

Neutral Citation Number: [2026] EAT 16

Case No: EA-2023-000109-TH

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 January 2026

Before:

THE HON. LORD FAIRLEY, PRESIDENT

Between:

Mr R J Bryce

Appellant

and

1) Active Security Solutions Limited

First Respondent

2) Stonegate Pub Company Limited

Second Respondent

Mr David Green, appearing *pro bono* for the **Appellant**
No representation or appearance for the **First Respondent**
Ms Rezaie (instructed by **Fieldfisher LLP**) for the **Second Respondent**

Hearing dates: 20 and 21 January 2026

JUDGMENT

SUMMARY

*Practice and procedure; reasonable adjustments for claimant's disability
Section 44 Employment Rights Act, 1996; meaning of "designated" and "detriment"*

The claimant was employed by the first respondent as a licensed door supervisor. He was assigned to work at the second respondent's premises. On 1 August 2021, he was sent home after an incident which resulted in police involvement. He brought a range of complaints against the respondents, one of which was of detriment due to carrying out designated health and safety activities.

The respondents applied in writing to have the complaints struck out or, in the alternative, for deposit orders. A hearing was fixed on those applications. Prior to the hearing, the respondents lodged and intimated a skeleton argument. At the hearing, the skeleton was supplemented by oral submissions. The claimant asked to be allowed to respond in writing to the oral submissions. He submitted that this would be a reasonable adjustment in light of his disabilities. The Tribunal refused that request, but allowed the claimant extra time to prepare his oral response.

In a reserved judgment, the Tribunal found *inter alia* that the claimant was not "designated" for the purposes of section 44 of the **Employment Rights Act, 1996** ("ERA") and that, in any event, he had not been subjected to a detriment by being sent home. It struck out some of the complaints and made deposit orders in relation to others.

The claimant appealed, submitting that (a) the refusal of his request to be allowed to respond in writing to the oral submissions for the respondent was a material procedural error which deprived him of a fair hearing; (b) the Tribunal had erred in concluding that he was not "designated" for the purposes of section 44 ERA; and (c) the Tribunal had further erred in its conclusion that sending him home was not a "detriment".

Held:

- (1) The claimant had not established that the refusal of the requested adjustment prevented him from making any further or different submission on a matter that was ultimately material to the Tribunal's decision;

- (2) The Tribunal was bound by the decision in **Castano v. London General Transport Services Limited** [2020] IRLR 417 to decide that the claimant was not “designated” for the purposes of section 44 ERA merely because he may, incidentally, have some health and safety duties as part of his normal role. **Castano** was not manifestly wrong and would therefore be followed by this Tribunal; and
- (3) Whilst the Tribunal had erred in its approach to detriment, the error was academic because the claimant was not protected by section 44(1) ERA.

THE HON. LORD FAIRLEY, PRESIDENT:

1. This is an appeal from a Judgment of a Tribunal at Birmingham dated 7 February 2023. I will refer to the parties as the claimant and the respondents.

2. The claimant was represented in the appeal *pro bono* by Mr David Green to whom I am particularly grateful. The second respondent was represented by Ms Rezaie who also appeared below. The first respondent was not represented, having been barred from participating in today's hearing following its failure to lodge Answers.

Facts

3. The claimant was employed by the first respondent as a licensed door supervisor (colloquially, a "bouncer"). He was assigned to work at the second respondent's premises. On 1 August 2021, an incident occurred which led to the claimant being sent home. The Tribunal's narration of the uncontroversial facts about the 1 August 2021 incident at ET § 13 and 14 is brief. The details of the incident are not material to this appeal. The incident seems, however, to have been the catalyst for what followed.

4. In particular, on 3 September 2021, the claimant brought a series of complaints against these two respondents and against others who are no longer parties to these proceedings. The complaints against the respondents to this appeal were (a) a claim of £176 for unpaid wages; (b) a complaint of discrimination arising from disability; (c) a complaint of detriment due to carrying out designated health and safety activities; (d) a complaint of protected disclosure detriment; (e) a claim of unlawful deductions from wages; (f) a complaint of disability discrimination by failure to make reasonable adjustments; and (g) a claim for holiday pay.

5. At a hearing on 6 September 2022, the Tribunal struck out the complaints directed against two other respondents, The Security Industry Agency and The Chief Constable of Staffordshire Police. That left only the two respondents to this appeal. They also made applications for strike out and for deposit orders. A hearing on those latter applications was listed for 23 January 2023 before Employment Judge Edmonds, sitting alone.

6. On 22 September 2022, the Judge issued a Case Management Order inviting the claimant to prepare written submissions for the hearing on 23 January 2023. The note also stated *inter alia*:

“In the event that the claimant believes that his health requires him to have the opportunity to make written submissions after the hearing on 23rd January 2023, the claimant shall provide any medical evidence to support this, along with an explanation of what disadvantage the claimant would otherwise suffer, to the respondents and the Tribunal on or before 16 December 2022 so that this can be considered.”

7. In the same case management note, the Judge recorded that, at the request of the claimant, she had familiarised herself with pages 396 to 398 and 408 to 409 of the Equal Treatment Bench Book.

8. The hearing proceeded on 23 January 2023. In a reserved Judgment dated 7 February 2023, the Tribunal struck out complaints (a) to (d), made deposit orders in relation to (e) and (f) and allowed (g) to proceed against the first respondent alone.

9. The claimant applied for reconsideration of that Judgment on 11 February 2023. He submitted that not all reasonable adjustments had been made for him at the hearing on 23 January. He attached to his reconsideration application a copy of **Sinclair v. Trackwork Limited** UKEAT/0129/20, which related to the section 44 ERA complaint. The reconsideration application was ultimately refused.

Grounds of appeal

10. Three grounds of appeal against the Judgment of 7 February 2023 were allowed to proceed following a rule 3(10) hearing on 25 October 2024.

11. In the first, the claimant alleges – as he did in the reconsideration application – a material procedural unfairness arising from the Tribunal’s refusal to allow him to respond in writing to the respondent’s oral submissions made at the hearing on 23 January 2023. He maintains that allowing him to do so was a required adjustment on account of his conditions of Asperger’s Syndrome and dyslexia.

12. Parties disagreed over the scope of this ground. For the appellant, it was submitted that it relates to all of paragraphs 1 to 6 of the Tribunal’s judgment. For reasons more fully

elaborated upon in her submissions, counsel for the second respondent submitted that this ground only relates to that part of the Tribunal’s judgment that deals with detriment due to carrying out designated health and safety activities (paragraph 3 of the Judgment).

13. The second ground relates only to paragraph 3 of the Judgment – the strike out of the complaint of detriment due to carrying out designated health and safety activities. The claimant maintains that the Tribunal erred in its conclusion that there was no reasonable prospect of him establishing that he was “designated” by his employer to carry out activities in connection with health and safety at work for the purposes of section 44(1)(a) ERA. He submits that the decision of Eady J in **Castano v. London General Transport Services Limited** [2020] IRLR 417 was either wrongly decided or wrongly applied by the Tribunal.

14. In the third ground, the appellant submits that the Tribunal erred in its conclusion that he had no reasonable prospect of establishing that sending him home on 1 August 2021 following the attendance of the police was a “detriment” for the purposes of section 44 ERA.

15. I will consider the three grounds in turn.

Ground 1

The Tribunal’s reasons

16. The Tribunal summarised the factual circumstances which give rise to ground 1 at ET § 4 in the following terms:

“The claimant says that he is disabled by reason of Asperger’s syndrome and dyslexia. As a result of this, I discussed with the claimant at the start of the hearing any reasonable adjustments that he may require, such as breaks. After hearing the respondents’ detailed submissions the claimant requested to submit his submissions in writing and said that he needed to do this as a reasonable adjustment because of the impact of his conditions on his memory. He also asked that the respondents be required to send their submissions in writing as he said they were more detailed than those submitted prior to the hearing, and he had not taken a note during the hearing. He referred me to some documents in the file which related to his medical conditions although not specifically in relation to his ability to make oral submissions. The respondents objected to this. Having considered the claimant’s request, I declined to order that the respondents provide additional written submissions or that the claimant could do so after the hearing. This was for the following reasons:

- (a) The claimant had been informed in advance of the hearing (in the Case Management Order issued following the hearing on 6th September 2022) that I intended to make my decision at the hearing today. He was specifically

invited to prepare any written submissions in advance and had chosen not to do so.

- (b) He had also been asked in that same Case Management Order to let the tribunal and the respondents know by 16 December if he felt he would need to make written submissions after the hearing, along with medical evidence to support this. He did not do so and did not provide relevant medical evidence.
- (c) The respondents had provided written grounds for their application a number of months earlier so the claimant had advance notice of what was being said. Whilst additional detail was provided orally, the essence of the application and the grounds for it were unchanged. The only wholly new matters were around financial means, but the respondent could not prepare submissions on that in advance because the claimant had not provided his evidence (contrary to my case management order which required him to do so by 16 December 2022). The claimant was capable of understanding the nature of the application and the points he would need to make in advance.

I was however prepared to grant the claimant an additional break in which to prepare any submissions he wished to make. Therefore, instead of a short break for lunch, we had a break from 12:48 to 2:30 which gave the claimant sufficient time to put together what he wanted to say. I also reassured the claimant that I did not mind what structure or language he used and that I did not mind whether or not he provided me with any case authorities.

Submissions for the appellant

17. For the appellant, Mr Green submitted whilst Employment Tribunals are not directly subject to any duty to make reasonable adjustments in terms of the Equality Act, 2010, they are nevertheless subject to a general duty to ensure fairness. That duty encompasses a requirement, where appropriate, to make an adjustment for a party with a disability to ensure equality of arms and secure their effective participation in the proceedings. Reference was made, in particular to **Rackham v. NHS Professionals Limited** UKEAT/0110/15 at paras 32, 36 and 50 and **Abanda Bella v. Barclays Execution Services Ltd and others** [2024] EAT 16.

18. At paragraph 36 of **Rackham**, Langstaff J noted:

“We...take the purpose of making an adjustment as being to overcome...barriers so far as access to court is concerned, in particular to enable a party to give the full and proper account that they would wish to give to the Tribunal, as best they can be helped to give it.”

The issue for an appellate court, viewing the proceedings below as a whole and in context, is whether there was substantial unfairness (**Rackham** at para. 50).

19. The Tribunal here, it was submitted, had failed properly to identify the disadvantage caused by the claimant’s disabilities in spite of having materials before it that suggested that

he had issues with his memory, his ability to understand, and his ability to form and carry out a plan. Reference was made in particular to a report from the University of Portsmouth's Autism Centre for Research on Employment dated 13 February 2020. The Tribunal's examination of these issues had been cursory and had focussed inappropriately upon the claimant's ability to make oral submissions.

20. Whilst the judge had suggested that the essence of the respondents' applications was known to the claimant some time before the hearing, in at least one respect the oral submissions went beyond the terms of those applications. That was in the submissions on section 44 **ERA**. The pre-hearing material to which the claimant had access made no reference to the **Castano** case and did not explain why the respondents submitted that the claimant was not "designated" by the first respondent for the purposes of section 44 **ERA**.

21. On the issue of "reasonableness" of the adjustment sought, the judge had not ultimately given an oral decision on the day of the hearing, in spite of her earlier intention to do so. Instead, she had reserved judgment. It would have been entirely feasible and reasonable to have given the claimant the chance to reply in writing to the respondent's submissions.

Submissions for the second respondent

22. For the second respondent, Ms Rezaie submitted that the Tribunal had properly identified the relevant disadvantages arising from the claimant's disabilities, had engaged with and considered the adjustment sought and had given coherent reasons as to why it refused to make that adjustment. In short, the judge had done exactly what **Rackham** required.

23. The question in this appeal was not whether the adjustment would have been possible. Rather, the issue was whether refusing the adjustment deprived the claimant of a fair hearing.

24. In that context, it was important to note that the hearing of 23 January 2023 was on an application for strike out and deposit orders. The task of the court was to assess the claimant's case at its highest. The role of the Tribunal was not to test the claimant's recall, or make assessments of the credibility or reliability of evidence.

25. The claimant's case had been articulated by him in his ET1 and in further particulars. Written submissions could only have changed what was said there if they had introduced new

factual material or a new legal argument. In his reconsideration application of 11 February 2023, the only point raised by the claimant in addition to those made by him orally at the hearing related to the issue of “designation” and detriment under section 44 **ERA**. Whilst that additional point bore upon paragraph 3 of the Judgment, it had no bearing upon any of paragraphs 1, 2, 4, 5 or 6 (respectively, the complaints of unpaid wages, discrimination arising from disability, protected disclosure detriment, unlawful deductions from wages, and disability discrimination by failure to make reasonable adjustments).

26. With the exception, therefore, of his submission on the section 44 **ERA** complaint (which was the subject of full legal submissions under grounds 2 and 3) the claimant had not identified any other matter on which he would have made further or different submissions to those that he made orally on 23 January 2023. He had not identified, either in the reconsideration application or in this appeal, any respect in which there was said to be any substantive unfairness.

Analysis and decision – ground 1

27. I do not accept that the Tribunal confined its assessment of impairment to the claimant’s ability to make oral submissions. When paragraph 4 of the Tribunal’s reasons is read as a whole, it clearly addressed its mind to the claimant’s two conditions, and examined the effect that those conditions would have upon his ability to respond to submissions of which he had not had prior warning or notice. The Tribunal was quite correct to consider that, in relation to submissions of which he had received prior notice, he was not placed at any disadvantage that the suggested adjustment would ameliorate.

28. Of the three reasons given by the Tribunal for refusing the adjustment sought, the third is the most significant. The Tribunal records that whilst additional detail was provided orally at the hearing on 23 January 2023, the essence of the respondents’ various applications and the grounds for them had been set out in writing prior to the hearing and were unchanged. During the appeal, I requested sight of some of those pre-hearing papers including the respondents’ applications and skeleton argument. Having considered those, it was clear to me that the Tribunal’s assessment of the situation was correct.

29. The claimant therefore had notice in writing some time before the hearing of points to which he had to respond and had been invited to prepare written submissions for the hearing.

This is an important factor when considering the overall fairness of the hearing in the context of the point now made in this ground of appeal.

30. I agree with the submission for the second respondent that, in order to succeed in this ground, the claimant needed to identify relevant and material issues in the Tribunal's reasons which he had no opportunity to consider prior to the hearing on 23 January and to which he did not have a fair opportunity to respond as a result of his disabilities. In practical terms, he would need to identify material points that were ultimately relied upon by the Tribunal for its decision but which were not foreshadowed in the written materials produced by the respondents that he had seen prior to the hearing. He would also need to identify what further or different submissions he would have made in writing.

31. I accept the submission made on behalf of the second respondent that the claimant has not done any of those things in this appeal save in relation to the one complaint to which paragraph 3 of the Judgment relates: that is the section 44 **ERA** complaint that forms the basis of grounds of appeal 2 and 3.

32. It follows that, at least in relation to paragraphs 1, 2, 4, 5 and 6 of the Tribunal's judgement the claimant has made out a case of potential prejudice, but not that the Tribunal's refusal of the requested adjustment was a cause of any actual unfairness to him. In relation to those parts of the Judgment, he has not established that the refusal of the requested adjustment prevented him from making any further or different submission on a matter that was ultimately material to the Tribunal's decision.

33. The legal issues that arise in relation to section 44 **ERA** are, separately, the subject of grounds 2 and 3, to which I now turn.

Ground 2

Relevant law

34. Section 44 ERA states:

Health and safety cases.

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

35. Section 44 was enacted to implement obligations under the Framework Directive on Health and Safety (Council Directive 89/391), articles 7(1) and (2) of which state:

“1. ...the employer shall designate one or more workers to carry out activities related to the protection and prevention of occupational risks for the undertaking and / or establishment.

2. Designated workers may not be placed at any disadvantage because of their activities related to the protection and prevention of occupational risks.

Designated workers shall be allowed adequate time to enable them to fulfill their obligations arising from this Directive.”

36. In **Castano v. London General Transport Services Limited** [2020] IRLR 417 Eady J considered the meaning of the word “designated”. She concluded (at paragraph 27) that on a proper construction of section 44(1)(a), it was intended to apply to a situation where a particular employee had been designated, over and above their ordinary duties, to carry out specific activities in connection with preventing or reducing risks to health and safety – essentially a health and safety officer function. Appointing an employee to a job in which they may, incidentally, have some health and safety duties as part of their normal role does not, of itself, mean that they are “designated” for the purposes of section 44 ERA.

The Tribunal’s decision

37. The Tribunal considered whether the claimant was “designated” for the purposes of section 44(1)(a) ERA at ET § 63. At ET § 29, it noted the ratio of **Castano**, and at ET § 63 it stated:

“I consider first whether the claimant was designated by either respondent to carry out activities in connection with preventing or reducing risks to health and safety at work. I conclude that he was not. It is certainly true the nature of a door supervisor’s role means that from time to time they will come across situations where they have to consider health and safety when determining how to deal with those situations. That is not the same as being designated to carry out activities in connection with preventing or reducing risks to health and safety, in the same way that a health and safety representative is.

Appellant submissions

38. Mr Green submitted that whilst **Castano** was a decision of the EAT, it was manifestly wrong (per **British Gas Trading Limited v Lock** [2016] ICR 503) and should not be followed. Eady J had clearly erred at paragraph 26 in her reference to Article 3 of the Framework

Directive. The definition in that Article related to representatives in terms of Article 11. Article 11 did not relate to “designated workers”. That was the purpose and scope of the separate Article 7. Section 44(1)(a) was only intended to implement the provisions of the Directive insofar as they relate to designated workers. In short, Eady J had erred in applying the definition of an Article 11 representative to an Article 7 designee. That error vitiated her reasoning as to the scope of the term “designated” in section 44(1)(a) **ERA**.

39. It was an error of law to look only for those who resemble health and safety representatives. Instead, the focus for the purposes of section 44(1)(a) should be on the activities themselves and upon whether the employer had made a conscious choice (or “designation”) that the employee in question should carry out those activities. The example of a banksman who helped safely to move a crane was helpful. The activity was one directed entirely at health and safety. The banksman could be said to be “designated” for the purposes of section 44 **ERA** whilst acting in that capacity.

40. In the case of the claimant, his role involved regulating access to the premises and thus was within the terms of section 44(1)(a) at least to the extent that he was safeguarding other employees or workers.

Second respondent

41. Ms Rezaie submitted (and Mr Green accepted) that this ground does not concern the second respondent because it was agreed that the second respondent was not the claimant’s “employer” for the purposes of section 44 (1)(a). She nevertheless made submissions on **Castano** to assist the court.

42. Eady J had carried out a purposive approach to the legislation in light of the terms of the Directive. The distinction between a section 44(1)(a) designated worker and a section 44(1)(b) representative related only to the method of appointment rather than to their respective functions. According to national practices within Great Britain, the former would be designated by the employer whilst the latter would likely be elected by the workforce. The purpose of the Directive was to protect both.

43. The *ratio* of **Castano** did not, therefore, turn upon the Article 3 definition. Even if the analysis of the effect of Article 3 was imperfect, the conclusion at para 27 was plainly correct.

Castano drew an important and correct distinction between health and safety responsibilities that arose merely as an incident of performing normal duties and those which were specifically designated. If the claimant's alternative analysis was correct almost every employee would fall within the scope of section 44(1)(a) and there would have been no need for 44(1)(b) and (c) at all.

Analysis and decision

44. Carefully and skilfully as Mr Green's submissions were presented, I am not persuaded that **Castano** can be said to be manifestly wrong. Even if the definition in Article 3 is properly confined only to Article 11 health and safety representatives, it does not follow that the wider analysis in para. 27 of **Castano** is obviously wrong. On the contrary, the final sentence of Article 7(2) of the Framework Directive supports it. The principle that designated workers require to be given "adequate time" to fulfil their obligations strongly suggests that their normal duties and the designated health and safety role are to be regarded as conceptually different.

45. Before I could over-rule or decline to follow **Castano**, I would have to be satisfied that it was plainly wrong. I am not so satisfied. The Tribunal was bound to follow **Castano** and I see no error of law in the manner in which it did so at ET § 63.

Ground 3

46. In light of my decision on ground 2, ground 3 cannot succeed. For completeness, however, I will say something very briefly about ground 3.

47. For the purposes of this appeal, the only alleged detriment relied upon was that of sending the claimant home on 1 August 2021. That same event was relied upon as "unfavourable treatment" for the purposes of the section 15 **Equality Act, 2010** ("EqA") complaint as an act of discrimination "arising from" disability. In that latter context, the Tribunal said this (at ET § 59):

"In relation to sending him home after the incident, I cannot see that this can realistically amount to 'unfavourable treatment'. He was sent home on full pay, without suspension and in fact was permitted to work only the following week again, showing that this was not a permanent state of affairs. To the contrary, sending an individual home who has been in an altercation with a member of the public which has led to the police attending the incident, whether or not that member of staff was at fault in any way, seems sensible and in the interests of all concerned, including the claimant. The respondents have clear legitimate aims in order to protect the public, clients, the business and the claimant

himself, and I cannot see him showing that sending someone home in this situation on full pay was anything other than a proportionate response.”

48. In the context of the section 44 **ERA** complaint, the Tribunal stated (at ET § 66):

“In relation to being sent home early, for all the reasons set out above, I cannot see that the claimant will be able to show that this was a detriment.”

49. Mr Green submitted that the Tribunal had erroneously transposed the legal tests for unfavourable treatment and justification under section 15 **EqA** to the separate and different issue of detriment contrary to section 44 **ERA**. Section 15 **EqA** requires an entirely objective analysis (**Williams v. Trustees of Swansea University Pension and Assurance Scheme** [2017] IRLR 882). Section 44 **ERA**, by contrast, requires to be examined both subjectively and also from the perspective of how a reasonable employee *might* have viewed the treatment (**Jesudason v. Alder Hey Children’s NHS Foundation Trust** [2020] IRLR 374 at para. 27 and 28).

50. Had it been necessary to determine this point, I would have seen force in it. It is not apparent that the Tribunal recognised the subtle but important difference between between “unfavourable treatment” and “detriment”. The differences between the two concepts were explained by Langstaff J in the **Williams** case ([2015] IRLR 885 at paras 27-29) and that analysis was later endorsed by the Court of Appeal ([2017] IRLR 882 at para 32). The Tribunal’s analysis in this case at ET § 59 and 66 does not appear to recognise that.

51. Had ground 2 been successful, therefore, I would have allowed the appeal on ground 3. In that event, I would have recalled paragraph 3 of the Tribunal’s Judgment and remitted the section 44 **ERA** complaint to the Employment Tribunal. Because ground 2 does not succeed, however, ground 3 also falls to be refused as it is academic.

52. Returning to ground 1, the appellant has now had the chance to advance, through counsel, the only point of any substance that he may even arguably have been denied the chance to argue in writing after the hearing on 23 January 2023. The fairness of the process must be viewed in the round, and he has now been fully heard on that argument. The consequence of my decision on ground 2 is that ground 1 also fails.

53. For these reasons, the appeal is refused.