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Unfair dismissal: When does future loss end?

By Stephen Wyeth

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Following his talk on Remedies in Complex Cases at 3PB's well-attended Employment Law Conference on 16 October 2025 Stephen Wyeth reviews the 'hot off the press' EAT decision of Davidson v National Express Ltd [2025] EAT 151, the latest appellate decision dealing with how tribunals should evaluate future loss in unfair dismissal cases.

The facts

1. Ms Davidson was employed by National Express Ltd as a PCV coach driver at Stansted Airport from January 2016. On 26 June 2021, she failed three consecutive alcohol breath tests upon reporting for duty, registering 13mg, 10mg, and 8mg per 100ml respectively. The company's Drugs and Alcohol (D&A) policy deemed any reading of 8mg or above as unacceptable. Following an investigation and disciplinary hearing, Ms Davidson was summarily dismissed. Her internal appeal against dismissal was unsuccessful.

2. Ms Davidson brought claims for unfair and wrongful dismissal in the London East Employment Tribunal. The tribunal (EJ Illing sitting alone) found the dismissal to be unfair solely due to procedural flaws in relation to the appeal. The tribunal concluded that the appeal manager failed to properly consider Ms Davidson's grounds of appeal. It did, however, find that the dismissal itself was substantively fair, given the failed alcohol tests and inconsistencies in Ms Davidson's explanations. Indeed, the tribunal determined on the balance of probabilities that the claimant failed the breath tests because she had consumed alcohol (despite the claimant denying this) and, consequently, the wrongful dismissal claim was dismissed.

3. In assessing remedy, the tribunal applied a 75 per cent *Polkey* reduction, reflecting the tribunal's view that there was a high likelihood the dismissal would have occurred had the appeal been fair. A 75 per cent reduction was applied by the tribunal for contributory conduct, due to Ms Davidson's role in the events leading to her dismissal. In recognition

of the employer’s failure to conduct a fair appeal a 10 per cent uplift was also applied by the tribunal under the ACAS Code of Practice.

4. The tribunal limited the compensatory award for future loss to Ms Davidson’s 65th birthday, despite her evidence that she intended to work until she reached the age of 70 due to financial necessity.

The appeal

5. Ms Davidson appealed on several grounds, namely that: a) the tribunal’s reasoning that the dismissal was substantively fair was insufficient (*Meek* challenges); b) the *Polkey* and contributory conduct reductions were inadequately reasoned (albeit that this aspect relied upon the same challenges advanced in relation to (a)); and c) that the limitation of future loss to age 65 lacked a principled basis.

The approach of the EAT

6. The EAT, presided over by HHJ Auerbach, dismissed all *Meek* challenges. The tribunal had adequately explained its findings, including its acceptance of evidence that Ms Davidson admitted to drinking alcohol and that the employer’s D&A policy was reasonable given the safety-critical nature of the role. The EAT did, however, uphold the appeal on the issue of future loss. It found that the tribunal had failed to properly assess the loss sustained by Ms Davidson as a result of the dismissal, as required by section 123(1) of the Employment Rights Act 1996 (“ERA”).

7. Section 123(1) ERA provides that the compensatory award for unfair dismissal “*…shall be such amount as the tribunal considers just and equitable in all the circumstances* ***having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*** *[emphasis added].*” It is therefore not sufficient for a tribunal merely to refer to what it considers just and equitable (as the Judge did in this case). It has to have regard to the loss sustained “in consequence of the dismissal”; and so it needs to evaluate that loss, as best it can.

8. The EAT held that the tribunal had not adequately engaged with Ms Davidson’s evidence that she intended to work until age 70, nor had it properly evaluated the likelihood of that intention being realised. HHJ Auerbach made reference to two particular previous EAT authorities dealing with remedy: *Software 2000 Limited v Andrews* [2007] ICR 825 and *Contract Bottling Ltd v Cave* [2015] ICR 146. Although *Andrews* was about the approach to be taken in a *Polkey* assessment, he drew a correlation with the circumstances in this

case because similar inherent uncertainty applies when predicting what will happen in the future. Drawing on the observations of Elias P (as he then was) in *Andrews*, as with *Polkey*, so with future loss, in deciding what are matters of "impression and judgment" the tribunal must "*have regard to any material and evidence which might assist it in fixing just compensation*". That is so, even if there are limits to the extent to which it can confidently predict, in relation to *Polkey*, what might have been, or, in relation to future loss, what will happen in the future. In both exercises "*[t]he mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence*".

9. Likewise, HHJ Auerbach quoted Langstaff P (as he then was) at paragraph 18 in *Cave* (which specifically dealt with future loss): "*As I have indicated, the position in most cases will necessarily involve a number of imponderables. They will vary heavily from case to case and from employee to employee. But the fact that many matters are imponderable does not mean to say that a Tribunal should not grapple with them insofar as it can.*"

10. The EAT emphasised that while tribunals must exercise judgment in the face of uncertainty, they are still required to grapple with the evidence and make a reasoned assessment. The tribunal's reliance on the absence of evidence about future pay increases and the length of the award period was not a sufficient basis to limit compensation to age 65.

11. In relation to the specifics of this case, the key issue for the tribunal was how long Ms Davidson might go on working. The tribunal had to do the best that it could to come to some fair assessment of that question, having regard to such evidence as it had that might cast some light on it, and applying its industrial common sense.

12. When addressing the claimant's evidence that she intended to go on working to age 70, because she considered that her financial and personal circumstances necessitated that, the tribunal needed to evaluate that evidence as part of its overall consideration of this issue. Even if it accepted that this was her current intention, the tribunal needed to consider whether that might change in the future; and whether her intentions might be thwarted at some point by other contingencies of life, such as declining or ill health, or other circumstances beyond her control (see paragraph 58).

13. The EAT remitted the case to the same tribunal judge for a fresh assessment of the compensatory award, including both past and future loss, with updated evidence. The findings on liability, *Polkey*, contributory conduct, and the ACAS uplift remain undisturbed.

Practitioners – take note

14. As I emphasised in my talk on remedies last month, all too often, practitioners as well as parties take their 'eye off the ball' when it comes to matters of remedy and are completely distracted by liability merits. The 'one year' cap on damages in unfair dismissal cases is in relation to *quantum* and not *time*. In theory, notwithstanding the substantial reductions for *Polkey* and contributory conduct, although very unlikely in this case, Ms Davidson's losses might have continued long enough to reach the limit of the equivalent amount of one year's gross earnings (the statutory cap), particularly if she was not so close to her intended retirement age, and she could show that her losses would continue for several years.

15. Whether acting for a claimant or respondent, thought needs to be given to the kind of evidence that can be advanced at a tribunal to maximise or limit the award. If a claimant is saying that they cannot retire until a certain age for financial reasons then they should produce documentary evidence to support that contention where possible. Likewise a respondent will want to seek disclosure of relevant evidence to rebut an assertion of this kind, such as bank statements of both current and savings accounts, evidence of rent or mortgage liability (or an absence of this) and pension information. Failing that, the matter becomes one of speculation rendering the likely award to be anyone's guess.

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