# Full Brief

Research Memorandum

**Subject:** Unfair Dismissal Employment Law
**Jurisdiction:** England and Wales
**Generated:** 1 May 2026

## Quick Read

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| **Fairness of Dismissal:** | Arguable — procedurally strong, but vulnerable to Polkey reduction at remedy stage if employer's oral evidence of performance concerns is accepted |
| **Key Risk:** | Even if unfair dismissal is established, the tribunal may apply a substantial Polkey reduction — potentially to nil — if it accepts the employer's oral evidence of genuine capability concerns, given that the absence of documentation does not itself preclude oral evidence of the underlying performance issues. |
| **Best Argument:** | The employer's complete failure to produce any documented performance management process, written warnings, or structured assessment not only fatally undermines procedural fairness under s.98(4) but also challenges whether capability was ever genuinely the operative reason under s.98(1) — a finding that would render dismissal unfair without the tribunal needing to reach reasonableness, and would remove the evidential foundation on which any Polkey reduction could be built. |
| **Biggest Weakness:** | The employee must urgently compile a comprehensive documentary record establishing the total absence of any pre-dismissal performance concerns — including absence of appraisals, written warnings, performance improvement plans, and relevant correspondence — because without this affirmative evidential foundation, a credible oral account from the employer of underlying capability issues could support a significant Polkey reduction even in the absence of formal documentation. |

*The following factual assertions are taken from client instructions and have not been tested in evidence.*

An employee with over two years continuous service has been dismissed by their employer. The employee believes the dismissal was unfair as the employer failed to follow proper disciplinary procedures and the reason given for dismissal was not a potentially fair reason under s.98(2) ERA 1996. The employee was not given adequate notice of the allegations against them and was not offered the right to

be accompanied at a disciplinary hearing. The employer claims the dismissal was for capability reasons but has not produced evidence of any performance management process.

## Leading Authorities

The following authorities have been verified against the National Archives Case Law Database:

✓ ***Commissioners for His Majesty's Revenue and Customs v Professional Game Match Officials Ltd*** **[2024] UKSC 29**

Mutuality of obligation for a contract of employment can be satisfied even if the mutual obligations exist only during the period of actual work, without any obligation to offer or accept future work. ([[55]], [[57]], [[59]], [[69]], [[76]], [[82]], [[88]], [[30]])

> *"In the light of these authorities, it is clearly established that there may be sufficient mutuality of obligation to satisfy one of the essential requisites of a contract of employment, even if the obligations subsist only during the period while the putative employee is working for the putative emp..."*

✓ ***Harper v Virgin Net Ltd*** **[2004] EWCA Civ 271**

The statutory scheme limits the right to claim unfair dismissal to employees who have completed the qualifying period, and Parliament deliberately chose not to extend the effective date of termination by reference to contractual notice periods. ([[15]], [[16]], [[17]], [[18]], [[19]], [[25]], [[27]], [[28]])

> *"The EAT held that the decision of the House of Lords in Johnson precluded them from upholding the Employment Tribunal's additional award. ... 'Parliament has decided that the statutory right not to be unfairly dismissed under section 94(1) ERA will be subject to certain limitations. ... It was open..."*

✓ ***McKinnon v The London Borough of Redbridge*** **[2014] EWCA Civ 178**

Attestation before a justice of the peace is the defining hallmark of the office of constable. ([[55]], [[58]], [[65]], [[66]], [[67]], [[68]], [[73]], [[75]])

> *"One feature which is common to all constables is attestation. They all take an oath or make a declaration before a justice of the peace to the effect that they will properly perform their duties as constable. Indeed, as correctly stated in Halsbury's Laws (volume 84, 2013, page 12 paragraph 3), 'the..."*

✓ ***Airbus UK Ltd v Webb*** **[2008] EWCA Civ 49**

A dismissal for misconduct can be fair even if the employer considered an expired final warning for similar prior misconduct. ([[46]], [[47]], [[55]], [[67]], [[72]], [[73]], [[77]], [[84]])

> *"I am persuaded that it is open to a tribunal to find that a dismissal for misconduct is fair, even though the employer, in his response to the reason for which the employee is dismissed, has taken account of the employee's previous similar misconduct, which was the subject of an expired final warnin..."*

✓ ***Buckland v Bournemouth University Higher Education Corp*** **[2010] EWCA Civ 121**

The correct test for fundamental breach of the implied term of trust and confidence is the objective Mahmud test, with the range of reasonable responses test reserved for the fairness stage only. ([[22]], [[25]], [[28]], [[39]], [[40]], [[43]], [[52]], [[54]-[55]])

> *"In summary, we commend a return to settled authority, based on the following propositions: (1) In determining whether or not the employer is in fundamental breach of the implied term of trust and confidence the unvarnished Mahmud test should be applied. (2) If, applying the Sharp principles, accepta..."*

✓ ***Botham v The Ministry of Defence*** **[2010] EWHC 646 (QB)**

The Johnson exclusion prevents common law claims for damages based on the manner of dismissal from coexisting with the statutory unfair dismissal regime. ([[43]], [[53]], [[54]], [[59]], [[60]], [[65]], [[71]], [[72]])

> *"Johnson is frequently cited as authority for the proposition in the speech of Lord Nicholls at page 526C that '…a common law right embracing the manner in which an employee is dismissed cannot satisfactorily coexist with the*

> *statutory right not to be unfairly dismissed.'"*

✓ ***Sean Pong Tyres Limited v Barry Moore (debarred)*** **[2024] EAT 1**

Liability for unfair dismissal under the ERA 1996 lies only with the claimant's employer and does not transfer under TUPE where the claimant's employment has not transferred. ([[20]], [[32](a)], [[32](b)], [[32](d)], [[32](e)], [[32](h)], [[45]], [[46]])

> *"Mr McFarlane agreed...that, as liability for (ordinary) unfair dismissal lies only with a claimant's 'employer' under the ERA 1996 and in no circumstances against anyone who is merely an employee or agent of the claimant's employer...liability for the claimant's unfair dismissal claim lies properly..."*

✓ ***C Knightley v Chelsea and Westminster Hospital NHS Foundation Trust*** **[2022] EAT 63**

The absence of an appeal opportunity is not per se determinative of unfair dismissal; it is a factor to be assessed in the overall circumstances. ([[36]], [[37]], [[38]], [[45]], [[46]], [[47]], [[48]], [[57]])

> *"The lack of an opportunity to appeal does not necessarily or automatically render a dismissal unfair. Whether it does so will depend on the circumstances of the particular case."*

## Legal Framework Analysis

The authorities establish a structured analytical sequence which a tribunal must follow.

**(1) An employee wrongfully dismissed before the qualifying period for unfair dismissal cannot recover damages for loss of the chance to claim unfair dismissal; the statutory scheme is exclusive..** Harper v Virgin Net Ltd [2004] EWCA Civ 271 at [15]-[16].

**(2) Under TUPE, an employer's liability under the Equality Act 2010 does not transfer to a transferee where the claimant employee's employment has not transferred, even if the individual tortfeasor's employment has transferred..** Sean Pong Tyres Ltd v Moore [2024] EAT 1 at [19]-[20].

**(3) Section 98(4) ERA 1996: fairness of dismissal depends on whether employer acted reasonably in treating the reason as sufficient, determined in accordance with equity and substantial merits. (also: C Knightley v Chelsea and Westminster Hospital NHS Foundation Trust [2022] EAT 63 at [34]).** Airbus UK Ltd v Webb [2008] EWCA Civ 49 at [36].

**(4) Section 15 EqA 2010: unfavourable treatment because of something arising from disability is discriminatory unless proportionate means of achieving legitimate aim..** C Knightley v Chelsea and Westminster Hospital NHS Foundation Trust [2022] EAT 63 at [32].

**(5) Section 20 EqA 2010: duty to make reasonable adjustments where a PCP puts a disabled person at a substantial disadvantage..** C Knightley v Chelsea and Westminster Hospital NHS Foundation Trust [2022] EAT 63 at [30]-[31].

**(6) Proportionality test under s.15 EqA: Bank Mellat four-stage test..** C Knightley v Chelsea and Westminster Hospital NHS Foundation Trust [2022] EAT 63 at [33].

**(7) The three statutory torts (unfair dismissal, s.15, s.20) are distinct; breach of one does not automatically mean breach of another..** C Knightley v Chelsea and Westminster Hospital NHS Foundation Trust [2022] EAT 63 at [37].

**(8) Range of reasonable responses test for unfair dismissal vs objective proportionality test for s.15 EqA..** C Knightley v Chelsea and Westminster Hospital NHS Foundation Trust [2022] EAT 63 at [38].

**(9) Lack of appeal does not automatically render dismissal unfair; it depends on circumstances..** C Knightley v Chelsea and Westminster Hospital NHS Foundation Trust [2022] EAT 63 at [36].

**(10) Section 200 ERA 1996 excludes from unfair dismissal protection those in police service, including constabularies maintained by enactment..** McKinnon v The London Borough of Redbridge

[2014] EWCA Civ 178 at [9].

**(11) A constabulary is an organised body of constables; small size does not prevent it being a constabulary..** McKinnon v The London Borough of Redbridge [2014] EWCA Civ 178 at [65].

**(12) An expired final written warning does not necessarily render a subsequent dismissal unfair; the underlying misconduct may be considered as a relevant circumstance..** Airbus UK Ltd v Webb [2008] EWCA Civ 49 at [47].

**(13) Diosynth v Thomson distinguished: where the expired warning was not the reason for dismissal, it does not compel a finding of unfairness..** Airbus UK Ltd v Webb [2008] EWCA Civ 49 at [66]-[68].

**(14) Disparate treatment: employees with prior disciplinary records are not in the same position as those without; dismissing only the former is not necessarily unfair..** Airbus UK Ltd v Webb [2008] EWCA Civ 49 at [77].

**(15) Polkey principle: procedural unfairness goes to remedy, not liability, if dismissal would have occurred anyway..** C Knightley v Chelsea and Westminster Hospital NHS Foundation Trust [2022] EAT 63 at [35].

**(16) Reasonable adjustments test: tribunal applies its own view of reasonableness, not range of reasonable responses..** C Knightley v Chelsea and Westminster Hospital NHS Foundation Trust [2022] EAT 63 at [31].

**(17) Mutuality of obligation: employee must provide personal service for payment; this is necessary but not sufficient. A single engagement can suffice; obligations need only exist during the period of work..** Commissioners for His Majesty's Revenue and Customs v Professional Game Match Officials Ltd [2024] UKSC 29 at [40]-[41], [49]-[55].

**(18) Right to terminate without penalty is irrelevant at the mutuality stage; it is a factor at the overall assessment stage..** Commissioners for His Majesty's Revenue and Customs v Professional Game Match Officials Ltd [2024] UKSC 29 at [59].

**(19) Constructive dismissal: employee may terminate without notice due to employer's repudiatory breach. The breach is judged objectively (Mahmud test), not by a range of reasonable responses..** Buckland v Bournemouth University Higher Education Corp [2010] EWCA Civ 121 at [19]-[25].

**(20) A completed repudiatory breach cannot be cured unilaterally by the contract-breaker; the innocent party's right to accept is unfettered, subject only to affirmation..** Buckland v Bournemouth University Higher Education Corp [2010] EWCA Civ 121 at [39]-[44].

**(21) Affirmation: the innocent party may lose the right to terminate if, with knowledge of the breach, he continues without reserving rights. The law takes a robust approach in employment contracts..** Buckland v Bournemouth University Higher Education Corp [2010] EWCA Civ 121 at [44], [54]-[55].

## Arguments & Counter-Arguments

### The Statutory Two-Stage Test for Fair Dismissal Under s.98 ERA 1996

Courts have held that a dismissal is only lawful if the employer discharges two sequential burdens: first, establishing a potentially fair reason falling within s.98(2) ERA 1996 (which includes capability); and second, demonstrating that it acted reasonably or unreasonably in treating that reason as sufficient for dismissal, determined in accordance with equity and the substantial merits of the case under s.98(4). Airbus at [36] provides the authoritative statement of the s.98(4) test: fairness depends on the

circumstances including the size and administrative resources of the undertaking. The second stage is not a rubber stamp on the first. An employer who asserts capability but produces no documented evidence of any performance management process faces serious difficulty establishing that it acted reasonably at the s.98(4) stage, since the absence of any structured process is itself a circumstance the tribunal must weigh. (*Airbus UK Ltd v Webb* at [[36]]).

Courts have recognised that where the reason for dismissal is capability, the employer must be able to demonstrate that capability was genuinely the reason and that it was treated as sufficient on reasonable grounds. In Knightley, it was common ground between the parties that capability was the reason for dismissal, and the tribunal proceeded to assess reasonableness on that agreed factual basis. Where, as in the present case, the employer asserts capability but has produced no evidence of any performance management process, no documented warnings, and no structured assessment of the employee's performance, the employer's ability to discharge even the first stage of the statutory test — establishing the reason — is materially undermined. The tribunal is entitled to draw adverse inferences from the absence of such documentation. (*C Knightley v Chelsea and Westminster Hospital NHS Foundation Trust* at [[25]]).

## Procedural Fairness as an Element of the s.98(4) Assessment

Courts have held that the availability of a fair disciplinary procedure — including notice of allegations and an opportunity to respond — is part and parcel of the overall procedural fairness relevant to assessing whether a dismissal was within the range of reasonable responses. In Knightley at [36], the EAT affirmed that the availability of an appeal, and what that appeal entailed, is part of the procedure relating to the dismissal and therefore relevant to the overall fairness assessment. By the same token, the failure to give adequate notice of allegations and the denial of the right to be accompanied are procedural elements that the tribunal must weigh in the round under s.98(4). Neither the lack of an appeal nor any single procedural defect automatically renders a dismissal unfair, but each defect is a factor, and their cumulative weight in this case — no notice, no accompaniment, no documented process — is substantial. (*C Knightley v Chelsea and Westminster Hospital NHS Foundation Trust* at [[36]]; *Airbus UK Ltd v Webb* at [[36]]).

Courts have further held that the analytical approach of separating procedural fairness from overall fairness, while intelligible, is not necessarily the most coherent methodology. In Knightley at [27], the EAT noted it was 'not convinced that separating procedural fairness from overall fairness was the best way to deal with the matter.' The correct approach under s.98(4) requires a holistic assessment of whether the employer, in all the circumstances, acted within the range of reasonable responses. On the present facts — where procedural failures are not isolated but are compounded by a complete absence of any performance management documentation — the cumulative effect on the overall reasonableness assessment may be determinative. (*C Knightley v Chelsea and Westminster Hospital NHS Foundation Trust* at [[27]]).

## The Polkey Principle: Procedural Unfairness and the Remedy Stage

Courts have consistently held that where a dismissal is unfair on procedural grounds, the question of whether the employee would have been dismissed in any event if a fair procedure had been followed is a remedy issue, not a liability issue. Knightley at [35] affirms this principle: the fact that an employee would have been dismissed even if a fairer procedure had been followed goes to remedy rather than to the finding of unfairness itself. This is significant in the present case because, notwithstanding the employer's procedural failures, the employer will almost certainly argue at the remedy stage that proper procedures would have made no difference and that any compensatory award should be substantially reduced. The strength of that Polkey argument depends critically on whether the employer can produce any underlying evidential basis for the capability concern — and in the present case, the absence of any documented

performance management process severely weakens the employer's Polkey position. (*C Knightley v Chelsea and Westminster Hospital NHS Foundation Trust* at [[35]]).

### The Johnson Exclusion: Statutory Regime as the Exclusive Remedy for Manner of Dismissal

Courts have held that no common law claim for damages founded on the manner of dismissal — including breaches of express or implied disciplinary procedures — can coexist with the statutory unfair dismissal regime. Johnson v Unisys at [43] establishes that a common law right embracing the manner of dismissal cannot satisfactorily coexist with the statutory right not to be unfairly dismissed. This principle was applied at first instance in Botham at [43], where the court held that the Johnson exclusion prevents common law claims for damages based on the manner of dismissal. Accordingly, if the employee were to seek damages at common law for the employer's failure to follow its disciplinary procedure, that claim would be barred: the appropriate vehicle is the statutory unfair dismissal claim in the Employment Tribunal. (*Johnson v Unisys Ltd* at [[43]]; *Botham v The Ministry of Defence* at [[43]]).

Courts have also held that disciplinary procedures incorporated into a contract of employment do not give rise to independently actionable contractual duties outside the Johnson exclusion. Johnson v Unisys at [46] and [47] establishes that it would be contrary to Parliament's evident intention to create a contractual common law remedy for unfair circumstances attending dismissal, and that the inclusion of disciplinary rules in contractual documents was not intended to create common law damages liability that would circumvent the statutory restrictions on compensation for unfair dismissal. The exception, established in Eastwood at [52]-[53], applies only where an employee acquires a pre-dismissal cause of action in which financial loss flows directly from the employer's unfair pre-dismissal conduct — such as psychiatric injury caused by prolonged unfair treatment or financial loss arising from suspension — independently of the dismissal itself. (*Johnson v Unisys Ltd* at [[46]]; *Eastwood v Magnox Electric plc; McCabe v Cornwall County Council* at [[52]]).

## Application to Facts

**(1) Capability Without Process: The Employer's Evidential Deficit at Both Stages of s.98.** The employer asserts capability as the reason for dismissal but has produced no evidence of any performance management process. This creates a compounding problem across both stages of the s.98 test. At the first stage, the employer must establish that capability was the genuine reason. Where there is no documented appraisal, no written performance concerns, no informal meetings, and no warnings of any kind, the tribunal is entitled to conclude that capability was not in fact the operative reason — raising the possibility that the stated reason is a pretext. At the second stage, even if the tribunal accepts capability as the reason, the s.98(4) assessment under Airbus at [36] requires the tribunal to consider all circumstances including the equity of the case and the substantial merits. An employer who dismisses for capability without any prior performance management process, without identifying the shortfall to the employee, and without giving the employee any opportunity to improve, will face very substantial difficulty demonstrating that it acted within the range of reasonable responses. This contrasts sharply with Knightley, where the employer had conducted capability proceedings prior to dismissal and the reason itself was not in dispute — here, the entire evidential foundation for the employer's stated reason is absent. (*Airbus UK Ltd v Webb* at [[36]]; *C Knightley v Chelsea and Westminster Hospital NHS Foundation Trust* at [[25]]).

**(2) The Cumulative Weight of Procedural Failures on the s.98(4) Assessment.** Three distinct procedural failures are identified: (1) failure to give adequate notice of the allegations; (2) failure to offer the right to be accompanied at the disciplinary hearing; and (3) complete absence of any documented performance management process preceding the dismissal. Under the holistic s.98(4) assessment

required by Airbus at [36], each of these failures is a relevant circumstance, and their cumulative effect is to place the employer's conduct far outside what a reasonable employer in these circumstances could be said to have done. Knightley at [36] confirms that procedural steps — including the availability of an appeal — are 'part and parcel of the procedure relating to the dismissal' and relevant to overall fairness. In Knightley, the procedural failure was limited to a single breach (failure to extend an appeal deadline), and even then, the EAT scrutinised whether it rendered the overall process unfair. In this case, the procedural failures are not peripheral: the employee was not told what allegations were being made against them and was denied the right to be accompanied. These failures go to the heart of a fair disciplinary process, and the employer will find it very difficult to argue the overall procedure remained within the range of reasonable responses. Furthermore, the EAT's caution in Knightley at [27] against artificially separating procedural from substantive fairness supports treating these failures as infecting the entirety of the employer's conduct, not merely its procedural steps. (*C Knightley v Chelsea and Westminster Hospital NHS Foundation Trust* at [[36]]; *C Knightley v Chelsea and Westminster Hospital NHS Foundation Trust* at [[27]]; *Airbus UK Ltd v Webb* at [[36]]).

**(3) The Polkey Position and the Absence of Any Documentary Foundation for Capability.** If the tribunal finds the dismissal unfair — as on the stated facts it should — the employer's Polkey argument at the remedy stage will turn on whether it can show that, even with a fair procedure, the employee would have been dismissed. The Polkey principle is affirmed by Knightley at [35]: procedural unfairness goes to remedy, not liability, where dismissal would have occurred regardless. However, the Polkey argument depends on the employer being able to demonstrate that there was a genuine and evidentially sound capability concern underlying the dismissal. In the present case, the employer has produced no evidence of any performance management process. This means the employer cannot credibly assert that proper capability procedures — conducted with notice, accompaniment, and documented performance concerns — would inevitably have produced the same outcome. A Polkey reduction requires the tribunal to assess the probability that a fair procedure would have led to the same result. Without any documented capability evidence, that probability assessment is highly adverse to the employer. The Polkey risk to the employee's full compensatory award is therefore significantly mitigated by the employer's own failure to build an evidential record. (*C Knightley v Chelsea and Westminster Hospital NHS Foundation Trust* at [[35]]).

**(4) The Johnson Exclusion Applied to Any Parallel Common Law Claim for Breach of Disciplinary Procedures.** The employee's complaints about the employer's failure to follow proper disciplinary procedures — including the failure to give notice of allegations and the denial of accompaniment — are the precise type of manner-of-dismissal complaints that the Johnson exclusion bars from common law enforcement. Botham at [53]-[54] draws the critical distinction: where financial loss arises from the dismissal itself rather than directly from pre-dismissal breaches, the claim falls within the Johnson exclusion. In Botham at [60], the decisive judicial concern was that the overlap in the damages claimed for breach of contract and the compensation claimed for unfair dismissal demonstrated that the loss arose from the dismissal. The same analysis applies here: any loss suffered by the employee flows from the dismissal, not from antecedent breaches that independently caused financial harm before termination. The Eastwood exception would only be engaged if the employee can point to independent financial loss — such as documented psychiatric injury or loss flowing from an antecedent suspension — caused by the employer's pre-dismissal conduct and predating the termination itself. On the facts as stated, no such pre-dismissal independent loss is identified. The statutory unfair dismissal claim before the Employment Tribunal is accordingly the exclusive and appropriate route for all losses flowing from the dismissal. (*Botham v The Ministry of Defence* at [[53]]; *Botham v The Ministry of Defence* at [[60]]; *Eastwood v Magnox Electric plc; McCabe v Cornwall County Council* at [[52]]).

## Counter-Argument Analysis

### Polkey Reduction Eliminates Effective Compensation

The employer will invoke the Polkey principle — affirmed by the EAT in Knightley at [35] — to argue that the employee would have been dismissed in any event even if proper procedures had been followed, and that the compensatory award should therefore be reduced to nil or near-nil. The employer will assert that the underlying capability concern was genuine, the outcome inevitable, and the procedural failures therefore immaterial to remedy. (*C Knightley v Chelsea and Westminster Hospital NHS Foundation Trust*).

**Rebuttal:** The Polkey reduction argument is fatally undermined by the employer's own evidential position. In Knightley, the employer had conducted documented capability proceedings, and the EAT found that the appeal — had it been heard — 'would not have succeeded' (Knightley at [23]). The tribunal had an evidential foundation from which to assess the hypothetical outcome of a fair process. Here, the employer has produced no documentation of any performance management process whatsoever. Without any evidential record of performance concerns, there is no basis on which a tribunal could conclude that proper capability procedures would inevitably have produced dismissal. The Polkey reduction in Knightley was justified by the existence of underlying substantive evidence; in the present case, that foundation is entirely absent.

- In Knightley, the EAT found at [23] that the appeal would not have succeeded even with a fair procedure — the tribunal had documentary evidence of capability proceedings on which to base that assessment. No equivalent documentary record exists here.
- The employer's complete failure to produce any performance management evidence means the tribunal cannot assess the probability that a fair process would have led to the same outcome; the Polkey reduction requires that probabilistic assessment, and it cannot be made in a factual vacuum.
- The employer has not identified any specific performance shortfall, warning, or assessment communicated to the employee prior to dismissal, making it impossible to conclude that the employee had been given a fair opportunity to improve and failed to do so.

### Procedural Failures Not Individually Determinative of Unfairness

The employer will rely on Knightley at [36], which confirms that 'the lack of an opportunity to appeal does not necessarily or automatically render a dismissal unfair' and that whether a procedural failure renders dismissal unfair 'will depend on the circumstances of the particular case.' The employer will argue that no single procedural failing is automatically determinative, and that the tribunal must assess overall fairness in the round. (*C Knightley v Chelsea and Westminster Hospital NHS Foundation Trust*).

**Rebuttal:** The principle from Knightley at [36] that no single procedural defect is automatically determinative of unfairness does not assist an employer facing the cumulative scale of procedural failure present here. In Knightley, the ET found overall procedural fairness despite one discrete failure (refusal to extend the appeal deadline). The procedural failure was isolated and occurred at the end of an otherwise structured capability process. In the present case, the procedural failures are not peripheral or isolated: the employee was given no adequate notice of the allegations against them, was denied the right to be accompanied, and the employer conducted no documented performance management process at all. The EAT's caution in Knightley at [27] — 'I am not convinced that separating procedural fairness from overall fairness was the best way to deal with the matter' — supports a holistic approach in which the cumulative effect of multiple foundational procedural failures is assessed together, not disaggregated and minimised.

- In Knightley, there was a structured capability process with documented proceedings; the only procedural failure was a failure to extend the appeal deadline. The present case involves no documentation at any stage of the process.

- The procedural failures in the present case — no notice of allegations, no accompaniment, no performance management — are not peripheral to the process but strike at the foundational requirements of a fair disciplinary hearing.
- The EAT noted in Knightley at [27] that separating procedural from substantive fairness was not the best analytical approach; this supports treating the multiplicity of procedural failures in this case as infecting the entirety of the employer's conduct under s.98(4).

**Johnson Exclusion Bars Any Contractual Damages Claim**

If the employee pursues a parallel common law claim for breach of contractual disciplinary procedures alongside the statutory unfair dismissal claim, the employer will invoke the Johnson exclusion as established in Johnson v Unisys at [43] and applied in Botham at [43]. The employer will argue that any such claim is founded on the fact and manner of the dismissal, that the loss claimed overlaps with the unfair dismissal compensatory award, and that the statutory regime is the exclusive remedy. The decisive judicial concern identified in Botham at [60] — 'the overlap in the damages claimed for breach of contract and the compensation claimed for unfair dismissal shows that the loss claimed arose when the Claimant was dismissed and by reason of his dismissal' — is directly applicable. (*Johnson v Unisys Ltd*; *Botham v The Ministry of Defence*).

**Rebuttal:** The Johnson exclusion argument is well-founded and should be accepted as correct: any common law claim for breach of disciplinary procedures, where the claimed loss is the same loss of earnings and benefits claimed in the unfair dismissal proceedings, will be barred. The Eastwood exception would require the employee to identify financial loss flowing directly from pre-dismissal breaches that caused independent harm before termination — for example, documented psychiatric injury caused by the employer's pre-dismissal conduct. On the facts as stated, no such independent pre-dismissal loss is identified. The employee's proper and exclusive route to remedy for the employer's procedural failures is the statutory unfair dismissal claim, not a parallel common law action. The significance of the Johnson exclusion analysis lies not in its theoretical uncertainty — it is settled law — but in ensuring that the Eastwood exception is properly assessed before any potential parallel claim is commenced. Botham at [65] confirms that claims for loss of earnings and benefits resulting from dismissal, even if based on pre-dismissal breaches of contractual disciplinary procedures, are barred by the Johnson exclusion.

- The Eastwood exception requires identification of a pre-dismissal cause of action generating independent financial loss before termination; on the facts as stated there is no identified pre-dismissal financial loss of this character.
- In Botham at [60], the decisive factor was the overlap between the schedule of loss in the contract claim and the compensation in the unfair dismissal proceedings; the same overlap would exist here, confirming the Johnson exclusion applies.
- Johnson v Unisys at [46]-[47] establishes that disciplinary procedures incorporated into a contract of employment do not create independently actionable duties; their inclusion was not intended to circumvent the caps and restrictions Parliament imposed on unfair dismissal compensation.

## Comparative Case Law

How courts have decided cases on comparable facts:

***Airbus UK Ltd v Webb*** **[2008] EWCA Civ 49** — Aircraft fitter (junior); 12 months (expired final written warning). **Outcome: Upheld.** Court of Appeal allowed the employer's appeal and held the dismissal fair under s.98(4). The expired warning was not the reason for dismissal; the later gross misconduct was. The underlying prior misconduct remained a relevant circumstance in the overall assessment. The employer had conducted a fair investigation and held a genuine belief in the employee's guilt [78].

***C Knightley v Chelsea and Westminster Hospital NHS Foundation Trust*** **[2022] EAT 63** — Lead Midwife for Mental Health (senior); 10 working days (appeal deadline). **Outcome: Upheld.** EAT dismissed the employee's appeal. Dismissal for capability was fair under s.98(4) notwithstanding a breach of the duty to make reasonable adjustments by failing to extend the appeal deadline. The EAT held the appeal would not have succeeded even with an extension [23], and the three statutory torts (s.98 ERA, s.15 and s.20 EqA) are legally distinct: breach of one does not automatically entail breach of another [37].

***Buckland v Bournemouth University Higher Education Corp*** **[2010] EWCA Civ 121** — Professor of environmental archaeology (senior); N/A. **Outcome: Struck down.** Court of Appeal allowed the employee's appeal and restored the employment tribunal's finding of constructive dismissal. The employer's act of re-marking exam papers without consulting the claimant was an objective breach of the implied term of trust and confidence, assessed under the unvarnished Mahmud test [22]. A completed repudiatory breach could not be cured unilaterally by the employer's subsequent inquiry report [39]-[40].

***Botham v Ministry of Defence*** **[2010] EWHC 646 (QB)** — Youth community worker (mid-level); N/A. **Outcome: Struck down.** High Court struck out the employee's common law claim for damages. The loss claimed (loss of earnings and benefits) arose from the dismissal itself, not from antecedent breaches, and therefore fell within the Johnson exclusion [60]. Claims for legal costs of Employment Tribunal proceedings were similarly barred as arising from the dismissal and circumventing the statutory costs regime [71]-[72].

***Harper v Virgin Net Ltd*** **[2004] EWCA Civ 271** — Employee (seniority unknown); N/A (employee had not completed one year's qualifying service). **Outcome: Struck down.** Court of Appeal dismissed the employee's appeal. An employee wrongfully dismissed before completing the qualifying period cannot recover damages for loss of the chance to claim unfair dismissal; Parliament deliberately chose not to extend the effective date of termination by reference to contractual notice periods [15]-[16], and allowing such a claim would circumvent the statutory scheme [17]-[19].

## Risk Assessment

1. **Polkey Reduction Substantially Limiting the Compensatory Award (High).** The tribunal finds the dismissal unfair on procedural grounds but, at the remedy stage, accepts the employer's argument that proper capability procedures would have produced the same outcome. Even without documentary evidence of performance management, the employer may call oral evidence of concerns about the employee's performance and argue that a structured process would have confirmed those concerns and led to dismissal. The tribunal is then asked to assess the probability that dismissal would have occurred in any event, applying a percentage reduction to the compensatory award. In Knightley at [35], this principle was applied to reduce compensation. If the tribunal accepts the employer's oral evidence of performance concerns as credible, a significant Polkey reduction — potentially to zero — remains a live risk. Mitigating factors: The employer has produced no documentary evidence of any performance concerns whatsoever, which severely undermines the credibility of any oral evidence of capability issues advanced at the remedy stage.; The complete absence of any performance management process means the employer cannot establish what a hypothetical fair process would have looked like or what its outcome would have been.; The Polkey assessment requires a tribunal to make findings about what would have happened in a fair process; without a documented evidentiary foundation for the capability concern, the probability of the same outcome is low and the percentage reduction should be minimal.. Mitigation: Gather all available evidence demonstrating the absence of any documented performance concerns prior to dismissal — including any absence of appraisals, absence of written warnings, absence of performance improvement plans, and absence of any correspondence identifying capability concerns.; Identify and obtain evidence from colleagues or line managers who can speak to the employee's actual performance record and the absence of any communicated concerns.; At the remedy stage, challenge the reliability of any oral

evidence of performance concerns by cross-referencing against the complete absence of contemporaneous documentation..

2. **Tribunal Accepts Capability as a Genuine Reason Despite Absence of Documentation (Medium).** The employer calls oral evidence at the tribunal asserting that capability concerns existed and informed the decision to dismiss, despite the absence of any documented performance management process. The tribunal must assess whether capability was the genuine reason. If the employer's witnesses are believed, the tribunal may accept capability as the genuine reason under s.98(1) and then proceed to assess reasonableness under s.98(4). Even on that footing, the employer faces the challenge of demonstrating reasonableness under s.98(4) per Airbus at [36], but acceptance of the reason at stage one would frame the debate as purely one of procedural reasonableness rather than a complete failure to establish any reason at all. The judicial concern identified in Airbus at [7] — that cases of this type involve 'finely balanced legal arguments' — indicates that outcome at stage one is not guaranteed. Mitigating factors: Tribunals will scrutinise the absence of any contemporaneous documentation as casting significant doubt on whether a genuine capability concern existed at the time of dismissal.; Airbus at [36] requires the s.98(4) assessment to take into account equity and the substantial merits; dismissing an employee for capability without any prior identification of performance shortfalls or opportunity to improve fails both criteria.; Knightley at [25] proceeded on the basis that capability was common ground; there is no equivalent concession here, and the employee is entitled to put the employer to strict proof of the reason.. Mitigation: Formally put the employer to strict proof of the reason for dismissal at the tribunal and require disclosure of all documentation — including any emails, appraisals, management notes, or communications — that purportedly evidence the capability concern.; Request disclosure of any documents predating the dismissal that record or communicate performance concerns to the employee, specifically to test the assertion that capability was the genuine operative reason.; Identify and consider whether any witness evidence from other employees or former managers can corroborate or undermine the employer's claimed performance concerns..

3. **Johnson Exclusion Bars Any Parallel Common Law Claim Commenced Alongside the Tribunal Proceedings (Medium).** If the employee or their representatives consider pursuing a parallel common law claim in the civil courts for breach of contractual disciplinary procedures — on the basis that the failure to give notice of allegations or provide accompaniment constitutes a breach of an incorporated term — the Johnson exclusion as applied in Botham at [43] and [60] will bar such a claim. The judicial concern identified in Botham at [60] was 'decisive' in weight: the overlap between the damages schedule in the civil claim and the compensation awarded in the unfair dismissal proceedings established that the loss arose from the dismissal, not from independent antecedent breaches. Botham at [65] confirms that loss of earnings and benefits resulting from dismissal, even if argued to flow from pre-dismissal breaches of contractual disciplinary procedures, falls within the exclusion. A civil claim commenced on these facts risks being struck out at an early stage. Mitigating factors: The Eastwood exception at [52]-[53] preserves a common law claim if the employee can identify and document independent financial loss caused by the employer's pre-dismissal conduct before termination — such as documented psychiatric injury or financial loss arising from a pre-dismissal suspension.; The obiter observation in Botham at [86] indicates that a properly pleaded antecedent breach claim causing loss before dismissal would not fall within the exclusion, leaving open the possibility of a common law claim if independent pre-dismissal loss can be established on the specific facts.; Johnson v Unisys at [46]-[47] forecloses arguments that the contractual incorporation of disciplinary rules creates actionable duties, removing one potential basis for a common law claim.. Mitigation: Before any decision to commence parallel civil proceedings, assess specifically whether any financial loss — distinct from the loss flowing from dismissal — occurred before the termination date and was caused directly by the employer's pre-dismissal conduct, as this is the only available basis for the Eastwood exception.; Review the Botham at [68] analysis: examine whether the employer's pre-dismissal conduct (including the disciplinary process itself) caused the incurring of specific costs or losses before dismissal, and whether those losses are causally attributable to a breach

independently of the termination.; Do not commence civil proceedings on the basis of the disciplinary procedure failures alone without first establishing an identifiable head of pre-dismissal loss that satisfies the Eastwood exception; otherwise the claim is likely to be struck out as falling squarely within the Johnson exclusion..

## What Will Trouble the Judge

1. **Whether Common Law Claims for Manner of Dismissal Are Barred by the Johnson Exclusion (Weight: Decisive)** In Botham at [60], Mrs Justice Slade held: 'The overlap in the damages claimed for breach of contract and the compensation claimed for unfair dismissal shows that the loss claimed arose when the Claimant was dismissed and by reason of his dismissal. Applying the approach of Lord Nicholls in paragraph 28 of the judgment in Eastwood and McCabe the resultant claim falls squarely within the Johnson exclusion area.' This concern is directly relevant because an employee who pursues both statutory unfair dismissal and a parallel common law claim for breach of contractual disciplinary procedures risks the common law claim being struck out where the loss overlaps with the statutory remedy. *Suggested response:* Ensure the statutory unfair dismissal claim under s.98 ERA 1996 is the primary vehicle. If any common law claim is contemplated alongside it, plead it narrowly around a discrete pre-dismissal breach causing independent financial loss (e.g., psychiatric injury, suspension) falling within the Eastwood exception, as Botham at [86] (obiter) suggests a properly pleaded antecedent breach claim could survive.

2. **Whether Finely Balanced Procedural Fairness Arguments Prevent Clear Findings of Unfairness (Weight: Significant)** In Airbus at [7], Mummery LJ observed: 'It is the finely balanced legal arguments, which are reflected in the authorities, that inject difficulty into reaching a reasoned decision.' Although that case concerned the different issue of expired warnings, the observation reflects a recurrent judicial caution that tribunals must weigh competing procedural considerations carefully rather than treating any single failure as automatically determinative. In the present case, the employer may seek to argue that, taken individually, no single procedural failure (no notice, no accompaniment, no documentation) is sufficient to render dismissal unreasonable. *Suggested response:* Frame the procedural failures cumulatively rather than in isolation. The total absence of any documented performance management process, combined with the lack of notice of allegations and the denial of accompaniment, is not a collection of isolated defects but a wholesale absence of procedure, which shifts the analysis from finely balanced to manifestly unreasonable.

3. **The Mismatch Between Constructive Dismissal and the Statutory Fairness Test Under s.98(4) (Weight: Significant)** In Buckland at [45], Sedley LJ noted: 'I have mentioned the mismatch between constructive dismissal and the statutory unfairness test.' This judicial concern about the conceptual tension between the objective test for breach of the implied term and the range of reasonable responses test under s.98(4) is relevant because the employee's case relies on both procedural deficiency at the s.98(4) stage and the broader proposition that the employer's handling objectively undermined the employment relationship. *Suggested response:* Maintain analytical clarity between the two tests. If constructive dismissal is not in issue (the employee was dismissed outright), concentrate on the s.98(4) reasonableness assessment, where the range of reasonable responses test applies. Avoid conflating the objective breach analysis with the statutory fairness analysis, as the tribunal will be alert to this distinction.

4. **Whether Separating Procedural Fairness From Overall Fairness Is Methodologically Sound (Weight: Minor)** In Knightley at [27], Linden J observed: 'I am not convinced that separating procedural fairness from overall fairness was the best way to deal with the matter.' This obiter remark signals judicial scepticism about treating procedural defects in isolation from the overall reasonableness assessment. The obiter comment in the same case at [39] reinforces this: 'the law of unfair dismissal arguably places a greater emphasis on procedural fairness than the concept of proportionality, which is more focussed on

outcomes.' *Suggested response:* Argue that procedural and substantive fairness are intertwined components of a single holistic assessment under s.98(4), as Linden J indicated. Where the employer has produced no evidence of capability concerns and simultaneously denied the employee basic procedural protections, the absence of procedure IS the substance of the case: there is nothing to separate.

5. **Whether a Party Concession on the Reason for Dismissal Forecloses Challenge at the s.98(1) Stage (Weight: Significant)** In Knightley at [25], it was recorded that 'it was common ground that the reason for dismissal was capability.' In Airbus at [42], 'it was common ground that section 98(4) of the Employment Rights Act 1996 was the applicable law.' These concessions show that tribunals often proceed on an agreed factual basis regarding the employer's reason. If the employee concedes capability as the reason, the fight moves entirely to s.98(4) reasonableness, potentially narrowing the scope of challenge. *Suggested response:* Do not concede that capability was the genuine reason unless satisfied on the evidence. If the employer has produced no documentation of any performance management process, no written concerns, and no structured assessments, the absence of contemporaneous evidence goes to the genuineness of the asserted reason at s.98(1), not merely its reasonableness at s.98(4). Preserve the argument that the stated reason is a pretext.

## Fallback Positions

In descending order of preference:

1. **Challenge the Genuineness of the Asserted Capability Reason at the s.98(1) Stage.** In Knightley [2022] EAT 63, the tribunal proceeded on the basis that capability was the genuine reason for dismissal because it was common ground between the parties at [25]. The case outcome turned entirely on the s.98(4) reasonableness assessment. By contrast, the present employee is not required to make any such concession. The employer's complete failure to produce any documented performance management process, any written concerns communicated to the employee, or any structured assessment of performance is not merely a procedural deficiency relevant to s.98(4); it is evidence that capability was never genuinely the employer's reason. The distinction between Knightley and this case is that in Knightley there was a documented capability process underlying the agreed factual position, whereas here there is no such foundation. If the employer cannot discharge the burden of establishing the reason at s.98(1), the dismissal is unfair without the tribunal ever reaching the reasonableness question, and the Polkey principle does not arise because there is no fair reason from which to construct a hypothetical fair process. *Deploy when:* The employer is unable to produce any contemporaneous documentary evidence of capability concerns predating the decision to dismiss.

2. **Resist Polkey Reduction by Distinguishing the Evidential Foundation.** The Polkey principle, affirmed in Knightley at [35], requires the tribunal to assess what would have happened if a fair procedure had been followed. In Knightley, the tribunal was able to conclude at [23] that the appeal 'would not have succeeded' because it had before it a documented capability process, medical evidence, and a substantive basis from which to reconstruct the hypothetical fair outcome. The present case is fundamentally different: the employer has produced no documentation of any performance concern whatsoever. Slade J's observation in Botham at [68] that expenses 'did not result from any breach of contract by the Defendant' because the claimant's own conduct was the sole cause of the disciplinary proceedings illustrates the importance of an evidential foundation for causal assessments. Without any documented evidence of what the capability concern actually was, the tribunal cannot construct a hypothetical fair process or assess its probable outcome, and any percentage reduction should be nominal. *Deploy when:* The tribunal finds the dismissal procedurally unfair and the employer invokes the Polkey principle at the remedy stage without any documentary record of the underlying capability issue.

3. **Explore the Eastwood Exception for Pre-Dismissal Independent Loss.** Botham at [86] contains the obiter observation that 'if the Particulars of Claim had disclosed a well founded cause of action sounding in damages such an action would not have merged with the breach of contract claim determined by the Employment Tribunal.' This preserves the possibility that a properly pleaded pre-dismissal cause of action, based on a breach that caused financial loss independently of the dismissal, could survive the Johnson exclusion and run alongside the statutory unfair dismissal claim. The governing principle from Eastwood [2004] ICR 1064 at [53] is that where financial loss flows directly from pre-dismissal unfair treatment rather than from the dismissal itself, the common law claim is not barred. If the employer's handling of the process prior to dismissal caused independent harm — for example, reputational damage from the manner in which unsubstantiated allegations were communicated to colleagues, or psychiatric injury caused by the employer's conduct in the pre-dismissal period — this route may yield compensation above the statutory cap. However, the Botham outcome demonstrates the difficulty of succeeding: the employee must identify a discrete pre-dismissal breach causing identifiable loss that is not merely the same loss as flows from the dismissal. *Deploy when:* There is evidence that the employer's pre-dismissal conduct (e.g., unsubstantiated allegations communicated to third parties, or a prolonged and distressing sham process) caused the employee quantifiable financial or health-related loss independent of the dismissal itself.

## Practitioner Checklist

### Evidence Required

- ☐ Obtain and collate all records of formal and informal appraisals, performance reviews, management notes, emails, and written communications predating the dismissal, specifically to establish the complete absence of any documented performance concern that would underpin a genuine capability reason and support a finding of reasonableness under s.98(4).
- ☐ Secure the employee's written account of all communications received from the employer prior to dismissal — including any allegations, concerns, or reasons stated at the disciplinary hearing — to build the factual record demonstrating that no adequate notice of the capability allegation was given.
- ☐ If any parallel common law claim is under consideration, obtain and document evidence of any financial loss sustained by the employee before the dismissal date — for example, evidence of psychiatric injury, medical records, or financial loss arising from any pre-dismissal suspension — to assess whether the Eastwood exception is engaged.
- ☐ Gather evidence establishing the employee's actual performance record during employment — including any positive appraisals, commendations, or absence of any management concerns raised during the employment — to oppose any Polkey reduction argument at the remedy stage.

### Disclosure Points

- ☐ Request disclosure of all investigation records, performance improvement plans, attendance management records, meeting notes, and any correspondence between the employer's HR department and the line manager prior to the decision to dismiss, to establish whether any capability process was in fact conducted.
- ☐ Request disclosure of any internal disciplinary policy, capability procedure, or staff handbook, together with evidence of whether those procedures were communicated to the employee and whether the employer's own process was followed, to establish the procedural standards against which the employer's conduct should be measured.

- [ ] Identify and secure the employee's contract of employment and all incorporated documents (staff handbook, disciplinary policy, capability procedure) and assess whether those documents have contractual effect, as this will define the employer's procedural obligations and the baseline against which departures are measured.

### Drafting Tips

- [ ] In the ET1, plead the unfair dismissal claim by identifying each specific procedural failure as a distinct element of the overall unreasonableness under s.98(4) — absence of notice of allegations, denial of accompaniment, and absence of any performance management process — rather than aggregating them in a single generic complaint, so each failure is squarely before the tribunal.

### Tactical Considerations

- [ ] Prepare detailed submissions for the remedy hearing directed specifically at the Polkey question: quantify the probability that a fair capability process — including documented performance concerns, an opportunity for the employee to respond, and a right to improvement — would have led to dismissal, emphasising that without any documentary foundation the employer cannot establish that probability.
- [ ] At the liability hearing, press the tribunal to assess procedural and substantive fairness holistically rather than in separate compartments, so that the complete absence of any substantive evidential foundation for the capability reason reinforces the finding that the overall process was outside the range of reasonable responses.
- [ ] Do not advance any claim for legal representation costs in the Employment Tribunal proceedings as a head of damages in civil proceedings; such a claim is squarely within the Johnson exclusion and would constitute an attempt to circumvent the no-costs regime of the Employment Tribunal.

## Scope & Limitations

This Full Brief covers the area of law identified above based on verified authorities from the National Archives. Practitioners should independently verify all citations against original judgment texts and consider:

- Related areas of law that intersect but were outside the query scope
- Procedural aspects not already addressed (limitation periods, pre-action protocols)
- Factual dependencies where the analysis would change based on specific facts
- Recent legislative developments or pending reforms that may affect the position
- Quantification and remedies assessment

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