

Culpable conduct and the extent it can be relied upon in respect of contributory fault reductions and orders for reinstatement

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[DHL Services Ltd v Pawal Ignatowicz \[2026\] EAT 74](#)

Overview / Executive Summary

For those short of time I summarise a few key takeaways of note:

- 1) The ET judgment on liability (which was not successfully appealed) acts first as a **salutary reminder of the importance of ensuring that social media guidelines are properly communicated and impressed upon staff**; second is ensuring that proper consideration and investigation as to reputational impact is given to all posts / areas of concern at the time of dismissal;
- 2) The EAT decision provides a useful summary of the law on contributory fault reductions and the distinction between its application in the context of a basic award as compared to a compensatory award – the former requiring a ‘temporal’ link, whereas the latter requiring a ‘casual’ link. **This means that culpable conduct of a claimant occurring between a dismissal decision and an appeal decision can in principal be taken account of as part of a compensatory reduction (i.e. if causative / influenced appeal decision) but not as part of a basic award reduction.**
- 3) The EAT decision quotes extensively from Mrs Justice Eady’s guidance in **British Council v Sellers [2025] EAT 1** in respect of reinstatement principles and found the ET had **erred by failing to consider the claimant’s conduct during litigation** in addressing the question as to whether reinstatement was practicable. The ET had **further erred by having substituted their view** as to whether reinstatement was practicable rather than whether the respondent genuinely and rationally believed it could no longer have confidence in the claimant.

- 4) **A clear lesson not to gratuitously gloat following a win in the ET** - As part of remission HHJ Tayler emphasises that the ET will need to consider the issue of reinstatement **as at the date of the remitted ET hearing**. This means that the claimant's further posts on social media and emails to the EAT subsequent to his winning his ET claim (including **reference to the dismissing managers as 'satanic bitches' and that they should be 'on their knees and get several slaps in the face with a stick'**) would need to be considered in whether the Respondent 'genuinely and rationally believes' it can no longer have confidence in the claimant such that reinstatement is not practicable.

The Background Facts

The Claimant ('C') had worked for several years for R as a warehouse operative. He applied for an administrative role with R, was not successful and raised a grievance about the recruitment process. C then went on to post his grievance on Facebook, adding some comments at the end which included a rant about capitalism in reference to '*job capitalism*' and the comment that '*capitalist dictatorship is evil and it has to be destroyed*'. This was on, and is referred to as the 6th June post.

C was ultimately dismissed for the 6th June post, however there were further posts by C on Facebook (which R maintained were not part of the reason for dismissal) as follows:

- 9th June – C referred to "*paranormal occurrences*". The claimant referred to the recruitment process: '*Both meetings were run by manager who has got all most similar surname in comparison to Chmielnicki*' and '*...I hope that those are the signs that confirm that very soon all my enemies will be destroyed. God could you make sure that my enemies are destroyed as soon as possible please?*' The ET noted Chmielnicki is a controversial historical figure in Polish history as he was responsible for a massacre of Jewish and Polish people and that Ms Chmielewska (who rejected the claimant for the role he applied for) was told by colleagues about the post and the significance of the historical figure and was upset by this.
- 15th July – C referred to email scammers and the claimant stabbing his "*voodoo doll*". The post concluded with, '*So my message to those who are sending those scam emails and all of my other enemies is: Congratulations you just digged the graves for you own children*'. The ET held of this post that C was expressing his frustration about cyber criminals / scammers which he had been a victim of and had nothing to do with his employment. The

EAT observed that the ET did not appear to analyse the wording that the message was for those who were sending scam emails “*and all of my other enemies*” in the context that the claimant’s previous messages potentially suggested that he considered some staff of the respondent as his enemies.

- There were then 3 further posts in August by C following his disciplinary hearing and dismissal on 31st July 2023. It appears at least the first was prior to (and the Appeal chair was aware of) at the time of the Appeal hearing on 14th August 2023. That post was:

‘Also, if Hearing Manager Jurgia Lebedevaite is doing such crucial mistakes, there is suspicion, that the decision has been made by person either incompetent or with not fully good mental health.’

C brought various claims but the only one of relevance and which he succeeded with before the ET was in respect of unfair dismissal. The ET did however find C had contributed to his dismissal by 10% by posting his grievance online. The ET ordered re-instatement.

The ET’s Decision

The ET held C was unfairly dismissed and gave the following rationale:

‘101.2 Based on the evidence before it, the tribunal concluded that the claimant had not been sent the relevant email and internet usage policy or a link to it.

101.3 The claimant had not been trained on the social media guidelines, it was assumed he knew what the policy was which was not a reasonable position to take in the circumstances.

101.4 The respondent did not follow the policy and ask the claimant to remove the Facebook post of 6 June 2023. He was not asked to do this at any stage. There was a delay between the discovery of the post and the invitation to the investigation hearing during which he was not asked to remove the post.

101.5 Breach of the social media is not given as an example of gross misconduct in the disciplinary policy.

101.6 The claimant was not suspended and there was no evidence that this was considered.

101.7 The respondent did not investigate the example of different treatment highlighted by the claimant in his appeal. The tribunal considered the respondent’s submissions on this point and noted the similarities between the example given by the claimant and his circumstances and

that the example mitigated dismissal to a final written warning.

101.8 There does not appear to have been a proper consideration of the mitigation put forward by the claimant.

101.9 The respondent appears to have ignored that the claimant did remove the 6 June 2023 post when he became aware it might breach the email and internet usage policy at the investigation stage.

101.10 There is no evidence that the respondent considered a lesser sanction than summary dismissal despite the claimant having a clean disciplinary record and a reasonable period of service.

101.11 There could be no reasonable belief that 15 July 2023 post was anything to do with the respondent which could reasonably have supported the decision to dismiss.

101.12 There was little evidence of detrimental impact on the respondent caused by the post. The most that could be said was that it caused disquiet and gossip amongst colleagues in the warehouse.

101.13 There was no evidence that the post had attracted the attention of the wider public. Three people commented on the post and six people liked it.

101.14 The information posted did not disclose any information which could reasonably be considered to be particularly sensitive or confidential.

Grounds of Appeal

- R submitted that the ET's conclusion in respect of contributory fault being limited to 10% was perverse because the ET limited its analysis to the fact of posting the content of the grievance online. In doing so the ET failed to take account of the severity of the additional language in the post which was not included in the grievance ('capitalists' dictatorship is evil and it has to be destroyed') and the later social media posts, which were relevant by the appeal stage at the latest;
- R also submitted that the ET erred in its consideration of reinstatement by failing to consider the claimant's conduct during the litigation, and substituting its own view on whether there should be a breakdown in trust and confidence when considering practicability

The EAT's Decision / Rationale on contributory fault

In respect of contributory fault, having usefully summarised the law (see Paras 37 to 43) HHJ Tayler drew a distinction between contributory fault reductions in the basic award under s.122(2) ERA and those in the compensatory award under s.123(6) ERA. **The distinction being that the link between conduct and dismissal under s.122(2) is temporal, whereas the link between conduct and dismissal for the purposes of a reduction under s.123(6) is causal.** This distinction was important as it determined the conduct of C which could or could not be taken into account in respect of a reduction for contributory fault in either the basic / compensatory awards. HHJ Tayler therefore upheld the appeal and remitted the matter to the ET to consider their assessment in respect of the % contributory fault reduction as follows:

'52. For the purpose of assessing any reduction of the basic award pursuant to section 122(2) ERA, the Employment Tribunal should have analysed whether the claimant was guilty of any culpable or blameworthy conduct in respect of the 6 June post, the 9 June post and/or the 15 July posts, all of which predated the dismissal on 31 July 2023, such that it would be just and equitable to reduce the amount of the basic award. It is not necessary that the posts were taken into account as part of the reason for dismissal.

53. For the purpose of any reduction in the compensatory award, pursuant to section 123(6) ERA, the Employment Tribunal should have analysed the extent to which some or all of the 6 June post, the 9 June post, the 15 July post and any of the August posts caused or contributed to the dismissal by being taken into account at the disciplinary or appeal hearing and, if so, decreased the compensatory award by such proportion as it considered just and equitable having regard to that finding.'

HHJ Tayler also seems to suggest / remind us (and the ET) that even if culpable conduct post dismissal is not causative of the appeal decision (such that an ET must reduce the compensatory award by a J&E proportion) that such culpable conduct can still be relied upon to reduce a compensatory award by virtue of section 123(1) ERA under the broader discretion the ET has to make an award that is 'just and equitable'.

The EAT's Decision / Rationale on Reinstatement

In respect of re-instatement HHJ Tayler highlighted the 3 factors set out by s.116 ERA, that the ET was required to take into account in considering reinstatement, namely (1) the claimant's wish

to be reinstated, (2) whether it is practicable for the employer to comply with an order for reinstatement and (3) whether it would be just to order reinstatement if the claimant caused or contributed to some extent to the dismissal.

HHJ Tayler then went on to quote extensively from Mrs Justice Eady's guidance in **British Council v Sellers [2025] EAT 1** in respect of reinstatement principles. HHJ Tayler then upheld the appeal and again remitted this issue to the ET as follows:

'61. I consider that the Employment Tribunal erred in law in failing to consider whether the claimant's conduct during litigation was such that the respondent genuinely and rationally believed that it could no longer have confidence in him. All the Employment Tribunal said was that it was not assisted by consideration of the claimant's conduct in the litigation. For instance, the claimant had likened the actions of the respondent's staff to that of the Nazis. The claimant's conduct in the litigation had to be assessed in considering the practicability of reinstatement as of the date of the hearing.

62. The Employment Tribunal used language much of which demonstrates that the members of the Employment Tribunal considered whether they thought that reinstatement was practicable, rather than whether the respondent genuinely and rationally believed it could no longer have confidence in the claimant. It was incumbent on the Employment Tribunal to consider how the staff of the respondent had been affected by the 6 June post, the 9 June post, the 15 July post, the August posts and the claimant's conduct in the litigation.

63. The remission of the assessment of contribution means that any change in the level of contributory conduct found will have to be taken into account when deciding whether to order reinstatement. I note that, at paragraph 104, the Employment Tribunal incorrectly considered whether the contributory conduct was such that it prevents reinstatement being practicable. That is not the correct test. The Employment Tribunal was required to consider whether, having regard to the claimant's contribution to his dismissal, it would be just to order his reinstatement.'

Concluding remarks

HHJ Tayler flags a couple of things to the ET in his closing remarks which are worthy of note:

First that when assessing the practicability of reinstatement (i.e. in assessing whether the respondent genuinely and rationally believes it can no longer have confidence in the claimant), the **ET will need to consider the situation as it is at the date of the remitted hearing** which

will mean taking into account further comments from the claimant that have occurred since that may be thought to be 'wholly unacceptable'. HHJ Tayler then sets out some of those further comments from the claimant:

- *I think that every time when someone wins Employment Tribunal for unfair dismissal or discrimination the punishment for managers who conducted unfair dismissal or discrimination should be like that: ... [link to video] On your knees lower and then there should be several slaps in face with the stick.*
- *In nowadays system in corporate fascism I saw at least 2 satanic bitches who were grinning like that. It was the dismissing managers*
- *the claimant suggested that one of his managers was involved in theft.*

Second, whilst not originally raised before the ET, a matter which the claimant referred to in general terms in his skeleton argument before the EAT and which HHJ Tayler thus refers the ET to as a 'live issue' for the remitted hearing is the qualified Convention right to freedom of expression, HHJ Tayler stating, *'this potentially could be relevant to the interpretation of the provisions dealing with contribution and reinstatement'*. Notably HHJ Tayler says nothing more on this, rather having flagged the issue he leaves this for the parties to address and the ET to determine.

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27 May 2026



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