

Strike Out

When is it appropriate? When is it draconian?

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Rule 38 Strike Out: The Key Principles

Striking out - Employment Tribunal Procedural Rules 2024

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.

(3) Where a response is struck out, the effect is as if no response had been presented, as set out in rule 22 (effect of non-presentation or rejection of response, or case not contested).

(4) Where a reply is struck out, the effect is as if no reply had been presented, as set out in rule 22, as modified by rule 26(2)(replying to an employer's contract claim).

Rule 38 Strike Out: The Key Principles

The Two-Stage Test

- ▶ **Stage 1** Ground established?
- ▶ **Stage 2** Should the Tribunal exercise its discretion?

(HM Prison Service v Dolby [2003] IRLR 694 ; Hasan v Tesco UKEAT/0098/16)

Overriding Objective

*Leeks v UCLH NHS
Foundation Trust [2024]
EAT 134*

*Emuemukoro v Croma
Vigilant (Scotland)
Ltd [2022] ICR 327*

*Cox v Adecco and others
UKEAT/0339/19/AT*



Is a fair trial still possible?



What prejudice has been caused?



Is the non-compliance deliberate?



Could the issue be addressed through a less severe sanction?



What impact will the decision have upon tribunal resources and other litigants?

Five grounds

No reasonable prospects of success

- *Balls v Downham Market High School* [2011] IRLR 217, EAT
- *Ukegheson v Haringey London Borough Council* [2015] ICR 1285
- *Mechkarov v Citibank NA* [2016] ICR 1121, EAT

Manner in which the proceedings have been conducted

- *Bolch v Chipman* [2004] IRLR 140, EAT
- *Arriva North London Ltd v Maseya* UKEAT/0096/16
- *Force One Utilities Ltd v Hatfield* [2009] IRLR 45

Non-compliance with rules

- Seriousness of the breach; responsibility for the breach; prejudice caused; whether a fair hearing remains possible
- *Weir Valves and Controls UK Ltd v Armitage* [2004] ICR 371, EAT.

Has not been actively pursued

- *Rolls Royce plc v Riddle* [2008] IRLR 873, EAT
- *Boateng v Moss Bros Group Ltd* [2026] EAT 50, [2026] IRLR 470.

No longer possible to have a fair hearing

- *Abegaze v Shrewsbury College of Arts & Technology* [2009] EWCA Civ 96



Partial strike
out



Deposit orders.



Unless orders.



*Forrest v Amazon
Web Services EMEA
SARL UK
Branch [2025] EAT
81;
Minnoch v
Interserve FM Ltd
[2023] EAT 35*



Specific
disclosure
applications.



Further
information
requests.



Relief from
sanctions:
reconsideratio
n of the strike
out

Practically

- ▶ **Before Making the Application**
 - ▶ Identify precise rule
 - ▶ Build chronology
 - ▶ Demonstrate prejudice
 - ▶ Show alternatives considered
- ▶ **At the Hearing**
 - ▶ Focus on proportionality
 - ▶ Explain why lesser sanctions inadequate
 - ▶ Emphasise overriding objective
- ▶ **Common Judicial Concerns**
 - ▶ Access to justice
 - ▶ Draconian nature of strike out
 - ▶ Fair hearing considerations

