no reduction on the footing of section 123(6) no matter how blameworthy in other respects the tribunal might think the conduct to have been. If it did cause or contribute to the dismissal to any extent then the tribunal moves to the next question (4).

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14. This, (4) is to what extent the award should be reduced and to what extent it is just and equitable to reduce it. A separate question arises in respect of section 122 where the tribunal has to ask whether it is just and equitable to reduce the amount of the basic award to any extent. It is very likely, but not inevitable, that what a tribunal concludes is a just and equitable basis for the reduction of the compensatory award will also have the same or a similar effect in respect of the basic award, but it does not have to do so.

In any case therefore, a tribunal needs to make the findings in answer to questions 1, 2, 3 and 4 which we have set out above.”

23. In the present case, the reasons for the dismissal were set out in a letter dated 1 July 2022 which followed a meeting between the claimant and Ms Shaw on 21 June 2022. There is no reference to the claimant working for Centrepont and it is apparent from the witness statement of Ms Shaw (supplementary Bundle page 30, paragraph 40) that she learned of this only after the dismissal.

24. In the present case, the tribunal did not address the four questions required of it by *Steen*. Had it done so, when assessing the conduct it regarded as blameworthy, namely the claimant’s failure to disclose the fact that he had been working for Centrepont while still on special paid leave, it could not, in my judgment, have found that this was in any way as causative of or contributory to the dismissal which took place at a date before the claimant was aware of it.

25. Taking stock, then, at this stage, I find that the tribunal erred in law in its re-characterisation of the dismissal as set out at paragraph 33 of the judgment which was inconsistent with the respondent’s written concession as to the unfair dismissal arising from procedural failings. Ground 1 therefore succeeds. The basis for reducing the compensatory award and in particular the failure to address the *Steen* questions was a further error of law. Ground 3 therefore succeeds.

26. As to ground 5, the tribunal made findings of fact regarding the legitimacy of the claimant’s employment with Centrepont with which I would ordinarily be slow to interfere. However, given my comments above as to that employment not being causative of or contributing to the dismissal, it could be relevant only to the basic award. As the respondent noted, such adjustments to awards usually stand or fall together. As the tribunal did not distinguish them and seems not to have been

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aware of the “subtle difference between them”, per Langstaff J, the finding must also be set aside. Ground 6 does not require further findings.

27. I therefore allow this appeal and quash the Employment Tribunal’s judgment. I would hope that common sense will prevail following this judgment. However, unless the parties reach agreement, I direct that the matter be remitted to a differently constituted tribunal for re-hearing. Given the force of the adverse findings made by the judge against the claimant, it would not be appropriate for him to re-hear the case.