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Research Memorandum

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Statutory Framework

The principal statute governing unfair dismissal in England and Wales is the **Employment Rights Act 1996** ("ERA 1996"). The key provisions are:

- **s.94 ERA 1996** — right not to be unfairly dismissed (qualifying employees only).
- **s.95 ERA 1996** — definition of "dismissal", including (i) termination by employer, (ii) expiry of a limited-term contract, and (iii) constructive dismissal under s.95(1)(c).
- **s.97 ERA 1996** — "effective date of termination" (EDT), which triggers limitation.
- **s.98 ERA 1996** — establishes the two-stage fairness test: (i) the employer must show one of five potentially fair reasons under s.98(1)–(2) (capability, conduct, redundancy, statutory contravention, or some other substantial reason); and (ii) the tribunal must determine, under s.98(4), whether the employer acted reasonably in treating that reason as sufficient justification for dismissal.
- **s.103A ERA 1996** — automatic unfair dismissal where the principal reason is the making of a protected disclosure.
- **s.111 ERA 1996** — three-month limitation period running from the EDT (subject to ACAS early conciliation extension and the "not reasonably practicable" extension).
- **s.128 ERA 1996** — interim relief (seven-day window after EDT).
- **s.200 ERA 1996** — exclusion of certain office-holders, notably members of "a constabulary maintained by virtue of an enactment".
- **ss.112–117 ERA 1996** — remedies: reinstatement, re-engagement, and compensation (basic and compensatory awards).

The qualifying period of two years' continuous service under s.108 ERA 1996 is currently subject to reform under the Employment Rights Bill 2024–25, which proposes a "day-one" right; practitioners should monitor commencement.

Leading Authorities

✓ *Royal Mail Group Ltd v Jhuti* [2019] UKSC 55 (Supreme Court)

(Note: distinguished by [2022] EAT 11 — use with care on its specific facts)

The Supreme Court held at [60] and [62] that where a person in the hierarchy of responsibility above the employee determines that the employee should be dismissed for reason A but hides it behind invented reason B which the decision-maker adopts, "the reason for the dismissal is the hidden reason rather than the invented reason." The Abernethy definition of "reason" — a set of facts known to or beliefs held by the employer that cause the dismissal — was endorsed at [44].

✓ *Polkey v AE Dayton Services Ltd* [1987] UKHL 8 (House of Lords)

(Note: distinguished by [2021] EWHC 398 (Ch); pinpoints below are page references in the grounded text and should be verified against the official report)

At pp. 7–8, Lord Bridge overruled the *British Labour Pump* principle and held that in applying s.57(3) of the Employment Protection (Consolidation) Act 1978 (now s.98(4) ERA 1996), the tribunal "is not permitted to ask … the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken". Procedural unfairness which would not have changed the outcome instead goes to compensation, with proportionate reduction available where there is uncertainty (p. 8).

✓ *Gisda Cyf v Barratt* [2010] UKSC 41 (Supreme Court)

The Supreme Court held at [35]–[41] that s.97 ERA 1996 is "a statutory construct" and must be interpreted by reference to "the protective purpose of the statute", not common law contract principles. The EDT occurs when the employee actually knows of the dismissal or has had a reasonable opportunity to find out (at [36]). Constructive knowledge has no place in the analysis (at [36]). The court must be "mindful of the human dimension" in assessing what is reasonable to expect of the employee facing dismissal (at [30]).

✓ *Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221

The court adopted the contract test for constructive dismissal at [45]: the employee must establish "conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms". The "unreasonableness" test was rejected as "too indefinite" and inconsistent with the statutory language (at [49]). The employee must act promptly or risk being held to have affirmed the contract (at [46]).

✓ *St Mungo's Community Housing Association v Finnerty* [2022] EAT 117 (Employment Appeal Tribunal)

(Note: distinguished by [2025] UKUT 197 (TCC))

The EAT reaffirmed at [22]–[25] the band of reasonable responses test, drawing on *Foley v Post Office* and *London Ambulance Service NHS Trust v Small*. At [43] and [52], the EAT held that the tribunal must engage with the employer's actual reasoning — including dismissal letters and live evidence — and explain why the decision fell outside the band, either because the conduct was inherently trivial or because the employer's reasoning was defective. A failure to do so is an error of law. At [58], the EAT confirmed that breach of the implied duty of trust and confidence is inherently fundamental.

✓ *McKinnon v The London Borough of Redbridge* [2014] EWCA Civ 178 (Court of Appeal)

(Note: distinguished by [2021] EWHC 99 (Comm) and [2019] EWCA Civ 806 — distinctions concern the statutory context rather than the core ratio on s.200)

The Court of Appeal held at [73]–[75] that members of a parks police force, attested as constables, fell within s.200(2)(a) ERA 1996 as "a constabulary maintained by virtue of an enactment", excluding them from the

right to claim unfair dismissal. Attestation is "the hallmark" of constabulary status (at [55]). Notably, Jackson LJ acknowledged the apparent injustice but held the court "is unable to discern any rational policy reason" yet "cannot … rewrite section 200" (at [68]).

Legal Framework Analysis

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

(1) Jurisdictional gateway. The claimant must be an "employee" within s.230 ERA 1996 and must not fall within an excluded category. *McKinnon* at [73] illustrates the strict territorial reach of s.200(2)(a): even where exclusion produces apparent unfairness, the court will not strain the statutory language. This is a hard jurisdictional bar that must be addressed before merits.

(2) Time and the effective date of termination. *Gisda Cyf* at [35]–[41] establishes that s.97 is interpreted independently of common-law contractual principles. The doctrine of constructive knowledge is excluded (at [36]). This is significant because, under the orthodox common-law approach to contractual termination, communication might occur on dispatch or deemed receipt; *Gisda* makes clear that for unfair dismissal limitation purposes, the employee must have actual knowledge or a reasonable opportunity to know.

(3) Establishing dismissal. Where the employer has expressly terminated, dismissal under s.95(1)(a) is straightforward. Where the employee resigns, *Western Excavating* at [45] and [49] requires the contract test: a fundamental breach, not merely unreasonable conduct. The implied duty of trust and confidence, when breached, is "inherently … fundamental" (*Finnerty* at [58]), so its breach automatically satisfies the *Western Excavating* threshold.

(4) Identifying the reason. Once dismissal is shown, the employer carries the burden under s.98(1) to identify a potentially fair reason. *Jhuti* at [44]–[46] requires the tribunal to identify the "real" reason. At [60], the Supreme Court held that the state of mind of a manipulator higher in the hierarchy can be attributed to the employer, even if the actual decision-maker was deceived. This is a significant doctrinal expansion: a "clean" decision-maker does not insulate the employer from liability for an unlawful hidden reason.

(5) Reasonableness. The s.98(4) test is governed by *Finnerty* at [22]–[25]: the tribunal applies the band of reasonable responses, judging by the objective standards of the hypothetical reasonable employer rather than its own subjective views. *Finnerty* at [43] requires substantive engagement with the employer's reasoning; the tribunal cannot simply prefer its own view of the conduct.

(6) Procedural fairness. *Polkey* at p. 7–p. 8 forbids the tribunal from asking whether a fair procedure would have changed the outcome when determining liability. Procedural failings make a dismissal unfair; the question of whether the same outcome would have followed goes to compensation, with the *Polkey* reduction operating proportionately (p. 8).

Tensions between authorities. The principal tension lies between *Jhuti* and the orthodox approach in *Finnerty*. *Finnerty* directs the tribunal to evaluate the reasoning of "this particular employer on this particular occasion" (at [43]). *Jhuti* requires the tribunal to look behind that decision-maker's reasoning where there is manipulation in the hierarchy (at [60]). The two are reconciled by treating *Jhuti* as a doctrine of attribution rather than substitution: the tribunal still evaluates the employer's reasoning, but identifies the relevant "employer" mind as that of the hidden manipulator. The CAUTION attached to *Jhuti* (distinguished by [2022] EAT 11) reflects the EAT's tendency to confine *Jhuti* to its facts — manipulation by a person with hierarchical responsibility, not lateral colleagues.

Arguments & Counter-Arguments

For the claimant:

- *Real reason argument.* Where the documentary or invented reason is contradicted by evidence of underlying motivation in the management chain, the tribunal is duty-bound to "penetrate through the invention" (*Jhuti* at [60]). This is particularly powerful in s.103A whistleblowing cases.
- *Constructive dismissal — trust and confidence.* Any breach of the implied term of trust and confidence is fundamental (*Finnerty* at [58]), engaging the *Western Excavating* test at [45] without further inquiry into seriousness.
- *Procedural unfairness.* The employer cannot defend liability on the basis that the outcome would have been the same; *Polkey* (p. 7–8) closes that route.
- *Time limits.* If the employer argues out-of-time, *Gisda Cyf* at [30] and [36] supports a generous reading of EDT where the employee did not have a reasonable opportunity to learn of dismissal.

For the respondent:

- *Band of reasonable responses.* The tribunal must not substitute (*Finnerty* at [22]–[25]). Where the employer can demonstrate genuine engagement with the evidence and a defensible chain of reasoning, dismissal will likely be within the band.
- *Polkey reduction.* Even where procedural failings are conceded, compensation may be reduced proportionately to reflect the chance of dismissal in any event (*Polkey* at p. 8).
- *Affirmation defence.* In constructive dismissal, delay in resigning may amount to affirmation (*Western Excavating* at [46]).
- *Confines of Jhuti. Jhuti* applies where the manipulator is in the hierarchy "above" the employee (at [60]); manipulation by lateral colleagues does not engage attribution. The CAUTION in [2022] EAT 11 supports a narrow reading.
- *Jurisdictional exclusions.* Section 200 ERA 1996 may bar certain claimants (*McKinnon* at [73]).

Risk Assessment

1. **Hidden-reason risk (Jhuti).** Employers face liability where the dismissing officer was deceived by a more senior manager with an unlawful motive. This risk is acute in s.103A whistleblowing contexts and where investigatory and decisional functions are shared. The CAUTION attached to *Jhuti* limits but does not extinguish this risk.

2. **Procedural risk (Polkey).** A flawed procedure renders the dismissal unfair regardless of merits. The risk is mitigated only at the compensation stage. Employers cannot rely on the outcome being inevitable.

3. **Substitution risk (Finnerty).** Tribunals risk being overturned on appeal where they substitute their own view of conduct for the employer's. The corollary risk for claimants is that a generous tribunal finding may not survive appellate scrutiny.

4. **Constructive dismissal risk (Western Excavating; Finnerty).** Employers risk fundamental-breach findings whenever managerial conduct could amount to a breach of trust and confidence. The contract test, although a higher threshold than reasonableness, is satisfied automatically by trust-and-confidence breaches per *Finnerty* at [58].

5. **EDT/limitation risk (Gisda Cyf).** Employers cannot rely on dispatch of dismissal letters; time runs from actual or reasonable opportunity to know. Conversely, claimants who lose contact with the employer cannot assume time runs from the date of letter receipt.

6. **Jurisdictional risk (McKinnon).** Specific categories of office-holders are excluded; the court will not relax the language of s.200 to remedy apparent injustice (at [68]).

Current Position

The unfair dismissal framework is statutorily codified in the ERA 1996, with appellate authority providing structured interpretation. The law on the "reason" for dismissal has been materially developed by *Jhuti* (2019), which extends attribution to hidden manipulators in the hierarchy. The procedural-fairness analysis remains governed by *Polkey* (1987), with the *British Labour Pump* heresy decisively overruled. The reasonableness test is governed by the band of reasonable responses, recently restated in *Finnerty* (2022). Constructive dismissal continues to be governed by the *Western Excavating* contract test. The EDT is governed by *Gisda Cyf* (2010), which decouples s.97 from common law.

Areas of uncertainty include: (i) the precise reach of *Jhuti* attribution beyond hierarchical superiors, given the distinguishing decision in [2022] EAT 11; (ii) the continuing operation of the qualifying period under the Employment Rights Bill 2024–25; and (iii) the interaction between *Polkey* reductions and *Jhuti* attribution where procedural failings are themselves a product of manipulation.

Practical Implications

In practice, advisers should: (i) interrogate the chain of decision-making to identify potential *Jhuti* attribution issues, particularly in cases involving suspected whistleblowing or discrimination; (ii) audit the procedural record carefully against ACAS Code requirements, recognising that *Polkey* preserves liability even where the outcome was inevitable; (iii) track the EDT meticulously per *Gisda Cyf*, including any actual knowledge gaps; (iv) frame constructive dismissal claims around trust-and-confidence breaches to engage the *Finnerty* "inherently fundamental" route; and (v) screen for s.200 exclusions before issuing.

A Full Brief would set out the argument structure for each potentially fair reason under s.98(2), provide a practitioner checklist for conduct of disciplinary procedures, address quantum (basic award, compensatory award, *Polkey* reduction, contributory fault, statutory cap, and Vento bands where discrimination is pleaded in tandem), and sketch an interim relief application timeline under s.128.

Scope & Limitations

This memo does not address the following, which require independent research where engaged:

- **Discrimination claims under the Equality Act 2010** — where dismissal allegedly relates to a protected characteristic, parallel claims with overlapping but distinct legal frameworks arise; remedies, time limits, and burden-of-proof rules differ.
- **Wrongful dismissal at common law** — the contractual claim is independent of unfair dismissal; *Société Générale v Geys* and the PILON jurisprudence are relevant where there is no express PILON clause but were not addressed here as outside the unfair dismissal scope.
- **Procedural and pre-action steps** — ACAS early conciliation (mandatory under s.18A Employment Tribunals Act 1996), the ET1/ET3 process, and the *not reasonably practicable* extension under s.111(2)(b) are not covered.
- **Quantification of remedies** — including the statutory cap under s.124 ERA 1996, the *Polkey* reduction percentages in practice, contributory fault under s.122(2)/s.123(6), and uplift/reduction for ACAS Code breaches under s.207A TULRCA 1992.
- **Pending legislative reform** — the Employment Rights Bill 2024–25 proposes the abolition of the two-year qualifying period and other significant changes; commencement and transitional provisions should be

checked at the date of any advice.

Note: Tillman v Egon Zehnder, Herbert Morris v Saxelby, General Billposting v Atkinson, Société Générale v Geys, American Cyanamid v Ethicon, Lansing Linde v Kerr, and Nordenfelt were retrieved but excluded as they concern restrictive covenants and interim injunctions, not unfair dismissal. Council of Civil Service Unions v Minister for the Civil Service was excluded as it concerns judicial review of prerogative powers, not unfair dismissal.

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