

# ACAS (The Advisory, Conciliation and Arbitration Service)

(see also [Adjustments and order of adjustments](#))

An award for compensation can be increased or reduced, by up to 25%, if the employer/employee (but not worker – see *Local Government Yorkshire & Humber v Shah* UKEAT/0587/11/ZT) has unreasonably failed to comply with a relevant code of practice relating to the resolution of disputes (see s207(A) TULR(C)A 1992). A relevant code of practice will have been issued either by ACAS or the Secretary of State under ss199 to 206 TULR(C)A. At present there are two relevant Codes of Practice:

- 1) ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015); and
- 2) Department for Business and Trade Code of Practice on Dismissal and Re-Engagement (2024) (see [Fire and rehire](#)).

The ACAS Code is not engaged unless a grievance is raised in writing and therefore the ACAS uplift is not available if a grievance is raised orally (see *The Cadogan Hotel Partners Ltd v Ozog* UKEAT/0001/14/DM, paragraph 52; *SPI Spirits (UK) Ltd v Zabelin* [2023] EAT 147). 'Grievance' is defined by the Code as 'concerns, problems or complaints that employees raise with their employers', and appears to be construed broadly (*Ikejiaku v British Institute of Technology Ltd* UKEAT/0243/19).

Tribunals are concerned with substantive compliance with the requirements of the Code. Pretending to apply an appropriate procedure will not amount to compliance – *Rentplus v Coulson* [2022] EAT 81.

The award has both compensatory and punitive elements – *Slade v Biggs* [2021] EA-2019-00687; *Secretary of State for Justice v Plaistow* [2021] UKEAT/0016/20.

The full list of tribunal jurisdictions to which s207A applies is detailed in Schedule A2 of TULR(C)A:

- s120 and s127 EA 2010 (discrimination etc in work cases);
- s145A TULR(C)A 1992 (inducements relating to union membership or activities);
- s145B TULR(C)A 1992 (inducements relating to collective bargaining);
- s146 TULR(C)A 1992 (detriment in relation to union membership and activities);
- s189 TULR(C)A 1992 (failure to follow consultation requirements)

- Paragraph 156 of Schedule A1 TULR(C)A 1992 (detriment in relation to union recognition rights);
- s23 ERA 1996 (unauthorised deductions and payments);
- s27K ERA 1996 (complaints about tips etc)
- s27N ERA 1996 (complaints about information)
- s48 ERA 1996 (detriment in employment);
- s111 ERA 1996 (unfair dismissal, but see below);
- s163 ERA 1996 (redundancy payments);
- s24 NMWA 1998 (detriment in relation to national minimum wage);
- The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (SI 1994/1623) (breach of employment contract and termination);
- The Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 (SI 1994/1624) (corresponding provision for Scotland);
- Regulation 30 of the Working Time Regulations 1998 (SI 1998/1833) (breach of regulations);
- Regulation 32 of the Transnational Information and Consultation of Employees Regulations 1999 (SI 1999/3323) (detriment relating to European Works Councils);
- Regulation 45 of the European Public Limited-Liability Company Regulations 2004 (SI 2004/2326) (detriment in employment);
- Regulation 33 of the Information and Consultation of Employees Regulations 2004 (SI 2004/3426) (detriment in employment);
- Paragraph 8 of the Schedule to the Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 (SI 2006/349) (detriment in employment);
- Regulation 34 of the European Cooperative Society (Involvement of Employees) Regulations 2006 (SI 2006/2059) (detriment in relation to involvement in a European Cooperative Society);
- Regulation 17 of the Cross-border Railway Services (Working Time) Regulations 2008 (SI 2008/1660) (breach of regulations);
- Regulation 9 of the Employment Relations Act 1999 (Blacklists) Regulations 2010 (SI 2010/493) (detriment connected with prohibited list).

Where part of a claim succeeds, but the unfair dismissal claim fails, an uplift for unreasonable breaches of the ACAS Code still needs to be considered – *Brown v Veolia* [2021] UKEAT/0041/20.

Awards can be uplifted against individual respondents as well as the employer where relevant claims have been brought against them personally – *SPI Spirits (UK) Ltd v Zabelin* [2023] EAT 147.

### Ill health capability dismissals

The ACAS Code's disciplinary provisions only apply in cases where there is '*culpable conduct*' or performance correction or punishment (*Holmes v Qinetiq Ltd* UKEAT/0206/15). In *Holmes*, the claimant was dismissed because of ill-health. No disciplinary procedure was invoked because, apart from the effects of his illness, the claimant was able to perform the job of security guard and there was no suggestion that his conduct or performance gave rise to a disciplinary situation or involved culpable conduct. That meant the employer was not required to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures and the uplift under s207A(2) was not available.

The Code does not apply to a capability dismissal arising from ill-health or sickness absence '*and nothing more*'. It does, however, apply to capability cases involving poor performance. These were confirmed in *Rentplus v Coulson* [2022] EAT 81 to amount to disciplinary situations.

### Dismissal for Some Other Substantial Reason (SOSR)

In *Phoenix House Ltd v Stockman & Anor* UKEAT/0264/15/DM the EAT held that the disciplinary section of the ACAS Code, and therefore the ACAS uplift, does not apply to dismissals for some other substantial reason where '*misconduct is not alleged and capacity is not in issue*'. Mitting J rejected the provisional view expressed by Laing J in *Hussain v Jury's Inn Group Ltd* UKEAT/0283/15/JOJ said that there were '*pointers in both directions*' on this issue, holding that '*clear words in the Code*' were needed for the ACAS adjustment to apply, and this was not the case in dismissals for Some Other Substantial Reason.

However, in *Rentplus v Coulson* [2022] EAT 81, the EAT said *obiter* that it considered that the Code was likely to apply to SOSR dismissals where a breakdown in working relationships results from the response of the claimant's fellow employees to their alleged misconduct or poor performance. The EAT stressed, however, that this was only a provisional view.

### Absolute value

When making an adjustment under these provisions, a tribunal must take account of the absolute value of a given uplift, rather than just the percentage value. Failure to do so when the award yields '*a significantly large amount in absolute terms*' is an error of law (*Acetrip Ltd v Dogra* UKEAT/0238/18/BA). Although *Dogra* was concerned with uplifts, it seems logical that the same principle will also apply to a reduction in compensation.

Even so, the fact that the absolute value will be large does not preclude the making of a 25% award in an appropriate case. In *Slade v Biggs* [2021] EA-2019-000687, Griffiths J observed that those who pay large sums in compensation should not be given the benefit of a non-statutory ceiling. There must be cases where the maximum award of 25% applied, and whilst these will only be the most serious of cases, there is no requirement that they be exceptional.

In *Secretary of State for Justice v Plaistow* [2021] UKEAT/0016/20, the EAT suggested the following approach in high-value cases:

- 1) Identify the amount of the award to which the uplift is applied;
- 2) Determine the appropriate level of uplift, assessing the employer's level of culpability and any harm to the employee;
- 3) Consider what that award would mean in monetary terms, assessing this against both the totality of the award if the uplift is applied, and the proportionality of the uplift itself;
- 4) If necessary, adjust the percentage in light of the actual sums involved.

### Approach to take

In addition to the approach outlined above in *Plaistow*, the EAT offered guidance on the approach to take to calculating ACAS uplifts in *Coulson* and *Biggs* (both citations above). Both were offered as suggestions rather than a binding test, and they are as follows:

#### *Coulson:*

- 1) Is the claim one which raises a matter to which the ACAS Code applies?
- 2) Has there been a failure to comply with the ACAS Code in relation to that matter?
- 3) Was the failure to comply with the ACAS Code unreasonable?
- 4) Is it just and equitable to award an uplift because of the failure to comply with the CASC Code and, if so, by what percentage, up to 25%?

#### *Biggs:*

- 1) Is the case such to make it just and equitable to award any ACAS uplift?
- 2) If so, what does the ET consider a just and equitable percentage, not exceeding although possibly equalling, 25%?
- 3) Does the uplift overlap, or potentially overlap, with other general awards, such as injury to feelings and, if so, what in the ET's judgment is the appropriate adjustment, if any, to the percentage

of those awards in order to avoid double-counting?

- 4) Applying a final sense-check, is the sum of money represented by the application of the percentage uplift arrived at by the ET disproportionate in absolute terms and, if so, what further adjustment needs to be made?

**Order of Adjustments:** Where a compensatory award for unfair dismissal falls to be adjusted for unreasonable failure to comply with a relevant code of practice, the adjustment is applied immediately before any reduction for contributory conduct (s123(6)) or reduction due to the receipt of an enhanced redundancy payment in excess of the basic award (s123(7)) (see s124A(a) and *Basic award, Compensatory award, Contributory conduct, Redundancy*).

**Example 1**

An ex-employee is awarded a basic award of £2,000, a compensatory award of £3,000 and damages for breach of contract of £500. The employer is found to have unreasonably failed to comply with a relevant code of practice and an uplift of 25% is applied to the applicable awards. The calculation would be as follows:

The basic award remains as £2,000 because the uplift does not apply to this award.

The compensatory award is now  $£3,000 \times 1.25 = £3,750$

The damages for wrongful dismissal are now  $£500 \times 1.25 = £625$

**Example 2**

An ex-employee would be awarded a basic award of £2,000, a compensatory award of £3,000 and damages for breach of contract of £500. However, he received an enhanced redundancy payment of £2,500. The employee is found to have unreasonably failed to comply with a relevant code of practice and a deduction of 25% is applied to the applicable awards. The calculation would be as follows:

The basic award is reduced to zero because of the enhanced redundancy payment, but there remains £500 of enhanced redundancy payment to put into the calculation of the compensatory award:  $£2,500 - £2,000 = £500$

The compensatory award is now  $(£3,000 \times 0.75) - £500 = £1,750$

The damages for wrongful dismissal are now  $£500 \times 0.75 = £375$

**Statutory authorities:** ERA 1996 s123(6), 123(7) and s124A(a); TULR(C)A Schedule A2

**Relevant case law:** *Acetrip Ltd v Dogra* UKEAT/0238/18/BA; *Brown v Veolia* [2021] UKEAT/0041/20; *Holmes v Qinetiq Ltd* UKEAT/0206/15/BA; *Ikejiaku v British*

*Institute of Technology Ltd* UKEAT/0243/19; *Local Government Yorkshire & Humber v Shah* UKEAT/0587/11/ZT; *Phoenix House Ltd v Stockman & Anor* UKEAT/0264/15/DM; *Rentplus v Coulson* [2022] EAT 81; *Secretary of State for Justice v Plaistow* [2021] UKEAT/0016/20; *Slade v Biggs* [2021] EA-2019-00687; *SPI Spirits (UK) Ltd v Zabelin* [2023] EAT 147; *The Cadogan Hotel Partners Ltd v Ozog* UKEAT/0001/14/DM

## Accelerated/decelerated receipt

(see also *Adjustments and order of adjustments; Table 38*)

### Accelerated receipt

If an award is made to a claimant to compensate for future losses, they are in fact receiving the money before they would have received it if they had not been dismissed. The idea behind the discount for accelerated receipt, therefore, is to take into account any interest that might in fact be earned on this money if it were invested as a lump sum, when it would not ordinarily have been available to the claimant to do so.

A discount for accelerated receipt can be made on awards for future loss, including the compensatory award and an award for financial losses in a discrimination claim. The reduction will only apply to future losses, such as future income and benefits.

No discount will need to be applied if the award for future loss is relatively small, as will often be the case (see *Les Ambassadeurs Club v Binda* [1982] IRLR 5).

There is no established route to calculate the appropriate reduction. Tribunals sometimes merely apply a single percentage adjustment to recognise accelerated receipt. However, in *Bentwood Bros (Manchester) Ltd v Shepherd* [2003] IRLR 364 the Court of Appeal overturned a decision to make a single 5% reduction for an award that covered 10 years' loss. It will always be necessary for a tribunal to set out the method it has used and its reasons for using it.

### Decelerated receipt

*Melia v Magna Kansei Ltd* [2005] EWCA Civ 1547 holds that in principle an uplift can be applied for decelerated, or delayed, receipt to ensure that past and future losses are treated consistently.

Such awards are rare in practice, and *Francois v Castle Rock Properties Ltd (t/a Electric Ballroom)* EAT/0260/10 observes that it is not the routine practice of tribunals to make such awards. The logic underlying decelerated receipt adjustments is unlikely to apply in discrimination cases, where there are already specific provisions for interest.

It is an open question whether such an adjustment should be applied in cases where there is no future loss: the principle of *Melia* is to treat the past and future losses consistently, an issue that does not arise where only one of the two awards is made.

A tribunal may choose to use a similar approach to that used for accelerated receipt (but in the opposite direction) to calculate the interest due on an award paid after the loss has been incurred.

In *Francois* the EAT observed that when considering an adjustment for decelerated receipt, the tribunal is considering ‘the loss of the use of the money which the recipient should have had earlier. Interest may be a measure of that loss. Other measures may also be appropriate.’

**Adjustments:** The discount/increase for accelerated/ decelerated receipt should be made within the first stage of any calculation, namely calculating the loss suffered by the individual. Any adjustments will be made afterwards (see also [Adjustments and order of adjustments](#)).

**Statutory authorities:** None

**Relevant case law:** *Benchmark Dental Laboratories Group v Perfitt* EAT/0304/04; *Bentwood Bros (Manchester) Ltd v Shepherd* [2003] EWCA Civ 380; *Francois v Castle Rock Properties Ltd (t/a Electric Ballroom)* EAT/0260/10; *Les Ambassadeurs Club v Baidia* [1982] IRLR 5; *Melia v Magna Kansei Ltd* [2005] EWCA Civ 1547; *York Trailer Co Ltd v Sparkes* [1973] IRLR 348

## Accompaniment to a disciplinary, grievance or flexible working meeting

A worker has the right to be accompanied at a grievance or disciplinary meeting (s10 and s11 EReA 1999), at a meeting to discuss their right to flexible working meeting (Reg 14 and Reg 15 FW(PR) Regs 2002) or at a meeting to discuss their right to make a request in relation to study or training (ss63D to 63K ERA 1996) (Reg 16 and Reg 17 EST(PR) Regs 2010) and a worker is allowed to have time off to accompany the other worker to the meeting. The worker is allowed to postpone the meeting in certain circumstances.

**Remedy:** Where a tribunal finds a complaint of a failure to comply well founded, it may make an award of up to 2 weeks’ pay.

**Gross or net:** Gross. A week’s pay as defined in ss220 to 229 ERA 1996 applies (see [Week’s pay](#)).

**Limit on a week’s pay:** £751 (see [Table 1](#) for historical rates).

**Limit on number of weeks:** 2

**Any maximum or minimum:** Maximum = £1,502; No minimum

**Adjustments:** None

**Tax:** The tax treatment relating to non-termination payments is not clear. If the claimant was claiming this head of loss alongside unfair or wrongful dismissal, it is arguable that any award under this head would be included in the compensatory award and therefore taxable under s401 ITEPA 2003. If the claimant’s employment has not been terminated however, it could be argued that no tax is payable - the award is not ‘earnings’, nor is it an award on termination of employment, or change of duties or earnings (see [Tax and termination payments](#)).

**Recoupment:** N/A

**Statutory authorities:** EReA 1999 [ss10](#) and [11](#); ERA 1996 [s63D to 63K](#); EST(PR) Regs 2010 (SI 2010/155) Regs [16](#) and [17](#); FW(PR) Regs 2002 (SI 2002/3207) Regs [14](#) and [15](#)

## Additional award

(see also [Arrears of pay \(reinstatement/re-engagement\)](#); [Re-engagement and reinstatement](#))

An additional award may be made where an employer has failed to comply with an order for reinstatement or re-engagement made under s113 ERA 1996, following a finding of unfair dismissal, and has failed to establish that it was not practicable for them to comply. See also s166 TULR(C)A 1992.

**Remedy:** The award differs according to whether there has been partial or total non-compliance. Only where there has been total non-compliance with the order will the additional award be made. In both cases, a separate award of compensation to cover financial losses will be made, subject to a statutory cap (see below).

**Partial compliance:** An employer will be ordered to pay compensation to an employee if an employee is reinstated or re-engaged pursuant to such an order, but the employer does not fully comply with the terms of that order (s117(1) ERA 1996).

The tribunal will award the amount it thinks fit having regard to the loss sustained by the employee in consequence of that failure to comply, but there is no power to order an additional award for partial compliance.

**Total non-compliance:** If an order for reinstatement or re-engagement is made, but the employee is not reinstated or re-engaged, a compensatory award will be made under s124 ERA 1996 and an additional award of compensation of between 26 and 52 weeks’ pay will be made (s117(3)).

## Additional award

The additional award will not be made, however, if the employer satisfies the tribunal that it was not practicable to comply with the order. The hiring of a permanent replacement will not satisfy this condition unless it was not practicable to arrange for the employee's work to be done without hiring a permanent replacement (s117(4) and s117(7)).

**Calculation:** Additional award = number of weeks x gross weekly pay

**Gross or net:** Gross. A week's pay as defined in ss220 to 229 ERA 1996 applies (see [Week's pay](#)).

**Limit on a week's pay:** £751 (see [Table 1](#) for historical rates).

**Limit on number of weeks:** Minimum is 26; Maximum is 52

**Any maximum or minimum:** Minimum depends on employee's gross weekly pay (but see [National Minimum Wage](#)); Maximum is £39,052

**Adjustments:** The following applies to compensation (but not the additional award itself): where the claimant has unreasonably prevented an order for reinstatement or re-engagement from being complied with, and where the tribunal makes an award of compensation for losses suffered (see above) the tribunal will take that conduct into account as a failure on the part of the claimant to mitigate his loss.

**Cap:** The statutory cap applies to an award under s117(1) and (2) and s123 ERA 1996. The statutory cap is currently the lower of £123,543 or 52 weeks' gross pay (as defined in ss220 to 229 ERA 1996) (see s124 ERA 1996). It should be noted that the cap will be lifted to the extent necessary to compensate for arrears of pay and any additional award:

- in the case of compensation awarded under s117(1) (where there has been partial compliance) the cap can be exceeded to the extent necessary to enable the award fully to reflect the amount specified as payable under s114(2)(a) or s115(2)(d) (see [Arrears of pay \(reinstatement/re-engagement\)](#)). In other words, the employee is entitled to receive at least their arrears of pay, even if those arrears exceed the cap;
- in the case of an award under s117(3) (where the employer has not complied at all) the cap may be exceeded to the extent necessary to allow the aggregate of the compensatory and additional awards fully to reflect the amount specified as payable under s114(2)(a) or s115(2)(d) (see [National Westminster Bank Plc v Parry](#) [2004] EWCA Civ 1563 and [University of Huddersfield v Duxbury](#) [2023] EAT 72).

This means that, in the case of partial compliance:

- if the arrears of pay exceed the cap on their own, the individual will receive the total amount of arrears;
- if the arrears of pay do not exceed the cap on their own they will be offset against the compensatory award.

In the case of complete non-compliance:

- if the arrears of pay exceed the aggregate of the capped compensation award and the additional award, the individual will receive the total amount of arrears;
- if the arrears do not exceed the sum of the capped compensation award and the additional award, the arrears will be offset against this aggregate.

**Mitigation:** The additional award is not expressly related to an employee's losses, or to mitigation, however a tribunal may well take into account an employee's losses and attempts to mitigate them in reaching the amount of the award, particularly perhaps if the statutory cap prevents full recovery of the employee's losses.

**Tax:** The additional award will be taxed under s401 ITEPA 2003 and can be taken into account within the £30,000 tax free amount at termination (see also [Grossing up](#)).

**Recoupment:** Recoupment does not apply to the additional award but it does apply to any compensation awarded under s123 as a result of non-compliance with s113 and to arrears of pay which may have been ordered by ss114 or 115.

**Statutory authorities:** ERA 1996 [ss113 to 118](#)

**Relevant case law:** [National Westminster Bank Plc v Parry](#) [2004] EWCA Civ 1563; [Selfridges Ltd v Malek](#) [1998] ICR 268

### Example 1

Basic award = £3,000

Financial losses = maximum available for this employee (52 weeks) = £25,000

Additional award = £15,000

Arrears of pay = £5,000 (The arrears of pay are included within the compensatory award with the remaining losses capped at £25,000 - £5,000 = £20,000)

Award = £3,000 + £25,000 + £15,000 = £43,000

### Example 2

Basic award = £3,000

Financial losses = zero

Statutory cap for this employee is £25,000 (52 weeks' pay)

Additional award = zero (reinstatement or re-engagement order was partially complied with)

Arrears of pay = £28,000

Award = £3,000 + £28,000 = £31,000

### Example 3

Basic award = £3,000

Financial losses = maximum available for this employee (52 weeks) = £30,000

Additional award = £25,000

Arrears of pay = £60,000

Aggregate of financial losses and additional award = £55,000, which is lower than the arrears of pay (£60,000) so replace the lower figure with £60,000.

Total Award = £3,000 + £60,000 = £63,000

## Adjustments and order of adjustments

(see also [ACAS \(The Advisory, Conciliation and Arbitration Service\)](#); [Accelerated/decelerated receipt](#); [Contributory conduct](#); [Interest](#); [Polkey](#); [Protected disclosure](#))

It is important that adjustments are applied to awards in the correct order since this can significantly affect the final figure.

This can be seen in *Digital Equipment Co Ltd v Clements* [1997] EWCA Civ 2899; [1998] ICR 258. Mr Clements argued that the redundancy payment of £20,685 should be deducted from the compensatory award of £43,136, leaving a balance of £22,451; which should then be reduced by 50% (*Polkey*) giving a compensatory award of £11,275. This would result in the then-maximum of £11,000 being payable. Digital argued that the tribunal should give full credit for the enhanced redundancy payment and first reduce the loss by 50%, leaving a compensatory award of £21,568 from which the tribunal should then deduct the £20,685, leaving a balance of £883. The tribunal ruled in favour of the claimant, but the decision was overturned by the EAT and the Court of Appeal, leaving the claimant with £883.

Different adjustments apply to the different types of award - these adjustments, and the correct order in which they should be applied, are listed below.

### Adjustments to the compensatory award

- 1) Calculate the total losses suffered by the claimant;
- 2) Deduct any amounts received from the employer such as payment in lieu of notice or a payment which is made to the employee as compensation

for the dismissal (*Digital Equipment Co Ltd v Clements* [1997] EWCA Civ 289; *Dafiaghor-Olomu v Community Integrated Care* [2022] EAT 84). This must exclude any enhanced redundancy payment above the basic award;

- 3) Deduct earnings which have mitigated the claimant's loss or a sum which reflects any failure by the claimant to mitigate his or her loss (s123(4) ERA 1996) (see also [Mitigation](#));
- 4) A '*Polkey*' deduction to reflect the chance that the claimant would have been dismissed in any event had the employer acted fairly (*Polkey v AE Dayton Services Ltd* [1987] IRLR 50 (HL)) (see also [Polkey](#));
- 5) Decrease/increase for accelerated/decelerated receipt of compensation in respect of future/past loss (*Bentwood Bros (Manchester) Ltd v Shepherd* [2003] EWCA Civ 380) (see also [Accelerated/decelerated receipt](#));
- 6) Percentage increase or reduction up to a maximum of 25% to reflect an unreasonable failure by the employer or employee to comply with the ACAS disciplinary code (s207A TULR(C)A) (see [ACAS \(The Advisory, Conciliation and Arbitration Service\)](#));
- 7) A percentage reduction, up to a maximum of 25%, if a protected disclosure was not made in good faith (see also [Protected disclosure](#));
- 8) Any extra award for a failure by the employer to provide written particulars of employment (s38 EA 2002) (see also [Written statement of particulars](#));
- 9) Percentage reduction for any contributory conduct on the part of the employee (s123(6) ERA 1996). Note that this percentage does not have to be same as any such deduction to the basic award (see also [Contributory conduct](#));
- 10) Deduction for any enhanced redundancy payment to the extent that it exceeds the basic award (s123(7) ERA 1996) (see also [Redundancy](#));
- 11) Interest on past losses, if available (see also [Interest](#));
- 12) Gross up (see [Grossing up](#));
- 13) Apply the statutory cap if relevant (see [Statutory cap](#)).

### Adjustments to the basic award

The basic award can be reduced in the following situations:

- By an amount that the tribunal considers to be just and equitable where the employee has unreasonably refused an offer of reinstatement (s122(1) ERA 1996);
- By an amount to reflect contributory conduct (s122(2) ERA 1996). Note though that s122(2)