

Unfair Dismissal

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Institute of Employment Rights Case Law Updates 2026

Unfair Dismissal

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The Cases

1. *Hewston v OFSTED* [2025] ICR 1270
2. *O'Brien v Cheshire and Wirral Partnership NHS Foundation Trust* [2025] EAT 156
3. *De Bank Haycocks v ADP ROP UK Ltd* [2025] ICR 265
4. *Hendy Group Ltd v Kennedy* [2024] EAT 106
5. *Impact Recruitment Services Ltd v Korpysa* [2025] ICR 1161
6. *Barry v Upper Thames Medical Group* [2025] EAT 146
7. *Zen Internet Ltd v Stobart* [2025] EAT 153

Unfair Dismissal – A Reminder of Basic Principles

- Did the Claimant have two years continuous employment? (s.108 ERA 1996) *NB: will be reduced to 6 months for dismissals from 1 January 2027 following reforms in the ERA 2025.*
- Was the Claimant an employee of the Respondent? (s.230 ERA 1996)
- Was the Claimant dismissed? (s.95 ERA 1996)
- If so, what was the reason for dismissal and was it a potentially fair one? (s.98(2) ERA 1996)
- Did the decision to dismiss fall within the range of reasonable responses?
- Did the Respondent apply fair and proper procedures?

Case 1

***Hewston v OFSTED* [2025] ICR 1270**

The Facts

- The Claimant was employed by Ofsted as an inspector.
- The Claimant briefly touched a pupil's head & shoulder to wipe away rain.
- School complained about the touching and Ofsted invited him to a disciplinary hearing.
- Employer accepted there was no safeguarding risks.
- Claimant had 12-years service – no disciplinary record.

The Facts

- Employer provided no training on inappropriate touch – no disciplinary rules in place defining this.
- Physical touch was not listed as an example of gross-misconduct by the employer.
- Claimant was summarily dismissed for gross-misconduct – failed to exercise good inspection judgment.
- School's complaint and pupils statement not disclosed to Claimant.
- Local authority designated officer (LADO) recommended to employer that the proportionate response was to hold internal investigation and consideration to raising awareness of professional boundaries and any training needed to support this. That recommendation was not disclosed to the Claimant.
- Claimant brought proceedings for unfair and wrongful dismissal. Claims dismissed.

The EAT's Decision (1)

- EAT substituted 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”* – not possible to cover every circumstance. [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] – KEY POINT*
- 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]*
- Employer 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]
- With respect to an employee's attitude following the conduct – *“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 issues:
 - *“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 = axiomatically unfair. [104]

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 Claimant'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 *attitude to 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]. KEY POINT.

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 facts here, the failure to provide Claimant 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.
- On disposal: CA concluded that, given the EAT's conclusions, it had been bound to find that the dismissal was unfair. It had not erred in law in making that finding itself.

Reflections...

- CA judgment offers a helpful and authoritative restatement of familiar principles applying to unfair conduct dismissals.
- Will prove useful to Claimant lawyers in demonstrating 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 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], an approach since re-affirmed by HHJ Tayler in **Lamb v TEVA UK Ltd [2026] EAT 8**.
- Judgment confirms that providing an employee accused of misconduct with any statement from their accuser is of fundamental importance to procedural fairness.

Case 2

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

The Facts

- C was ward manager, dismissed on 30 March 2021 following a disciplinary procedure.
- ET found reason for dismissal was C was found, on certain occasions during September – December 2018, to have failed to work her weekly contracted hours and had once claimed overtime for hours she had not worked.
- First brought to managers attention C may have not been on ward in January 2019 but this was not raised with C at the time.
- A fact-finding investigation began in January 2019. In late March – September 2019 Claimant was absent from work following serious health issue requiring operation. Informed formal investigation would be undertaken in October 2019.
- C interviewed over four occasions in 2020, and investigation report not produced until November 2020, leading to charges and a disciplinary hearing in March 2021. C highlighted throughout 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 Decision

- ET raised some concerns about the process: critical of R for not approaching C to ask why she had not been on the wards in January, when her memory would have been fresh.
- Found first period (between January – end of March 2031 when C's absence for ill health commenced) had not been fully explained and led to a *significant* loss of opportunity to speak to the Claimant. ET found there were valid explanations for significant periods of subsequent delay e.g. C's ill health absence and COVID.
- 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. R had followed a reasonably fair procedure. The unfair dismissal complaint failed but the wrongful dismissal claim succeeded.
- On appeal, C argued 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

- HHJ Auerbach found that describing the failure to raise the issues with C before her lengthy period of absence as “unfortunate” did not fairly reflect or engage with the ET’s own earlier findings that this early delay was “significant” and that raising the matter during that period would have given C the chance to respond when her memory was fresh. *C did not get the opportunity to address any allegations at a time when she could have recalled the reasons for her attendance at the particular time being 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 any ACAS uplift for compensation in the wrongful dismissal claim, that R had not unreasonably failed to comply with the Code - did not explain how that finding could be reconciled with its findings about the failure to speak to C promptly.
- EAT quashed decision to dismiss unfair dismissal and remitted matter back to the ET to consider afresh implications of earlier findings and the ACAS Code.

Reflections...

- Judgment reminder that significant delays to disciplinary processes may be capable of rendering dismissals unfair, particularly where they cause material unfairness, and each part of a significant delay should be considered.
- Should be remembered that in certain circumstances, delay in the conduct of an investigation *may*, of itself, render an otherwise fair dismissal unfair: ***RSPCA v Cruden*** [1986] IRLR 83.
- However, in any case in which delay is being considered, relevant for ET to consider extent to which employee might be prejudiced – that will provide additional concerns about process to support any challenge to fairness (see ***A v B*** [2003] IRLR 411 at [68]).
- One to watch in 2026: ***Pasha v Home Office*** EA-2023-001064 (on the proper treatment of delay when considering the question of fairness) – heard in December 2025, judgment awaited.

Case 3

De Bank Haycocks v ADP ROP UK Ltd [2025] ICR 265

The Facts

- Small, non-unionised company made redundancies using redundancy section criteria matrix.
- C received lowest score and informed at risk and dismissed following series of meetings.
- No *collective* consultation because statutory collective consultation did not apply
- C later discovered during internal appeal what his scores were and that scoring was completed before consultation had begun. He argued he had not been given opportunity to challenge his scores. His appeal was unsuccessful.
- ET dismissed employees claim, finding redundancy process fair. It found C had not been able to demonstrate he should have scored higher and that the appeal process was carried out conscientiously.

The EAT's Decision

- On appeal, C argued ET had erred in not dealing with his contention that the redundancy process was flawed because he was not informed of his scores until the appeal, thereby vitiating consultation.
- EAT held that to ensure opportunity for consultation on common issues was given in case of smaller scale redundancies in non-unionised workplace, *it should be treated as a requirement of good industrial relations practice that employers should, in such cases, conduct general workplace consultation.*
- A rebuttal presumption a dismissal would be unfair where there had been no such *general workplace consultation*. EAT found there had been no such consultation at a formative stage and therefore allowed the appeal and made a finding of unfair dismissal.

The CA's Decision

- Question for CA – whether EAT was correct that general workforce consultation should be standard practice, in cases of smaller-scale redundancies where the statutory collective consultation provisions do not apply.
- CA re-examined **Williams v Compare Maxam** [1982] ICR 156 and other established cases, emphasising that consultation should occur when proposals at a formative stage – thus allowing employees to influence decisions. It is good practice for employees to be given , in course of individual consultation, the opportunity to express views on common issues or, where appropriate., to be invited to group meetings to express their views. However, the adequacy of such consultation should be considered *on a case-by-case basis*.
- However, CA disagreed there was a requirement or presumption of *general workforce consultation*. It was not for the EAT to fill what it may have perceived to be a gap created by the fact the statutory requirements do not apply to small scale redundancies.

The CA's Decision

- On C's argument that dismissal had been effectively decided when the scoring had been done, whilst that had not been expressly deal with by the ET, the EJ had made findings that the appeal process had involved a conscientious investigation of C's complaints and, by necessary inference, had found they had been reasonably rejected on appeal (a finding C had not challenged).
- The ET's failure to expressly deal with the issue of the timing of the scoring exercise did not amount to a material error of law.
- The decision of the EAT was thus reversed.

Case 4

***Hendy Group Ltd v Kennedy* [2024] EAT 106**

The Facts

- C employed as a trainer within R training academy. Dismissal in 2020, largely brought about by the COVID-19 pandemic.
- Did not contest genuine redundancy situation or his selection but argued R had failed to give fair consideration to possibility of working alternative role.
- Whilst C applied for several roles, received no proactive assistance from HR and applications not progressed.
- ET found R did not take reasonable steps to avoid dismissal by exploring redeployment to alternative roles.
- ET also declined to make a Polkey reduction because the reason C did not obtain another job was because of R's failure i.e. blocking his applications.

The EAT's Decision

- On appeal the employer argued ET had not properly applied the range of reasonable responses test.
- HHJ Tucker reiterated the EJ's findings which included (i) C was simply told he could apply or jobs on the company's website (2) HR communicated with him via an email to which he did not have access and (3) there was no evidence of other steps a reasonable employer might have taken e.g. speaking to employees about where their interests might lie, assisting with identifying other roles, encouraging conversations.
- Given Judge had found, as a fact, that nothing was done by R in respect of consideration of alternative employment, it was open to him to find that this was an approach which no reasonable employer would have adopted.
- The EJ had not substituted his own decision for that of the employer. *"The duty on the employer to consider whether C could be offered alternative employment had to be considered within the size and administrative resources of the employer"* [36]. The EAT noted this was a large organization with relatively large resources and there were, on paper, a number of roles C might be considered suitable for.

Case 5

***Impact Recruitment Services v Korpysa* [2025] ICR 1161**

The Facts

- C employed by R agency and worked as a Howdens warehouse operative.
- C and most other agency staff “laid off” by Howdens following COVID lockdown in March 2020.
- Confusion in C’s mind about her employment status, exacerbated by language issues. C allegedly requested her P45 and holiday pay, having indicated she was started a new job. C said she had only requested her contract to check her notice.
- ET found conflicting accounts regarding whether C had another job offer at time but found C did not in fact resign but was dismissed when she received her P45. Although dismissal based on mistaken belief that C had resigned, that was not deemed by ET to be a *potentially fair reason* for dismissal under s.98(1).

The EAT's Decision

- On appeal, the employer relied on previous case law to claim an erroneous but genuine belief in a state of affairs (which, had it in fact existed, would have been a fair reason for dismissal), could itself be a substantial reason for dismissal falling within section 98(1)(b). By logical extension, it was argued that principle should be applied to a genuine but mistaken belief that an employee had resigned.
- The EAT (HHJ Auerbach presiding) found the ET had been correct to proceed on basis the factual reason for dismissal was the employer's genuine but mistaken belief C had resigned. It further found the employer was correct that in this type of case, that *mistaken belief was capable of being treated as SOSR within s.98(1)(b)* [35]. The ET had erred because it assumed such a belief could not qualify as SOSR.
- The EAT stopped short of concluding that such a factual reason must always be regarded as a substantial reason, in every case. HHJ Auerbach did, observe (obiter) that such a belief *"ought to be regarded as qualifying, unless the ET considers the belief was truly capricious, or lacking any possible rational basis, or something of that sort"*.

Reflections...

- The remarks in this decision create quite a powerful presumption in favour of genuine mistaken beliefs in resignations amounting to SSOR, a potentially fair reason for dismissal.
- Judgment does not consider the potentially difficult issue of *what, if any, procedural process ought to be followed in a dismissal based on such a genuine but mistaken belief*? Although HHJ Auerbach did observe that he did not think it could be right that a mistaken belief in resignation dismissal could never be found to be unfair on procedural grounds. Rather, in every case, the ET should consider what s.98(4) required.
- Ought there to be some consultation with the employer, in cases of ambiguity, in order to allow the parties' the opportunity to resolve any confusion? Ought there to be some investigation of the belief to ensure it was a reasonable one?
- Ultimately, the EAT remitted the ultimately question of fairness on the facts back to a different ET.

Case 6

***Barry v Upper Thames Medical Group* [2025] EAT 146**

The Facts

- C was GP working for R's GP partnership. Diagnosed with an autoimmune disorder, leading to lengthy periods of absence and disputes over her treatment.
- Issue arose regarding her entitlement to sick pay, which had been stopped by the R on 28 August 2020, after approx. 17 months of C receiving it.
- C union rep negotiated on sick pay and by 16 February 2021 the practice manager had indicated C was in fact owed £9,000, although this was never paid.
- C resigned on 6 April 2021, following a letter from R on 26 March 2021 confirming no sick pay would be paid.
- Key issue: *had C affirmed her contract* by delaying resignation despite R's repudiatory breach in failing to pay sick pay?

The ET's Decision

- ET found there had been a breach of an express term of the contract re failure to pay contractual sick pay.
- *However*, ET found C had affirmed her contract, relying on her delay in resigning and her readiness to work.
- ET pointed to (1) C's long delay in resigning between Sep 2020, when C first knew she was not being paid more sick pay, and April 2021 (2) the fact C was assisted by her union during this period and (3) the fact that, on C's own evidence, she was ready and wanted to return to work from December 2020. ET concluded this conduct suggested C was not treating her contract with the R as being at an end.
- On appeal, C challenged these findings on affirmation.

The EAT's Decision

- HHJ James Tayler provides useful review of main authorities on affirmation including **WE Cox Toner v Crook** [1981] ICR 823 and **Leaney v Loughborough University** [2023] EAT 155.
- The EAT re-affirmed that this case law confirmed that *mere delay* will not constitute affirmation unless accompanied by conduct consistent with the contract's continuation: affirmation requires communication, either by word or deed.
- In this case the EAT concluded that the ET went “*significantly awry in its consideration of affirmation*”. In the context of this case, the Claimant's illness and ongoing negotiations over sick pay were said to be crucial. More factors pointed against affirmation and the factors ET considered established affirmation were much more limited.

The EAT's Decision

- The ET had failed to take into account its earlier and highly relevant finding that in the period until 26 March 2021 there were *ongoing discussions* between the parties in which C was seeking to persuade R to pay contractual sick pay and C had been informed as late as Feb that she was owed £9,000 in sick pay [25].
- The ET had also found that C was assisted by her union representative but that ought to have been a factor that went against affirmation; the union rep was *seeking to assert C's contractual right to sick pay* [26].
- The ET's finding C was ready and willing to return to work in December went against the ET's earlier finding that she was not prepared to return unless she was paid the sick pay to which she was contractually entitled.
- Because there was only one possible answer to the affirmation question, the decision of the ET was substituted with a finding of unfair dismissal, and the matter was remitted to the same ET to determine the question of remedy.

Reflections...

- Useful decision in re-iterating that delay is not enough to make out affirmation.
- Decision can be used to demonstrate that ongoing negotiations, particularly those involving trade union representatives, militate against findings of affirmation because they support the argument that C was expecting R to continue to perform the contract.
- In practice, it is always important for employees to who take time to negotiate to make it clear they are reserving their rights / continuing to assert that there has been non-compliance with the contractual obligations relied upon.

Case 7

***Zen Internet Ltd v Stobart* [2025] EAT 153**

The Facts

- C was CEO of R company from October 2018 – March 2023 when he was dismissed for alleged performance concerns by chairman and founder, Mr Tang.
- C had received positive performance reviews. ET found it was difficult to see how C was informed of actual concerns regarding his performance. Not until 24 February 2023 that Mr Tang expressed view he had lost confidence in C and made an offer for him to swap roles and become chairman.
- On 17 March a board meeting decided to serve notice of termination. The 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 – in particular 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

- 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.
- The EAT considered that the following circumstances *might* cause an employer to fairly dispense with such requirements: (1) where these steps would be of no benefit and an unfair burden to the business (2) where they would be utterly useless and (3) where they would be merely an empty charade. But 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

- 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; it considered 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 imposed any absolute procedural requirement to give such a warning / opportunity in every case.

The EAT's Decision

- On ***Polkey***, the interesting 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)? HHJ Tayler concluded there was no such fetter; there was *no restriction in time periods discernible from the statute* (considering section 123 ERA).
- 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 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 – although practically the focus is often likely to be on period after the original concern came to light.

The EAT's Decision

- Held: the ET appeared to have confined its consideration to what would have occurred after 17 March (the date when C was given notice of termination), excluding earlier matters and discussions taken place on 24 February 2023.
- The ET had provided inadequate reasons in support of its Polkey finding that dismissal would have taken place no later than 31 May 2023 and so the appeal on the Polkey finding (alone) was allowed and the issue remitted to the same ET.

ANY QUESTIONS?

Thank you

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