

Neutral Citation Number: [2026] EAT 58

Case No: EA-2025-000625-RS

**EMPLOYMENT APPEAL TRIBUNAL**

Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 28 April 2026

**Before :**

**JUDGE STOUT**

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**Between :**

**Mr L Tarbuc**

**Appellant**

**- and -**

**Martello Piling Limited**

**Respondent**

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The **Appellant** in person  
Patrick Keith (instructed by George Green LLP) for the **Respondent**

Hearing date: 16 April 2026  
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**JUDGMENT**

## **SUMMARY**

### **TRIBUNAL PRACTICE AND PROCEDURE – SECTION 111A EMPLOYMENT RIGHTS ACT 1996**

Prior to the termination of the claimant’s employment purportedly by reason of redundancy, the respondent employer held a conversation with him that was intended by the respondent to be protected by section 111A of the Employment Rights Act 1996 (**ERA 1996**) as a pre-termination negotiation. The claimant submitted that section 111A did not apply as the respondent’s conduct had been “improper” under section 111(4). The Employment Tribunal rejected the claimant’s argument and held that section 111A applied. It directed that the fact and content of the protected conversation were therefore not admissible, that documents relevant to it need not be disclosed and all references to it should be redacted from the pleadings and the documents in the bundle for the hearing.

#### **Held:-**

- (1) The claimant had brought claims for unlawful deduction from wages and less favourable treatment as a part-time worker as well as unfair dismissal. Section 111A only applies to unfair dismissal and the judge had therefore erred in directing that the evidence of the protected conversation should be excluded from the evidence in relation to his other claims.
- (2) The judge had not erred in failing to identify of her own motion that the claimant had brought (or wished to bring) an automatic unfair dismissal claim under section 104 of the ERA 1996.
- (3) Although the judge’s decision on improper conduct was not vitiated by perversity, the judge had erred by dealing only with what was said by the respondent’s manager at the meeting, and how it was said, and not also considering matters in the round and, in particular, the claimant’s complaints about having been ‘ambushed’ by the meeting and not given the opportunity to bring a companion.

## **JUDGE STOUT:**

### **Introduction**

1. This is my reserved judgment, albeit produced at speed in view of the trial in this matter in the Employment Tribunal being listed for 26-29 May 2026.
2. The appellant was the claimant below and I will refer to him as such. He was employed by the respondent as an Estimating Engineer from 19 February 2018 until he was dismissed on 13 June 2024, purportedly by reason of redundancy, although the reason for dismissal is in dispute.
3. The claimant commenced a claim in the Employment Tribunal by ET1 filed on 22 August 2024. In his ET1 he ticked the boxes in Section 8 for “unfair dismissal”, “arrears of pay” and “another type of claim”, which he identified as being “less favourable treatment for part-time worker”. He provided narrative further particulars in Section 8.2, which I will come to later.
4. This appeal before me is against a decision of the London South Employment Tribunal (Employment Judge Wright) given orally at a preliminary hearing on 3 March 2025, with written reasons sent to the parties on 13 March 2025. Judge Wright decided that a conversation between the respondent’s managing director, Mr Macklin, and the claimant on 23 April 2024 was inadmissible by virtue of section 111A(1) of the Employment Rights Act 1996 (**ERA 1996**) as being what is often referred to as a “protected conversation”. Judge Wright determined that the conversation was not improper so that no part of the conversation was admissible under section 111A(4). Judge Wright made case management directions to the effect that the respondent was not required to disclose documents related to the “protected conversation” and all references to it should be redacted from the pleadings and the bundle.
5. Subsequent to the decision under appeal, the claimant on 3 April 2025 made an application to amend his claim to include claims of automatic unfair dismissal pursuant to section 103A ERA 1996, subsection to a detriment contrary to section 47B ERA 1996, automatic unfair

dismissal under section 104 ERA 1996 for asserting a statutory right to payment of a contractual bonus under section 13 ERA 1996 and also automatic unfair dismissal for asserting his rights as a part-time worker. This amendment application was decided, and refused, by Employment Judge Musgrave-Cohen at a hearing on 4 September 2025, with written reasons sent to the parties on 9 December 2025.

6. That decision is the subject of a separate appeal by the claimant (EA-2026-000039-RS), which is to be listed for a preliminary hearing before the EAT. In directing that preliminary hearing, Lord Fairley observed that it was arguable that Employment Judge Musgrave-Cohen had erred in law in refusing the claimant's application to amend his claim to include a section 104 ERA 1996 complaint in relation to assertion of a contractual right to a bonus, although Lord Fairley did not grant permission on that ground because he considered further clarification was required at a preliminary hearing.

### **The grounds of appeal to the EAT in this case**

7. There are three grounds of appeal. There was a preliminary issue at the hearing before me as to the precise scope of the first ground of appeal. In the original notice of appeal filed on 22 April 2025, ground 1 had two parts to it: what I shall call "ground 1(a)" that the Employment Tribunal had erred in failing to recognise that his part-time workers less favourable treatment claim and unlawful deduction from wages claim were covered by section 111A(3); and, "ground 1(b)" that the Employment Tribunal had erred in failing to recognise that the four claims that he subsequently sought to add as amendments were covered by section 111A(3). HHJ Beard on the sift granted permission to appeal on both parts of ground 1, but refused permission on the other grounds. The respondent filed an answer to ground 1 on 3 July 2025.
8. The claimant renewed his application for permission to appeal under rule 3(10). That application was heard by HHJ Russell on 26 January 2026. The claimant was represented at that hearing by counsel under the ELAAS scheme who put forward draft amended grounds of

appeal on his behalf. HHJ Russell granted permission on what are now amended grounds 2 and 3 as they were set out in writing afterwards by the ELAAS representative in the order sealed by the EAT. The draft prepared by the ELAAS representative included an amended ground 1 which corresponded to ground 1(a) and omitted ground 1(b). Paragraph 2 of HHJ Russell's order states: "The draft amended grounds of appeal lodged on behalf of the Appellant are approved and replace the existing grounds". The respondent filed an answer to grounds 2 and 3 on 18 February 2026.

9. The claimant in his skeleton argument for this hearing set out his case by reference to the original ground 1 as it was in his notice of appeal, albeit with ground 1(b) focused only on his putative section 104 claim in relation to having asserted a statutory right in relation to a bonus. Mr Keith's skeleton argument for the respondent responded to the argument on that basis.
10. Two days before the EAT hearing, I arranged for the parties to be supplied with a copy of the Court of Appeal's decision in *Moustache v Chelsea and Westminster Hospital NHS Foundation Trust* [2025] EWCA Civ 185, [2025] ICR 1231 (*Moustache*) because it seemed to me to be relevant to ground 1(b). In response to that, both parties provided further written submissions on *Moustache*. Mr Keith in his submissions raised as a preliminary issue the objection that ground 1(b) was not part of the grounds of appeal by virtue of HHJ Russell's order, but nonetheless went on to deal with it in his submissions.
11. I discussed the position with the parties at the start of the hearing and invited them to address me on whether the claimant should be given permission to re-amend his grounds of appeal if that were necessary. The claimant explained that he had not realised that the ELAAS counsel had amended his ground 1, hence why he had conducted proceedings as he had and not made an application to re-amend previously. The respondent as a result of this discussion accepted that there was no real prejudice to it in the claimant being permitted to pursue the grounds of

appeal as advanced in his skeleton argument. I was satisfied that it was appropriate to grant permission to re-amend the grounds of appeal. Ground 1(b) (as refined by the claimant in his skeleton argument) was arguable and the parties were in reality ready to deal with it. I was satisfied that it was only mistake or oversight that had led to Ground 1(b) ceasing to be part of the grounds of appeal. It was in the interests of justice to permit the re-amendment so that the grounds of appeal matched the claimant's arguments as set out in his skeleton argument, to which the respondent had responded.

12. The three grounds of appeal for me to consider are accordingly as follows. The words in italics are added by me to reflect the re-amended ground 1, which I have divided into grounds 1(a) and 1(b):

Ground 1: The Employment Tribunal erred in law by determining that the inadmissibility finding under s.111A(1) of the Employment Rights Act 1996 applied globally to all of the Claimant's claims, without considering the explicit statutory limitations and exceptions where such protection does not apply. The ET failed to recognise that s.111A protection is expressly excluded by s.111A(3) and s.111A(5) for claims other than ordinary unfair dismissal.

*Ground 1(a):* The Claimant's claims for Unpaid wages (relating to his contractual bonus earned June–December 2023), Less favourable treatment contrary to the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (PTWR 2000) are not caught by this provision.

*Ground 1(b):* *The Claimant's putative claim under section 104 of the ERA 1996 in respect of his assertion of his statutory right to a contractual bonus is not caught by this provision.*

Ground 2: The Employment Tribunal failed to give proper consideration to the ACAS Code of Practice on Settlement Agreements when reaching its decision. In particular, it failed to consider the cumulative effect of the Respondent's conduct, including the Claimant being ambushed in the corridor, not being afforded sufficient time to secure a companion to accompany him to the meeting and the short timeframe he was given to consider the offer.

Ground 3: The Tribunal's conclusion that Mr Macklin had taken advice in respect of the meeting on 23 April 2024 and had clearly followed it was unsupported by evidence and therefore perverse.

## **The law**

### *The legislation*

13. Section 111A of the ERA 1996 provides as follows:

#### **111A Confidentiality of negotiations before termination of employment**

(1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111. This is subject to subsections (3) to (5).

(2) In subsection (1) “pre-termination negotiations” means any offer made or discussions held, before the termination of the employment in question, with a view to it being terminated on terms agreed between the employer and the employee.

(3) Subsection (1) does not apply where, according to the complainant's case, the circumstances are such that a provision (whenever made) contained in, or made under, this or any other Act requires the complainant to be regarded for the purposes of this Part as unfairly dismissed.

(4) In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.

(5) Subsection (1) does not affect the admissibility, on any question as to costs or expenses, of evidence relating to an offer made on the basis that the right to refer to it on any such question is reserved.

14. Section 104 of the ERA 1996 provides as follows:

#### **104 Assertion of statutory right.**

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

(a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section—

(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an employment tribunal ...

The ACAS Code of Practice

15. ACAS has produced a Code of Practice on Settlement Agreements (under section 111A of the Employment Rights Act 1996) (2013). As the Code itself explains, as it was issued under Section 199 of the Trade Union and Labour Relations Consolidation Act 1992, a failure to follow the Code does not in itself give rise to freestanding liability, but Employment Tribunals should take it into account where they consider it to be relevant to any issue in the case. So far as material to the present case, the Code of Practice includes the following:

**Settlement agreement discussions and section 111A of the ERA 1996**

6. Section 111A of the ERA 1996 provides that offers to end the employment relationship on agreed terms (i.e. under a settlement agreement) can be made on a confidential basis which means that they cannot be used as evidence in an unfair dismissal claim to an employment tribunal.

Under section 111A, such pre-termination negotiations can be treated as confidential even where there is no current employment dispute or where one or more of the parties is unaware that there is an employment problem.

...

7. There are, however, some exceptions to the application of section 111A. Claims that relate to an automatically unfair reason for dismissal such as whistleblowing, union membership or asserting a statutory right are not covered by the confidentiality provisions set out in section 111A.

Neither are claims made on grounds other than unfair dismissal, such as claims of discrimination, harassment, victimisation or other behaviour prohibited by the Equality Act 2010, or claims relating to breach of contract or wrongful dismissal.

...

8. The confidentiality provisions of section 111A are, additionally, subject to there being no improper behaviour. Guidance on what constitutes improper behaviour is contained in paragraphs 17 and 18 of this Code.

...

**Reaching a settlement agreement**

11. Settlement agreements can be proposed by both employers and employees although they will normally be proposed by the employer. A settlement agreement proposal can be made at any stage of an employment relationship. How the proposal is made can vary depending on the circumstances. It may be helpful if any reasons for the proposal are given when the proposal is made. Whilst the initial proposal may be oral, one of the requirements for a settlement agreement to become legally binding is that the agreement must ultimately be put in writing (see paragraph 4).

12. Parties should be given a reasonable period of time to consider the proposed settlement agreement. What constitutes a reasonable period of time will depend on the circumstances of the case. As a general rule, a minimum period of 10 calendar days should be allowed to consider the proposed formal written terms of a settlement agreement and to receive independent advice, unless the parties agree otherwise.

13. The parties may find it helpful to discuss proposals face-to-face and any such

meeting should be at an agreed time and place. Whilst not a legal requirement, employers should allow employees to be accompanied at the meeting by a work colleague, trade union official or trade union representative. Allowing the individual to be accompanied is good practice and may help to progress settlement discussions.

...

### **Improper behaviour**

15. If a settlement agreement is being discussed as a means of settling an existing employment dispute, the negotiations between the parties can be carried out on a 'without prejudice' basis.

'Without prejudice' is a common law principle (i.e. non-statutory) which prevents statements (written or oral), made in a genuine attempt to settle an existing dispute, from being put before a court or tribunal as evidence. This protection does not, however, apply where there has been fraud, undue influence or some other 'unambiguous impropriety' such as perjury or blackmail.

16. Section 111A of the ERA 1996 offers similar protection to the 'without prejudice' principle in that it provides that any offer made of a settlement agreement, or discussions held about it, cannot be used as evidence in any subsequent employment tribunal claim of unfair dismissal. Unlike 'without prejudice', however, it can apply where there is no existing employment dispute. The protection in section 111A will not apply where there is some improper behaviour in relation to the settlement agreement discussions or offer.

17. What constitutes improper behaviour is ultimately for a tribunal to decide on the facts and circumstances of each case. Improper behaviour will, however, include (but not be limited to) behaviour that would be regarded as 'unambiguous impropriety' under the 'without prejudice' principle.

18. The following list provides some examples of improper behaviour. The list is not exhaustive:

- (a) All forms of harassment, bullying and intimidation, including through the use of offensive words or aggressive behaviour.
- (b) Physical assault or the threat of physical assault and other criminal behaviour.
- (c) All forms of victimisation.
- (d) Discrimination because of age, sex, race, disability, sexual orientation, religion or belief, transgender, pregnancy and maternity and marriage or civil partnership.
- (e) Putting undue pressure on a party. For instance:
  - (i) Not giving the reasonable time for consideration set out in paragraph 12 of this Code.
  - (ii) An employer saying before any form of disciplinary process has begun that if a settlement proposal is rejected then the employee will be dismissed.
  - (iii) An employee threatening to undermine an organisation's public reputation if the organisation does not sign the agreement, unless the provisions of the Public Interest Disclosure Act 1998 apply.

19. The examples set out in paragraph 18 above are not intended to prevent, for instance, a party setting out in a neutral manner the reasons that have led to the proposed settlement agreement, or factually stating the likely alternatives if an agreement is not reached, including the possibility of starting a disciplinary process if relevant. These examples are not intended to be exhaustive.

...

### Case law on section 111A

16. The inadmissibility of evidence under section 111A is confined to "proceedings on a

complaint under section 111”, that is, ordinary unfair dismissal. It does not apply to other claims: *Faithorn Farrell Timms LLP v Bailey* [2016] IRLR 839 (***Faithorn***) at [38] *per* Eady J. In *Basra v BJSS Ltd* [2018] ICR 793 (***Basra***) Choudhury P at [26] explained the effect of the section as follows:

26 Several principles emerge from this analysis. (a) First, unlike the position in relation to common law privilege in respect of without prejudice communications, the protection under this section cannot be waived by agreement between the parties. (b) Second, where the protection exists, it extends to both the fact and content of any pre-termination negotiations. (c) Third, in a claim involving several causes of action including a claim of unfair dismissal, a tribunal may well have to exclude consideration of protected conversations for the purposes of that claim whilst taking them into account for the purposes of other claims. The third principle might require a tribunal to treat the same evidence differently according to the claim to which it relates. This will not always be an easy task. However, it is the kind of analytical compartmentalisation that tribunals and courts often have to undertake.

17. A third EAT decision is particularly relied on by the parties in this case: *Harrison v Aryman Ltd* UKEAT/0085/19 (***Harrison***), a decision of HHJ Auerbach. At [25] of *Harrison*, HHJ Auerbach referred to *Faithorn* and summarised the key points of that case in much the same way as Choudhury P did in *Basra*. In particular, he observed “that where there are mixed claims Section 111A will apply to a claim of unfair dismissal, unless it is one of automatic unfair dismissal, but not to the other claims, so that the Tribunal may have regard to evidence excluded by Section 111A in relation to the unfair dismissal claim for the purpose of determining the other claims”. There has been some suggestion in this case as a result of a sentence in HHJ Beard’s reasons for granting permission on the original ground 1 that HHJ Auerbach in *Harrison* held that if section 111A(3) or (4) applies in relation to any claim in the proceedings, the whole of section 111A will not apply in relation to any claim. That suggestion was based on a sentence in [34] of *Harrison*, where HHJ Auerbach makes certain observations about the “architecture” of section 111A, including noting that, whereas if section 111A(3) applies the whole of section 111A(1) will not apply, if section 111A(4) applies, then section 111A(1) only applies to the extent the Tribunal considers just. Those

were pertinent points, but HHJ Auerbach was not thereby intimating any disagreement with the plain effect of section 111A, as described by Eady J in *Faithorn* and Choudhury P in *Basra*, as being claim-specific, so that where there are claims to which section 111A(1) applies and also claims to which it does not, or claims to which section 111A(3) applies, the Tribunal will need to “compartmentalise” the evidence and consider the evidence of the pre-termination negotiations only in relation to the claims in respect of which it is permitted to do so.

18. I need to say more about *Harrison* now because it is a case that is close to the present in terms of an issue that it raised. In *Harrison* there were claims that the dismissal was unfair and also an act of pregnancy discrimination. The judge had proceeded on the basis that section 111A applied to the unfair dismissal and sex discrimination claims without considering section 111A(3) and (4). Both parties were represented by counsel before the Employment Tribunal in that case, but neither counsel had referred to sections 111A(3) or (4) either. HHJ Auerbach nonetheless held that the judge had erred in failing to raise sections 111A(3) and (4) for consideration of his own motion in circumstances where: (a) the claim was that pregnancy was the reason for the dismissal, which is an automatically unfair reason, albeit that the claimant’s pleadings had not identified it as such; and (b) there was material in the pleadings raising a case of improper conduct.
19. What HHJ Auerbach says about the automatic unfair dismissal claim and section 111A(3) is particularly relevant to the present case (emphasis added):

36. However, what I think at least is clear, and Mr Kohanzad accepted this up to a point, is that the original claim form did assert a constructive unfair dismissal claim as well as claims of discrimination during employment and a constructive discriminatory dismissal claim. Further, it did, in relation to the constructive unfair dismissal claim, assert a factual basis that would support a claim under Section 99 and the relevant associated provisions of the Maternity and Parental Leave Etc Regulations 1999, including stating in terms:

“He has treated me unfairly as a result of my decision to start a family”.

I say that Mr Kohanzad accepted this up to a point, because he accepted that all the elements of that claim in terms of the factual case were there, but he said it was still not stated that the Claimant was asserting automatic unfair dismissal pursuant to Section 99 and Regulation 20 of the 1999 Regulations. However, he conceded that, on an application to amend, that would be bound to have been granted as a mere

relabelling exercise.

...

40. Pausing there, **it seems to me that, on a careful reading of the amended particulars of claim it ought to be clear to the reader, even though Section 99 and/or Regulation 20 of the 1999 Regulations have not been cited, that the Claimant is asserting a claim of automatically unfair dismissal, and asserting that for that reason Section 111A(3) is engaged, and Section 111A does not apply.** That is in addition to her further argument, advanced at that point, that this letter was not evidence of pre-termination negotiations in the section 111A(2) sense, because it was a sham attempt to negotiate.

...

55. In another case **the difference between the mechanism of Section 111A(3) and that of Section 111A(4) could be significant because, as I have noted, the former applies simply where according to the complainant's case the circumstances are such that a provision making the dismissal automatically unfair would be engaged. Arguably, therefore, where the complainant has asserted such a case, the Tribunal inescapably has to conclude that Section 111A(3) is engaged. Here, the Claimant had asserted such a factual case by the time of the April 2018 hearing. Even if Mr Kohanzad is right that, in order to actually pursue an automatically unfair dismissal claim under Section 99 and Regulation 20, she would have to have applied to amend to attach that legal label to her claims, he is also right to concede effectively that such an application to amend, if needed and made, would have been bound to be granted.**

57. If no case that there was improper behaviour has been advanced, sufficiently or at all, then I do not think the Judge needs to consider those issues. However, in the present case, it seems to me, the section 111A(3) and (4) arguments really go hand in hand, because the Claimant was saying that this letter was written as a reaction to the news that she was pregnant, and that same factual proposition was said to be the foundation of her claim that there was a fundamental breach, her claim that this was an unfair constructive dismissal, including implicitly, if not explicitly, pursuant to Section 99 and Regulation 20, and her claim that this was improper behaviour. That is having regard, in particular, it must be noted, to the provisions of the Code, that include any act of discrimination among the examples of improper behaviour. All of these propositions really stand or fall together in this particular case.

58. In those circumstances, Mr Bromige's second line of argument does reinforce the conclusion that **the Judge ought, in this particular case, to have proactively considered and raised how the issues stood in relation to Section 111A(3) and (4), before coming to his conclusions on section 111A, or at any rate that he should have explained what consideration he had given to those matters in order to produce a Rule 62, and/or Meek compliant decision.**

20. The final case on section 111A relied on by the parties is *Gallagher v McKinnon's Auto and Tyres Ltd* [2025] IRLR 112 (*Gallagher*), a decision of Judge Barry Clarke. In that case, the EAT upheld a decision by the Employment Tribunal that there had been no improper behaviour. The claimant's arguments before the EAT in that case were summarised in the

headnote as follows:

The claimant appealed on three grounds: (i) that the ET had erred by failing to find improper behaviour where Ms M had told him he had been made redundant which he contended was a proposition that dismissal would result if the offer was not accepted, and a paradigm example of that which para 18(e)(ii) of the Acas Code of Practice on Settlement Agreements ('Acas Code') identified as undue pressure; (ii) that the meeting had been set up under false pretences and that Ms M had misrepresented the purpose of the meeting as a 'return to work' discussion, when in reality she simply wished to propose terms of severance; and (iii) that the claimant was given only 48 hours to respond to the settlement proposal, which was also said to have constituted undue pressure and fell far short of the period of ten days suggested at paras 12 and 18(e)(i) of the Acas Code. It was contended on all three grounds of appeal that the ET's findings had been perverse.

21. The EAT dismissed the appeal. Judge Clarke noted that the Employment Tribunal had had regard to paragraph 18(e)(ii) of the Acas Code and had concluded as a matter of fact that the directors had not closed their minds to what would happen if the claimant rejected the settlement proposal, and, further, that they had not told him that he would be dismissed, only that a redundancy process would commence. The EAT found that the Employment Tribunal had taken a nuanced approach to the employer's lie about the purpose for the meeting, and balanced that against all the surrounding circumstances. As to the period of time for considering the proposal, the Employment Tribunal had noted that the period of 48 hours only related to acceptance or not of the verbal offer, not the proposed settlement agreement and found it did not constitute undue pressure. Judge Clarke observed that a different judge might have taken a different view. Judge Clarke further added at [43]:

Mr MacDougall has fairly made the point that impropriety should be assessed by looking at the aggregate effect of the pre-determined redundancy, the false pretences for the meeting and the 48-hour deadline (as they have been described by the claimant). However, reading the ET's judgment as a whole, it is clear that the judge concluded that these factors did not subject the claimant to undue pressure either individually or cumulatively; the judge was clear that the respondent did not behave improperly overall, and that judgment was open to her on the facts as she found them. Accordingly, the ET committed no error of law in concluding that the fact and content of the pre-termination negotiations were inadmissible.

Case law on identifying issues

22. *Harrison* was decided before the Court of Appeal's decision in *Moustache v Chelsea and*

*Westminster Hospital NHS Foundation Trust* [2025] EWCA Civ 185, [2025] ICR 1231. The facts of that case may be taken from the Headnote:

The claimant brought a claim of disability discrimination against her employer D and in her ET1 claim form ticked the box indicating that her claim included a claim for discrimination arising from disability. She mentioned a panic attack and being signed off sick with work-related stress, but it was not clear on what grounds she was claiming discrimination nor what disability she was alleging. In reply to a request for particulars, the claimant stated that she had had a hip replacement and had difficulty walking, which had affected her work and led to adverse treatment by her employer. The claimant was subsequently dismissed on ill-health grounds, following 13 months' sickness absence, and she issued a second claim for unfair dismissal when "still signed off with work-related stress". The claims were consolidated and a list of issues agreed by the claimant, who was unrepresented throughout the tribunal proceedings. Following a hearing, held remotely, the employment tribunal dismissed the claims of disability discrimination and unfair dismissal. The Employment Appeal Tribunal allowed an appeal by the claimant, holding that the employment tribunal should have identified and determined a further claim, which was not on the agreed list but should have been evident to the tribunal, as to whether the claimant's dismissal was an act of unlawful discrimination, related to her stress and mental health problems, and it remitted that matter to the employment tribunal.

23. The Court of Appeal reversed the decision of the EAT, holding that the employment tribunal had not erred in failing to identify and determine the further claim. Warby LJ gave the judgment of the Court. At [33]-[38] he made "four general points" and then went on to set out the established principles relating to the extent to which a judge may give, or be expected to give, assistance to the parties in relation to their cases:

33 First, proceedings in the ET are adversarial. The range of claims that may be brought and the range of substantive or procedural answers that may be raised to those claims are defined by law, principally by statute. In any given case the primary onus lies on the parties to identify, within those ranges, which claims they wish to bring and which answers they wish to advance.

34 Secondly, the issues raised by the parties are those which emerge clearly from an objective analysis of their statements of case. Identification of the issues does not involve reference to other documents which do not have the status of pleadings and come later. Nor should the process be a complex or difficult one. ... The EJ should not be expected to analyse a party's case by reference to documents which come after the pleadings and do not have the same status, such as a witness statement, or by reference to submissions....

35 Of course, the contents of a statement of case must be analysed in their proper context but this does not require the ET to engage in an elaborate or complex interpretative exercise. I would adopt the words of Elisabeth Laing J (as she then was) in *Adebowale v ISBAN UK Ltd* (unreported) 5 August 2015 at para 16:

"the construction of an ET1 is influenced by two factors: the readers for whom

the ET1 is produced, and whether the drafter is legally qualified or not. The ET1, whether it is drafted by a legal representative, or by a lay person, must be readily understood, at its first reading, by the other party to the proceedings (who may or may not be legally represented) and by the EJ. The EJ is, of course, an expert but . . . should not be burdened by, or expected by the parties to engage in, a disproportionately complex exercise of interpretation.”

36 Thirdly, where a party seeks the ET’s ruling on an issue that emerges from an objective analysis of the statements of case (and falls within its jurisdiction) the ET has a duty to address that issue. This is the core function of the tribunal. That does not mean that the ET has to resolve every issue that is raised in a case. Sometimes a party will not press all the claims that have been pleaded; the ET is not obliged to address those which are raised but later abandoned: see *Mensah v East Hertfordshire NHS Erust* [1998] IRLR 531. And the ET needs only decide enough to reach a conclusion on the claims that have been pressed. Subject to these points, however, I would accept the broad submission of Ms Monaghan, that the ET does not have a discretion not to consider and determine a claim that has been brought before it.

37 Fourthly, however, the ET’s role is arbitral not inquisitorial or investigative. It must perform its functions impartially, fairly and justly, in accordance with the overriding objective, the law, and the evidence in the case. It may consider it appropriate to explore the scope of a party’s case by way of clarification. That may, in particular, be considered appropriate in the case of an unrepresented party. Whether to do so is however a matter of judgment and discretion which will rarely qualify as an error of law such that the EAT can interfere. The ET has no general duty to take proactive steps to prompt some expansion or modification of the case advanced by a party where that might be to their advantage. These propositions emerge clearly from a series of decisions of this court and the EAT.

38 We have been referred to the decisions of this court in *Mensah* (above) at paras 28 and 36 and *Muschett v HM Prison Service* [2010] IRLR 451, para 31. I do not consider it necessary to review those two cases in further detail. That was done in *Drysdale v Department of Transport (Maritime and Coastguard Agency)* [2015] ICR D2; [2014] IRLR 892 where the court subjected the relevant authorities to a detailed analysis from which Barling J (with whom Arden and Christopher Clarke LJ agreed) derived the following general principles:

- (1) It is a long-established and obviously desirable practice of courts generally, and employment tribunals in particular, that they will provide such assistance to litigants as may be appropriate in the formulation and presentation of their case.
- (2) What level of assistance or intervention is “appropriate” depends upon the circumstances of each particular case.
- (3) Such circumstances are too numerous to list exhaustively, but are likely to include: whether the litigant is representing himself or is represented; if represented, whether the representative is legally qualified or not; and in any case, the apparent level of competence and understanding of the litigant and/or his representative.
- (4) The appropriate level of assistance or intervention is constrained by the overriding requirement that the tribunal must at all times be, and be seen to be, impartial as between the parties, and that injustice to either side must be avoided.
- (5) The determination of the appropriate level of assistance or intervention is properly a matter for the judgment of the tribunal hearing the case, and the creation of rigid obligations or rules of law in this regard is to be avoided, as much will depend

on the tribunal's assessment and "feel" for what is fair in all the circumstances of the specific case.

(6) There is, therefore, a wide margin of appreciation available to a tribunal in assessing such matters, and an appeal court will not normally interfere with the tribunal's exercise of its judgment in the absence of an act or omission on the part of the tribunal which no reasonable tribunal, properly directing itself on the basis of the overriding objective, would have done/omitted to do, and which amounts to unfair treatment of a litigant.

39 The following analysis seems to me correct in principle and consistent with the case law. The starting point is to consider what claims emerge from an objective analysis of the statements of case. A failure by the tribunal to identify and address those claims is liable to amount to a breach of its core duty and hence an error of law. A failure to identify and determine a claim that does not emerge from such an analysis can amount to an error of law but only in rare or exceptional circumstances of the kind outlined in *Drysdale*. It is in this overall context that the role of an agreed list of issues falls for consideration.

40 A list of issues is not a pleading but a case management tool. The main purpose of such a document is to summarise the existing pleadings not to amend them. ... A tribunal will usually be entitled to confine its attention to the issues on the list. By way of exception, however, it may be necessary in the interests of justice to depart from even an agreed list. There are at least two distinct categories of situation in which that may be so. The first is where a pleaded claim has been omitted from the list in circumstances that do not amount to abandonment of the claim. The second is where the claim has not been pleaded but the fundamental duty of fairness makes it necessary (that is to say, essential) that it should be raised and considered.

24. The Court of Appeal reviewed a number of the other authorities on the question of identifying pleaded claims. At [44]-[46], the Court referred to, and did not disapprove or doubt, the decision of the Court of Appeal in *Mervyn v BW Controls Ltd* [2020] ICR 1364 in which the Court of Appeal determined, reversing the judgment of Laing J in the EAT, and adopting the language of HHJ Auerbach in *McLeary v One Housing Group Ltd* UKEAT/124/18 (*unreported*) 6 February 2019, EAT that it 'shouted out' from the contents of the claimant's particulars in that case that she was alleging constructive dismissal, albeit that it had been omitted from a list of issues. At [44] the Court of Appeal cited, with apparent approval, the dictum of Laing J in EAT in that case that:

"the ET . . . [has] a duty, if it is obvious from the ET 1 that a litigant in person is relying on facts that could support a legal claim, to ensure that the litigant in person does understand the nature of that claim."

25. Warby LJ at [46] characterised the decision of the Court of Appeal in *Mervyn* as being one of

those “exceptional” cases described by the Court of Appeal in *Scicluna v Zippy Stitch* [2018] EWCA Civ 1320, where a Tribunal would be under a duty to depart from an agreed list of issues.

26. In *Moustache*, the Court of Appeal considered the EAT had erred in dealing with the case as if it was such an exceptional case for the reasons given in Warby LJ’s judgment at [53]-[55]. In particular, the Court of Appeal considered it significant that the discrimination box had not been ticked in section 8.1 of the ET1 and that the failure to tick the box was to be given weight because the claim was by “an articulate professional woman who had recently demonstrated an understanding of the concepts of discrimination and disability”, having “deployed both in her first claim”. Further, at ([56]), “Although the ET1 referred to the employee being signed off sick from work “due to anxiety stress and panic attacks due to my work situation” it did not “clearly assert that this was the reason for her dismissal or even a reason”, nor did it “shout out” or make “any clear assertion to the effect that the employee’s mental state amounted to a disability”.

### *The approach of the EAT*

27. In considering the decision of the Employment Tribunal, the EAT applies the well-established principles summarised in the Court of Appeal’s decision *DPP Law Limited v Greenberg* [2021] IRLR 1016 at [57]-[58]:

(1) The decision of an employment tribunal must be read fairly and as a whole, without focusing merely on individual phrases or passages in isolation, and without being hypercritical. In *Brent v Fuller* [2011] EWCA Civ 267, [2011] IRLR 414, [2011] ICR 806, Mummery LJ said ([2011] IRLR 414 at 417, [2011] ICR 806 at 813):

‘The reading of an [employment tribunal] decision must not, however, be so fussy that it produces pernicky critiques. Over-analysis of the reasoning process; being hypercritical of the way in which the decision is written; focusing too much on particular passages or turns of phrase to the neglect of the decision read in the round: those are all appellate weaknesses to avoid’.

...

(2) A tribunal is not required to identify all the evidence relied on in reaching its conclusions of fact. To impose such a requirement would put an intolerable burden on any fact finder. Nor is it required to express every step of its reasoning in any greater degree of detail than that necessary to be Meek-compliant (Meek v Birmingham City Council [1987] IRLR 250). Expression of the findings and reasoning in terms which are as simple, clear and concise as possible is to be encouraged. ...

(3) It follows from (2) that it is not legitimate for an appellate court or tribunal to reason that a failure by an employment tribunal to refer to evidence means that it did not exist, or that a failure to refer to it means that it was not taken into account in reaching the conclusions expressed in the decision. What is out of sight in the language of the decision is not to be presumed to be non-existent or out of mind. ...

58 Moreover, where a tribunal has correctly stated the legal principles to be applied, an appellate tribunal or court should, in my view, be slow to conclude that it has not applied those principles, and should generally do so only where it is clear from the language used that a different principle has been applied to the facts found. Tribunals sometimes make errors, having stated the principles correctly but slipping up in their application, as the case law demonstrates; but if the correct principles were in the tribunal's mind, as demonstrated by their being identified in the express terms of the decision, the tribunal can be expected to have been seeking faithfully to apply them, and to have done so unless the contrary is clear from the language of its decision. This presumption ought to be all the stronger where ... the decision is by an experienced specialist tribunal applying very familiar principles whose application forms a significant part of its day to day judicial workload.

### **The proceedings before the Employment Tribunal and the Employment Tribunal's decision**

28. The Employment Tribunal preliminary hearing before Employment Judge Wright on 3 March 2025 was the first hearing in these proceedings. The date was originally listed as the first day of a two-day final hearing, the Employment Tribunal apparently having given standard directions previously for the case to go straight to final hearing without any preliminary hearing. However, shortly in advance of the hearing, the parties tell me that an Employment Judge reviewed the file and converted the hearing to a preliminary hearing to deal with the section 111A issue, an application by the claimant for specific disclosure and other case management issues.
29. I have already set out above that the claimant in his ET1 filed on 22 August 2024 had ticked the boxes in Section 8.1 for "unfair dismissal", "arrear of pay" and "another type of claim", which he identified as being "less favourable treatment for part-time worker". The narrative

particulars in Section 8.2 were arranged under three headings: “Unfair Dismissal Claim”, “Unpaid Wages Claim” and “Less favourable treatment for being part-time worker claim”. The last bullet point under the “Unfair Dismissal Claim” identified that the claimant was asserting that part of the reason why he was dismissed was because he was part-time worker. The last three bullet points under “Unpaid Wages Claim” stated (emphasis added to show the words particularly relied on by the claimant in relation to ground 1b):

- In April 2024, after 80% of the jobs I secured had been delivered (with the remaining 20% being Phase 2 of a job that was realistically priced in Phase 1), I requested payment of my contractual bonus. To avoid further disputes, I removed the Phase 2 job from my claim, but this did not resolve the issue.
- The company refused to pay my contractual bonus, asserting that jobs had to be both secured and delivered within the same period, an extra condition not included in the original agreement. This extra requirement is also unreasonable for an estimator’s target, as my work was completed in 2023, even if some jobs were delivered in early 2024.
- **After requesting my contractual bonus, I was threatened with redundancy on 23rd April 2024 and subsequently made redundant on 13th June 2024 in a botched redundancy process.**

30. The respondent in [7] of its ET3 relied on section 111A in stating that pre-termination negotiations took place with the claimant that were inadmissible. The respondent denied any improper conduct.
31. The claimant in a witness statement dated 5 February 2025 challenged the respondent’s reliance on section 111A. His witness statement sets out a detailed chronology of events regarding his seeking of his contractual bonus, the 23 April 2024 meeting that was said to be a “protected conversation” and the subsequent redundancy process and dismissal. Regarding his request for payment of his bonus and what immediately followed, his statement included the following:

**3.4. 18 April 2024 – Denial of Bonus & My Response**

- o Mr. Ahmad emailed me on 18 April 2024, stating I would not receive the bonus for reasons I believed were inconsistent with the original scheme (e.g., referencing the timing of job deliveries in 2024). (see Annex A, Item 3)
- o I responded in writing that I still met the criteria outlined by Craig. I reiterated that the core of my job was to secure work, which I had done successfully in 2023. (see Annex A, Item 4)

**4. 2024.04.23 – THE “PROTECTED CONVERSATION” (APPROX. 2 PM)****4.1. Summoned to Meeting**

- o On 23 April 2024, around 2 PM, Mr. Ahmad came to my office unexpectedly and said Mr. Macklin wanted to see me.
- o I had no opportunity to refuse or to bring a representative. I was led into a meeting room where Craig sat with a printout of my April 18th email.

**4.2. Craig’s Threatening Statements**

- o Craig stated: “This is a protective conversation.” I asked what that meant, and he described it as a “legal term.”
- o He then read my email, emphasizing the words “to motivate MEEE.” He accused me of being entitled, referencing last year’s alleged “entitled attitude.”
- o Craig then said:
  - “Look, Laurentiu, I don’t trust you, and I want you to leave the business. I made you an offer to leave; take this envelope – it’s a good deal for you... You don’t have to accept this offer, but if you don’t, I will put all the estimators in the redundancy process, and I guarantee you that you will come last... I gave you 3 months’ salary, more than you’re worth.”
- o He also mentioned that because 2023 was a good year, discretionary bonuses would be given out but, due to my “entitled attitude,” I would not receive my “thank you.”

32. At paragraph 15, the claimant set out the reasons why he submitted the 23 April conversation was not a “protected conversation” as follows:

**15. WHY THE 23 APRIL “PROTECTED CONVERSATION” IS NOT GENUINELY PROTECTED****15.1. Improper Conduct & Coercion**

- o Craig’s language and ultimatum—“If you don’t accept, I’ll put you in the redundancy process and guarantee you come last”—constitute threats and intimidation, which go beyond the scope of a lawful protected discussion.

**15.2. No Choice to Refuse or Accompaniment**

- o I was given no advance notice, no right to refuse, and no option to bring a representative. Such conditions conflict with the principle that a protected conversation should be voluntary and non-coercive.

**15.3. Immediate Redundancy Preparations**

- o The internal emails, scoring sheets dated 25 April, the WhatsApp message, and the “Redundancy procedure.pdf” distribution on 23 April all prove that the Respondent enacted a plan to remove me on the same day I declined the settlement, exactly as Craig threatened.

**15.4. Consistent Records & Repeated Non-Denial**

- o My contemporaneous notes, phone calls, repeated references in consultation and appeal meetings, plus the fact that the Respondent never denied the threat itself, strongly indicate that the threat indeed occurred. Under employment law, intimidation cannot be cloaked under “protection.”

33. The witness statement concluded with a request by the claimant that the Tribunal direct the parties to agree a list of issues (pp 144-145).
34. Mr Macklin for the respondent filed a witness statement in response to the claimant’s. So far

as material, it included the following as regards the 23 April 2024 meeting:

3. I was provided with a script by our HR Consultant which I read out to the Claimant.

4. It was clearly explained to him that Section 111A of the Employment Rights Act 1996 applied and that the conversation was confidential and would not be admissible in evidence.

5. The Claimant alleges that he was threatened with redundancy by me. He says that I said, “You don’t have to accept this offer, but if you don’t I will put all the Estimators in the redundancy process and I guarantee you will come last”.

6. I did not make this comment and he most certainly was not threatened. ...

9. The Claimant asked me what would happen if he didn’t accept the offer and I said that due to the poor financial performance of the business I was forced to consider making cuts to try and ensure that the business remained viable. ... I told him that, subject to taking detailed HR advice, it might be that I had to put members of the estimating team on notice of redundancy and that if I was tasked with completing performance scoring, which I would not be, he would likely come last for the reasons I had just explained to him [*relating to his view of the claimant’s attitude and performance*].

35. The claimant has obtained a full transcript of the hearing before Employment Judge Wright on 3 March 2025, which took place by video. From that, it can be seen that the hearing began with consideration of the section 111A issue. The claimant gave evidence on oath and was cross-examined by Mr Keith, then Mr Macklin gave evidence and was cross-examined by the claimant. The judge gave the parties each five minutes to make submissions on that issue. After a break the re-listing of the final hearing for four days was discussed and then there was a short discussion of the issues (page 30).

36. The following matters in the transcript are of particular relevance to this appeal:

- a. The claimant’s opening questions to Mr Tarbuc related to his email of 18 April 2024 and the connection between the disagreement they had had regarding his bonus and Mr Macklin’s decision to hold a protected conversation with him to discuss him leaving the business. Mr Macklin accepted that the disagreement about the bonus was one of the reasons for the conversation (see generally page 12, line 23 to page 14 line 21, and also page 16, line 12ff).

- b. Mr Macklin resiled from paragraph 3 of his witness statement, stating that what he had described as a “script” produced by HR was in fact the termination proposal letter that he handed to the claimant in an envelope at the meeting and which neither of them read at the meeting (see page 14, line 28 to page 15, line 32).
  - c. When discussing the list of issues, in answers to questions from the judge about the bonus claim, the claimant accepted that he had received his contractual bonus, but not a discretionary bonus (page 31, lines 32-33).
  - d. There was then a discussion of the claimant’s specific disclosure claim, with counsel for the respondent submitting that if the judge found that section 111A applied then emails related to the protected conversation would be “out in their entirety” (page 33, line 21).
  - e. At page 33, lines 28-30, the judge comments on one of the claimant’s specific disclosure requests, saying “I do not see how ...[these documents] are going to assist the Tribunal in deciding whether or not your redundancy was fair, whether it was related to your part-time status **or related to your bonus**” (emphasis added).
37. The judge gave an oral judgment on the section 111A issue after the lunch break. Written reasons for that decision were provided on 13 March 2025, together with a case management order which, among other things: (i) listed the final hearing for 26 May 2026 to 29 May 2026; (ii) refused the appellant’s request for specific disclosure of documents relating to the section 111A protected conversation; and (iii) set out a list of issues.

### The Employment Tribunal’s decision

38. Employment Judge Wright’s written reasons begin, after a short introduction, by setting out [3]-[13] of *Gallagher*.
39. The material part of the reasons is short and for convenience I set it out in full:
- 5. A meeting took place on the 23/4/2024 between the claimant and Mr Mackin. For the purposes of the unfair dismissal, the respondent relies upon s.111A

ERA, namely that the evidence of the pre-termination negotiations is inadmissible in any proceedings on a complaint under s.111A ERA. The shorthand term 'protected conversation' was adopted and used at the hearing.

6. The claimant seeks to rely upon s.111A(4) ERA, on the basis that Mr Mackin's conduct in the meeting was improper or was connected with improper behaviour.

7. Mr Mackin agrees that during the meeting he said word to the effect of if he (Mr Mackin) were tasked with completing the performance scoring, which he would not be, he (the claimant) would likely come last for the reasons which had just been explained. This was against the background of Mr Mackin as MD needing to cut costs and him being dissatisfied with the claimant's performance and attitude.

8. The claimant's version of events is that Mr Mackin said to him 'you don't have to accept this offer, but if you don't I will put all the Estimators (the claimant was an Estimator) in the redundancy process and I guarantee you will come last.

9. It was submitted by the respondent that the claimant did not complain about this meeting at the time and that he had previously raised issues he was unhappy about with HR. The claimant's explanation was that he wanted to keep his job.

10. On the balance of probabilities (is it more likely than not), the Tribunal prefers Mr Mackin's version of events and the words the claimant attributes to him were not said. Mr Mackin had been forthcoming about the matters he considered required improvement in respect of the claimant's performance. Besides the claimant's performance, Mr Mackin had issues with the claimant's absence and him having accidents, his working from home and his lack of attendance in the office. Mr Mackin was measured and had a clear understanding of the purpose of S.111A ERA. He had taken advice in respect of the meeting and had clearly followed that advice. He was attempting to bypass the unrest a redundancy situation would cause and the fact that it would be a more protracted process, than a negotiated and agreed exit.

11. The proposal Mr Mackin made to the claimant was obviously unwelcomed by him. The claimant said during the meeting that he did not wish to accept the offer and he refused to open and read the letter Mr Mackin had prepared for him. The claimant said (and it was not disputed) that he telephoned his wife and a friend after the meeting. It is to be expected that a proposal that his employment would terminate would be upsetting for the claimant and that he would seek support.

12. It may well be the case that the claimant interpreted Mr Mackin's statement as a threat. The test to be applied via s.111A(4) ERA is whether anything done was in the Tribunal's opinion improper. The Tribunal's opinion is that Mr Mackin's comments were not improper conduct.

13. S.111A(1) ERA therefore applies and the pre-termination negotiations are not admissible in the claim for unfair dismissal. As it is not possible by agreement to waive s.111A(1) ERA and the protection extends to the fact of the negotiations and not just the content, all references to the meeting on the 23/4/2024 will have to be redacted from the pleadings, the bundle and the witness statements.

### **The parties' submissions, and my analysis and conclusions in relation to each ground**

40. Both parties provided me with very helpful written and oral submissions. I do not set out here a separate summary of their submissions, but deal with the principal planks of their arguments in setting out my analysis and the conclusion I have reached in relation to each ground of appeal.

### **Ground 1(a): error of law in failing to recognise that section 111A does not apply to the unlawful deduction from wages and part-time worker claims**

41. The parties are in agreement, and there is no doubt, that the judge erred in law in failing to recognise in [13] of her decision that section 111A does not apply to the claimant's unlawful deduction from wages claim, or to his claim of less favourable treatment as a part-time worker. Accordingly, she erred in directing that all references to the protected conversation should be redacted from all the documents in the hearing bundles, and refusing the claimant's application for specific disclosure of related documents. Were this the only ground on which this appeal succeeds, it would leave the Tribunal with a very difficult task of analytical compartmentalisation in this case (to use Choudhury P's term from *Basra*). The documents would remain inadmissible in relation to the 'ordinary' unfair dismissal claim. However, the claimant's claim of less favourable treatment as a part-time worker is that he was selected for redundancy, and this alleged treatment is also relied on as rendering the dismissal unfair. The mental gymnastics required for any Tribunal to decide this case properly applying section 111A if ground 1(a) were the only ground to succeed would therefore be very challenging. The parties and Tribunal may (or may not) be spared that difficulty, depending on the decision

that the Employment Tribunal makes in the light of the outcome of this appeal.

**Ground 1(b): the putative section 104 ERA 1996 claim**

42. In the light of the legal principles established in the authorities on identifying issues (see above paragraphs 22 to 26), the question that arises under this ground is whether the claimant had in his ET1 pleaded the factual basis of a claim of automatic unfair dismissal under section 104 ERA 1996 and, if so, whether Judge Wright erred in law in failing to raise that possibility with the parties. The claimant goes further and suggests that the judge was bound to find that he had made such a claim and thus to disapply section 111A by virtue of section 111A(3).
43. I have to assess whether or not Judge Wright made an error of law by reference to the position as it was at the hearing on 3 March 2025. The fact that the claimant subsequently made an express application to amend his claim to include such a claim, and that was refused by Employment Judge Musgrave-Cohen, cannot change the analysis one way or another, albeit that I can take those subsequent events into account insofar as they cast light on the position as it was before Employment Judge Wright on 3 March 2025.
44. I have to consider, first, whether the ET1 includes the factual basis for such a claim. Employment Judge Musgrave-Cohen when considering the application to amend considered that it **did** having considered the pleading in detail in response to an application to amend, and approached the amendment decision supposedly on the basis that it was a “re-labelling” exercise. However, as I have said, I have to assess this afresh and objectively. Secondly, as the question is whether Judge Wright should have identified and raised this possible claim of her own motion, the fact that the factual elements of the claim may be in the ET1 when it is carefully scrutinised (so that any amendment required will merely be re-labelling) is not necessarily enough. In accordance with the well-established approach, re-stated by the Court of Appeal in *Moustache*, I have to consider whether the ET1, read in the context of the appellant being a litigant in person with no legal qualification, can readily be understood (“at

its first reading” was how Laing J put it in *Adebowale*, quoted at [35] of *Moustache*; ‘shout out’ is the other term used), as including the claim in question.

45. The necessary elements in the pleading of a section 104 claim are:
- a. An allegation made prior to dismissal that the employer has infringed a right of the claimant’s that is a relevant statutory right. Sections 104(2) and (3) make clear that it is immaterial whether the employee has the right, or whether it has been infringed, and the employee does not have to specify the right, only make it reasonably clear to the employer what the right claimed to have been infringed was; and,
  - b. A claim that the reason for dismissal was that allegation or, at least, that there was a causal connection between the allegation and the dismissal.
46. The claimant relies on the bold bullet point under the heading of “Unpaid wages claim” (see above paragraph 29). The respondent submits that this does not include the factual elements of a section 104 claim because: (a) there is no allegation of *infringement* of a right, just a request to be paid; and (b) the connection with the dismissal is pleaded as being chronological rather than causal. I agree with the respondent on point (a), but not on point (b). As to point (a), the pleading states merely that he ‘requested’ his contractual bonus. It does not state that he asserted to his employer that the employer had breached any right of his. It sets out the basis of an unlawful deduction from wages claim, as one would expect given that the bullet point comes under that heading in the pleading, but it does not include a pleading that there has been an assertion of infringement as required for a section 104 claim (or words to similar effect). Further, although there is no ambiguity in the pleading on this point, I note that Employment Judge Musgrave-Cohen when dealing with the amendment application took the view that the documents relied on by the appellant as the assertion did not meet the statutory requirements either.
47. On point (b), although the words “After requesting my contractual bonus...” are capable of indicating a chronological link or a causal link, I read the bullet point as a whole objectively

as indicating a causal link in the context of this case. If there is any ambiguity, then it seems to me that the general prohibition on looking to material other than the ET1 would need to be relaxed in order to resolve it. It is not necessary to look far in this case to see the claimant has evidently felt from the outset that his request for his bonus was a cause of his dismissal – as noted above, that was a focus of his cross-examination of Mr Macklin at the preliminary hearing, and Mr Macklin essentially accepted there was *a* causal relationship between the two. Indeed, Judge Wright herself had evidently understood that was the claimant’s case too: see paragraph 36(e) above.

48. Because point (a) is not in the pleading, this is not a case like *Harrison* where the factual basis of the automatic unfair dismissal claim was in the ET1 and an amendment application would ‘inevitably’ have been granted. (Nor, indeed, was the amendment application granted when it was subsequently made, albeit that the judge’s reasons for refusing the amendment may prove to have been flawed.)
49. As I have decided that the factual basis of the section 104 claim is not in the ET1, I do not strictly have to go on to consider whether Employment Judge Wright erred in raising the possibility of amending to include that claim with the claimant of her own motion. However, I add that, even if I had found the factual elements of the claim were included in the ET1, I would not have concluded in this case that the judge erred in law in failing to identify the claim (or potential claim) of her own motion.
50. As I have indicated, there is a difference between what is required of a pleading before a judge will be expected to identify an unlabelled legal claim of their own motion, and what claims may, on very careful scrutiny, turn out to be factually in a pleading so that any amendment application must be dealt with as a re-labelling exercise.
51. In this case, the claimant is in some ways a victim of his own skill in presenting legal arguments. I have observed that he has a quite remarkable facility for grasping legal principles and arguments and presenting them as a lawyer would which is all the more impressive given

that English is not his first language. However, as a result, his documents give an impression that he is more competent and knowledgeable than he is. He is not a lawyer and he is evidently learning the law as he has gone along in these proceedings. Nonetheless, the impression of competence affects the way his ET1 is objectively construed. His ET1 presents, exceptionally clearly, the three claims that were identified by the judge and the respondent. Although he included the less favourable treatment as a part-time worker allegations in both the unfair dismissal and part-time worker discrimination sections, thus making clear that he considered that treatment formed part of the reason why the dismissal was unfair, he did not do the same for the bonus issue. Nor, as I have noted, did he plead (or, if I am wrong about that, nor did he plead *clearly*) that he had asserted the factual basis of a claim for infringement of a statutory right in response to which he had been dismissed. This was not a claim that “shouted out” from the pleadings. The judge did not err in law in failing to identify and raise it with the parties of her own motion. Ground 1(b) therefore fails.

**Ground 2: failure to give proper consideration to the ACAS Code of Practice and failure to consider the cumulative effect of the respondent’s conduct including the Claimant being ambushed in the corridor, not being afforded sufficient time to secure a companion to accompany him to the meeting and the short timeframe he was given to consider the offer.**

52. The claimant submits, in short, that when considering whether or not there was improper conduct by the respondent, the Employment Tribunal failed to consider all these matters as they are not mentioned in the material part of its reasons set out at paragraph 39 above. The respondent submits that I need to apply the *Greenberg* approach. The Employment Tribunal properly directed itself as to the law by setting out the passage from *Gallagher* and can be assumed to have applied it. The respondent further submits that *Gallagher* shows that being ambushed by a meeting and having little time to consider a settlement proposal are not

sufficient to constitute improper conduct.

53. On this ground, I agree with the claimant. Although I am prepared to accept that, because the Employment Judge quoted the passage from *Gallagher* that refers to the Acas Code of Practice, she did not leave the Code wholly out of account, the Employment Judge has approached the question of whether there was improper conduct by reference solely to the question of what Mr Macklin said in the meeting, and how he said it. She has not in her reasons even mentioned the way in which the meeting was called or the failure to allow the claimant a companion. These were matters that the claimant had specifically advanced in his witness statement for the hearing as being part of why he said there was improper conduct: see paragraph 32 above. Although I note from the transcript of the hearing that the claimant did not specifically allude to these points again in his closing submission, it is evident from the transcript that the Judge was seeking to hurry the parties at that point, gave them only five minutes to make their submission and interrupted the claimant (properly) when he appeared to start talking about legal advice. I do not criticise the Judge's conduct of the hearing in these respects, but it does mean that I do not consider it was open to the Judge to regard the claimant as having reduced his case on improper conduct only to what he managed to say in closing submissions rather than taking account of the case he had advanced in his witness statement.
54. Moreover, it does not follow that because an 'ambush' meeting and failure to allow an employee time to bring a companion were insufficient to persuade the Employment Tribunal in *Gallagher* that conduct was improper, and the EAT accepted the Tribunal had not erred in so concluding, that such matters will not be sufficient in other cases, in combination with other conduct. It is apparent from Judge Clarke's decision in *Gallagher* that the Employment Tribunal's decision in that case survived challenge on appeal because the Employment Tribunal's reasons were 'nuanced' and all relevant matters had been considered and expressly dealt with in the reasons. That is not the position in this case. I am satisfied that the Employment Tribunal erred in law as contended in ground 2 by failing to consider the full

circumstances and failing to give adequate reasons for its conclusions that dealt with the main elements of the claimant's case.

55. In reaching this conclusion, I have deliberately not mentioned the argument that the claimant now raises on this appeal about the length of time that he was given to consider the respondent's offer. That is because this point seems to me to be something of a 'red herring' in this case. The claimant rejected the respondent's offer outright at the meeting, so it cannot be said that the period of 5 days offered in the letter presented at the meeting (which the claimant did not read) added to any pressure on the claimant or any improper conduct by the respondent. Further, the recommendation in paragraph 12 of the Acas Code of Practice is for 10 calendar days to consider the "proposed formal written terms of a settlement agreement and to receive independent advice". The respondent's 23 April 2024 letter was not the formal written terms of a settlement agreement, it set out proposed "heads of terms" and envisaged that a formal settlement agreement would follow if the "heads of terms" were agreed.
56. Nonetheless Ground 2 succeeds for the reasons I have given.

**Ground 3: Tribunal's conclusion that Mr Macklin had taken advice in respect of the meeting on 23 April 2024 and had clearly followed it was unsupported by evidence and therefore perverse.**

57. Given my conclusion on ground 2, this ground becomes unnecessary as the question of whether there was improper conduct will need to be re-visited. However, in view of certain factual points that became clear in the course of the hearing before me, I record that I do not consider this aspect of the Tribunal's conclusion was perverse.
58. The claimant is right that it became clear in cross-examination of Mr Macklin that there was no "script" for the meeting on 23 April 2024 as that term is normally understood. What Mr Macklin meant by the "script" turned out to be the letter that he presented to the claimant in an envelope at that meeting. The claimant is also right that Mr Macklin did not in his witness

statement or in oral evidence specifically state that he had taken advice in respect of the meeting and that he followed that advice. The claimant is also right that it is apparent from Mr Macklin’s oral evidence that he raised with the claimant in that meeting many aspects of the claimant’s performance that he considered to be unsatisfactory and that this means that Mr Macklin cannot have been precisely following any advice he had received.

59. However, it is plain from [10] of the Employment Judge’s reasons that she had grasped all those points (or, at least, her reasons are not inconsistent with all of those points being true). Paragraph [10] does not suggest that Mr Macklin read from a script and it refers to Macklin’s evidence about discussing with the claimant all the matters of concern as regards his performance. Beyond that, the judge was entitled to form her own view of a witness (that he was “measured and had a clear understanding of the purpose of s. 111A ERA”) and also to draw reasonable inferences from the evidence. The inference that Mr Macklin had “taken advice in respect of the meeting” and “clearly followed that advice” is one such. Mr Macklin had confirmed that the 23 April 2024 letter was given to him by HR advisors (although he wrongly described it as a “script”), the letter has all the hallmarks of being drafted by advisors and includes in the last paragraph a reference to the company’s “employment law advisors”. It is also a reasonable inference that Mr Macklin followed the advice he had received in holding the meeting, giving the claimant the letter and raising with him the matters in that letter, even if he also covered other matters.

60. Ground 3 therefore fails.

### **Conclusion and disposal**

61. For the reasons set out above, Ground 1(a) succeeds (by consent), Ground 1(b) fails, Ground 2 succeeds and Ground 3 fails.

62. In view of the proximity of the trial of this matter both parties (to a greater extent in the case of the claimant) urge me if the appeal succeeds to exercise the powers of the employment

tribunal, to decide any issues I can for myself and to make directions for the further case management of the Employment Tribunal proceedings.

63. So far as Ground 1(a) is concerned, I can do that. As the respondent accepts, the documents relevant to the “protected conversation” now need to be disclosed (if that has not already happened) and will need to be considered by the Tribunal in relation to the unlawful deduction from wages and part-time workers claims. I am content to make that direction since it is a direction that must be made and therefore it is appropriate for me so to direct (see *Jafri v Lincoln College* [2015] QB 781 at [21] *per* Laws LJ).
64. The respondent suggested that I should direct a split trial whereby the unfair dismissal claim is determined first and only then is the Employment Tribunal shown the documents relevant to the “protected conversation”. However, given that: (i) the claimant relies on his allegations of less favourable treatment as a part-time worker in support of his unfair dismissal claim in respect of which section 111A does not apply; and (ii) Ground 2 has also succeeded so that the question of improper conduct also needs to be re-determined, I am not willing to make any such direction to the Employment Tribunal. These are matters of evidence handling and time management that must be for the Employment Tribunal to determine.
65. It may be, if the parties agree (or the Employment Tribunal considers it appropriate so to direct), that the pragmatic solution in this case is for the trial to go ahead on all claims on the basis of all the evidence, and for the Tribunal to take a decision at the end of it as to whether there has been improper conduct and therefore whether it needs to exclude the material relating to the protected conversation from consideration when reaching its conclusion on the unfair dismissal claim. This may, as I noted previously, require some difficult mental gymnastics, but Tribunals do frequently have to engage in such gymnastics when questions of admissibility of evidence arise; the difficulty should not be insuperable.
66. Although there is no reason to doubt the professionalism of Employment Judge Wright, this case on remission should be listed before a different judge.