



Institute of Employment Rights Case Law Update 2026

Unfair dismissal

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Basic principles of unfair dismissal

- **Qualification**

- Two years' continuous employment (s.108 Employment Rights Act 1996 ('ERA 1996'))
- For dismissals after 1 January 2027, 6 months
- An 'employee' – s.230 ERA 1996

- **Dismissal (s.95 ERA 1996)**

- Termination by the employer
- Non-renewal of fixed term contract
- 'Constructive' dismissal

- **Reason for dismissal**

- What was the factor operating on the mind of the dismissing manager?
- Automatic unfair dismissal v 'ordinary' unfair dismissal

- **'Fairness'/reasonableness**

- Within the range of reasonable responses? The 'Burchell' test (from British Home Stores Ltd v Burchell [1978] IRLR 379, EAT/ Iceland Frozen Foods Ltd v Jones [1983] ICR 17, EAT)
- "Substantive" v "procedural" fairness – in reality, the same thing! Useful to think about them separately...

The cases

1. Hewston v Ofsted [2025] EWCA Civ 250, [2025] ICR 1270
2. Chand v EE Limited [2026] EAT 17
3. O'Brien v Cheshire and Wirral Partnership NHS Foundation Trust [2025] EAT 156
4. Zen Internet Ltd v Stobart [2025] EAT 153
5. Pal v Accenture (UK) Limited [2026] EAT 12

**1. Hewston v OFSTED [2025] EWCA Civ 250,
[2025] ICR 1270**

The facts (1)

- Mr Hewston was employed by OFSTED as an inspector
- He briefly touched a pupil's head and shoulder to wipe away rainwater
- School complained about the touching and OFSTED invited him to a disciplinary hearing
- He had 12 years' service – no disciplinary record
- He was dismissed for gross misconduct

The facts (2)

- OFSTED accepted that there was no safeguarding issue
- There was no 'no touch policy' at OFSTED and no policy or guidance on the use of touch
- Physical touch was not listed as an example of gross misconduct by OFSTED
- The school's complaint and the pupil's statement had not been disclosed to Mr Hewston
- The local authority designated officer ('LADO') had recommended to OFSTED that the proportionate response was training/awareness-raising and an investigation. This was not disclosed to the Claimant.
- Employment Tribunal dismissed his claims for unfair and wrongful dismissal

The EAT's decision (1)

- EAT substituted a decision of unfair dismissal; remitted the wrongful dismissal claim
- HHJ Auerbach: employers do not have to identify *“every type of conduct which it regards as gross misconduct, for which an employee might be dismissed for a single instance, such that dismissal for conduct of a type which has not been so identified will necessarily be unfair”* [72]
- Underlying principle of fairness – *“it is not fair to dismiss an employee for conduct which he did not appreciate, and could not reasonably have been expected to appreciate, might attract the sanction of dismissal for a single occurrence.”* [73]
- There are *“some types of conduct, the nature of which is inherently such that any employee ought reasonably to appreciate that it would attract the sanction of dismissal without needing to have it specifically spelled out in advance”* [74]

The EAT's decision (2)

- *“But there are other types of conduct where this is not **inherently obvious**, and in respect of which the stance of different organisations may differ, depending on circumstances peculiar to, for example, their activities or their employees.” [74]*
- No safeguarding issue, there was no no-touch policy, no policy or guidance/training on touch – applying the law to the facts – *“it was not fair to dismiss the claimant when he was **not on fair notice** that this conduct might attract that sanction.” [97]*
- OFSTED tried to argue that it was not the original touching incident which the Claimant could be expected to be dismissed for but because of his subsequent attitude to that conduct [78]
- Re: employee's attitude/'insight'– *“if it would not, in the given case, be open to the employer, within the band of reasonable responses, to dismiss for the substantive conduct, then the absence of such features cannot render that sanction fair” [82]*

The EAT's decision (3)

- Procedural fairness:
 - *“the tribunal should have considered that the failure to provide the claimant with the statement of complaint about him by the school and the written account of the pupil, both of which were seen by the dismissing manager, was liable to render the dismissal unfair.”* [102]
 - not sufficient for the Tribunal to say the Claimant was “aware of the factual matrix” of that complaint [103]
 - Not providing the LADO recommendation to the Claimant was axiomatically unfair. [104]

The Court of Appeal's decision (1)

- CA agreed EAT asked the correct question = was it reasonable for dismissing officer to take view, in absence of disciplinary rules or guidance, that employee's conduct was of a kind which he *should have realised would warrant dismissal for a first offence*
- CA agreed Mr Hewston's conduct did not warrant dismissal, as it was *not inherently obvious* that such conduct would lead to dismissal without explicit guidance. Warby LJ: root cause of unfairness was R's inability to spell out, even before CA, what was said to be wrong with what C had done.
- Re Mr Hewston's "*attitude*" to his conduct, there might be some cases where dismissal might be justified because of subsequent attitude demonstrated risk of further serious misconduct, but this was not one of those cases.
- Underhill LJ: it would be hard to see how it could ever be reasonable to "*bump up*" the seriousness of conduct which was not itself capable of justifying dismissal just because an employee failed to show proper contrition or insight [66]

The Court of Appeal's decision (2)

- On procedural fairness, starting point is that, in any case where employee accused of misconduct against another person, it is obvious good practice to show him that person's complaint unless there is some good reason not to.
- On the facts here, the failure to provide Mr Hewston with the pupil's statement was procedurally unfair because, given the gloss it had received in the school's complaint, the pupil's statement was evidence which might support his argument about the school's ulterior motive.

Takeaways

- CA judgment offers a helpful and authoritative restatement of familiar principles applying to unfair conduct dismissals
- Will prove useful re: the limits of an employer's ability to rely on an employee's response or attitude towards charges, a 'loss of trust and confidence' or reputational harm to "bump up" the seriousness of those charges where the underlying misconduct itself would not be sufficient to justify dismissal
- Useful comments from Underhill LJ on the limits of the range of reasonable responses test and how this does not mean a tribunal can only find unfairness where the employer's decision is perverse [15]
- Reminder that providing an employee accused of misconduct with any statement from their accuser is of fundamental importance to procedural fairness

2. Chand v EE Limited [2026] EAT 17

The facts (1)

- Ms Chand worked as a sales advisor in a high street phone shop
- She had 16 years' unblemished service
- She was under significant emotional stress in 2022 because of heavy caring responsibilities
- The Respondent investigated four sales of phone contracts by Ms Chand in 2022 which had not complied with its procedures, resulting in failed credit checks/duplicate sales/errors re: customer ID policy.
- On one occasion, she had processed two sales consecutively for the same customer using different 'BAN codes' and different postal addresses

The facts (2)

- The Respondent summarily dismissed her for four incidents of gross misconduct amounting to “fraud” (N.B. at Tribunal, the dismissing manager was unable to differentiate between alleged customer fraud and Ms Chand herself committing a fraud)
- That decision was upheld on appeal; the appeal officer said that, if there had been fewer proven allegations, “the length of good service may have made a difference to the outcome”
- Ms Chand accepted that she had been negligent on each occasion

The ET's decision

- In relation to 3 of the 4 incidents, the Tribunal concluded that the employer had been unreasonable in coming to the view that Ms Chand had acted fraudulently. The employer's conclusion that each of these three incidents amounted to 'gross misconduct' was outside the range of reasonable responses
- However, in relation to the 'BAN code' incident, it found that Ms Chand had committed an "*egregious*" breach of policy, but not a fraud – she had been suffering from acute stress
- Conduct in relation to the 'BAN code' was a "*catastrophic error of judgment*" for which a decision to dismiss was within range of reasonable responses
- It therefore concluded that she was fairly dismissed for conduct

The EAT's decision (1)

- A dismissal for conduct will not necessarily be unfair if an employer proves, in fact, that it dismissed for a principal reason and that it acted reasonably in treating a principal reason among a series of reasons as a basis for dismissal (even where it has unreasonably concluded that other incidents had also happened): Robinson v Combat Stress UKEAT/0310/14
- But crucial to decide what, in fact, was the *actual* reason for dismissal. It was not sufficient to deal with what the decision-maker *could have* decided; rather it was necessary to look at what they *did* decide
- In this case, it was clear that there was a composite reason for dismissal: in the mind of the decision-maker, these had not been separate incidents – see e.g. the appeal officer's comments
- The Tribunal did not make a finding that the 'BAN code' incident was in fact the principal reason for dismissal

The EAT's decision (2)

- In Smith v Glasgow City District Council [1987] ICR 796, HL, employer had relied on multiple reasons. Where part of the composite reason was not established on reasonable grounds, dismissal was unfair
- In this case, Ms Chand had been dismissed because the dismissing officer had concluded that *all four* incidents had been fraudulent. This belief had not been held on reasonable grounds. There was no finding that appeal officer had drawn any different conclusion
- As such, the employer did not have reasonable grounds for believing that C had done the conduct for which it dismissed

Takeaways

- Tribunals must not lose sight of what the *actual* reason for dismissal is at the liability stage
- What the employer would or might fairly have done is relevant at the remedy stage (and indeed, this case may be a Pyrrhic victory for Ms Chand given the ET's findings about the fourth incident, which will likely give rise to a 100% Polkey reduction)
- Given its conclusions, the EAT did not need to resolve Ground 2, which was an (ambitious!) assault on the correctness of the Burchell test as approved in Post Office v Foley [2001] 1 All ER 550, seeking a leapfrog appeal to the Supreme Court – watch this space?

3. O'Brien v Cheshire and Wirral Partnership NHS Foundation Trust [2025] EAT 156

The facts

- Ms O'Brien was a Ward Manager at the Trust, was dismissed on 30 March 2021 because, on certain occasions during September – December 2018, she was found to have failed to work her weekly contracted hours and had once claimed overtime for hours she had not worked
- It was first brought to managers' attention that she may have not been on ward in January 2019 but this was not raised with her at the time
- A fact-finding investigation began in January 2019. In late March – September 2019, Ms O'Brien was absent from work following serious health issue requiring operation. She was informed that a formal investigation would be undertaken in October 2019
- She was interviewed over four occasions in 2020, and an investigation report not produced until November 2020, leading to charges and a disciplinary hearing in March 2021. She highlighted throughout the investigation that it was impossible for her to answer specific questions about what had occurred on specific dates 2.5 years later, particularly as she had PTSD, anxiety and depression

The ET's decision

- ET was critical of the Trust for not approaching Ms O'Brien to ask why she had not been on the wards in January 2019, when her memory would have been fresh
- Found first period of delay had led to a *significant* loss of opportunity to speak to the Claimant. It found there were valid explanations for significant periods of subsequent delay e.g. ill health absence and COVID-19
- ET found that the overall delay did not in and of itself render dismissal unfair, although it did note that the initial period of delay was unfortunate. The Trust had followed a reasonably fair procedure
- The unfair dismissal complaint failed but the wrongful dismissal claim succeeded
- Ms O'Brien appealed. On appeal, she argued that the ET decision was perverse having regard to its own findings about failure to carry out informal process after concerns first coming to management's attention and the provisions of the *ACAS Code* on the need to act promptly

The EAT's decision

- In characterising the failure to raise the issues with Ms O'Brien before her lengthy period of absence as "*unfortunate*", the ET did not fairly reflect or engage with the earlier findings that this early delay was "*significant*" and that raising the matter during that period would have given her the chance to respond when her memory was fresh. She did not get the opportunity to address any allegations at a time when she could have recalled the occasions investigated
- The potential implications of those ET findings for the issue of fairness was reinforced by the *ACAS Code*. Whilst ET did find, in context of considering an ACAS uplift for compensation in the wrongful dismissal claim, that the Trust had not 'unreasonably' breached the *Code*, it did not explain how that finding could be reconciled with its findings about the failure to speak to C promptly
- The EAT set aside the ET's decision to dismiss unfair dismissal and remitted matter back to the ET to consider afresh the implications of its earlier findings and the *ACAS Code*.

Takeaways

- Delay in conduct of an investigation *may* of itself render an otherwise fair dismissal unfair, even where there is no prejudice: RSPCA v Cruden [1986] IRLR 83, EAT
- Where delay causes material prejudice to an employee this will create “*additional and independent*” concerns which will go to the procedural fairness of the dismissal: A v B [2003] IRLR 405, EAT

4. Zen Internet Ltd v Stobart [2025] EAT 153

The facts

- Mr Stobart was CEO of Zen Internet Ltd until 31 March 2023 when he was dismissed for alleged performance concerns by chairman and founder, Mr Tang
- Mr Stobart had received positive performance reviews. The ET found it was difficult to see how he was informed of actual concerns regarding his performance. It was not until 24 February 2023 that Mr Tang expressed the view he had lost confidence in C and made an offer for him to swap roles and become chairman
- On 17 March, the board decided to serve Mr Stobart notice of termination. His effective date of termination was brought forward to 31 March 2023

The ET's decision

- The ET concluded C's dismissal was unfair, relying on fact R had failed its own policies and procedures which mirrored the *ACAS Code* – it failed to take steps to formally establish the facts, inform the employee of the problem, arrange a meeting where he could be accompanied and put his case, decide upon the outcome and allow him an appeal. Each step had been bypassed
- However, on the question of Polkey, the ET held that, had a fair process taken place, *“a fair dismissal would have taken place a little over two months following the 17 March 2023 board meeting and certainly by no later than 31 March 2023”*

The EAT's decision (1)

- On appeal, the employer argued the ET had (1) erred in deciding the dismissal was procedurally unfair and (2) erred in deciding that a fair dismissal would have taken place no later than 31 May 2023 (rather than before 1 April 2023).
- On procedural fairness the EAT re-affirmed that there is “no absolute requirement that in every capability case the employee must be given warning of performance concerns and an opportunity for improvement before a dismissal can be fair” [51].
- However, the EAT went on to say such procedural steps are the “normal expectation” and failure to take them will usually result in a finding the employer's actions were outside the range of reasonable responses: [51]-[52]

The EAT's decision (2)

- The EAT acknowledged that there might be circumstances in which an employer could fairly dispense with such requirements: (1) where these steps would be of no benefit to the employee and an unfair burden to the business and (2) where they would be utterly useless and/or *“merely an empty charade”*.
- But it stressed each would be a high hurdle to meet, reflecting the fact that warnings and opportunities to improve serve a useful function and are important elements of fairness [52]

The EAT's decision (3)

- The EAT also noted previous authority that suggested warnings and opportunities to improve may be much less important in cases concerning senior management roles but stressed this was merely guidance and did not constitute a general rule of law
- The EAT ultimately rejected the appeal against the procedurally unfair dismissal finding: the ET had decided the dismissal was unfair because R had failed to follow its own policies and procedures rather than because C had not been warned or given an opportunity to improve – in any event the ET had not said there was a requirement to do this in every case

The EAT's decision (4)

- On Polkey, the novel point the EAT had to grapple with was whether, in predicting what is likely to have occurred if the employer had acted differently and fairly, a Tribunal is limited to looking forward from a particular date (e.g. dismissal)? The EAT said “no” – there is no such limit in the legislation
- In a typical Polkey case, the employer is accused of unfairly failing to take a step which would have prolonged employment (causing a time gap) but there may be other less typical scenarios where the particular unfairness has led to the employee being dismissed later than they would have been had a fair procedure been followed

The EAT's decision (5)

- The correct approach is for the ET to “look at what it was about the dismissal that rendered it unfair...and consider what is likely to have happened had the particular employer acted differently and fairly in the respects identified”.
- In that task, the ET is not limited to considering how the matters may differ from any particular point in time (i.e. might be *earlier*)

Takeaways

- Paragraphs 85-97– a (comprehensive) survey of the Polkey case-law
- At para 106, the question of whether the Tribunal must identify the “minimum fair response” by the employer (similar to the “least burdensome” principle in wrongful dismissal) or which of the options this employer would actually have chosen was left open for another day
- Does leave door open for employer arguing that fair dismissal would have been *quicker* – e.g. in a delay case

5. Pal v Accenture (UK) Limited [2026] EAT 12

The facts

- Ms Pal had worked for a professional services firm since 2009
- The firm operated a progression-based performance model, in which employees were expected to demonstrate continuous progression towards senior positions (“up or elsewhere”)
- In 2018, she informed her employer that she needed urgent surgery for ovarian cysts and was then diagnosed with endometriosis. She had two periods of sickness absence, followed by a phased return to work.
- She was assessed as ‘not progressing’ in performance reviews, and ultimately dismissed.
- She brought an unfair dismissal and discrimination arising from disability claim under section 15 Equality Act 2010

The ET's decision

- The ET upheld the unfair dismissal claim on the basis that the employer had not complied with its Disciplinary and Appeals policy (which covered – albeit awkwardly – capability dismissals), in not conducting the mandated investigation under that policy and because of the prior involvement of dismissing managers in Ms Pal's case
- It went on to find, however, that there should be a 100% Polkey reduction:

“239. However, we are in no doubt that, had the respondent used a policy which properly reflected the otherwise reasonable approach that it took in the dismissal, the claimant would have been dismissed fairly at the same time in any event. We therefore make a reduction of 100% to the compensatory award under the principles in *Polkey*.”

The EAT's decision (1)

On Polkey:

- The ET had to decide what that employer *would or might have done* had it had the opportunity to remedy the defect; not to decide what *it* would have done
- There was no evidence before the ET that the employer would have introduced a new capability policy that mirrored the process it had applied
- Question was instead what *would or might have* happened had the employer complied with the requirements under the Disciplinary and Appeals policy

The EAT's decision (2)

On Polkey:

- Remitted to ET with the following (instructive!) guidance:
 - Would or might the employer have decided to dismiss?
 - If so, what would or might have been the factual reason for dismissal? Capability/some other substantial reason ('**SOSR**')?
 - Would or might that have been for a potentially fair reason?
 - Would or might the employer have acted fairly in dismissing for that reason or principal reason – what would a further investigation have shown?

The EAT's decision (3)

On the progression-based model:

- Dismissal based on a failure to progress to the next level would not amount to a dismissal for capability if employee performing adequately/competently in current role – see s.98(2)(a) ERA 1996 (“work of the kind which he was employed by the employer to do”)
- Might give rise to a SOSR dismissal, providing it is capable of justifying the dismissal of an employee holding the relevant position, as defined in s.235 ERA 1996. Depends on employee's status, nature of their work, terms and conditions of employment

Takeaways

- Importance of evidence (not assumptions) in the Polkey analysis: the burden is on the employer to show what it might or would have done *if the unfairness remedied*
- Likely to have practical consequences for professional services/consulting/legal sector - particularly once the statutory cap on compensation lifted on 1 January 2027

Questions

Thank you

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