Neutral Citation Number: [2026] EAT 177

Case No: EA-2025-SCO-000013-SH

EMPLOYMENT APPEAL TRIBUNAL

52 Melville Street
Edinburgh EH3 7HF

Date: 11 November 2026

Before :

JUDGE BARRY CLARKE

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Between :

P&O EUROPEAN FERRIES (IRISH SEA) LTD **Appellant**

- and –

MR CRAIG RENNIE **Respondent**

- -
- -

Mr James McHugh (instructed by Pinsent Masons LLP) for the **Appellant**
Mr Ronald Clarke (of Thompsons Scotland LLP]) for the **Respondent**

Hearing date: 9 July 2026

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL

This appeal concerns the date at which an Employment Tribunal must assess practicability where its order for re-engagement has not been complied with. The claimant managed two of the respondent's ports until he was dismissed by reason of redundancy. An employment tribunal held the dismissal unfair and ordered the respondent to re-engage him in another post by 1 August 2024. The respondent did not comply. At a further hearing the tribunal held that it had been practicable for the respondent to comply with the order. The respondent appealed.

Held, dismissing the appeal:

1. Practicability under section 117(4)(a) of the Employment Rights Act 1996 falls to be assessed at the date by which the order requires compliance, here 1 August 2024. The question is put in the past tense and is directed to compliance with the order, and the only date such an order must contain is the one fixed under section 115(2)(f). It is not the date of the later hearing, nor does it move to whatever date evidence happens to be led. The tribunal took the right date.
2. The tribunal was not required to find that the post existed at that date before deciding that the respondent had not satisfied it that compliance was not practicable. The burden lay on the respondent, and its only witness on the issue was disbelieved. A tribunal which rejects the only evidence offered by the party bearing the burden can properly decide against that party; it is not in the different position of a tribunal which cannot resolve finely balanced evidence. Resort to the burden of proof was open to it.

JUDGE BARRY CLARKE:

Introduction

1. This appeal is about an order of an Employment Tribunal ("ET") which required an employer to re-engage an employee it had unfairly dismissed. The employer did not comply with that order. The question is whether the ET erred in law in deciding that it was practicable for the employer to comply.
2. The respondent, among other things, runs ports; the claimant managed two of them until he was dismissed by reason of redundancy. I refer to the parties as the claimant and the respondent, as they were before the ET. The respondent is the appellant.
3. Where a tribunal finds a dismissal unfair, the **Employment Rights Act 1996** ("**ERA**") requires it to consider first getting the employee back to work. It must explain what orders it may make for that purpose and ask whether the dismissed employee wants one: section 112(2) **ERA**. There are two types of order: an order for reinstatement (which requires the employer to treat the employee as if he had not been dismissed) and an order for re-engagement (which requires it to engage him in comparable or other suitable employment): sections 114(1) and 115(1) **ERA**. Compensation follows only where neither order is made: section 112(4) **ERA**. Because those orders must be considered before an award of compensation, re-employment is sometimes called the "primary remedy" for unfair dismissal.
4. Such an order is not made automatically. Before making one the tribunal must take into account whether it is practicable for the employer to comply with it: sections 116(1)(b) and 116(3)(b) **ERA**. If the order is made and the employer does not comply, the tribunal must award compensation for the unfair dismissal and, on top of that, an additional award: section 117(3) **ERA**. The additional award does not follow if the employer satisfies the tribunal that it was not practicable to comply with the order: section 117(4)(a) **ERA**. Practicability may therefore be judged on two occasions. This appeal is about the second occasion.

5. The **ERA** does not say at what date the tribunal must judge whether compliance was practicable. The date matters, because circumstances change: a job which is open on one date may be gone by another. It is suggested in this appeal that the authorities point to different dates and that I must decide which of them is right.

Background

6. I take the facts in this part from the ET's judgments and orders. I set out only what is needed to understand the issue in this appeal.

7. The claimant was employed by the respondent, or by a predecessor within its group, from 1 January 1996 until his dismissal on 2 August 2023. He was latterly Port Manager for Cairnryan and Larne. In May 2023 the respondent began consulting on a restructure of its business which it called Project Fleet. The proposals deleted the claimant's post. They created, among others, six Senior Port Duty Manager posts ("SPDM"), one of them at Cairnryan.

8. The claimant applied for the SPDM post at Cairnryan. He was the only applicant. (I should say at this point that the ET found that he would have been appointed to that role, if his application had been taken forward; see the June judgment at [41]. It was not taken forward.) The claimant pressed the respondent to tell him what the post paid and which of the duties of his existing post it would not include. He was given neither. Instead, he was required to confirm within a tight timescale whether he wished his application to proceed. When he did not confirm, the respondent dismissed him by reason of redundancy.

9. His complaint of unfair dismissal came before Employment Judge Murphy ("the judge"), sitting alone in Glasgow, on 11 and 12 April 2024 and on 20 and 21 May 2024. The claimant was represented by Mr Clarke, solicitor, who has acted for him at every stage and appears for him before me. The respondent was represented at that stage by Ms Finlayson, solicitor.

10. The judge held the dismissal unfair. The essence of the decision was that the information given to the claimant, in terms of its adequacy and timing, took the respondent's decision to dismiss

him outside the range of reasonable responses (June judgment at [124] and [135]-[136]). There has been no appeal against that conclusion.

11. It was made clear at the outset of the hearing in April 2024, and repeated when the hearing resumed in May 2024, that the judge would decide both liability and one aspect of remedy: namely, whether it was practicable for the respondent to comply with an order for reinstatement or re-engagement. Evidence relevant to practicability was therefore led during the April and the May hearing dates (Order, reasons at [1]).

12. The claimant did not seek reinstatement, his post having been made redundant. He sought re-engagement instead. The judge found that the SPDM post at Cairnryan had remained vacant after the claimant's dismissal until the end of December 2023 and that, when the hearing began in April, none of the posts in the respondent's restructured ports structure was vacant (June judgment at [80]-[81]). But the position had changed by May. She found that, as at 20 May 2024, the respondent had a vacancy for a Port Technical and Assets Manager (Irish and North Sea) ("the PTAM role"), advertised as based in Woking but requiring travel to the respondent's Irish Sea and North Sea ports. The claimant was willing to travel, and willing if necessary to be based in Woking (June judgment at [83]).

13. The PTAM role had not been mentioned during the April hearing dates, when the respondent's witnesses gave evidence about the vacancies then advertised within its group. The claimant raised it when he gave his evidence in May. The judge inferred that the post had been advertised in the interval. The fact of the vacancy was uncontroversial. No challenge was made to the claimant's evidence about it, and it was not put to him that he was unsuitable for the post or that his appointment to it would be impracticable (June judgment at [89] and [140]).

14. The judge held that practicability fell to be assessed not at the date of dismissal but at the date on which she had received all the material to be placed before her, which here was 21 May 2024. She found on that basis that it was practicable for the respondent to comply with an order

to re-engage the claimant to the PTAM role (June judgment at [141] and [145]). That judgment was dated 19 June 2024 and sent to the parties on 20 June 2024.

15. The judge did not treat her finding about the practicability of re-engagement as final. In the reasons she later gave with the Order, she recorded that there are two stages at which a tribunal assesses practicability. The first had been determined. The second would arise only if the respondent refused to comply with a re-engagement order. To that extent her finding was characterised as provisional and might yet prove not to be final; see the order sent to the parties on 17 July 2024 ("the Order"), reasons at [4].

16. The judge gave notice that she intended to order re-engagement to the PTAM role, or to such other post as the parties might agree, and invited them to agree the terms or to make written submissions on what the terms should be (case management order of 19 June 2024, at [1]-[2]).

17. The respondent took neither course. On 3 and 11 July 2024 its representative wrote to the ET to say that it did not consider re-engagement practicable, setting out five points which amounted to new evidence about the PTAM role. That evidence had not been led at the hearing. It had not been put to the claimant, whose contrary evidence had gone unchallenged, and no explanation was offered for advancing it at that stage. The judge declined to admit it: practicability was a question of fact, that finding had been made, and there was no basis to reopen it (Order, reasons at [3]-[4]). There had also been no application to the ET to reconsider the June judgment, and the respondent made no submissions on the terms of the order (Order, reasons at [5]).

18. The judge duly made the order for re-engagement. The Order required the respondent to re-engage the claimant in the post of Port Technical and Assets Manager (Irish and North Sea), based at Cairnryan. It specified his remuneration, the rights and privileges to be restored to him and the sum payable to him for the period since his dismissal. It was to be complied with by 1 August 2024 (Order at 1(i)-(vi)).

19. The respondent did not appeal the June judgment, the notice of 19 June 2024 or the Order. It also made no application to vary the Order.

20. The respondent did not re-engage the claimant. On 6 August 2024 its representative wrote to the ET to say that it was not in a position to comply with the Order, and asked for a hearing to determine the practicability of re-engagement and, if re-engagement were practicable, the level of compensation due (case management note of 28 November 2024, at [2]). A hearing was listed for 26 and 27 November 2024. By then the respondent was represented by Mr McHugh of counsel, who appears for it before me.

21. After discussion, it was agreed that the hearing on 26 November 2024 would be confined to a single question: whether the respondent had satisfied the ET that it was not practicable to comply with the Order, under section 117(4)(a) **ERA**. The compensation issues were deferred to a further hearing (case management note of 28 November 2024, at [3]-[4]).

22. At that hearing the respondent's case was that the PTAM role had never existed. The judge rejected that contention. By a decision dated 10 December 2024 and sent to the parties on 12 December 2024, she held that the respondent had not complied with the Order and that it had been practicable for the respondent to comply with it.

23. That is the decision under appeal. I will look at it in more detail shortly. The appeal proceeds on a single ground: that the ET erred in law in deciding that it was practicable for the respondent to comply with the Order.

The issue in this appeal

24. The ground on which the appeal proceeds takes its words from the statutory test, and so does not say what the ET is said to have got wrong. The issue needs to be stated more precisely, which involves splitting it into two questions.

25. The first question is the date at which practicability fell to be assessed for the purposes of section 117(4)(a) **ERA**. That date is important as it fixes the moment at which the respondent's ability to comply with the Order must be judged – and, of course, circumstances can differ from one date to the next.

26. Four candidate dates have been supplied: 21 May 2024 (when the judge had received all the material placed before her at the hearing that led to the June judgment); 15 July 2024 (when she made the Order); 1 August 2024 (the date by which the Order required compliance, which I will call "the compliance date"); and 26 November 2024 (the date of the hearing that led to the decision under appeal). Those dates span more than six months.

27. The second question is whether the ET was required to make findings of fact about the PTAM role and, in particular, whether it existed and was available at whichever of those dates is correct. The ET decided the question before it by resorting to the burden of proof. The second question therefore extends to whether that course was open to it without such a finding. The second question arises whichever answer is given to the first question.

28. I will deal with those two questions in sequence.

The decision under appeal

29. I turn to the decision under appeal. I will look at it in some detail. Paragraph numbers in this part are those of that decision, unless I say otherwise.

30. At the hearing the respondent called a single witness, Mr Steer, its Director of Port Operations. The claimant gave evidence himself ([25]). In the passages I quote below, the judge refers to the claimant as C and to the respondent as R, and to Mr Steer by his full name.

31. The judge identified what she needed to decide: whether the PTAM role existed and was available within the respondent's organisation, and whether the claimant was capable of performing its duties, so that the Order could be implemented with success. She held that she had to assess practicability "*as of 1 August 2024 since that is the date specified in the Order for compliance*" ([27]). She did not at that point decide whether she was bound by the finding she had made in the earlier June judgment. She proceeded on the assumption that she was free to resolve the conflict of evidence either way ([29]).

32. The decision turns in part on a post that has not yet featured in this judgment, which I should briefly address. From 22 January 2024 the respondent advertised a new post of Ports Technical Strategy Manager ("the PTSM post"). It was a senior post in the ports structure, two tiers below Mr Steer ([9]). He had the sign off on all senior managerial posts in ports. He knew of this vacancy from its inception and was involved throughout ([10]). The PTSM post and the PTAM role are different. Only the PTAM role was the subject of the Order. The distinction matters, because the respondent's case was that the claimant had mistaken the advertisement for the PTSM post for an advertisement for a post that never existed ([26] and [30]).

33. The judge traced when the PTSM post was advertised. The first advertisement ran until 29 February 2024 and drew 61 applicants. Six were interviewed by telephone and three in person on 5 April. None was appointed ([11]). The respondent's witnesses said nothing about the vacancy during the hearing dates on 11 and 12 April 2024. On Monday 15 April, the next working day, the post was advertised again ([12]). It remained advertised, and unfilled, until Friday 17 May, the last working day before the hearing resumed ([13]). On 19 June it was advertised once more. The June judgment was sent out the next day, and the advertisement came down the day after that ([15]). There was no evidence about why the advertising stopped on either occasion, and none that the respondent's need for the post had ceased, diminished or been met ([13] and [15]).

34. As for the PTAM role, the claimant had seen its advertisement when he looked at the respondent's vacancies website shortly before 20 May ([14]). When he looked again on 20 June, prompted by the judgment, it had gone. The judge found that it ceased to be published, at least externally, at some point between about 17 May and 20 June 2024 ([16]). Neither post was advertised again before 26 November 2024 ([18]). As at the compliance date the claimant was willing to travel to the Irish Sea and North Sea ports. He remained willing to take up the PTAM role, and still believed that he had the skills and experience to perform it ([17]); his bitterness about his dismissal had mellowed ([19]).

35. At the November 2024 hearing, Mr Steer's evidence was that the PTAM role did not exist and never had existed. He gave extensive evidence about the PTSM post, which no witness for the respondent had mentioned before, and about why he considered the claimant unqualified for it. The claimant maintained the account he had given in May ([26]). No copy of the PTAM advertisement was produced, then or at any time ([30]). The judge reviewed the evidence of every witness about vacancies, as given at that hearing and at the earlier hearing dates. She tested each account for internal consistency, against the others and against the documents ([29]).

36. The judge explained why she had significant concerns about Mr Steer's credibility. They arose from the difference between what he had said in April 2024 and what he now said in November 2024 about senior vacancies in ports ([31]). On 11 April he was taken to the structure chart prepared for the Project Fleet consultation, which did not show the PTSM post ([32]). Asked whether there was a vacancy anywhere in the business, he said that there was none in a leadership role and none at senior level ([37]). Asked when there had last been a vacancy, he hesitated. He answered that a port duty manager role in Hull had been filled in January ([38]). Interviews for the PTSM post had taken place 6 days earlier, and he had the final sign off ([34]). The judge's conclusion on that evidence was as follows:

> **39. I cannot reconcile the above evidence given by Mr Steer in April 2024 with that which he gave in November about the PTSM vacancy. In November he explained the PTSM post was a very senior vacancy sitting levels above C. Even if one accepted that because the PTSM post was not advertised until two working days later, it was strictly correct to say the vacancy didn't exist on 11 April (which is dubious), Mr Steer's evidence about when the most recent vacancy had arisen is highly problematic. It is simply not credible that Mr Steer did not know the PTSM vacancy had been advertised more recently than the SPDM Hull post. An interview round to the PTSM post had happened less than a week before he gave evidence on 11 April 24. It is not credible that on that date, he struggled to remember when the last vacancy was, or that he did not recall there had been a senior vacancy for a PTSM which was the subject of an active recruitment process spanning from late January until days before the April hearing. His evidence in November was that he had final sign off on appointment to the post as part of the interview process. I regret to conclude that Mr Steer was dishonest with the Tribunal in April 2024 when he told the Tribunal that the most recent vacancy was an SPDM post which had been filled in January 24. I conclude that, when giving evidence, he deliberately sought to (and did) conceal the existence of the PTSM vacancy.**

The judge found other passages of the April evidence equivocal rather than dishonest. Asked how often the respondent recruited a senior manager, Mr Steer redefined the question by reference to the structure chart, which did not show the PTSM post ([40] and [41]). Asked whether the structure was fixed, he said that there was no money to add people to it. On his own November evidence the PTSM post, carrying a salary of about £95,000, had by then been added ([42] and [43]). Neither of the respondent's other witnesses mentioned the vacancy in April ([44] and [46]). The judge did not accept that Ms Gilmour, who reported to Mr Steer and attended monthly meetings at which vacancies were discussed, could have been unaware of it ([44] and [45]). She recorded that neither witness had been questioned as directly as Mr Steer was, and found no evidence of any decision to remove the vacancy and later reinstate it ([47]).

37. The judge returned to the absence of any challenge to the claimant's evidence in May. The respondent's written submission of 21 May 2024 had invited a finding that re-engagement was not practicable, by reference to the April evidence, and had said nothing about the PTAM advertisement ([21]). Neither Mr McHugh nor Mr Steer explained the lack of challenge. Mr Clarke suggested an error by the respondent's representative. The judge observed that another explanation was that the claimant's evidence was not incorrect, and that the human resources business partner who attended to instruct Ms Finlayson was well placed to give instructions about managerial vacancies ([48]). She compared the claimant's evidence in May with his evidence in November, and found no inconsistency ([49] and [50]).

38. The judge then weighed the two accounts of whether a PTAM vacancy had been advertised. She acknowledged that Mr Steer, as Director of Port Operations, was better placed than the claimant to know what vacancies existed. The difficulty with the respondent's account was that she had not found his evidence credible ([51]). The judgment continued:

> **52. I considered the possibility that although Mr Steer was dishonest in April 2024 when asked about the about the most recent vacancy in Ports by omitting to disclose the PTSM vacancy, he might yet have been honest in his evidence to the Tribunal in November 24 that a PTAM post never existed. I weighed this against C's consistently maintained evidence that he saw a PTAM vacancy advertised in May 24. I also accorded some weight to the fact that C's evidence in May went**

> **unchallenged and no explanation has been forthcoming for that lack of challenge. I was not ultimately satisfied on the balance of probabilities that there has never existed a vacancy for a Ports Technical Asset Manager or that such vacancy was not advertised in May 2024. It was not inherently implausible that, having failed to appoint a more senior Port Technical Strategy Manager in April 2024 process involving 60 plus applicants, R advertised a vacancy for a similar but pared back post of Ports Technical Assets Manager either concurrently with or following the expiry of the advert for the PTSM post in May 2024.**

39. The judge then set out section 117 **ERA** and summarised the authorities ([53]). From **King v Royal Bank of Canada Europe Ltd** [2012] IRLR 280 she took that a tribunal errs if it confines itself to the vacancies available at the date of dismissal. From **Rembiszewski v Atkins Ltd** UKEAT/0402/11/ZT she took that practicability must be assessed as at the date on which the tribunal has received all the material to be placed before it ([54]). From **Port of London Authority v Payne** [1994] IRLR 9 she took that practicability is a question of fact; that the test is practicability and not possibility; that an employer's reasons are to be scrutinised, with due weight given to the commercial judgment of management unless its witnesses are disbelieved; and that an employer need not explore every avenue that ingenuity might suggest ([55]). From **Mabirizi v National Hospital for Nervous Diseases** [1990] IRLR 133 she took that there can be no more than one order for re-employment in respect of a dismissal, and that the consequence of a failure to comply with such an order is the award for which the statute provides ([56]). She quoted the passage in **Mabirizi** where Knox J said that the statute contemplates an employer arguing impracticability before an order is made and arguing it again after non-compliance; one process looks forward and the other looks back, and two bites are allowed ([57]).

40. Before coming to the judge's conclusions, I will briefly record the arguments she heard. (The submissions made to me are a separate matter.) The respondent's primary submission was that the PTAM role did not exist, so that it was not practicable to comply with the Order. Mr McHugh submitted that the judge was free to reverse the finding she had made in the June judgment, relying on **King** and **Rembiszewski**. He also submitted that re-engagement to the PTSM role would not be practicable, because the claimant lacked the competency and qualifications for it ([60]). For the claimant, Mr Clarke submitted that the finding in the June

judgment was immutable, "*writ in stone*". The point might be technical, he said, but the claimant was entitled to take it. There was no evidence why the claimant could not be re-engaged to the PTAM role; and, if it mattered, re-engagement to the PTSM post was practicable ([61] and [62]).

41. The judge began her conclusions by observing that, the Order not having been complied with, the claimant's remedy under the statutory scheme was a monetary one. The ET had no jurisdiction to enforce the Order or to make a new one ([59]). There was therefore no scope to amend the Order so as to specify the PTSM post, and none, on the authority of **Mabirizi**, to make a fresh order for re-engagement to that post. The judge rejected the suggestion that the acronym in the Order was a clerical slip: the Order rested on the evidence and on the finding about the availability of the PTAM role in May 2024. What she had to decide was whether it was practicable to re-engage the claimant to the PTAM role, as the Order required. She did not, therefore, address the claimant's competence or qualifications for the PTSM post, about which much had been heard ([63]).

42. The judge commented on the arguments about immutability but did not resolve them ([64]). She saw force in Mr Clarke's points, which sat well with the principle of finality in litigation. She was unpersuaded by the suggestion, if it was made, that the June finding rested on a flimsy basis because the claimant's evidence had gone unchallenged: a finding founded on material evidence that is not challenged is a finding of fact like any other, usually final, subject to reconsideration or appeal ([65]). She also saw force in Mr McHugh's argument that practicability is a special case, where two bites are allowed, so that the finding of practicability made at the first stage is not immutable ([66]). What **Mabirizi** did not address was whether the second bite extends to replacing a primary finding of fact made at the first stage with an incompatible finding at the second ([67]). The judge's conclusion was expressed in these terms:

> **68. Ultimately, it is not necessary for me to decide the point in the circumstances of this case either. I have come to the findings in fact contained in this decision not because of Mr Clarke's 'technical' argument on immutability. Rather, I have found the same facts with respect to the advertisement of the PTAM post in May**

> **2024 as I did in the June judgment because, having reviewed all the available evidence, I did not accept, on the balance of probabilities, Mr Steer's contrary account that it was not and has never been advertised. I preferred C's account that such a vacancy had been externally advertised shortly before the hearing on 20 May 2024.**
>
> **69. Having made that finding, there is a relative paucity of evidence about the PTAM role. I accept that at some stage between 20 May and 20 June 2024, the PTAM post ceased to be advertised, at least externally. There was no evidence about the circumstances under which the vacancy ceased to be advertised, other than Mr Steer's (rejected) evidence that it had never existed. I had C's evidence given in May 2024 that he considered he could do the post, having seen the information about it in the advert he viewed in May (which I accepted on balance). C had considerable experience of managing ports assets in the ports he had managed for R.**
>
> **70. On the state of the evidence before me, I resorted to the burden of proof. I asked myself was whether the respondent had satisfied me (on the balance of probabilities) that it was not practicable for it to comply with the Order to re-engage C to the PTAM role on 1 August 2024. I concluded that it had not.**

I now turn to the law.

The legal framework

The statutory provisions

43. The remedies for unfair dismissal are in Chapter II of Part X **ERA**. I set out the provisions which govern this appeal, so far as they are material. Section 112 **ERA** provides:

> **(1) This section applies where, on a complaint under section 111, an employment tribunal finds that the grounds of the complaint are well-founded.**
>
> **(2) The tribunal shall—**
>
> > **(a) explain to the complainant what orders may be made under section 113 and in what circumstances they may be made, and**
> > **(b) ask him whether he wishes the tribunal to make such an order.**
>
> **(3) If the complainant expresses such a wish, the tribunal may make an order under section 113.**
>
> **(4) If no order is made under section 113, the tribunal shall make an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126) to be paid by the employer to the employee.**

Section 113 **ERA** then provides:

> **An order under this section may be—**
>
> **(a) an order for reinstatement (in accordance with section 114), or**

(b) an order for re-engagement (in accordance with section 115),

as the tribunal may decide.

Section 114 **ERA** defines an order for reinstatement as an order that the employer shall treat the complainant in all respects as if he had not been dismissed. Reinstatement is not in issue in this appeal.

44. Section 115 **ERA** defines an order for re-engagement and prescribes what such an order must specify:

(1) An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment.

(2) On making an order for re-engagement the tribunal shall specify the terms on which re-engagement is to take place, including—

(a) the identity of the employer,
(b) the nature of the employment,
(c) the remuneration for the employment,
(d) any amount payable by the employer in respect of any benefit which the complainant might reasonably be expected to have had but for the dismissal (including arrears of pay) for the period between the date of termination of employment and the date of re-engagement,
(e) any rights and privileges (including seniority and pension rights) which must be restored to the employee, and
(f) the date by which the order must be complied with.

It was under section 115(2)(f) **ERA** that the compliance date was fixed in this case.

45. The choice between the two orders is governed by section 116 **ERA**:

(1) In exercising its discretion under section 113 the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account—

(a) whether the complainant wishes to be reinstated,
(b) whether it is practicable for the employer to comply with an order for reinstatement, and
(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement.

(2) If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms.

(3) In so doing the tribunal shall take into account—

(a) any wish expressed by the complainant as to the nature of the order to be made,

> **(b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and**
> **(c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms.**

There are three further subsections worth mentioning. Subsection (4) requires a re-engagement order, except where the tribunal takes contributory fault into account, to be made on terms as favourable as an order for reinstatement, so far as is reasonably practicable. Subsections (5) and (6) require the engagement of a permanent replacement to be left out of account in determining practicability under subsection (1)(b) or (3)(b), subject to two exceptions.

46. Section 117 **ERA** is headed "Enforcement of order and compensation". It provides, insofar as material:

> **(1) An employment tribunal shall make an award of compensation, to be paid by the employer to the employee, if—**
>
> **(a) an order under section 113 is made and the complainant is reinstated or re-engaged, but**
> **(b) the terms of the order are not fully complied with.**
>
> **...**
>
> **(3) Subject to subsections (1) and (2), if an order under section 113 is made but the complainant is not reinstated or re-engaged in accordance with the order, the tribunal shall make—**
>
> **(a) an award of compensation for unfair dismissal (calculated in accordance with sections 118 to 126), and**
> **(b) except where this paragraph does not apply, an additional award of compensation of an amount not less than twenty-six nor more than fifty-two weeks' pay,**
> **to be paid by the employer to the employee.**
>
> **(4) Subsection (3)(b) does not apply where—**
>
> **(a) the employer satisfies the tribunal that it was not practicable to comply with the order,**
> **...**
>
> **...**
>
> **(7) Where in any case an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in determining for the purposes of subsection (4)(a) whether it was practicable to comply with the order for reinstatement or re-engagement unless the employer shows that it was not practicable for him to arrange for the dismissed employee's work to be done without engaging a permanent replacement.**

47. Those provisions combine to form a scheme. If an order is made and is not complied with, the tribunal must award compensation for unfair dismissal and, unless section 117(4) **ERA** applies, an additional award. In **R (Mackenzie) v Chancellor, Masters and Scholars of the University of Cambridge** [2019] EWCA Civ 1060, Underhill LJ held that a re-engagement order imposes no absolute obligation to re-engage and confers no correlative right on the employee. The employer must either re-engage or become liable for the awards specified by section 117(3) **ERA**. Those are the only consequences of non-compliance (at [20]). Parliament may be taken to have relied on the additional award to encourage compliance (at [25]). He added that re-employment is sometimes called the primary remedy, because the tribunal must consider it first, but that such orders are in reality made in a very small minority of cases (at [9]). Neither party cited that case to me. I mention it because it underlines what happens in the event of non-compliance.

The authorities

48. The statute does not say what "practicable" means. Nor does it identify explicitly the date at which practicability is to be judged. The correct approach has been discussed in the authorities, and I summarise them below insofar as they apply to the two questions I have identified. Three of the decisions were given under sections 69 and 71 of the **Employment Protection (Consolidation) Act 1978**, the predecessors of sections 116 and 117 **ERA**. They have since been applied to the present sections at the highest level and in the EAT. Two of the decisions arise out of the same litigation, with the parties reversed. The first is **Kelly v PGA European Tour** [2021] EWCA Civ 559, [2021] ICR 1124, which I shall call **Kelly** in the Court of Appeal. The second is **PGA European Tour v Kelly** UKEAT/0285/18/DA and UKEAT/0338/19/DA, which I shall call **Kelly** in the EAT.

49. I start with the meaning of the word. In **Kelly** in the Court of Appeal, Lewis LJ held that "practicable" means that reinstatement or re-engagement is not merely possible but capable of being carried into effect with success, applying **Coleman and Stephenson v Magnet Joinery**

Ltd [1975] ICR 46 at 52B-C (at [8]). That meaning was adopted in **The British Council v Sellers** [2025] EAT 1 (at [44]). In **Cold Drawn Tubes Ltd v Middleton** [1992] IRLR 160, Tucker J adopted a description of it as an ordinary English word of great flexibility, which takes its meaning from its context and calls for the exercise of common sense. A tribunal ought to take a broad commonsense view of the circumstances, rather than analyse the application of the word in too much detail, and may err if it proceeds by reference to general objective rules (at [12]). Practicability is a question of fact: see **Payne** at [57] and **Sellers** at [45]. It is not a test of "reasonable" practicability. Parliament used that qualified expression once in these provisions, in section 116(4) **ERA** (where it governs the terms of an order) and, of course, elsewhere in respect of the time limit provisions.

50. Practicability may need to be considered twice. In **Payne**, Neill LJ held that where an order for re-engagement is made but not complied with the question may have to be considered at two stages. The first is before any order is made, under what is now section 116(3)(b) **ERA**. The second arises if the order is not complied with, when the additional award falls to be considered, under what is now section 117(4)(a) **ERA** (at [34]). I shall call them the first stage and the second stage, as the authorities do.

51. The two exercises are not the same. In **Cold Drawn Tubes**, Tucker J put the difference thus: at the first stage the tribunal looks forward and has to take into account whether it is practicable to make the order; at the second stage it is looking back (at [8]). In **Mabirizi**, Knox J likewise said that one process looks forward and the other looks back, adding memorably that, although a cherry rejected at the first bite is likely to be regarded as indigestible at the second, two bites are allowed (at [11]). In **Kelly** in the EAT, HHJ Auerbach held that the material difference between the two exercises flows from the point in the process at which each is undertaken (at [68]).

52. The burden also differs. At the first stage there is no onus on the employer. The matters listed in section 116 **ERA** are for the tribunal itself to resolve on the circumstances before it, on a

neutral burden of proof: **Sellers** at [42] and [44]. At the second stage the statute places the onus on the employer. It must satisfy the tribunal, to the civil standard, that it was not practicable to comply with the order: section 117(4)(a) **ERA**; **Cold Drawn Tubes** at [8]; **Payne** at [46]; and **Sellers** at [44]. In **McBride v Scottish Police Authority** [2016] UKSC 27, [2016] ICR 788, drawing the threads together, Lord Hodge said that practicability of compliance is assessed at two separate stages: a provisional determination at the first, and a conclusive determination, with the burden on the employer, at the second (at [37]).

53. The word "provisional" needs care. In **Payne**, Neill LJ held that a determination must be made at the first stage, but that it is of necessity provisional (at [42] and [46]). In **Kelly** in the EAT, HHJ Auerbach separated three senses in which the word is used. The first is that the determination gives rise to no estoppel, the statute expressly permitting the employer to invite the tribunal to revisit the question (at [69]). The second is that the employer is not confined to facts occurring after the order, because at the second stage the tribunal determines a different question: not whether it will be practicable to comply in the future, but whether it was practicable to comply in the past (at [70]). That second strand comes from **Payne** itself, at [42]. The third is that the assessment at the first stage is prospective, so that there is bound to be uncertainty about how things will turn out: **McBride** at [38], as HHJ Auerbach explained at [72]. In **Kelly** in the Court of Appeal, Lewis LJ cautioned that the description ought not to be misinterpreted. The assessment at the first stage will not necessarily be a final and conclusive determination, because a tribunal considering compensation under section 117(3)(a) **ERA** may also consider whether it was practicable to order re-engagement (at [56]).

54. There is a limit to the second of those senses. In **Kelly** in the EAT, HHJ Auerbach held that it potentially permits new evidence, and additional fact-finding, about events before the date of the first order. It would not permit a party to seek at the second remedy hearing to reopen what he called "hard" factual findings made in the first decision. In most cases, he added, the contention at the second stage is likely to rest on developments after the first order, about which

no facts will have been found (at [71]). In **Mabirizi**, Knox J held that there can be nothing in the nature of a factual estoppel between two hearings at the first of which no evidence is adduced and at the second of which there is evidence. Where the issues and the evidence differ, there is no necessary inconsistency in reaching a conclusion on the second occasion which differs from that reached on the first (at [11]).

55. As for the date, the statute does not fix one. Section 116(3)(b) **ERA** asks whether it is practicable for the employer to comply with an order for re-engagement. That is a question about compliance in the future with an order not yet made. Section 117(4)(a) **ERA** asks whether it was not practicable to comply with the order, which is a question about the past. Neither provision explicitly identifies the date by reference to which its question is to be answered. Section 115(2)(f) **ERA** requires the order to specify the date by which it must be complied with, but that is a term of the order rather than, in terms, the date of any assessment.

56. I said earlier that the correct approach to the date has been discussed in the authorities. I will take them in two groups.

57. The first group concerns the first stage. In **Great Ormond Street Hospital for Children NHS Trust v Patel** UKEAT/0085/07/LA, Underhill J held that in principle the tribunal must assess practicability as at the date that any order would take effect, which in practice, absent any very unusual circumstances, means judging the position as at the hearing date (at [18] and [27(1)]). In **King**, the EAT held that the relevant time for considering re-engagement was the time of the hearing, and not the time of dismissal (at [54] and [57]). In **Rembiszewski**, the EAT applied **King** and **Patel** and held that the decision is to be taken when the tribunal has received all the material to be placed before it, which there meant the date of the last written submission after the hearing (at [39]-[41]). In **Kelly** in the EAT, HHJ Auerbach put the matter in terms of the process: at the section 116 stage the tribunal considers, as at the date of the remedy hearing or final submissions, whether it will be practicable to comply with the proposed order by the future final compliance date to be set in it under section 114(2)(c) or 115(2)(f) **ERA** (at [68]). In **Kelly**

in the Court of Appeal, Lewis LJ held that the exercise involves an assessment, on the facts as at the date of making the order, whether it would be practicable for the employer to comply with it and re-engage the claimant by the time specified in the order (at [56]). In **Sellers**, the EAT said that practicability is a question of fact, to be determined at the date when the tribunal is making the order (at [45]). Each of those decisions concerned the question whether to make an order under section 116 **ERA**.

58. The second group of cases is smaller in number. In **Kelly** in the EAT, HHJ Auerbach held that under section 117 **ERA** the tribunal returns to the matter only if and when the last date for compliance has passed without the order having been complied with. The employer may then seek to satisfy the tribunal under section 117(4) **ERA** that, as things actually turned out, it was not practicable to comply with the order by that date (at [68]). He continued (at [73]), original emphasis:

> **However, even at the second stage, when the Tribunal is considering whether it *was* practicable to reinstate, it should still be remembered that it is applying that test *as at* the same date, namely the last date on which the original Order required the employer to *start* the employee in the new job. The regime does not provide for the employee to be given a trial period. The Tribunal is not, at the second stage, reviewing how things have in fact gone in a job that the employee has in fact started, and been trying out.**

I return to these authorities, and to what the parties make of them, when I come to the first of the two questions arising in the appeal.

59. Two further propositions concern what an employer may rely on. In **Cold Drawn Tubes**, Tucker J held that reinstatement could not be a practicable option where it would result either in a redundancy process or in significant overmanning. It would be contrary to the spirit of the legislation to compel redundancies, and contrary to common sense and to justice to enforce overmanning (at [23]). That conclusion was reached at the second stage, under the predecessor of section 117(4)(a) **ERA**, and in relation to reinstatement. In **Sellers**, the EAT stated the proposition in the context of section 116 **ERA** and as applicable to either form of order, adding that it will always turn on the specific facts of the case (at [45]). Secondly, in **Payne**, Neill LJ held that a tribunal should carefully scrutinise the reasons an employer advances, but should

give due weight to the commercial judgment of management unless witnesses are disbelieved. The standard must not be set too high, and an employer cannot be expected to explore every possible avenue which ingenuity might suggest (at [57]).

60. The second question arising in the appeal, a much more general one, concerns the duty of a tribunal to find facts. In **Peart v Dixons Store Group Retail Ltd** UKEAT/0630/04/MH, the EAT held that, where there are disputed issues of fact relevant to the question before it, a tribunal is charged with resolving them and finding the primary facts (at [24]). It will generally be its duty, faced with the decision whether a particular event occurred, to find as a fact, one way or the other, whether it occurred. If there is evidence both ways it can decide either way, and generally that is precisely what it should do (at [26]). There is no legal bar to a tribunal believing one witness over another (at [28]). The parties are entitled to know why they have won or lost, so a tribunal which has assessed the evidence and rejected a witness's account should say so and give succinct reasons (at [29] and [31]). In **King**, the EAT held that a tribunal is not required to deal with every dispute of fact, but is required to address disputes of fact which are of real importance to its conclusions (at [73]). Where practicability is in issue, it should make careful findings about it (at [56]).

61. The authorities also address when a tribunal may decide an issue by the burden of proof rather than by finding the fact. In **Peart**, the EAT held that there will be rare occasions when the evidence is so finely balanced that the tribunal cannot make up its mind whether the event occurred. In that rare event it should say so, and the burden of proof will decide the issue (at [26], the authority being **Morris v London Iron and Steel Co Ltd** [1987] 2 All ER 496 at 500-501, which the EAT set out at [27]). A tribunal which has relied on the burden of proof in an exceptional case should say that it has done so (at [31]).

62. The same approach is found outside the employment field. In **Brendon International Ltd v Water Plus Ltd** [2024] EWCA Civ 220, Snowden LJ held that the legal burden rests throughout on the party who asserts the matter, so that if the court does not find the allegation

proved on the balance of probabilities that party loses (at [50]). Once all the evidence is in, the court weighs each piece for and against the disputed proposition and decides where the overall balance of probability lies. Only in "*very rare (exceptional) cases*", where the evidence is either so evenly balanced or so unsatisfactory that the court cannot reasonably form a view, does the legal burden come back into play (at [54]).

63. Finally, a few words on the limits of my own role. My jurisdiction on an appeal from the ET is confined to questions of law: section 21(1) of the **Employment Tribunals Act 1996**. **Sellers** describes what follows. Due respect is to be given to the findings of fact made by the tribunal of first instance, to its evaluation of those facts and to the inferences it has drawn from them. An appeal advanced on the ground of perversity faces a high burden. It ought only to succeed where an overwhelming case is made out that the tribunal reached a decision that no reasonable tribunal, on a proper application of the evidence and the law, would have reached (at [58], quoting **Yeboah v Crofton** [2002] IRLR 634 at [93]). A tribunal enjoys a particularly wide discretion when it decides whether to order reinstatement or re-engagement, and few subjects are more obviously the territory of the employment tribunal, as the industrial jury, than practicability (at [59]). I turn next to the submissions I heard.

The parties' submissions

64. As I noted above, the ground on which the appeal proceeds takes its words from the statutory test. The parties each told me what they thought that the ET got right or wrong when applying the test. I take each party's case under the two questions I have identified, beginning with the respondent as the appellant.

For the respondent

65. Mr McHugh's case can be stated shortly. The ET could not decide whether it was practicable to re-engage the claimant into a post without first deciding whether the post existed. It never decided that. He accepted that there is no appeal against the June judgment or the Order, and

that the only question is whether the ET erred in law in the decision under appeal. He took the ET's findings at their highest. The PTAM role had existed and had been advertised at some time before 20 May 2024; it ceased to be advertised between then and 20 June 2024; there was no evidence of what became of it thereafter, beyond Mr Steer's rejected account that it had never existed; and the ET then resorted to the burden of proof.

66. On the first question, Mr McHugh's skeleton argument identified a potential conflict in the authorities. **Sellers**, he said, puts the assessment at the date on which the tribunal makes the order, and **Patel** at the date on which the order would take effect. He noted that **Sellers** was decided after the remedy hearing in this case. He relied on **Rembiszewski** for the proposition that the assessment may fall later still, where relevant material reaches the tribunal at a later date. Orally that became his primary submission: the material bearing on the existence of the PTAM role was placed before the ET on 26 November 2024, and practicability should have been assessed as at that date. In reply he submitted that Mr Clarke had misread **Rembiszewski**, because evidence arriving later can move the date of the assessment.

67. On the second question, Mr McHugh submitted that the ET was bound to decide whether the PTAM role existed at the relevant date, and did not do so. He relied on **Peart** for the duty of a tribunal to find as a fact whether a disputed event occurred. Orally he emphasised the limit for which that case also provides: the burden of proof should decide the issue only where the evidence is genuinely incapable of resolution, and this was not such an exceptional case. He pressed the complaint as one which does not depend on the first question: on any of the candidate dates, the ET simply made no finding at all about whether the role existed after June 2024. The disappearance of the advertisement was, he submitted, powerful evidence that it did not. If it did not exist, compliance would have required the respondent to create a post to accommodate the claimant, and he relied on **Cold Drawn Tubes** for overmanning as a reason why re-engagement would then not be practicable.

68. Mr McHugh's second complaint under that question was about what the ET did not know. It had never seen the advertisement for the PTAM role. It therefore knew nothing of the salary, the duties or the qualifications required. Relying on **Sellers**, he submitted that practicability calls for a real-world assessment, and that none could be made on material as thin as this. Without knowing what the post was, the ET could not know whether it was comparable employment or other suitable employment. On disposal, he asked me to allow the appeal and to remit the question of practicability to the ET.

For the claimant

69. Mr Clarke's submissions had two themes. The first was that the ET asked itself the right question and answered it properly. The second was that the respondent's difficulties were of its own making. He began with the scope of the appeal; that this is not an appeal against the June judgment or the Order. The respondent could have appealed the June judgment or asked the ET to reconsider it, and did neither. Invited to make submissions on the terms of the Order, it made none. It cannot challenge either now.

70. His primary submission went to the second question. Section 117(4)(a) **ERA** placed the burden on the respondent, a burden which differs in kind from the neutral burden applying at the first stage. He relied on **Brendon**: a party which asserts a matter must prove it, and if the assertion is not made out on the balance of probabilities, that party loses. The respondent asserted that compliance was not practicable; to that end, it called a single witness on the issue, and the ET found that witness to be a dishonest one. Once his account was rejected there was nothing left of the respondent's case. The conclusion that it had not discharged the burden was not merely open to the ET but inevitable. It was no part of the ET's function to look for evidence to support a case the respondent had failed to prove. In the absence of credible evidence that the role did not exist, Mr Clarke submitted, no separate finding about its continued existence was called for.

71. Mr Clarke dealt with **Peart** in his oral submissions. In **Peart** the tribunal had repeatedly declined to determine disputed allegations. That is not what happened here. The ET found that

the role had been advertised, that Mr Steer's account was false, and that the claimant's account was to be preferred. He also addressed the finding made in the June judgment. Evidence which goes unchallenged is evidence like any other, and a finding based on it is a factual finding, ordinarily final unless it is reconsidered or set aside on appeal. He accepted that difficult questions might arise about whether such a finding may be revisited at the second stage, but submitted that they do not arise here: the ET looked at the evidence again in November 2024 and reached the same conclusion. There are, in effect, two factual findings to the same effect.

72. Mr Clarke advanced his submission on the first question as an alternative, to be reached only if I found some merit in the appeal. There is, he submitted, no true conflict in the authorities once they are read correctly. **Sellers** speaks of the date on which the order is made, **Patel** of the date on which it takes effect, and **Rembiszewski** of the case where material reaches the tribunal after the hearing has ended. In practice the first two dates will be close together. **Rembiszewski** decides no more than that a tribunal must take account of all the material before it reaches its decision. It leaves untouched the principle that practicability is judged by reference to the date for implementation. On that approach the correct date was the date on which the Order was made, or the date on which it was to take effect; here, that was the compliance date, which is the date the ET took.

73. Finally, insofar as the appeal is put as a challenge to the ET's conclusion on the facts, Mr Clarke submitted that it comes nowhere near the threshold in **Yeboah**. He also asked rhetorically what a remission would achieve. If the respondent were to maintain that the role never existed, that contention has been rejected twice already, and the ET would be in no better position. If it were to advance a different case, it would be having a third attempt to resist re-engagement, which he said raised a question of finality. He asked me to dismiss the appeal and to direct that the case be listed to determine the outstanding matters of remedy.

Discussion and analysis

74. Paragraph numbers in square brackets in this part are those of the decision under appeal, unless I give the name of a case.

75. I should say at the outset what is not in issue. There is no appeal against the June judgment or against the Order; the findings of fact in the decision under appeal are not mine to make again; and my jurisdiction is confined to questions of law. The two questions I have identified arise in sequence, but neither disposes of the other. The second must be answered whatever the answer to the first, because the complaint that no finding was made is advanced independently of the date. I take the date issue first.

The relevant date

76. I start with the words Parliament used. Section 117(4)(a) **ERA** disapplies the additional award where the employer "*satisfies the tribunal that it was not practicable to comply with the order*". Three features of that language say something useful about the date: the question is put in the past tense, so that it looks back; its subject is compliance with the order, so that its content is fixed by what the order required; and the only date which an order for re-engagement must contain is the one fixed under section 115(2)(f) **ERA**, "*the date by which the order must be complied with*".

77. Those features point towards one date rather than another. An award falls to be made under section 117(3) **ERA** where an order has been made but the complainant "*is not reinstated or re-engaged in accordance with the order*". An order is complied with in accordance with its terms if the employee is engaged by the date it specifies, and it is not complied with if he is not. What brings the second stage into being is therefore the passing of the compliance date without compliance. It would be odd if the question which then arose were directed to some other date.

78. The authorities say the same. In **Payne**, Neill LJ held that the final conclusion as to practicability "*is made when the employer finds whether he can comply with the order within the period prescribed for reinstatement or re-engagement*" (at [46]). The period prescribed ends with the compliance date. HHJ Auerbach was more explicit in **Kelly** in the EAT, holding that

even at the second stage the tribunal applies the test as at the same date, namely the last date on which the original order required the employer to start the employee in the new job (at [73]). His reason was that the statutory scheme provides for no trial period, so that the tribunal is not reviewing how things have gone in a job the employee has started.

79. Neither counsel cited either passage to me. I have not thought it necessary to invite further submissions on them, for these reasons. **Payne** is a decision of the Court of Appeal, and the judge applied it in the decision under appeal at [55]. The reasoning of HHJ Auerbach in **Kelly** in the EAT was warmly endorsed in terms by the Court of Appeal in the same litigation, Lewis LJ calling the judgment clear, thorough and impressive and Underhill LJ paying tribute to it (**Kelly** in the Court of Appeal at [26] and [69]); and the Court of Appeal's decision was cited to me. In my judgment, these passages answer the question which both parties asked me to decide, and it is a question of law on which no evidence could have been led.

80. Two of the four candidate dates can be disposed of shortly. On 21 May 2024, when the judge had received all the material placed before her, no order had been made. On 15 July 2024 the Order had just been made, and the time for compliance had not begun to run. Section 117(4)(a) **ERA** asks whether it was not practicable to comply with an order, and neither date can answer that question. Each of them comes from an authority about the first stage. In **Sellers** the EAT said that practicability is to be determined at the date when the tribunal is making the order (at [45]). In **Kelly** in the Court of Appeal, Lewis LJ said that the assessment is made on the facts as at the date of the order, and that what it assesses is whether the employer could comply by the time the order specifies (at [56]). Even that formulation looks forward to the compliance date.

81. That leaves 26 November 2024, the principal date for which Mr McHugh contends. His argument rests on **Rembiszewski**. But it does not bear the weight he places on it. That appeal concerned section 116 **ERA** and the decision whether to make an order. At [38] both counsel agreed that, applying **King** and **Patel**, the relevant date was when re-engagement would take

effect, which in practice means the date of the hearing. At [39] the EAT adopted **Patel** at [27(1)] in terms. The qualification which follows was made for a particular reason: the hearing had been followed by written submissions, and the tribunal had decided the question without considering them (at [40] and [41]). The case therefore decides that a tribunal must take account of all the material placed before it when it decides. It does not decide that the date of the assessment moves to whatever date evidence happens to be led. It also says nothing about section 117(4)(a) **ERA**.

82. There are other reasons for rejecting 26 November 2024. It is contrary to **Kelly** in the EAT at [73]. It would make the answer depend on when a hearing could be listed, so that two employers in the same position on the compliance date would be judged differently according to the state of the hearing list. It would also allow an employer to improve its position by delay, because the longer the interval, the more likely it is that a vacancy will have gone. In **Mabirizi**, Knox J said that two bites of the cherry are allowed (at [11]), but his memorable phrase reminds us that the second bite is of the same cherry.

83. One objection must be met. In **Payne**, Neill LJ held that the determination at the first stage does not confine the employer at the second stage to facts which occurred after the order was made (at [42]), and HHJ Auerbach explained why in **Kelly** in the EAT (at [70]). If the employer may rely on earlier facts, it might be said that the inquiry cannot be tied to a single date. In my judgment, the answer is this: the date fixes the question, not the evidence by which the question is answered. The tribunal asks whether compliance by the compliance date was practicable. In answering it, the tribunal may look at what happened before that date and at what happened after it, insofar as either bears on the answer.

84. The judge directed herself correctly. At [27] she concluded that she had to assess practicability "*as of 1 August 2024 since that is the date specified in the Order for compliance*". That is the right date, reached for the right reason. At [70] she asked herself whether the respondent had satisfied her that it was not practicable to comply with the Order to re-engage the claimant "*on*

1 August 2024", where the Order required compliance by that date. Nothing turns on the difference between the two formulations; the question she asked herself was the same question.

85. The answer to the first question therefore is that practicability fell to be assessed as at the compliance date, 1 August 2024. The ET did not err in law in taking that date. The respondent's appeal fails on the first question.

The burden of proof

86. The complaint under this head has two parts: that the ET could not decide whether compliance was practicable without deciding whether the PTAM role existed at the relevant date, and never decided that; and that the ET had never seen the advertisement, and so had too little material to make the assessment the authorities require. Again I start with the statutory words. Section 117(4)(a) **ERA** does not require a tribunal to make any particular finding; it asks whether the employer has satisfied the tribunal that it was not practicable to comply with the order. The burden is the employer's, and it is a persuasive burden: **Payne** at [46] and **Sellers** at [44]. Where the party which bears such a burden fails to discharge it, the tribunal is not obliged to find the opposite. It is obliged to decide against that party: **Brendon** at [50].

87. That does not dispose of the complaint, because a tribunal also has a duty to find facts. It must resolve the disputed issues of fact which are relevant to the question before it: **Peart** at [24]. It must address disputes of fact which are of real importance to its conclusions: **King** at [73]. Where practicability is in issue, it should make careful findings about it: **King** at [56]. The factual premise of the respondent's complaint is a sound one: the judge found that the PTAM role had been advertised shortly before 20 May 2024 (at [68]) and accepted that it ceased to be advertised at some time between 20 May and 20 June 2024 (at [69]), but she made no finding about what became of it after that. The findings she made as at the compliance date concern the claimant rather than the post (at [17]).

88. **Peart** supplies the limit of that duty in the same paragraph as the duty itself. There will be rare occasions when the evidence is so finely balanced that the tribunal cannot make up its mind,

and in that event it should say so, and the burden of proof will decide the issue (at [26]). **Brendon** is to the same effect: only where the evidence is so evenly balanced or so unsatisfactory that the court cannot reasonably form a view does the legal burden come back into play (at [54]).

89. This case does not fall within that exception. But this is the crucial point: the ET did not treat the case as though it did. The vice considered in **Peart** was a tribunal which repeatedly declined to determine disputed allegations. That is not what happened here, because the judge resolved the dispute which the respondent's case raised. The respondent bore the burden and called one witness, Mr Steer, whose evidence was that the PTAM role had never existed at all. The judge found that he had been dishonest with the tribunal in April 2024, and that he had deliberately concealed the existence of a senior vacancy (at [39]). She rejected the evidence he gave in November for that reason, preferred the claimant's account, and found that the vacancy had been advertised (at [51], [52] and [68]). In **Payne**, Neill LJ said that a tribunal should give due weight to the commercial judgment of management "*unless the witnesses are disbelieved*" (at [57]). That is precisely what happened here: the respondent's only witness was disbelieved. That was the judge assessing the evidence before her, precisely as she was required to do.

90. The question the judge identified at [67] and left open at [68], whether a finding of fact made at the first stage may be replaced at the second by a finding incompatible with it, does not arise. She reached the same finding on a fresh review of the evidence. There is no need for me to express a view on it.

91. The respondent advanced no alternative case. It did not say that the post had existed in May 2024 and had been filled, or withdrawn, or absorbed into another post, by the compliance date. Had it done so, there would have been a dispute to resolve, and the ET would have had to resolve it. Nor does **Cold Drawn Tubes** assist the respondent, because the principle about overmanning is reached only if the post did not exist on the compliance date, and that is the finding the respondent did not obtain from the judge.

92. Mr McHugh submits that the disappearance of the advertisement is powerful evidence that the post did not exist on 1 August 2024. Yes, it was evidence. And the judge considered it. But it did not compel the inference he draws. An advertisement which is taken down may mean that the post has been filled, or that it has been withdrawn, or that recruitment has been paused. The judge found that the respondent had paused and resumed the advertising of the PTSM post more than once, with no evidence of any decision to remove that vacancy or to reinstate it (at [13], [15] and [47]). What weight to give the point was for her.

93. On that material the ET was entitled to decide the issue as it did. The judge said that she had resorted to the burden of proof, and she set out the question she was asking: whether the respondent had satisfied her that it was not practicable to comply with the Order (at [70]). That is the statutory question, with the burden where the statute puts it. A tribunal which has heard and rejected the only evidence offered by the party bearing the burden is not in the position described in **Peart** at [26]. It is in the simpler position described in **Brendon** at [50].

94. It would be a counsel of perfection to require the judge to say in terms what she found, or could not find, about the post as at the compliance date. The losing party was not left trying to work the answer out. The answer is not hard to find in what the judge wrote. The respondent's case was that the post had never existed; the judge did not believe the witness who advanced it; and the burden of proving that compliance was not practicable lay on the respondent throughout. I can detect no error of law in this approach.

95. I turn to the second part of the complaint. The ET never saw the advertisement for the PTAM role, and so did not know the salary, the duties or the qualifications required (at [14] and [30]). That point concerns section 115(1) **ERA** as well as practicability. Insofar as the respondent complains that the post specified in the Order was not employment comparable to that from which the claimant was dismissed, or other suitable employment, it is not open on this appeal. Section 115(1) **ERA** governs the making of an order for re-engagement. The time to take that

point was before the Order was made, or by appealing against the Order, and the respondent did neither.

96. I accept that a tribunal which knows nothing at all about a post may be unable to say that compliance with an order to appoint to it was practicable. But the judge was not in that position: she had the claimant's evidence about what the advertisement said, which she accepted; his evidence that he believed he could do the post; and her finding that he had considerable experience of managing ports assets for the respondent (at [69]). She also had the respondent's failure to challenge any of that in May 2024 (at [48]). The material before her was thin, but this was in part because of the way the respondent conducted the hearing; that did not relieve the respondent of the burden.

97. There remains the question whether this appeal is in truth a challenge to the ET's factual findings, as Mr Clarke maintains. In part it is not: the date at which practicability falls to be assessed is a question of law, and so is the extent of a tribunal's duty to find facts. But in part it is: the complaint that the removal of the advertisement was powerful evidence that the post had gone is of a different kind. It asks me to hold that the judge should have drawn an inference which she declined to draw. That is not a question of law, and it comes nowhere near the perversity threshold in **Yeboah**.

98. The answer to the second question is that the ET was not required, before deciding that the respondent had not satisfied it that compliance was not practicable, to make a positive finding about whether the PTAM role existed on 1 August 2024. Its resort to the burden of proof was open to it. The respondent's appeal fails on the second question as well, and the single ground of appeal therefore fails.

Disposal

99. The appeal is dismissed.

100. The parties know what comes next but I will briefly set it out. The claimant will not be re-engaged. The **ERA** gives him no right to be. What it provides, where an employer does not comply with an order of this kind, is money and nothing else: **Mackenzie** at [20]. The respondent has not satisfied the ET that compliance was not practicable, so it has not brought itself within section 117(4)(a) **ERA**. The ET must therefore make both of the awards for which section 117(3) **ERA** provides: compensation for unfair dismissal under paragraph (a), and an additional award under paragraph (b). What each of them should be is for the ET.

101. I am grateful to Mr McHugh and to Mr Clarke for their helpful submissions.