**REMEDIES IN THE EMPLOYMENT TRIBUNAL**

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**The Remedies: Orders and Compensation**

1. **Remedy choices?**

Where an ET finds that a complaint of unfair dismissal has been made out it must consider the appropriate remedy, in the following order:

1. Reinstatement
2. Re-engagement
3. Compensation

(section 112 and 113 of the Employment Rights Act 1996 (“ERA”),

1. **Reinstatement and Re-engagement**

An ET that makes finding of unfair dismissal must explain to the claimant what orders for reinstatement or re-engagement may be made, and in what circumstances, and ask the claimant whether he or she wishes the ET to make such an order (s. 112(2) ERA). It is only if the claimant expresses such a wish that an order can be made (s. 112(3) ERA). Any failure of the ET to comply with the procedure does not automatically nullify judgment. In practice an ET will normally just confirm the remedy the claimant has indicated on their ET1.

* **Reinstatement** - defined as ‘an order that the employer shall treat the complainant in all respects as if he had not been dismissed’ (s. 114(1) ERA)
* Specify amount in respect of benefit employee might reasonably be expected to have had but for dismissal (s. 114(2)(a) ERA)
* Includes arrears of pay from date termination to date re-instatement
* All rights and privileges including seniority and pension rights must be restored (s. 114(2)(b))
* Thus if employee would have benefited in an improvement in terms and conditions if not terminated - these must be given and backdated as appropriate (s. 114(3))
* No financial limit applies and thus the statutory cap can be exceeded
* ET must specify the date by which the Order must be complied with (s. 114(2)(c))
* ET must take into account and deduct any sums received by the claimant between the date of termination and the date of reinstatement by way of wages in lieu of notice or ex gratia payments paid by the employer or remuneration paid by another employer (s. 114(4))
* BUT not an Order in judicial sense - as employment relationship a voluntary one
* **Re-engagement** – employment comparable or other suitable employment with the employer or successor to employer or by an associated employer (s. 115(1) ERA)
* If an order is made for re-engagement then the ET will specify the terms upon which it should be made. In making an order for re-engagement, the ET must specify at least the following details (s. 115(2)):
* the identity of the employer;
* the nature of the employment;
* the remuneration from the employment;
* the 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;
* any rights and privileges, including seniority and pension rights, which must be restored to the employee; and
* the date by which the order must be complied with.
* ET must deduct any sums received by the claimant between the date of termination and the date of reinstatement by way of wages in lieu of notice or ex gratia payments paid by the employer or remuneration paid by another employer (s. 115(3))
* Note the terms specified should not be substantially more favourable to the terms that the employee was previously engaged upon; *Rank Xerox (UK) Ltd v Stryczek* [1995] IRLR 568. In *Rank* the EAT commented that the ET should identify the nature of the proposed employment rather than recommending re-engagement to a specific job.

**WHEN WILL REINSTATEMENT OR RE-ENGAGEMENT BE ORDERED?**

* ET has a wide discretion in deciding whether either order is appropriate
* Order will only be made if (i) employee wants it; (ii) it is practicable; and (iii) in cases where the employee has caused or contributed to his dismissal the ET considers that it is just to make the order (s.116 ERA).
* Generally the ET will not consider the fact that the employer has engaged a replacement to carry out the dismissed employee’s work to be relevant to its determination unless:
* The employer can show it was not practicable to arrange for the dismissed employee’s work to be done without engaging permanent replacement e.g. Chief Accountant then re-instatement unlikely to be ordered because not easy to employ a temporary one, however position would be quite different for e.g. an administrative worker;
* Where the employer engaged the replacement after the lapse of a reasonable period without having heard from the dismissed employee that he or she wished to be re-instated, and when the employer engaged the replacement it was no longer reasonable for work to be done except by permanent replacement (s. 116(6) ERA)
* The issue of practicability is a question of fact for the ET
* It arises at two separate stages:
* Stage 1: the ET must have regard to the question of practicability at the stage when it makes the order. There is no need for an ET to reach a final conclusion that reinstatement or re-engagement is practicable before making any such order: *Timex Corpn v Thomson* [1981] IRLR 522;
* Stage 2: if an employer fails to comply with the order the ET will again have to decide, looking at the matter in the knowledge of the actual facts which have occurred, whether or not it was practicable to carry out the order.
* The burden of proof at Stage 2 rests on the employer: *Port of London Authority v Payne* [1994] IRLR 9. The employer will have to adduce further evidence to demonstrate any difficulties that have actually been faced.
* Industrial Conflict an issue to be taken into account before such an order – if re-instatement / re-engagement will lead to serious industrial strife neither practicable or in accordance with equity to make such an Order – e.g. *Rao v Civil Aviation Authority* [1992] ICR 503 and affirmed CA on other grounds [1994] IRLR 240
* Also, in cases where there has been a real, as opposed to fanciful, breakdown in mutual trust and confidence between employer and employee then the remedy will be applicable in very few cases indeed: *Central and North West London NHS Foundation Trust v Abimbola* [2009] All ER (D) 188

**NON-COMPLIANCE WITH THE ORDER**

* If the employer succeeds in establishing that it was not practicable to comply at stage 2, then the tribunal will simply award compensation in the usual way.
* If ET finds it was practicable to comply and the claimant was reinstated or re-engaged, but not fully in compliance with the order (eg not receiving proper back pay) the ET must award compensation to reflect the loss resulting from non-compliance (s. 117 ERA).
* If the claimant was not reinstated or re-engaged at all, the ET will calculate compensation in the normal way and order an additional award of compensation of between 26 and 52 week’s pay – currently capped at a maximum of £400 per week (s. 117(3) ERA.
* If the claimant unreasonably prevents the order being complied with, the ET must take that conduct into account as a failure by the employee to mitigate his loss (s. 117(8) ERA).
* In the case of a refusal to reinstate or re-engage, the compensatory award may exceed the normal maximum to the extent necessary to reflect the sums which the employer has to pay by way of back pay in order to comply with the original reinstatement or re-engagement order of the tribunal (s. 124(4) ERA).
* If employee found another job this will tend to reduce award
* If a large employer refuses to comply this will tend to increase the award on basis that such an employer would have had a greater capacity to comply with the order.
* Additional award not subject to deduction for contributory fault
* Be aware of Rule 76(3) of the ET Rules, if employee indicates to the employer at least 7 days before the hearing of his unfair dismissal complaint that he would seek an order for re-instatement / re-engagement then the employer must attend the hearing with evidence as to the availability of the old job or comparable or suitable employment, and if they do not and an adjournment is occasioned then unless they have a good excuse they will be liable to costs. Indeed the regulations state *a tribunal must make a costs order against a respondent* in those circumstances.

**3. Compensation**

In the vast majority of cases orders of reinstatement and re-engagement are not made and compensation is the only remedy granted. Compensation for unfair dismissal is assessed under two heads: (i) the basic award; and (ii) the compensatory award.

1. **Basic Award**
* equivalent to statutory redundancy pay
* as of 6 April 2017 the statutory limit on a week’s pay is £489 (s. 227 ERA)
* calculated by reference to period of continuous employment ending with effective date of termination (‘EDT’)
* start at end of employment and reckon backwards
* 1½ weeks’ pay for each year of employment in which employee was aged 41 and above
* 1 week’s pay for each year of employment in which employee was between the ages of 22 years and 40 years
* ½ a week’s pay for each year of employment in which he was below the age of 22 years
* Check out the handy government redundancy calculator at <https://www.gov.uk/calculate-employee-redundancy-pay>.
* Part XIV Chapter II ERA defines a week’s pay
* contractual remuneration for normal hours worked or if none average contractual remuneration over last 12 weeks
* if paid less than National Minimum Wage (illegal) – set that as the basis
* includes bonus, allowance and commission
* the gross amount is used
* There are three circumstances when the basic award is calculated differently:
1. If the employee has been dismissed by reason of redundancy and has either unreasonably refused or left suitable alternative employment, or had his contract renewed or has been re-engaged, the basic award will be two weeks’ pay (s. 121 ERA);
2. Where the dismissal is automatically unfair in accordance with s. 120(1) ERA the amount of the basic award (before any reduction) will be not less than £5,676 where the effective date of termination occurred on or after 6 April 2014. The reasons for dismissal which are covered by this provision include certain health and safety dismissals, dismissals of employee representatives and dismissals of pension fund trustees; and
3. Where an employee is regarded as unfairly dismissed by virtue of s.98A(1) ERA and the amount of the basic award is less than the amount of four weeks' pay the basic award will be increased to four weeks' pay (s. 120(1A) ERA). The ET shall not be required to increase the amount of the basic award if it considers that the increase would result in injustice to the employer (s. 120(1B)). S.98A was repealed by s.1 of the Employment Act 2008 and does not apply in respect of any dismissals taking place on or after the 6 April 2009 unless the employer had on or before the 5 April 2009 complied with EA 2002 Sch 2 paras 1, 2 or 4.
* This award can be reduced if the ET considers that it is just and equitable to do so taking into account:
* the employee’s conduct before dismissal - s.122(2)
* the employee’s unreasonable refusal of an offer of reinstatement s.122(1)

**(b) Compensatory Award**

* Awarded in respect of the Claimant’s actual loss – no more no less
* Amount ‘that is 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’ (s.123(1) ERA)
* Maximum compensatory award where the dismissal occurred on or after 6 April 2017:
	+ Increased to £80,541 (s. 124(1) ERA)

BUT

* + The Unfair Dismissal (Variation of the Limit of Compensatory Award) Order 2013 SI 2013/1949 (made under s.15 of Enterprise and Regulatory Reform Act 2013) added a new s.124(1ZA) to s.124 of ERA – inserting alternative cap of 52 weeks’ pay if 52 weeks’ pay is lower than £80,541. “A week’s pay” is determined in accordance with Part II of Chapter XIV ERA 1996.
	+ The new amendment at s.124(1ZA) will affect those earning less than £80,541 per annum and those for whom it will take longer than 12 months to find new employment.
	+ As a result the new amendment is at present the subject of an application for judicial review on the grounds that it indirectly discriminates against older workers, it having been accepted in *McCulloch v Imperial Chemical Industries* that older workers find it more difficult to find work.
* Duty to mitigate – e.g. can extinguish loss from the date the claimant should have obtained alternative employment (s.123(4) ERA)
* Burden is on Claimant of showing his loss
* Immediate loss of wages up to final hearing
* Future loss of wages (from the hearing)
* Loss arising from manner of dismissal
* Loss of protection of statutory rights in respect of unfair dismissal
* Does not include non pecuniary loss[[1]](#footnote-1) - injured feelings etc
* Unfair procedure but no loss = no compensatory award, but a basic award will likely be made.
* ET must itself raise categories of compensatory award inc. lost pension rights (see later)
* Primary duty to consider any evidence available and submissions of parties
* **Immediate loss**
* Calculated net
* Includes fringe benefits e.g. Company car – AA & RAC tables of value, BUPA etc
* If dismissed without notice can include net pay for period of notice
* Unclear if employee finds other work during notice period if can still recover – current view no credit need be given
* But purpose is to compensate and not provide a windfall
* Other earnings once outside the notice period must be deducted
* Partial intervening employment does not end entitlement if it’s lost before adjudication
* But the loss of that intervening employment might go to mitigation
* If employee suffers ill health after EDT ET must consider whether the dismissal caused the illness to a significant extent[[2]](#footnote-2)
* **Loss of statutory rights**
* Loss of statutory rights – *viz.* right to claim unfair dismissal and redundancy – usually awarded one week’s pay i.e. £489.
* **Future loss**
* Langstaff J. in *Saiger v North Cumbria Acute Hospitals NHS Trust* UKEAT/0325/10/CEA, paras 18 to 21, summarised the approach that the ET ought to take to determining the quantum of any future loss:

 “First, when a Tribunal is concerned with future loss, it is concerned to establish what financially the Claimant has lost in consequence of the wrong which has been done her. Because those losses have yet to occur, they cannot be regarded as certain, nor indeed capable of being established on the balance of probabilities. They are estimates to be made as best can be made on the available material. The exercise is a predictive one. A Tribunal estimates as best it can, just as would a court, what the situation is likely to be in the future and the extent to which it is likely so to be. Thus it is conventional that a Tribunal in any issue of disputed future job pattern or promotion will, for instance, have regard not to the probability but to the chance of that occurring, that is the percentage chance if the matter is a matter of dispute. The choice is not between two alternatives, seeking to establish which on balance is more likely, thus awarding no future loss if the claimed job or promotion is less likely than not, but the full losses if it is more likely than not: it is as to what level at which to assess the chances, and of what job or promotion, whether above or below 50%....

 ….. It has to be the best estimate which the Tribunal can make. It has to factor into its conclusion a number of features. Dealing with compensation, in an endeavour to be precise as to the figure which results, a number of specific matters may need to be paid regard to. There may be considerable argument as to what they are and a penumbra of uncertainty around each of them. Thus, for instance, a Tribunal may not be able to say specifically what particular job a dismissed Claimant may yet be able to achieve, or where, or when she will do so, or if so, with what precise salary or with what precise perks.

 Further, it may not be able to say, and almost certainly will not able to say with certainty, what the costs to the Claimant will be of accepting any such job. There may be travel expenses, there may be relocation expenses, there may be consequential expenses where family and friends need to be catered for. Every decision is necessarily likely to be specific to its circumstances.

 The layers of detail, therefore, which apply to the calculation of compensation are many and various. A decision of a Tribunal which attempted to pay regard to each and every one of those factors in detail would almost inevitably miss one or other, or appear to give some too much weight. What matters in a calculation such as this, where precision cannot be guaranteed with pinpoint accuracy but what is required is a best estimate, is an overall assessment by a Tribunal. This has on occasions been called a broad-brush assessment. It is none the worse for that, provided that the essential elements of it are clear and provided that the Tribunal demonstrates that it has taken into account the principal matters which it has been required to have regard to by the parties in their arguments”.

* + Calculation of future loss is far from an exact science, but provided a reasoned assessment of that loss takes places, whether or not that is described as a ‘broad brush’, the EAT will likely uphold the decision reached by the ET.
	+ When analysing the claim it is sometimes useful to consider the following 4 possibilities, there may be more than these 4, but as was said in Saiger, they aid thinking:

(i) The ET could find that the Claimant would never work again, in which case compensation ought to be calculated on a whole career loss basis, subject to contingencies.

(ii) The Claimant may never work again at the level he had worked with the Respondent employer. In which case loss should be calculated by reference to the difference between his role with the Respondent and his new role.

(iii) The Claimant will achieve his previous level, but it will take a period of time before he does so. This would lead to compensation being paid for the period that the ET found it would probably take for the Claimant to return to his pre-dismissal level – c.f. potential impact of loss of opportunity to secure promotion.

(iv) By the time remedy is considered the Claimant has secured equivalent, or better, employment than he had had with the Respondent, in which case there would be no continuing loss – but c.f. potential loss of opportunities for promotion.

* + As a very rough rule of thumb ET’s typically awards periods of 6 to 9 months for future loss of earnings. However, every single case will turn upon its own facts and it is crucial to look at the evidence to see whether, in the particular case, it is justifiable to seek a much longer period.
	+ In an appropriate case the ET is entitled to use the Ogden Tables (8th edition awaited) to calculate the future loss of earnings, but this will only arise in relatively few cases and there is clear guidance from the EAT as to how the ET is to approach an ‘Ogden’ case: Kingston upon Hull City Council v Dunnachie (No.3) EAT/0848/02.
	+ In reaching its conclusion the ET is entitled to apply its industrial knowledge, so if one, or more, members have particular knowledge of the industry or field in question then they are entitled to apply that knowledge, however, if they choose to do so then they must give the parties an opportunity to make submissions in relation to that knowledge and its application to the case: Bentwood Brothers (Manchester) Ltd v Shepherd [2003] ICR 1000, CA.
	+ Chagger v Abbey National [2009] EWCA Civ 1202, has made it clear that ‘stigma’ damages are recoverable and can be taken into account by the ET. This is important because it can be used to justify a longer period of future loss on the basis that the Claimant is now ‘tainted’ or ‘stigmatised’ within the employment market place because he or she has brought a claim. Plainly if such an argument was to be mounted then it would require evidence from the Claimant as to the difficulties that they had faced within the market place. In Ur-Rehman v Ahmad [2013] ICR 28, EAT, it was held that such evidence would need to address whether, in relation to finding new employment, stigma from the former employee’s previous employment had a real and substantial effect, and if it did, how great that effect was.
	+ If the Claimant takes himself off the market – e.g. by going on a training course - then this may end his entitlement to recover, but much will depend upon why he has taken that path. In the current economic climate it may be entirely reasonable to retrain and enter a different field of work, even if that would pay less than the previous occupation.
	+ Note that in a dismissal claim events that come to light after dismissal (e.g. gross misconduct discovered after an employee leaves) may be relied upon by the employer when assessing whether it is just and equitable to make a compensatory award, though such matters would not be admissible in relation to the employer’s liability for unfair dismissal, since they would not have been known to the employer at the time the decision was made to dismiss and thus could not have formed part of the reasons relied upon for dismissal: Devis v Atkins [1977] 3 All ER 40 (HL).
	+ The Respondent may well seek to limit future loss by reference to what would have happened had the Claimant remained in employment. Putting to one side purely procedural unfair dismissals, the classic example is where by the time remedy falls to be considered a substantial restructure or redundancy exercise has taken place, which allows the Respondent to argue that the Claimant would have lost their employment at that juncture.

**(c) Pension Loss**

***Essential Reading: ‘Employment Tribunals: Principles for Compensating Pension Loss’ (2017, 4th Edition) and Presidential Guidance on the same***

* Employment Tribunals must have regard to the Presidential Guidance although they are not bound by it.
* The Principles are guided by five concepts: justice; simplicity; proportionality; pragmatism; and flexibility.
* The Principles provide a framework for establishing when a claimant will retire from the workforce. The starting point is that the retirement age will be (a) the state pension age (where a claimant has not accrued significant occupational pension rights) or (b) the age at which a claimant would be entitled to significant benefits from an occupational pension scheme, whichever is the earlier. The tribunal will decide, what level of accrued benefits is “significant” based on the facts of each case, Evidence from the parties can displace this approach.
* Very broadly speaking there are two kinds of pensions schemes – Defined Benefit (DB or final salary) schemes (dying out), and Defined Contribution (DC or money purchase) schemes.
* In a money purchase scheme the loss to the Claimant is the prospective value of the Respondent’s contributions to the pot that it would have made had the employment continued. There may be a penalty imposed due to being an early leaver from the Scheme, which should also be claimed too.
* In a final salary scheme the Claimant will, in all probability, receive a deferred pension even though he has been dismissed. Had he not been dismissed then that pension would have been larger upon his retirement. The loss is therefore the difference between what his deferred pension is worth now and what it would have been worth had he not been dismissed (credit will then need to be given for any other pension arrangements that may have been entered into, which can become highly speculative).

**Defined Contribution (DC or money purchase) schemes**

***Calculation method***

* Where the claimant has lost benefits (employer contributions) from a DC scheme, the pension loss calculation will be as follows:
* get details of the claimant’s pay and the employer contributions (where there is no evidence the tribunal may assume auto-enrolment);
* establish the end date for the period of loss;
* identify employer’s contributions to the date of the remedy hearing (no recoupment);
* identify the future loss of employer contributions (take into account any future pay rises);
* give credit for any employer contributions made by a new employer against the award (here the tribunal may assume auto-enrolment with a new employer. This assumption is rebuttable by evidence).
* No loss arises because of a lost facility to make Additional Voluntary Contributions.

**Defined Benefit (DB or final salary) schemes**

* Here there is a simple and a complex method of calculation.

***Simple cases***

* Examples of simple cases might be where the loss amount is academic because the compensation cap applies or where a *Polkey* type terminal date for loss of benefits applies. It is likely that there will not be an award for loss of enhancement of accrued pension rights. The pension loss calculation will be calculated as for DC schemes above.

***Complex cases***

* Typically these cases are where there are significant losses and the compensation cap does not apply or cases where the loss is career long. Case management will identify complex cases at an early stage with the claimant being expected to specify the type of pension scheme in which the claimant accrued benefits prior to dismissal (i.e. whether DC or DB) in a Schedule of Loss. Using the phrase “to be confirmed” on the Schedule will be discouraged. Complex cases are likely to have split liability and remedy hearings.
* When the pension loss is being determined there will be two types of loss to be assessed: loss of annual pension and loss of a lump sum.
* Calculating pension loss in a complex case will involve choosing one of two approaches (or a blend of the two). The first approach involves using the Ogden Tables and the second involves using an expert, usually an actuary. (See chapter 5 4th Ed of the Principles).
* The Principles are not ridged rules. They do not have the force of law. Where parties wish to use their own calculations rather than follow the Principles, the tribunal will consider them.
* In any claim disclosure is essential. Chapter 6 (4th Ed of the Principles) sets out the documents and information relevant to pension loss which the parties will be expected to disclose including the pension scheme rules and all the information relating to what the claimant’s pension position is in the light of the dismissal. You may also need to obtain similar information from a new employer if they provide a pension scheme, because it may not be as generous as the old scheme.
	+ - * As a rule of thumb the ‘simplified’ approach will typically be the most appropriate course to follow.

**(d) Contributory Fault**

* To the extent that the dismissal is caused or contributed by the action of the employee.
* ET shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.
* ERA S 123(6) – only to extent conduct known before dismissal.
* Broad common sense view – matter of impression, opinion and discretion – appellate tribunals will not interfere unless plain error of law or no reasonable ET could have reached the decision i.e. perversity c.f. Yeboah v Crofton, extremely difficult to assert.[[3]](#footnote-3)
* Culpable conduct.
* Includes perverse, foolish, bloody-minded or unreasonable.
* Must have caused the unfair dismissal.
* Requires behaviour or lack of effort.
* If doing his best employee will not have contributed.
* Misconduct unconnected to dismissal will not suffice.
* Where a constructive dismissal less likely such a finding can be made.
* Participating in industrial action cannot be taken into account.[[4]](#footnote-4)

**(e) Uplift**

* An ET can increase, or decrease, the amount of compensation it awards by up to 25% if it considers that either party had unreasonably failed to comply with a Code of practice then, if it considers it just and equitable, the award can be increased or decreased by up to 25%.
* The Code of practice that needs to be considered here is the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (March 2015).
* *Phoenix House Ltd v Stockman* EAT 17 May 2016 ruled that the 25% uplift for non-compliance with the Code does not apply to dismissals for some other substantial reason (SOSR) where there is an irretrievable breakdown in the working relationship.
* *Holmes v Qinetiq Limited* EAT 26 April 2016 ruled that the Code only applied in cases where there was 'culpable conduct' on the part of the employee which requires correction or punishment. In this case it did not apply where poor performance was the consequence of genuine illness.

**(f) Redundancy payments**

* The quantum of an individual's redundancy claim will depend upon whether there is a contractual redundancy scheme available to a Claimant.
* Sometimes the employer is liable for enhanced redundancy payments because it is bound by a business or industry wide collective agreement that sets out enhanced redundancy pay terms.
* Also possible for employees to benefit from an *implied* contractual entitlement to enhanced redundancy pay. In Peacock Stores ~v.~ Peregrine & Ors UKEAT/0315/13/SM the Employment Appeal Tribunal confirmed that the employer was required to pay enhanced redundancy payments, and not only statutory redundancy payments, as a result of the implication of a contractual redundancy term.  The evidence showed that the consistent practice of the employer in various redundancy situations had been to make redundancy payments based on statutory terms, but without applying the cap on years of service or weekly pay.
* If there is no such scheme then the statutory scheme under Part XI ERA 1996 will apply (vast majority of cases).
* There is a two-year qualifying period to claim for statutory redundancy pay: s.155 ERA 1996.
* The basis of the statutory calculation is the same as for the calculation of a basic award in unfair dismissal and it has a similar cap in place. An employee is not entitled to both a basic award and a redundancy award and thus the redundancy award is deducted from the basic award: s.122(4) ERA 1996 UNLESS the tribunal finds that redundancy was not the real reason for the dismissal in which case a basic award and a redundancy award will be made.
* If on redundancy an employer offers suitable alternative employment which is unreasonably refused, the redundant employee may lose his right to a redundancy payment that would otherwise be applicable: s.141 ERA 1996
* In circumstances where an employee’s contract of employment is renewed or re-engaged under a new contract of employment in pursuance of an offer, whether in writing or not, made by his employer before the ending of his employment under the previous contract and the renewal takes place either immediately or at the termination of the old contract or within four weeks of that date the employee is deemed not to have been dismissed and no liability to make a redundancy payment arises: s.138(1) ERA 1996.
* An employee is entitled to a written statement from an employer indicating how a redundancy payment has been calculated unless a tribunal has already fixed an amount. Failure to comply with this obligation constitutes a criminal offence: s.165 ERA 1996.
* Note: s.165 is particularly important because if an ex gratia payment is made to an employee, which exceeds the statutory payment, an employer runs the risk of an employee later arguing that ex gratia payment made did not cover the statutory redundancy payment.[[5]](#footnote-5)
* An employer is obliged to carry out consultation with employee representatives if it proposes to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less: s.188 Trade Union and Labour Relations (Consolidation) Act 1992.
* If the employer fails to comply with its obligations under s.188 then a complaint can be made to a Tribunal and an award of up to 90 days pay for each employee affected can be ordered. This has been held to be a punitive payment and thus a Tribunal will start with an order for 90 days pay and then adjust it to what is just and equitable in a particular case.[[6]](#footnote-6)

**(g) Ex gratia payments and the order of calculating loss**

* In general an employee will need to account for any ex gratia payments that the employer has made to the employee. Unless for example such payments would have been made to the employee even if he would not have been dismissed.
* Such payments will usually be set-off against the compensatory award due. However, in certain circumstances if the language used is clear then it is possible for the ex gratia payment to be set-off against the basic award as well[[7]](#footnote-7).
* The employer who pays compensation for redundancy on a more generous scale than the statutory scale is entitled to full credit for the additional payment against the amount of the loss which makes up the compensatory award in an unfair dismissal case (e.g. redundancy procedure unfair)[[8]](#footnote-8).
* The correct approach for the order of reductions in a unfair dismissal case other than for a redundancy claim is as follows:
	+ Calculate the loss suffered by the Claimant;
	+ Give credit for payments received on or since dismissal;
	+ Make a Polkey deduction (if appropriate);
	+ Reduce the award for contributory fault.
* In a redundancy case the order is:
	+ Calculate the loss suffered by the Claimant;
	+ Give full credit for payments received by the Claimant;
	+ Make a Polkey deduction (if appropriate);
	+ Reduce the award for contributory fault;
	+ Set off any enhanced redundancy payment made by the employer.

**4. Tax Treatment of awards**

* All termination payments, are chargeable to tax to the extent that they exceed £30,000: s.403(1) Income Tax Earnings and Pensions Act 2003; s.188 Income and Corporation Taxes Act 1988.
* Therefore to the extent that the sum due exceeds the £30,000 threshold it must be grossed up to allow for taxation. Note in particular that HMRC will only look at the sum paid to the claimant and will tax that. Thus if the sum paid to the employee is the net sum, then to the extent that that sum exceeds £30,000 it will be taxed. In such circumstances an aggrieved employee may look to his legal advisor for compensation.
* An award in respect of injury to feelings in a discrimination claim is not subject to tax: *Orthet Ltd v Vince-Cain* [2004] IRLR 857, EAT. A compensation payment made by an employer to an employee for discrimination is taxable if the discrimination is the cause of the termination of the employment, but only then to the extent that the award meets financial loss caused by the termination of the employment. For an example of how this works in practice we suggest reading the relatively short judgment of the First Tier Tax Tribunal in *Oti-Obihara v The Commissioners* [2010] TC/2010/00688.
* It should be borne in mind that there is no duty upon an employer to apportion a settlement between taxable and non-taxable elements, and if a compromise is agreed but it does not itself apportion the sums as taxable and non-taxable then it is for the employee and not the employer to take the matter up with Revenue and Customs: *Norman v Yellow Pages Sales Ltd* [2010] EWCA Civ 1395
* Where an award for injury to feelings or personal injury is made for discriminatory acts that pre-date the termination of employment, they are not termination payments and therefore they are not taxable and do not need to be grossed up. Similarly an award for compensation for loss of pension rights on termination of employment is not a payment to a beneficiary out of a pension scheme falling under s.407 ITEPA 2003 and this should not be grossed up either: *Yorkshire Housing v Cuerden* UKEAT/0397/09/SM
* When grossing up an award account must be taken of the Claimant’s personal allowance and the standard rate for the year in which they received the compensation award, so flat rates applied to the whole award (e.g. 40%) would not be the correct way to carry out the calculation: *Yorkshire Housing*.
* It is always important to consider, particularly when negotiating settlement agreements for higher rate tax payer clients how tax is to be dealt with. It may be appropriate to include indemnities governing tax liabilities.
* Recoupment: Specific regulations allow the Government to recoup jobseeker's allowance and income support paid to an employee.

**5. Discrimination**

* The remedies available for a victim of discrimination are as follows:
	+ A declaration as to the rights of the victim and the Respondent in relation to which the complaint relates.
	+ A recommendation that the respondent take, within a specified period, action which appears to the tribunal to be reasonable in all of the circumstances of the case, for the purpose of obviating or reducing the adverse effect upon the victim of any matter to which the complaint relates (s. 124(2) EqA 2010).
	+ Note Government proposed legislation to remove the power (see below).
	+ An order that the Respondent pays compensation to the victim.

**(a) Declaration**

* A declaration is often of considerable importance to a complainant, especially in cases where no loss, or modest loss, has been sustained at the time of the hearing, but such loss could be significant in the future e.g. an employee may wish to challenge the lawfulness of a redundancy policy which apparently discriminates on the ground of age.
* It is important to bear in mind that a Claimant could be at risk on costs if he/she decided to take a wholly technical, but substantively unmeritorious point to a full merits hearing, merely to obtain a declaration, particularly where a Respondent had offered substantial monetary sums to settle the claim.

**(b) Recommendations**

* In *Lycée Français Charles De Gaulle v Delambre*UKEAT/0563/10 HHJ McMullen QC reviewed the key authorities and helpfully summarised the principles applicable to recommendations (albeit pre-EqA 2010 recommendations):

''21     … A recommendation under regulation 38 [of the Age regulations 2006] gives a Tribunal extremely wide discretion (see *Chief Constable of West Yorkshire Police v Vento (No 2)[*2002] IRLR 177 *at 49.1* per Wall J on behalf of the EAT).

22     The requirement of practicability is met when the Tribunal focuses upon what is practicable in terms of its effect on the complainant (see *Fasuyi v London Borough of Greenwich* UKEAT/1078/99 *at paragraph 24*).

23     The practicability of a recommendation has to be also seen from the perspective of an employer. Only one which is completely impracticable would constitute an error of law (see *Leeds Rhinos Rugby Club v Sterling* UKEAT/0267/01 *at 6.1*).

24     A recommendation which is generally ameliorative, that is applying across the board, may be justified if the effect of it will obviate or reduce the adverse effect of discrimination on the complainant, who is a person within the general application (see *Fasuyi* at paragraph 24).

25     Tribunals have a wide range of discretion in the recommendations they make so that, for example, a letter being sent to all parents of a school was approved, subject to some minor drafting on appeal, in *The Governing Body of St Andrews Catholic Primary School v Blundell* UKEAT/0330/09, and good practice will require senior managers within an employer which has been found guilty of discrimination to face up to findings made by reference to a Judgment in an Employment Tribunal (see *Vento* at paragraph 4.49). A requirement to undertake formal equality and diversity training may be appropriate (see *London Borough of Southwark v Ayton* 18 September 2003 unreported EAT at paragraphs 26 to 28).''

* Note that s.124(3) EqA 2010 empowers an ET to make a recommendation that reduces or obviates the effect of any matter to which the proceedings relate on the Claimant and *on any other person.* Under the government’s ‘red tape challenge’ it has consulted on whether the ET’s power should be restricted to just recommendations affecting the Claimant. The government have recently proposed to restrict the power to make recommendations and legislation is expected.
* If an employer fails, without reasonable justification to comply with a recommendation then it may have to pay compensation, or where appropriate, additional compensation to a victim.

**(c) Compensation**

* The tribunal is not obliged to make an order for compensation if it does not consider it just and equitable to do so; but, having decided to make such an order, the measure of damages is to be the same as that adopted by the ordinary courts of the appropriate jurisdiction, which means that the tribunal is entitled to make an award for injury to feelings (s. 124(6) EqA 2010).
* The discretion of the tribunal is as to the nature of the remedy to be granted – compensation is to be awarded where it is just and equitable to do so in the circumstances, however once the discretion has been exercised the level of the award is not subject to an assessment of what is ‘just and equitable’ (*Hurley v Mustoe (No 2)* [1983] ICR 422, EAT).
* The correct approach to the assessment of a claim for unlawful discrimination is that the complainant is entitled to be compensated for the loss and damage which arises naturally and directly from the discriminatory act.
* The Claimant ‘as best as money can do it…must be put into the position she [or he] would have been in but for the unlawful conduct’: *Ministry of Defence v Cannock* [1994] ICR 918 EAT.
* There is no requirement to show that the particular type of loss sustained was reasonably foreseeable, hence the Respondent must take its victim as they find them. The issue is one of pure causation: *Essa v Laing Ltd* [2004] IRLR 313 (CA).
* If personal injury is alleged to have been caused by the act of discrimination then it must be alleged and brought within the ET as it has exclusive jurisdiction over discrimination claims arising from employment: *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] IRLR 481, CA.
* There is no limit upon the amount of compensation that may be awarded. Consequently remedies hearings are extremely important and need to be properly prepared for. If there is to be a substantial claim for future loss then witness evidence specifically addressing such matters should be served. Further properly argued schedules and counter-schedules of loss can be of invaluable assistance to a Tribunal when determining a claim.
* If the complaint is of s.19 EqA 2010 indirect discrimination, then the ET may not award any money compensation at all, unless it first considers whether to make a declaration or a recommendation: s.124(4) / (5) EqA 2010.
* Past pecuniary losses are calculated from the date of the discriminatory act to the date of the remedies hearing before the ET. Such pecuniary losses may include full or partial loss of earnings (to be assessed net of tax), and also other benefits such as health insurance, pension, share options etc.
* Monies received by the Claimant by way of mitigation of his or her losses will be deducted from an award of compensation.
* It is for the Respondent to adduce evidence to demonstrate that the loss could have been mitigated.
* Monies received by the Claimant as a result of social security benefits and invalidity benefits received as a result of the discriminatory act will also fall to be deducted from an award of compensation: *Chan v Hackney London Borough Council* [1997] ICR 1014, EAT; the rationale being that such benefits are paid only because of inability to earn a wage, and thus credit should not be given for this as well as for the lost earnings themselves.
* By virtue of s.124(6) and s.119 of the EqA 2010 an ET has the power to grant any remedy which could be granted by the High Court in proceedings in tort or upon a claim for judicial review. Therefore both aggravated and exemplary damages may be awarded, both are rare and the latter particularly so because they will only be awarded if compensation is insufficient to punish the wrongdoer and if the conduct is either (i) oppressive, arbitrary or unconstitutional action by the agents of government, or (ii) where the defendant's conduct has been calculated to make a profit which may well exceed the compensation payable to the applicant: *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29.
* In *Wardle v Credit Agricole Corporate and Investment Bank* [2011] EWCA Civ 545, [2011] IRLR 604, the Court of Appeal gave the following guidance to tribunals having to assess future loss of earnings after a discriminatory dismissal:

1. where it is at least possible to conclude that the employee will, in time, find an equivalently remunerated job (which will be so in the vast majority of cases), loss should be assessed only up to the point where the employee would be likely to obtain an equivalent job, rather than on a career-long basis, and awarding damages until the point when the tribunal is sure that the Claimant would find an equivalent job is the wrong approach;
2. in the rare cases where a career-long-loss approach is appropriate, an upwards-sliding scale of discounts ought to be applied to sequential future slices of time, to reflect the progressive increase in likelihood of the Claimant securing an equivalent job as time went by;
3. applying a discount to reflect the date by which the Claimant would have left the Respondent's employment anyway in the absence of discrimination was not appropriate in any case in which the Claimant would only voluntarily have left his employment for an equivalent or better job; and
4. in career-long-loss cases, some general reduction should be made, on a broad-brush basis (and not involving calculating any specific date by which the claimant would have ceased to be employed) for the vicissitudes of life such as the possibility that the claimant would have been fairly dismissed in any event or might have given up employment for other reasons.
* When calculating future loss an assessment of the actual probability that a complainant would have remained in employment is essential. It is important that this is done by reference to calculating the percentage probabilities, and not on a simple balance of probabilities. That approach was endorsed by the CA in *Vento v Chief Constable of West Yorkshire Police (No 2)* [2003] IRLR 102, [2003] ICR 318 (see per Mummery LJ at paras 32–3).

**(d) Interest**

* A tribunal may include interest on the compensation awarded in a discrimination claim: Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Simple rather than compound interest will be awarded.

**(e) Joint and Several Liability**

* Where there are concurrent discriminators the usual award will be that each is jointly and severally liable for the wrong: *LB Hackney v Sivanandan* [2011] IRLR 740.
* The ET cannot determine contribution as between Respondents under the Civil Liability (Contribution) Act 1978, because that Act is only justiciable within the civil courts: *Brennan v Sunderland City Council* UKEAT/0286/11, 2nd May 2012.
* The EAT has held that where there are several Respondents in a claim comprising a complaint of discrimination and one or more non-discrimination causes of action e.g. holiday pay etc, the ET should apply joint and several liability under both heads: *Catanzano v Studio London* UKEAT/0487/11, 7th March 2012.
* In *Amissah and others v Trainpeople Co UK Ltd*[UKEAT/0187/16](http://www-lexisnexis-com.ezproxy.westminster.ac.uk/uk/legal/search/enhRunRemoteLink.do?A=0.5249128835312651&service=citation&langcountry=GB&backKey=20_T26771190636&linkInfo=F%23GB%23UKEAT%23sel1%16%25page%0187%25year%16%25&ersKey=23_T26771190638) the EAT determined that the calculation for compensation must be started at the beginning and not at the end of the process that gives rise to the loss. This was an appeal against the level of compensation awarded to the 31 Claimants after it was found that the Employment Agency (Trainpeople) and the hirer had breached Reg 5(1) of the Agency Workers Regulations 2010.

**(f) Injury to feelings**

* Awards can be made for injury to feelings in cases where discrimination has been proved and / or where a Claimant has established that she or he has suffered a detriment.
* The basic rule is that ‘any injury to feelings must result from the knowledge that [there] was an act of…discrimination’ (*Skyrail Oceanic Ltd. v. Coleman* [1981] ICR 864).
* The measure of damages is the same as that adopted by the civil courts.
* A person that discriminates must take his or her victim as he finds him or her.
* The leading case on valuation of injury to feelings claims remains *Vento v Chief Constable of West Yorkshire Police (No. 2)* [2003] IRLR 102. It held that a tribunal should consider the Judicial College Guidelines for general damages covering pain, suffering and loss of amenity (now see 14th edition) and held that awards should fall within three bands. The figures were subsequently updated in *Da’Bell v NSPCC* [2009] All ER (D) 219 (by 20%, from the bands in *Vento*). The bands are now:
	+ Up to £8,400 for a single one off incident of discrimination (Up to £6000 for claims made before 11 Sept 2017).
	+ £8,400 to £25,200 for middle bracket claims i.e. more than an isolated incident but not a campaign (£6,000 to £18,000 for claims made before 11 Sept 2017).
	+ £25,200 to £42,000 for claims in the top band e.g. where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race (£18,000 to £30,000 for claims made before 11 Sept 2017).
* It was held in 2002 that a minimum award of £750 should be made: Doshoki v Draeger Ltd [2002] IRLR 340, EAT. With inflation that figure is now £1119.66.
* There is no particular guidance as to where within a band a particular case should fall. It is open to the Tribunal to exercise its judgment having heard all of the relevant evidence.
* In cases where more than one type of discrimination is found to be proven e.g. race and disability then the tribunal should consider each wrong separately and value the injury to feelings accordingly. However, at the end of that exercise it must consider the global sum and ensure that it is proportionate to the matters found proved and that there has not been any double counting: *Al Jumard v Clwyd Leisure Ltd* [2008] IRLR 345.
* Following *Simmons v Castle* [2012] EWCA Civ 1288, should an injury to feelings award be increased by 10% from 1st April 2013? While the case concerned personal injury claims, in their second judgment the Court of Appeal widened the scope of the increase to include awards of damages in all civil claims, which explicitly included awards for ‘mental distress’, which should include injury to feelings in the ET. Over the past 3 years there has been inconsistent case law on this point, but in *Pereira de Souza* v *Vinci Construction UK Ltd* [2017] EWCA Civ 879 the CA recently confirmed that the Simmons and Castle uplift **does** apply to employment matters.
* *The uplift described in Simmons had been implemented as part of the Jackson reforms in the civil courts. The reforms had put an end to successful claimants being able to recoup success fees and after-the-event insurance premiums as part of their costs, and the Simmons uplift was intended to compensate them, as a class, for being deprived of that right, and to help them to meet success fees out of their damages.*

**(g) Personal Injury**

* The ET has exclusive jurisdiction to award compensation to a complainant who has been discriminated against by his employer. Where the injury to feelings is so severe that a diagnosable psychiatric injury occurs then compensation for that injury can be recovered in the ET and only in the ET: *Sheriff v Klyne Tugs (Lowestoft) Ltd* [1999] ICR 1170.
* If an employee were to suffer a physical or psychiatric injury as a consequence of harassment then such an injury would also be recoverable within the ET.
* It is important to consider whether there is any double recovery occurring. An injury to feelings may well overlap, perhaps considerably, with a psychiatric injury. If that is a factor then the EAT has recommended that a single award is made for injury to feelings, which should include an element for psychiatric harm: *HM Prison Service v Salmon* [2001] IRLR 425.
* If it can be established that an act of direct and intentional discrimination has been proven and that this has caused the victim to suffer a physical or psychiatric injury then the tribunal may award compensation for that injury. There is no need for the victim to prove that such injury was reasonably foreseeable *Essa v Laing Ltd* [2004] IRLR 313 (CA).
* Note: *Essa v Laing* leaves open the possibility of a different test i.e. one of foreseeability being applied to claims that do not allege direct and intentional harassment. *Essa* was a case where direct race discrimination had been proved – an offensive racial remark.

**7. Insolvency**

* Where an employer has become insolvent, as defined by s.183 ERA 1996, then the Claimant can seek payment of certain defined ‘debts’ from the Secretary of State under Part XII of the ERA 1996.

* The sums that can be claimed are as follows (s.184 ERA 1996):
1. Up to 8 weeks arrears of pay;
2. Any period of unpaid statutory notice;
3. Any holiday pay;
4. Any basic award for unfair dismissal;
* There is a statutory cap on the amount that may be paid in the sense that a week’s pay cannot exceed the current statutory maximum of **£489** **(gross)** per week, so to the extent that a Claimant’s earnings would have exceeded that then they will be taxed down to the £489 allowed: s.186 ERA 1996.
* If the Secretary of State does not pay after an application has been made under s.182, or pays too little, then a claim can be pursued for payment before the ET: s.188 ERA 1996.

**8. Costs**

* Costs may be awarded in an ET pursuant to rules 74-84 of the 2013 Employment Tribunal Rules of Procedure.
* Costs orders may be made if the receiving party has been legally represented or represented by a lay representative; in respect of a fee paid by the party at the hearing or, if the proceedings are determined without a hearing, at the date of determination – r.75(1). If the receiving party has not been represented then a preparation time order can be made (r.75(2)).
* An application must be made either at the conclusion of the hearing or in writing to the Tribunal office within 28 days of judgment (or the hearing date if oral judgment was given).
* There are two general grounds for making a costs order: (i) a discretionary ground relating to the bringing or conducting of the proceedings; and (ii) specific grounds relating to postponements and adjournments, where a deposit has been paid under r.39 or as a result of the non-compliance with an order, or where a party has paid a tribunal fee (r.76(4).
* Pursuant to r.78(1) a tribunal, if minded to make an order for costs, may make one of the following:
	+ An order for a specified sum not exceeding £20,000;
	+ An order for a specified sum agreed by the parties; or
	+ An order that the paying party pay the receiving party the whole or part of the amount of any tribunal fee paid
	+ An order that the whole or specified part of the costs be determined by way of a detailed assessment in a county court in accordance with the CPR part 47 (note – potential for expensive satellite litigation).
	+ Note: r.41(3) specifically allows for an agreed order or an order assessed pursuant to detailed assessment to exceed £20,000.
* Preparation time order: such costs orders are calculated by the tribunal / judge by assessing the number of hours that have been spent on preparation time. It will make an assessment on the basis of what is a reasonable and proportionate amount (r.75 and r.79). It will then multiply the number of hours by £35 an hour (currently, increases by £1 each April, 6th).
* If any of the following grounds apply then the tribunal / judge has a duty to consider making a costs order, and having considered the matter, has a discretion to make an order if they consider it appropriate to do so. The grounds are:
	+ the paying party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably; or
	+ the bringing or conducting of the proceedings by the paying party has been misconceived; or
	+ any claim or response had no reasonable prospect of success.
* Note: that if tribunal / judge find that the paying party's conduct has been unreasonable it is not necessary to prove that the specific conduct has caused particular costs to be incurred: *McPherson v BNP Paribas (London Branch)* [2004] ICR 1398.
* The Court of Appeal has provided guidance as to the proper approach that an ET should take when considering whether or not to order costs where there has been unreasonable conduct, see Mummery LJ in *Barnsley Metropolitan Borough Council v Yerrakalva* [2011] EWCA Civ 1255, para 41:

“*The vital point in exercising the discretion to order costs is to look at the whole picture of what happened in the case and to ask whether there has been unreasonable conduct by the claimant in bringing and conducting the case and, in doing so, to identify the conduct, what was unreasonable about it and what effects it had.*”

* A tribunal or employment judge may (and usually does) take into account a paying party's ability to pay – r.84. However an ET does not **have** to take into account a paying party’s ability to pay when deciding upon the amount of any costs order: *Arrowsmith v Nottingham Trent University* [2011] EWCA Civ 797.
* If an ET declines to take into account a paying party’s ability to pay it must act judicially and explain why it has taken that course:

“*Rule 41(2) gives to the Tribunal a discretion whether to take into account the paying party’s ability to pay. If a Tribunal decides not to do so, it should say why. If it decides to take into account ability to pay, it should set out its findings about ability to pay, say what impact this has had on its decision whether to award costs or on the amount of costs, and explain why. Lengthy written reasons are not required. A succinct statement of how the Tribunal has dealt with the matter and why it has done so is generally essential.*” (*Jilley v Birmingham and Solihull Mental Health NHS Trust*, EAT, 21.11.2009, HHJ Richardson).

* Costs orders are fairly rare, but there does appear to be an increasing willingness to make orders in appropriate cases, particularly in cases where an offer to settle has not been beaten and, in fact, the claim has been dismissed or where an employer has formally notified the claimant employee that if their claim fails then an order will be sought.
* If there has to be an adjournment or postponement then the party in default may have to pay the costs thrown away.
* If a deposit has been ordered to be paid by a party at a PHR (r.39) and at the substantive hearing the tribunal finds against that party the deposit will be paid to the part in whose favour the finding is made, provided it is for a finding for substantially the same reasons. If a costs order is made as well, then the deposit will count towards the settlement n of the costs and will not be an additional payment.
* An EAT will only interfere with an ET's decision on costs if it can be established that the ET has (i) taken into account matters which it should not have done; (ii) failed to take account that which it should have done; or (iii) whether in some other way it came to a conclusion to which no ET, properly directed, could have arrived: *Beynon v Scadden* [1999] IRLR 700, EAT
* Wasted costs (r.80): These can be ordered against a party's representative. Costs recoverable must be proven to have been incurred by a party either (i) as a result of any improper, unreasonable, or negligent act or omission on the part of any representative; or (ii) which, in the light of any such act or omission occurring after they were incurred, the tribunal considers it unreasonable to expect that party to pay. Leading authority as to the application of this rule is: *Ridehalgh v Horsefield* [1994] Ch 205 (CA) approved by *Medcalf v Mardell* [2003] 1 AC 120 (HL).

**9.** **Settlement**

* Settlement agreements entered into between an employer and employee may well compromise any common law claims on a 'full and final settlement' basis but they will not compromise any statutory claims that an employee has: see for example s.203(1) ERA 1996 (amended recently by the Enterprise and Regulatory Reform Act 2013).
* To validly compromise ***both*** common law and statutory claims either the settlement agreement must be reached following conciliation or the following conditions must be satisfied:
	+ - The agreement must be in writing;
		- It must relate to the particular proceedings;
		- The employee must have received independent legal advice from a relevant independent adviser as to the terms and effects of the proposed agreement and in particular its effect on his ability to pursue his rights before an employment tribunal;
		- There must be in force when the adviser gives the advice a policy of insurance covering the risk of a claim by the employee in respect of loss arising in consequence of the advice;
		- The agreement must identify the adviser;
		- The agreement must state the conditions regulating settlement agreements under the ERA 1996 are satisfied.
* A ‘relevant independent adviser’ means: a barrister, solicitor, trade union official, advice centre workers and Fellow of the Institute of Legal Executives.
* Independent means advice given by someone who is not acting for the employer or associated employer.
* Conciliation - an agreement reached between an employer and employee will be valid and would survive e.g. s.203(1) ERA 1996 where a conciliation officer has 'taken action' under s.18 Employment Tribunals Act 1996. This is not a rubber-stamping exercise. The officer must actually participate in the process.
* Note: A conciliated agreement under the ERA 1996 will, unless expressly stated to the contrary, only operate to bar the proceedings specified in s.18 ETA 1996. Therefore it would not bar a Claimant from bringing a claim under the EqA 2010. To avoid this occurring it is necessary to include an express statement to the effect that the payment is made in 'full and final settlement of all claims', whether under the ERA 1996, TULRA 1992, EqA 2010 etc, or under EC law.
* Conciliated settlements are usually set out in form COT3. It is prudent to include the wording of an agreed, fair and accurate reference within the COT3 so that there can be certainty over what will be said about the employee to future prospective employers. This applies equally to settlement agreements and consent orders.
* Where there is a general release the court, when considering if a specific claim has been compromised, will determine what the objective intention of the parties was in the context of the circumstances in which the release was entered into: *Bank of Credit and Commerce International SA v Ali* [2001] IRLR 292, HL.
* This means that very clear language will have to be used when drafting settlement agreements. If it is intended to compromise e.g. future changes in the law with retrospective effect, then it will have to say so in terms (issue in *BCCI*). The agreement will be narrowly constructed so it is essential to draft widely and fully.
* It is essential when drafting settlement agreements to ensure that full particulars of law and fact are set out. Rolled up expressions such as 'all statutory rights' are not acceptable. It is essential to make specific reference to sections of actual statutes: *Hinton v University of East London* [2005] IRLR 552. In reality this can be done in a pro-forma document and then adapted for use in each particular case.
* Settlement at tribunal/court – can be particularly attractive for a Claimant who has received significant job seekers allowance payments or income support payments because if an award is made by a tribunal then such benefits would have to be paid back under the Employment Protection (Recoupment of Job Seekers Allowance and Income Support) Regulations 1996. An out-of-court settlement is not covered by the Regulations and can be advantageous to both employer and employee.
* If an agreed lump sum is to be paid then a consent order can be sought pursuant to r.28(2). It is unlikely that the recoupment provisions would apply because there may be no identification of the separate components of the award. If a large award is paid, consider splitting the payment into separate amounts.
* However, to err on the safe side the preferred course is to invite the Tribunal to dismiss the claim on withdrawal on the basis of terms agreed between the parties and contained in the schedule to the dismissal order (a Tomlin order) and to avoid the risk of difficulties if the settlement goes wrong, tribunals will often order that all further proceedings be stayed, except for the purpose of carrying the terms agreed into effect, with liberty to apply for that purpose and it will then order that if no application is made under the liberty to apply within a fixed period the proceedings will be dismissed on withdrawal.

**10. Enforcement**

* A Respondent ought to be given a reasonable time to pay any monies awarded by an ET. But, if payment is not forthcoming and a polite request for payment has not led to payment then the Claimant will have no choice other than to take steps to enforce the judgment.
* All methods of court enforcement (including bankruptcy and insolvency) are available to claimants.
* The Claimant will need to complete form N322A available on the Civil Procedure Rules website, which will entail calculating the amount of interest due upon the Award.
* Interest is currently set at 8% per annum. If the award relates to a discrimination complaint then interest will start to accrue from a date 14 days after the date on which the judgment was sent to the parties. If the award remains unpaid after 14 days then the interest begins to accrue from the day after the date on which the judgment was sent. Interest in all other ET awards begins to accrue 42 days after the date on which the judgment was sent to the parties.
* The Claimant will need to pay a fee to register the judgment, but this fee will be added to the sum due.
* The form needs to be sent to the County Court where the Respondent carries out its business (or has its registered office).
* Once this process is completed the ET’s judgment will have been registered with the County Court and will now be considered to be a County Court Judgment. At this point a recalcitrant Respondent may well pay up because they may consider a CCJ to have greater force than an ET’s judgment.
* If the Respondent (now Defendant) still fails to pay then enforcement steps can be taken using the usual County Court process:
1. Warrant of execution;
2. Attachment of earnings order;
3. Third party debt order;
4. Charging order.
* The other option for a Claimant is to use the High Court Enforcement Officer scheme, which is operated through ACAS and the Employment Tribunal Fast Track. The fee can be claimed back from the employer.

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November 2017

1. Dunnachie v Kingston Upon Hull City Council [2004] IRLR 727 HL [↑](#footnote-ref-1)
2. Dignity Funerals Ltd v Bunce [2005] IRLR 189 (Ct of Session) [↑](#footnote-ref-2)
3. Hollier v Plysu Ltd [1983] IRLR 260 [↑](#footnote-ref-3)
4. Crosville Wales Ltd v Tracey (No 2) [1996] IRLR 91 [↑](#footnote-ref-4)
5. Galloway v Export Packing Services Ltd [1975] IRLR 306. [↑](#footnote-ref-5)
6. Susie Radin Ltd v GMB [2004] IRLR 400, CA; Smith v Cherry Lewis Ltd (In receivership) [2005] IRLR 86, EAT [↑](#footnote-ref-6)
7. Chelsea Football Club & Athletic Co Ltd v Heath [1981] IRLR 73 (EAT) [↑](#footnote-ref-7)
8. Digital v Clements [1998] IRLR 134 [↑](#footnote-ref-8)