



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**  
Mr R Duque

AND

**Respondent**  
JD Wetherspoon Plc

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT** Bodmin

**ON**

25 March 2024

**EMPLOYMENT JUDGE** N J Roper

### Representation

**For the Claimant:** In person, assisted by his mother Mrs G Lenehan

**For the Respondent:** Ms B Balmelli of Counsel

### JUDGMENT

The judgment of the tribunal is that:

1. The claimant was a disabled person by reason of Autism Spectrum Disorder at all times material to this claim; and
2. The claimant's claim has little reasonable prospect of success and it is now subject to the attached deposit order.

### REASONS

1. This is the judgment following a preliminary hearing to determine whether the claimant's claim should be struck out on the grounds that it has no reasonable prospect of success, or whether the claimant should be ordered to pay a deposit as a condition of continuing with the claim because it has little reasonable prospect of success.
2. In this case the claimant Mr Roger Duque, who suffers from autism, has brought a claim alleging discrimination arising from his disability. The claims are denied by the respondent.
3. I have considered the grounds of application and the response submitted by the parties. I have considered the oral and documentary evidence which it is proposed will be adduced at the main hearing. I have also listened to the factual and legal submissions made by and on behalf of the respective parties. I have not heard any oral evidence, and I do not make findings of fact as such, but my conclusions based on my consideration of the above are as follows.
4. The Background:
5. This is a case in which the background facts are not in dispute. The respondent is the well-known national chain of pubs and hotels throughout the UK. The claimant commenced employment with the respondent as a Bar Associate at a pub in Truro on 13 May 2022.

The claimant's employment was conditional on his disclosing any criminal conviction which was not spent under the Rehabilitation of Offenders Act 1974. In addition, there were disciplinary rules and procedures in place which applied to the claimant's employment. The definitions of gross misconduct which would ordinarily give rise to summary dismissal included failing to disclose unspent criminal convictions or charges brought before or during employment, and dishonesty generally.

6. The respondent also has a neuro diversity policy which is designed to accompany a neuro diversity support plan. When the claimant informed the respondent that he had Autism Spectrum Disorder, the respondent engaged with the claimant to discuss his well-being and the need for support and/or adjustments. A neuro diversity support plan was completed with the claimant on the commencement of his employment on 13 May 2022. No adjustments were requested by the claimant.
7. Unfortunately, the claimant did have a criminal conviction from March 2022 which was not spent under the Rehabilitation of Offenders Act and which he failed to disclose to the respondent. The claimant has explained that the conviction related to the vandalism of cars which he asserts is linked to his autism.
8. When the respondent discovered that the claimant had this unspent criminal conviction, it commenced disciplinary proceedings against the claimant for gross misconduct, and he was dismissed on 8 August 2022. The respondent concluded that the claimant had committed two acts of gross misconduct: the first was his failure to disclose the unspent conviction; the second was dishonesty in that the claimant originally denied that he had committed any criminal offences as alleged. The claimant appealed the decision to dismiss him but his appeal was also rejected.
9. At no stage during the disciplinary or appeal hearings did the claimant deny the allegations against him. The claimant admitted that he had withheld information during the application process in order to obtain employment with the respondent by failing to disclose the unspent criminal conviction. He also admitted that he had lied during the investigation process. The respondent concluded that the claimant knew that he had an obligation to disclose his criminal convictions but had simply decided not to do so. This is consistent with a subsequent email to the tribunal office from the claimant dated 13 February 2023 in which he stated: "I was fearful of declaring my criminal convictions because I thought I wouldn't get the job."
10. The claimant commenced the Early Conciliation process with ACAS on 8 September 2022, and ACAS issued the Early Conciliation Certificate on 12 September 2022. The claimant presented these proceedings on 13 September 2022 alleging disability discrimination. There was then a case management preliminary hearing on 2 June 2023 before Regional Employment Judge Pirani, and his case management order of that day was sent to the parties on 4 June 2023 ("the Order").
11. Under the terms of the Order the claimant was directed to provide further information as to his disability, and it was confirmed that the claimant was pursuing one claim only, namely a claim for discrimination arising from disability under section 15 EqA. The unfavourable treatment relied upon by the claimant was (i) his dismissal; (ii) failing to uphold his appeal; and (iii) deciding that he was dishonest. REJ Pirani then identified in the Order that the issue before the tribunal will be whether or not his failure to disclose his convictions was something arising from his disability, in other words caused by his autism, and not dishonesty. REJ Pirani also then listed this hearing to determine whether the claimant's claim should be struck out under Rule 37 as having no reasonable prospect of success, or alternatively be subject to a deposit order under Rule 39 as having little reasonable prospect of success.
12. The claimant originally failed to comply with the terms of the Order with regard to the provision of an Impact Statement relating to his disability, and any supporting documents, because at that stage the respondent had not conceded that the claimant was a disabled person. The claimant has now provided a Disability Impact Statement, and he has also adduced an Autistic Spectrum Disorder Report dated 15 July 2022 ("the Report"). The authors of the Report are Dr A van Hoorn, a consultant psychiatrist, and Caroline Finlayson an Advanced Speech and Language Therapist. The summary of the Report reads as

- follows: “Based on multidisciplinary assessment including direct observation and developmental history, Roger Duque meets the criteria for Autism Spectrum Disorder (ASD) according to the Diagnostic and Statistical Manual of Mental Disorders (fifth edition) due to evidence of persistent deficits in social communication and social interaction AND restricted repetitive patterns of behaviour, interests and activities present in the early developmental period and which cause significant impairment in social and occupational functioning.”
13. This hearing was not listed as a preliminary hearing in person to determine whether or not the claimant was a disabled person at the material times. Nonetheless in my judgment it seems clear that this was the case. It is clear from the Report that the claimant suffers from the mental impairment of autism, and has done so for many years, and that this has had a substantial adverse effect on his normal day-to-day activities including “persistent deficits in social communication and social interaction” and which cause “significant impairment in social and occupational functioning”. They must be substantial in the sense that there are more than minor or trivial.
  14. The respondent has now received the claimant’s Disability Impact Statement, and the Report, and it now concedes that the claimant was a disabled person by reason of Autism Spectrum Disorder at all times material to this claim. I agree with that concession, and accordingly I make a finding that the claimant was a disabled person with that impairment at all times material to this claim.
  15. Although the background facts are not in dispute, one aspect does appear to be in dispute, which is critical to the claimant’s claim. This is whether or not the dishonesty for which he was dismissed can be said to be something which arose in consequence of the claimant’s disability.
  16. The claimant’s Disability Impact Statement was prepared with the assistance of the CAB. It includes the following comment: “I withheld information about my conviction which was due to my condition and not an act of malice or deliberate dishonesty.” The claimant has conceded that he does not fully understand his own disability. The respondent asserts that this comment was included by the CAB in his Disability Impact Statement, with the adviser presumably having read the Order, to seek to create an unjustified link between the claimant’s dishonesty and his autism, in respect of which there is no medical evidence in support.
  17. Having given the above background, I now apply the law.
  18. The Law:
  19. The Employment Tribunal Rules of Procedure 2013 are in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 and are referred to in this judgment as “the Rules”.
  20. Rule 37(1) provides that at any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on the grounds: (a) 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 or response (or the part to be struck out).
  21. Rule 39 provides that where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument. Under Rule 39(2) the Tribunal shall make reasonable enquiries into the paying party’s ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.
  22. The claimant alleges discrimination because of his disability under the provisions of the Equality Act 2010 (“the EqA”). The claimant complains that the respondent has

- contravened a provision of part 5 (work) of the EqA. The claimant alleges discrimination arising from a disability contrary to s15 EqA.
23. The protected characteristic relied upon is disability, as set out in section 6 and schedule 1 of the EqA. A person P has a disability if he has a physical or mental impairment that has a substantial and long-term adverse effect on P's ability to carry out normal day to day activities. A substantial adverse effect is one that is more than minor or trivial, and a long-term effect is one that has lasted or is likely to last for at least 12 months, or is likely to last the rest of the life of the person.
  24. As for the claim for discrimination arising from disability, under section 15 (1) of the EqA a person (A) discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B's disability, and A cannot show that the treatment is a proportionate means of achieving a legitimate aim. Under section 15(2), this does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
  25. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
  26. Under section 212(1) EqA "substantial" means more than minor or trivial.
  27. With regard to s15 EqA, I have considered the cases of Pnaiser v NHS England [2016] IRLR 170 EAT; Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14; City of York Council v Grosset [2018] IRLR 746 CA; Sheikholeslami v University of Edinburgh [2018] IRLR 1090; Robinson v Department for Work and Pensions [2020] IRLR 884; Williams v Trustees of Swansea University Pension and Assurance Scheme [2019] IRLR 306 SC;
  28. With regard to strike-out and Rule 37 HHJ Eady QC as she then was in Hussain v UPS Limited UKEAT/0221/17/DM gave the following guidance as to the legal principles to be applied (at paragraphs 19 to 25):
  29. "[19] The power to strike out an ET claim is provided by Rule 37 of Schedule 1 of the 2013 Rules, which allows that an ET may strike out all or part of the claim on the basis that it has no reasonable prospects of success. This is, for example, to be contrasted with an ET's power to order that an allegation or argument may only be pursued upon payment of a deposit, which requires that the ET consider that the allegation or argument in question has little reasonable prospect of success.
  30. [20] In Ezsias v North Glamorgan NHS Trust v [2007] ICR 1126 CA, Lord Justice Maurice Kay stated as follows: "29 ... It would only be in exceptional case that an application to an employment tribunal will be struck out as having no reasonable prospect of success when the central facts are in dispute. An example might be where the facts sought to be established by the claimant were totally and inexplicably inconsistent with the undisputed contemporaneous documentation ..."
  31. [21] Guidance was further provided by the EAT in Balls v Downham Market High School & College [2011] IRLR 217 at paragraph 6. [6] "Where strike out is sought or contemplated on the ground that the claim has no reasonable prospects of success ... The tribunal must first consider whether, on a careful consideration of all of the available material, it can properly conclude that the claim has *no* reasonable prospects of success. I stress the word "no" because it shows that 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 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." (Original emphasis).
  32. [22] more specifically, in Tayside Public Transport Co Ltd t/a Travel Dundee v Reilly [2012] IRLR 755 CS, it was noted that in almost every case the decision in an unfair dismissal claim is fact sensitive, and it was further observed that: "30 ... Where the central facts are

- in dispute, a claim should be struck out only in the most exceptional circumstances. Where there is a serious dispute on the crucial facts, it is not for the tribunal to conduct an impromptu trial of the facts ...”
33. [23] And further, where there is a dispute as to the reason for dismissal, it has been stated that it would be very rare indeed that the dispute could be resolved without hearing from the party or parties who actually made the decision (per Langstaff J in Romanowska v Aspirations Care Ltd UKEAT/0015/14 at paragraph 15).
  34. [24] As for discrimination cases, it has been recognised that involving, as they do, an investigation as to why an employer took a particular step, they will generally (allowing for the exceptional case) dictate that the evidence needs to be heard and no summary decision taken as to the merits; see Anyanwu v South Bank Students' Union [2001] ICR 391 HL. In that case, which involved a complaint of race discrimination, Lord Steyn identified what might be described as the public policy reasons why discrimination claims should not be struck out: “24 ... Discrimination cases are generally fact sensitive, and their proper determination is always vital in our pluralistic society. In this field perhaps more than any other the bias in favour of a claim being examined on the merits or demerits of its particular facts is a matter of high public interest ...” Similarly, Lord Hope of Craighead stated: “37 ... Discrimination issues of the kind which have been raised in this case should as a general rule be decided only after hearing the evidence. The questions of law that have to be determined are often highly fact sensitive. The risk of injustice is minimised if the answers to these questions are deferred until all the facts are out. The tribunal can then base its decision on its findings of fact rather than on assumptions as to what the claimant may be able to establish if given an opportunity to lead evidence ...”
  35. [25] whilst, therefore, the ET retains the power to strike out discrimination claims or claims of constructive unfair dismissal, the case law makes clear that in such cases that power shall be exercised with far greater caution than in other less fact sensitive types of claim.”
  36. That said, nonetheless Anyanwu confirms that in a case where the core of facts is undisputed, or in a “plain and obvious case”, the Tribunal may properly strike out a claim. And in addition, Anyanwu is not of itself to be taken as a fetter on the tribunal’s discretion. In Jaffrey v Department of the Environment, Transport and the Regions [2002] JIRLR 688 EAT Mr Recorder Langstaff QC as he then was stated: “Although the power to strike out a claim is one which should be exercised sparingly, and although full regard must be had to the words of Lord Steyn in Anyanwu v South Bank Students' Union [2001] UKHL 14 at paragraph 24, that there is a high public interest which should bias a tribunal in favour of a claim being examined on the merits or demerits of its particular facts, if a tribunal reached a tenable view that the case cannot succeed, then it had a discretion to strike out a claim ...”
  37. This is one of those unusual discrimination cases where the core facts are simply not in dispute. Effectively the only issue to be determined by the Tribunal is whether or not the two acts of dishonesty for which the claimant was dismissed amounted to something which arose in consequence of the claimant’s disability. If not, that is the end of the claimant’s case. If so, the tribunal would then go on to consider whether less favourable treatment complained of was justified in the sense that it was a proportionate means of achieving a legitimate aim.
  38. In my judgment the claimant knew that he had an obligation to disclose his criminal convictions, but he chose not to do so, in order not to jeopardise the prospect of his employment with the respondent. When challenged he subsequently lied about whether he had that conviction. He did so because, in his own words: “I was fearful of declaring my criminal convictions because I thought I wouldn’t get the job.” I do not accept that these decisions which he made were something which arose in consequence of his disability. The claimant has adduced no evidence to suggest that his decisions were made because of his autism, nor that they arose in consequence of his autism. In my judgment he chose not to disclose his conviction, and then lied about having it, in the hope of securing and then maintaining his employment with the respondent. That may have been understandable in the circumstances, but in my judgment, it was not something which arose in consequence of the claimant’s disability.

39. Nonetheless the claimant's Disability Impact Statement does suggest that he withheld the information about his conviction as a result of his condition, not because of dishonesty. Although I consider that to be highly improbable, and not supported by any medical evidence, it is something which in my judgment needs to be examined on hearing evidence. I cannot say at this stage that the causative link between the autism and the dishonesty is impossible to prove. I cannot therefore say that this claim has no reasonable prospect of success.
40. Nonetheless for the reasons set out above I do not think that the claimant will be able to establish any causative link between his dishonesty and his autism, and in my judgment this claim has little reasonable prospect of success. I have therefore decided to make the attached Deposit Order under Rule 39.
41. The claimant was able give information as to his means. He is impecunious and he does not own any assets. He receives Universal Credit and a personal Independence Payment, and after rent and other deductions he receives slightly less than £700 per month. I decided to set the level of the Deposit Order at £100 bearing in mind such information as I have regarding the claimant's means.
42. To the extent only that the claimant meets the terms of the Deposit Order, then the claim will be listed for a further case management preliminary hearing to clarify any defence of justification which might be pursued by the respondent, and to list the matter for its full main hearing.

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Employment Judge N J Roper  
Dated 25 March 2024

Judgment sent to Parties on  
04 April 2024 By Mr J McCormick

For the Tribunal Office

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