



EMPLOYMENT TRIBUNALS

Claimant: Mr. C Phillips
Respondent: Yu Energy Retail Limited
Heard at: Nottingham (On the papers)
On: 11th March 2026
Before: Employment Judge Heap (sitting alone)

Representation

For Claimant: Written Representations
For the Respondent: Written Representations

JUDGMENT

1. The claim for automatically unfair dismissal advanced under Section 104 Employment Rights Act 1996 is struck out on the basis that it has no reasonable prospect of success.
2. This does not affect the claim for breach of contract which will proceed to a hearing with a reduced time estimate of one day on **9th July 2026**. The hearing date on 8th July 2026 has been vacated.

REASONS

BACKGROUND AND THE ISSUES

1. The Claimant presented his claim on 16th August 2025 claiming unfair dismissal and breach of contract in respect of what he said was unpaid notice pay. That latter complaint turns on whether the Respondent was obligated to pay statutory notice (in fact they paid more than that) or the three months notice which the Claimant contends that he was entitled to upon termination of employment.

2. It is not in dispute that at the date of termination of employment the Claimant had just over six months continuous employment. He therefore did not have the continuous service with the Respondent required by Section 108 Employment Rights Act 1996 to bring a complaint of so called “ordinary” unfair dismissal.
3. That being the case, the Tribunal issued a warning to the Claimant on 22nd September 2025 requiring him to give reasons why the unfair dismissal claim should not be struck out. The Claimant replied on 24th September 2025 to say that he accepted that he did not have two years service but contended that the claim was brought under Section 104 Employment Rights Act 1996 because he had been dismissed for asserting a statutory right and thus did not need any minimum length of service.
4. I directed that the Claimant needed to make an application to amend the claim identifying what relevant statutory right he was asserting. The Claimant did so on 21st October 2025 setting out that the statutory rights that he relied on were Section 86(1) and Section 13 Employment Rights Act 1996. The Respondent did not object to the application to amend the claim in those terms but set out that further detail was required.
5. Employment Judge Adkinson directed that the final hearing be converted to a Preliminary hearing to deal with the amendment application, clarify the issues and give directions for a final hearing.
6. That hearing came before me on 30th January 2026. The automatically unfair dismissal claim was explored in further detail and I made observations that there appeared to be some inherent difficulties with it.
7. The Respondent had before the Preliminary hearing applied to strike out the unfair dismissal claim or for Deposits to be Ordered to be paid as a condition of continuing with it but that application was dismissed by Employment Judge Adkinson on the basis that there could be no proper consideration of those matters until the issues in the claim were clear.
8. At the Preliminary hearing the Claimant said that he relied on three emails which he said were his assertion of a statutory right. Despite directions from Employment Judge Adkinson that the Claimant had to be prepared to discuss the further information requested by the Respondent the Claimant was largely unable to do so. Further information was therefore Ordered to be provided in respect of those emails with regard to who they were sent to and what words in each amounted to the assertion of a statutory right. Thereafter, I Ordered the Respondent to confirm if they were renewing their application for a strike out or Deposit Orders and for both parties to confirm if they wished any such application to be dealt with on the papers or at a hearing. If it was the former the Claimant was invited to make submissions on his means and ability to pay any Deposit that may be Ordered to be paid.

9. The Respondent renewed their application and expressed a preference for it to be dealt with on the papers. The Claimant did not express a preference and I take from that that he does not request a hearing. It is in all events a matter that could be dealt with on the papers more expeditiously than listing a further hearing. The Claimant did not make any representations about his means and ability to pay any deposit.
10. The Respondent produced a short bundle which included the further information from the Claimant and the emails relied on as asserting statutory rights and I have had regard to that and the Claimant's earlier representations before determining the application.

THE LAW

Striking out a claim or part of it – Rule 38 Employment Tribunal Constitution and Rules of Procedure Regulations 2024

11. Employment Tribunals must look to the provisions of Rule 38 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2024 when considering whether to strike out a claim.
12. The relevant parts of Rule 38 provide as follows:

“38.—(1) The Tribunal may, on its own initiative or on the application of a party, strike out all or part of a claim, response or reply on any of the following grounds—

(a) that it is scandalous or vexatious or has no reasonable prospect of success;

(b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious;

(c) for non-compliance with any of these Rules or with an order of the Tribunal;

(d) that it has not been actively pursued;

(e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim, response or reply (or the part to be struck out).

(2) A claim, response or reply may not be struck out unless the party advancing it has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing”.

13. The only consideration for the purposes of the Respondent's application is whether the unfair dismissal claim can be said to have no reasonable prospect of success.
14. In dealing with an application to strike out all or part of a claim a Judge or Tribunal must be satisfied that there is "no reasonable prospect" of success in respect of that claim or complaint. It is not sufficient to determine that the chances of success are remote or that the claim or part of it is likely, or even highly likely to fail. A strike out is the ultimate sanction and for it to be appropriate, the claim or the part of it that is struck out must be bound to fail. As Lady Smith explained in **Balls v Downham Market High School and College [2011] IRLR 217, EAT** (paragraph 6):

"The Tribunal must first consider whether, on a careful consideration of all the available material, it can properly conclude that the claim has no reasonable prospects of success. I stress the words "no" because it shows the test is not whether the Claimant's claim is likely to fail nor is it a matter of asking whether it is possible that his claim will fail. Nor is it a test which can be satisfied by considering what is put forward by the Respondent either in the ET3 or in the submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is, in short, a high test. There must be no reasonable prospects..."

15. Claims or complaints where there are material issues of fact which can only be determined by an Employment Tribunal at a full hearing will rarely, if ever be, apt to be struck out on the basis of having no reasonable prospect of success before the evidence has had the opportunity to be ventilated and tested (see **Anyanwu v South Bank Student Union [2001] ICR 391** and **Ezsias v North Glamorgan NHS Trust [2007] ICR 1126**).

THE RELEVANT EMAILS

16. The further information produced by the Claimant after the Preliminary hearing set out that he relied on five emails (rather than the three previously referred to) which he said amounted to him asserting a statutory right. He had been asked to identify the words used in each of them which demonstrated that right.
17. The first was an email of 8th July 2025 to Priyanka Kerai which the Claimant said primarily addressed performance matters, the extension of his probation and proposed terms for a potential contractual settlement. As to the passages relied on as asserting a statutory right the Claimant said this *"No passage from this email is relied upon as constituting an assertion of a statutory right for the purposes of section 104 ERA"*.
18. The second email was one sent to Chris Gordon on 11th July 2025 which the Claimant said addressed the withdrawal of system access, uncertainty regarding employment status and sought clarification and resolution. As to the passages relied on as asserting a statutory right the Claimant again said this *"No passage from this email is relied upon as constituting an assertion of a statutory right for the purposes of section 104 ERA"*.

19. The third email was also dated 11th July 2025 but this time to Rebecca Bateman which the Claimant said formed part of settlement discussions and addressed procedural concerns and proposed terms for resolution. As to the passages relied on as asserting a statutory right the Claimant again said this *“No passage from this email is relied upon as constituting an assertion of a statutory right for the purposes of section 104 ERA”*.
20. The fourth email was also to Rebecca Bateman sent on 14th July 2025. The Claimant set out that this addressed clarification of employment status, access removal and procedural concerns. As to the passages relied on as asserting a statutory right the Claimant again said this *“No passage from this email is relied upon as constituting an assertion of a statutory right for the purposes of section 104 ERA”*.
21. The final email was also sent to Rebecca Bateman on the same date. The Claimant set out that this reiterated his position regarding exclusion from employment and indicated an intention to progress the matter externally if unresolved. As to the passages relied on as asserting a statutory right the Claimant again said this *“No passage from this email is relied upon as constituting an assertion of a statutory right for the purposes of section 104 ERA”*.
22. Under a heading “Clarification of the Claimant’s Position” he said this:
- “The Claimant did not expressly reference section 86(1) ERA 1996 or statutory notice in the July correspondence.*
- The Claimant’s case is that his entitlement to notice arose upon termination of employment and that his communications concerning exclusion, termination, and the absence of process constituted an **implicit assertion in substance of that entitlement, as would reasonably have been understood by the employer.***
- Whether those communications amount to an assertion of a statutory right for the purposes of section 104 ERA is a matter for determination at the final hearing”*.
23. I have seen each of the emails and have considered them both singularly and cumulatively. As referred to above, the Claimant relies on asserting a statutory right to notice.
24. The first email deals with the Claimant’s assertion that if his probationary period had been handled correctly then he would have been entitled to three months notice and proposed a “mutual and dignified exit” with payment of six months salary.
25. The second email related to what the Claimant termed as his exclusion from the Respondent, that he had not resigned or refused to work but that if he did not receive a formal response then he would conclude that his employment had ended and would treat the position as him being free to take alternative work. He again expressed a preference about settling matters. Nothing was said about notice.

26. The third email acknowledged an offer made by the Respondent to pay one months notice (which as I understand it is not disputed was later paid), referred to him not having resigned and made a proposal for a resolution by payment of five months notice. Nothing else about notice was said.
27. The fourth email rejected the offer of a meeting to discuss matters, maintained that he had not resigned and referred to the Respondent avoiding accepting that he had passed his probation. Nothing was said about notice.
28. The final email rejected the offer of a meeting and set out that the Claimant considered himself to have had his employment terminated and that in essence he would pursue a claim. Nothing was said in that email about notice.
29. I make plain that these are my observations on the emails. They are not findings of fact and they do not bind the Tribunal at the final hearing.

CONCLUSIONS

30. A claim under Section 104 Employment Rights Act 1996 ("The Act") can only succeed where the reason or principal reason for the dismissal is because an employee has asserted a relevant statutory right. The relevant statutory rights are set out at Section 104(4) of the Act.
31. The Claimant contended at the Preliminary hearing before me and within his further information provided thereafter that the relevant statutory right that he had asserted was that the Respondent had infringed Section 86(1) of the Act. That is a relevant statutory right which deals with the minimum period of statutory notice required to be given on the termination of employment. In the Claimant's case given his length of service, that was one week.
32. None of the emails which the Claimant relies on either singularly or cumulatively give rise to any suggestion that he was contending that he was entitled to one week's notice. The references to notice were that if his probation had been handled correctly then he would have been entitled to three months notice and proposing that he leave the Respondent with payment for either six or then five months pay.
33. It is clear that the Claimant was not arguing about one week's statutory notice. If he had been then he would not have been raising counter offers to the Respondent's proposal to pay one months notice. What the Claimant was asserting is that either he had or should have passed his probationary period in which case he would have been entitled to three months notice and that he should be entitled to a larger payment essentially for loss of office and seeking an exit on those terms.
34. Putting his case at its absolute highest he was not arguing about statutory notice but about contractual notice. There is a difference between statutory notice and contractual notice. The latter would be a claim under the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994. That is not a relevant statutory right under Section 104(4) Employment Rights Act 1996.

35. I struggle to understand how the Claimant's contention that *"his entitlement to notice arose upon termination of employment and that his communications concerning exclusion, termination, and the absence of process constituted an **implicit assertion in substance of that entitlement, as would reasonably have been understood by the employer**"*. There is nothing in the emails which he relies upon which makes any suggestion that he is asserting that he was entitled to one weeks notice. In fact, far from it as he was proposing that he leave on much more generous terms.
36. None of the communications when taken individually or as a whole could therefore reasonably be interpreted as the Claimant having asserted a statutory right about one weeks notice.
37. I should observe that although not referenced by the Claimant either at the Preliminary hearing or in his further information he had previously referred to reliance on Section 13 of the Act which deals with complaints about unauthorised deductions from wages. As I observed in the record of the Preliminary hearing, the Claimant had not been given notice and as such could not have been saying at that stage that some payment had been made to him which was less than that which was properly payable. Having considered the emails again both singularly and cumulatively there is nothing within them that even hints at the assertion that the Respondent had made an unauthorised deduction from his wages.
38. I am therefore satisfied that the claim of automatically unfair dismissal does have no reasonable prospect of success on the basis that the communications relied on by the Claimant do not when viewed singularly or cumulatively assert any relevant statutory right.
39. Having reached that conclusion, I therefore need to exercise my discretion to consider whether to strike out the automatically unfair dismissal claim. Whilst the Claimant asserts that whether he had asserted a statutory right should be determined at the final hearing, that is not in accordance with the overriding objective. There is no point in the parties preparing to deal with a claim for automatically unfair dismissal which is doomed to failure. The documents which are relied on are clear and nothing that will come out in evidence at the final hearing will alter that. All that will be achieved is a waste of time and costs and that is not least as the issue of the notice pay claim – which in reality is what this matter is all about – is straightforward and can be disposed of within a maximum of one day.
40. There is therefore no good reason for the automatically unfair dismissal claim not to be struck out and that is therefore the decision that I have reached.
41. This does not affect the breach of contract claim about notice pay which proceeds to the final hearing. As above, that is relatively straightforward and accordingly I have reduced the listing to one day on what otherwise would have been the second day of hearing time. All other arrangements for the hearing including the venue and

commencement time remain the same and the parties must take this as revised Notice of hearing and no further notice will follow.

Approved by:

Employment Judge Heap

Date: 12th March 2026

JUDGMENT SENT TO THE PARTIES ON

10 April 2026.....

.....
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.