

Neutral Citation Number: [2026] EAT 143

Case No: EA-2024-001612-BA

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 22 April 2026

Before:

HIS HONOUR JUDGE TARIQ SADIQ

Between:

MASTER TRADE NETWORK LTD

- and -

BASHIR AHMED

Appellant

Respondent

Mr Rafael Katz (instructed by **Peninsula Business Services Ltd**) for the **Appellant**
Mr Z Khan (instructed by **Lexwin Solicitors**) for the **Respondent**

Hearing date: 22 April 2026

APPROVED JUDGMENT

SUMMARY

PRACTICE AND PROCEDURE

The ET struck out the Respondent's Response at a merits hearing preventing the Respondent from further participation at the hearing. The ET went onto to uphold the Claimant's claims for unlawful deduction of wages, lack of written statement of employment particulars, automatic unfair dismissal for asserting rights under the National Minimum Wage Act and awarded injury to feelings resulting from the dismissal of £1,000.

Held: The ET erred in law in striking out the Response since strike out was disproportionate and a fair trial was still possible, and the decision was also perverse. It the EAT hearing, it was conceded that as a matter of law injury to feelings awards are not available in automatic unfair dismissal cases – **Dunnachie v Kingston-Upon-Hull City Council** [2004] ICR 1052. In the circumstances, it was appropriate to quash the strike out decision and substitute a decision declining to strike out the Response as at the date when that decision was made and quash the decision regarding the injury to feelings award arising from the dismissal. The matter would be remitted to a different ET to decide the claims on the basis of the Respondent's unamended case that the Claimant was not a worker or an employee.

HIS HONOUR JUDGE TARIQ SADIQ:

1. In this judgment I shall refer to the parties as they were in the Employment Tribunal below as Claimant and Respondent. The Respondent appeals against the decision of the Employment Tribunal sitting in London South striking out its response at the hearing on 7 October 2024 and under Rule 21 of the ET Rules of Procedure preventing the Respondent from further participation at the hearing. The Employment Tribunal went on to uphold the Claimant's claims for unlawful deduction of wages, lack of written statement of employment particulars, automatic unfair dismissal for asserting rights under the National Minimum Wage Act and injury to feelings resulting from the dismissal of £11,200.

2. The following grounds of appeal were allowed through by the sift decision dated 6 February 2025 namely:

- (1) The decision to strike out was disproportionate and a fair trial was still possible;
- (2) Rule 21 was not applicable in the circumstances; and
- (3) The Employment Tribunal erred in awarding injury to feelings given this was an unfair dismissal claim.

Ground 2 is no longer pursued by the Respondent. In relation to ground 3 the Claimant has conceded that the award of interest on injury to feelings was in error.

3. At this hearing the Claimant was represented by Mr Khan, Solicitor, and as he was in the Tribunal below and the Respondent was represented by Mr Katz, Solicitor Advocate. I am grateful for their oral and written submissions.

THE BACKGROUND

4. The Claimant was engaged by the Respondent as a Barista from 10 July 2023 to 28 September 2023 at its coffee shop. In mid-September 2023 the Claimant went on a planned holiday to Bangladesh having allegedly informed his manager of his absence. On 28 September 2023 upon his return to work he alleges he was dismissed. The Claimant subsequently brought claims for automatic

unfair dismissal and wrongful dismissal, unlawful deduction of wages, a lack of written statement of employment particulars and holiday pay. In its Response the Respondent stated that the Claimant was not an employee but was a trainee with no contract. It was alleged that the Claimant made mistakes during his employment and that he left to find another job.

5. On 8 July 2024 there was a Preliminary Hearing before Employment Judge Corrigan. The Respondent did not attend without good reason and the Employment Judge proceeded in its absence.

At paragraphs 52 and 53 the Employment Judge set out the claim and defence as follows:

“52. The claim was about whether or not the claimant received the pay he was entitled, including the minimum wage and whether he was subjected to detriment and/or dismissed for taking action with a view to securing the benefit of the minimum wage. The respondent’s defence is that the claimant was paid the minimum wage and the claimant was not dismissed but chose to leave his employment.

53. The respondent has disputed that the claimant was an employee. However, the respondent accepts that he was a trainee and given pay slips. The claimant also says he received a P45. On this basis it is likely that the claimant was either an employee or a worker rather than in business on his own account. The respondent is ordered to give details of what the respondent says the claimant’s employment status was as per the order above.”

6. Paragraph 18 of the case management order directed the Respondent by 22 July 2024 to clarify its case regarding the Claimant’s employment status if he was not an employee as argued by the Respondent. The Respondent did not comply with this deadline.

7. At paragraph 55 the Employment Judge set out the Claimant’s claims including automatic unfair dismissal under section 104A of the Employment Rights Act 1996 and unlawful detriment under section 23 of the National Minimum Wage Act 1988. At paragraph 57.1 he referred to the issue of employment status and whether the Claimant was an employee under section 230 of the Employment Rights Act 1996/section 54 National Minimum Wage Act 1998 or a worker within section 230 of the Employment Rights Act 1996 or section 54 of the National Minimum Wage Act 1998.

8. Regarding unfair dismissal, under paragraph 3.4 he identified the issue was the reason or

principal reason for dismissal that the Claimant took action or proposed to take action with a view to securing the benefit of his right to the minimum wage. Paragraph 6 dealt with detriment under section 23 of the National Minimum Wage Act 1998 and listed five detriments. Under paragraph 10 he identified the remedies for unlawful detriment, including at paragraph 10.4 injury to feelings. The case management order was sent to the parties on 10 July 2023.

THE EMPLOYMENT TRIBUNAL'S DECISION

9. The decision under appeal runs to only seven pages. Under the heading “**The hearing**” at paragraph 21 the Employment Tribunal said that a key issue had arisen:

“Regarding the respondent seeking to argue that the claimant was a worker when their response had denied he was a worker or employee. The tribunal refuse to allow the late change of position.”

10. At paragraph 22 it said that following legal submissions “The Tribunal struck out the Respondent’s response for ambushing the Claimant with an unpleaded case. As a result, under Rule 21 the Respondent could not further participate”.

11. Under the heading “**Applications**” at paragraph 25 the Employment Tribunal said:

“A key issue arose during the claimant’s cross-examination when it became apparent that the respondent was seeking to argue that Mr Ahmed was a worker. However, the respondent’s ET3 response has denied he was a worker or employee asserting he was a trainee with no contract.”

12. In the next paragraph the Employment Tribunal noted that there had been no formal application to amend, the Claimant had not been notified in advance and the case had proceeded on the basis of the pleaded response.

13. The Claimant’s solicitor applied for the Response to be struck out as the Respondent was no longer pursuing the pleaded defence. The Respondent’s representative made a late application to amend the Response alleging that the Claimant was a worker, stating that the Employment Tribunal would have to consider the employment status in any event, which was opposed.

14. At paragraph 31, in refusing the amendment application the Employment Tribunal noted that the change in position had not been flagged up in advance or put in writing and that the Claimant would face prejudice having to deal with an unpleaded case. At paragraph 31 the Employment Tribunal said that a late unpleaded amendment would be contrary to the overriding objective and that it would fundamentally change the nature of the response after the claimant had prepared his case accordingly.

15. At paragraph 33 the Employment Tribunal referred to the Claimant being ambushed by the respondent at the hearing and at paragraph 34 referred to the Respondent's behaviour:

“..obstructed rather than furthered justice, wasting time and resources. Needless reversals on pleaded cases at the last minute will not be tolerated. This was unfair litigation strategy for which the respondent deserved strong criticism in this instance.”

16. Finally at paragraph 35 the Employment Tribunal said the “the Tribunal struck out the response as no longer reflecting the Respondent's position. This was an appropriate and proportionate step given the interests of justice.” Significantly, the Tribunal did not refer to any authorities on the power to strike out.

17. Under the law section at paragraph 51 regarding compensation for injury to feelings the Employment Tribunal said that section 12 of the Employment Rights Act was engaged. It went on to find, as far as is relevant to this appeal, that the Claimant had been automatically unfairly dismissed under section 104 of the Employment Rights Act 1996. As regards injury to feelings the Employment Tribunal stated that section 12 of the Employment Rights Act was engaged which it said allowed the Tribunal to award compensation where an employer has contravened the employee's rights under the Employment Rights Act 1996.

18. At paragraph 64 the Tribunal found that the reason or principal reason for dismissal was the Claimant asserting his national minimum wage right and that applying section 104 of the Employment Rights Act 1996, the dismissal was automatically unfair. At paragraph 67 pursuant to section 12 of the Employment Rights Act 1996 the Employment Tribunal awarded injury to feelings, “Resulting

from the unfair manner of the claimant's dismissal and its consequences."

19. At paragraph 69 the Employment Tribunal referred to the "discriminatory manner of the dismissal" when making the injury to feelings award of £11,200.

20. The Respondent's reconsideration application was unsuccessful by decision sent to the parties on 19 December 2024.

THE LEGAL PRINCIPLES

21. Rule 37(1) of The Employment Tribunals Rules of Procedure 2013 provides, as far as is relevant, the power to strike out where the manner in which the proceedings have been conducted by or on behalf of, here, the respondent has being scandalous, unreasonable, or vexatious (that is Rule 37(1)(b)); for non-compliance with any of these rules or with an order of the tribunal (that is Rule 37(1)(c)), or the tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (that is rule 37(1)(e)).

22. In the well-known case of **Bolch v Chipman** [2004] IRLR 140 EAT, which itself was an appeal by the respondent from a decision to strike out a response, Burton J set out the guidance at paragraph 55 for Employment Tribunals when determining whether or not to strike out as follows. First, there must be a finding that the party is in default of some kind falling within rule 37(1). Second, if so, consideration must be given to whether a fair trial is still possible and save in exceptional circumstances, if a fair trial remains possible, the case should be permitted to proceed. Third, even if a fair trial is not achievable, the Employment Tribunal must consider that the strike out is a proportionate sanction or whether there may be a lesser sanction that can be imposed. Fourth and finally, if strike out is the only proportionate and fair response, reasons should be given why that is so.

23. In **James v Blockbuster Entertainment Ltd** [2006] IRLR 630, the Court of Appeal to similar effect where Sedley LJ recognised at paragraph 5 the draconian nature of the strike out power and

that it is not to be readily exercised. He held, even where the conditions for making a strike out order are fulfilled, it is necessary to consider whether the sanction is a proportionate response to the particular circumstances of the case and the answer to that question must have regard to whether the claim can be tried because time remains within which orderly preparation can take place, or whether a fair trial can take place. He also said at paragraph 19 that it takes something very unusual to justify the striking out of the claim made on the eve or morning of the hearing.

24. As the Employment Appeal Tribunal made clear in **T v Royal Bank of Scotland** [2023] EAT 119 at paragraph 40, HHJ Auerbach presiding, there are examples in the authorities where the parties' conduct of the litigation is so egregious or serious that they are properly treated as having by their conduct forfeited their right to have their case heard, for example where a litigant's conduct is so threatening, abusive, or disruptive that whatever the cause it ought not to be tolerated. But outside these cases a claim should not otherwise be struck out on account of conduct unless the conduct means or has created a real risk that the claims cannot be fairly tried.

25. In **Bailey v Aviva Employment Services Ltd** [2025] EAT 109 the EAT held, again HHJ Auerbach presiding, at paragraph 45 that as part of the consideration whether a fair trial is still possible, the Employment Tribunal must also consider what alternative ways short of strike out there may be of reasonably managing, mitigating, or addressing the conduct of the party concerned or the impact which it threatens to have on the possibility of there being a fair trial so as to avoid it having that effect.

26. As the Employment Appeal Tribunal made clear at paragraph 47, the question whether a fair trial is still possible and the question of whether there is an alternative proportionate measure short of strike out that the Employment Tribunal should adopt often go hand in hand and are intertwined.

THE GROUNDS OF APPEAL

27. Ground 1 is that the Employment Tribunal erred in law in striking out the Response since

strike out was disproportionate and a fair trial was still possible, or the decision was perverse.

28. Ground 1 succeeds for the following reasons. First, the Employment Tribunal overstated the Respondent's unreasonable conduct under rule 37(1)(b). The stated basis for the strike out of the Respondent's Response was for "ambushing the claimant with an unpleaded case" (see paragraph 22). This was because of the Respondent seeking to argue during the Claimant's cross-examination that the Claimant was a worker when in its Response it had denied that he was a worker or an employee (see paragraphs 21, 25 and 33 of the ET's reasons).

29. The employment status of the Claimant was clearly a live issue before the Employment Tribunal based on the record of the preliminary hearing on 8 July 2024 and the list of issues therein regarding employment status. Instead of the issue being whether the Claimant was an employee or a worker, the Respondent's concession meant that the Tribunal had to decide whether he was a worker or an employee. Being a worker meant that the Respondent was potentially liable for all the claims, save for dismissal.

30. I reject the Respondent's submission that no amendment was required. The Respondent had denied in its Response that the Claimant was a worker or an employee. The Respondent had been ordered to clarify its position on employment status by 22 July 2024, and it had failed to do so by the deadline. In the grounds of appeal, the Respondent had submitted that the Employment Tribunal had permissibly refused its amendment application which by implication, of course, means that it accepted an amendment was necessary. Further, it is not a ground of appeal that no amendment application was required and/or that the Employment Tribunal erred in law in refusing the Respondent's application to amend.

31. Second, the Employment Tribunal failed to consider adequately or at all proportionality and whether a fair trial was still possible. It held at paragraph 35 no more than that striking out the Response was "the appropriate and proportionate step given the interests of justice". The

Employment Tribunal failed to refer at all to the guidance given in **Bolch v Chipman** and **Blockbuster Entertainment Ltd**. The second step in **Bolch v Chipman** whether a fair trial was still possible was not considered at all. The Employment Tribunal failed to grapple with the issue whether a fair trial was possible on the basis of the Respondent's unamended case namely that the Claimant was not a worker or an employee. It clearly could have proceeded on the basis of the Respondent's assertion that the Claimant was self-employed and the Claimant asserting that he was an employee. As stated in the Claimant's skeleton argument at paragraph 26(iii) he was prepared to answer the trainee defence and he gave evidence in his witness statement that he was an employee.

32. It is also clear from reading the brief judgment that the Employment Tribunal considered strike out to be a punitive measure which it should not (see paragraph 52(2) of the passage in **Bolch v Chipman**). The Employment Tribunal referred twice to the Respondent ambushing the Claimant at the hearing seeking to argue that he was a worker (see paragraphs 22 and 33). At paragraph 33, the Employment Tribunal "heavily criticised the Respondent's conduct of this litigation" and at paragraph 34 said that "Needless reversals of pleaded cases at the last minute would not be tolerated, which was unfair litigation strategy for which the Respondent deserved strong criticism".

33. For all of these reasons, the Employment Tribunal erred in law striking out the Respondent's Response. For the same reasons, no reasonable Employment Tribunal could have reached the conclusion that a fair trial was no longer possible and therefore the perversity challenge also succeeds.

34. Ground 3. Ground 3 is that the Employment Tribunal erred in awarding injury to feelings given this was an unfair dismissal claim. Section 23(4)(a) of the National Minimum Wage Act 1998 provides as follows:

"(4) This section does not apply where the detriment in question amounts to dismissal within the meaning of—

(a) Part X of the Employment Rights Act 1996 (unfair dismissal)."

35. The House of Lords held in **Dunnachie v Kingston-upon-Hull City Council** [2004] ICR

1052 that injury to feelings awards are not available for compensatory awards under section 123 of the Employment Rights Act 1996. At this hearing Mr Khan for the Claimant conceded as a matter of law injury to feelings awards are not available in automatic unfair dismissal cases. He submitted, however, that at paragraph 67 in awarding injury to feelings for the “unfair manner of the claimant’s dismissal and its consequences” the Employment Tribunal were making findings in favour of the Claimant regarding the non-dismissal detriments.

36. I reject that submission. The reference to “its consequences” referred to the impact of the dismissal on the Claimant which might, of course, be relevant to the amount of the injury to feelings award. Here, the only detriment found by the Employment Tribunal was the dismissal - see paragraphs 64 to 66 of the ET’s reasons. It did not make any findings regarding any of the non-dismissal detriments relied upon. As stated above, at paragraph 67 the Employment Tribunal said that it was making an injury to feelings award for the “unfair manner of the Claimant’s dismissal and its consequences” and the “discriminatory manner of dismissal”. Since the only detriment found was the dismissal, the Tribunal had no power to make an injury to feelings award. Accordingly, Ground 3 succeeds.

DISPOSAL

37. The circumstances in which the Employment Appeal Tribunal substitutes its own view for those of the fact-finding Employment Tribunal are rare. It must be satisfied that there are no other possible conclusions on the facts before it can do so. I have upheld Grounds 1 and 3. If the matter is remitted to a further Tribunal, then they would first have to consider whether there should be a further hearing of the question whether the Respondent should be debarred.

38. I am satisfied that no reasonable Tribunal if the matter was now reheard could reach the conclusion that a fair trial of the claims was not possible for the reasons I have given for upholding Ground 1. Accordingly, I will simply quash the strike out decision made and substitute a decision

declining to strike out the Response as at the date when that decision was made and quash the decision regarding the injury to feelings award arising from the dismissal. In the circumstances, it would be appropriate to remit the matter to a differently constituted Tribunal to decide the claims on the basis of the Respondent's unamended case, namely that the Claimant was not a worker or an employee. That Tribunal will also need to decide the non-dismissal detriment claims. That disposes of this appeal.