



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr R Duque  
**Respondent:** J D Wetherspoon PLC  
**Heard at:** Bodmin Employment Tribunal  
**On:** 24 and 25 April 2025  
**Before:** Employment Judge Volkmer

## Representation

Claimant: in person  
Respondent: Ms Balmelli, counsel

**JUDGMENT** having been sent to the parties on 7 May 2025 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

## REASONS - LIABILITY

1. The Claimant notified ACAS on 8 September 2022 and the certificate was issued on 12 September 2022. The claim was presented on 13 September 2022. The Claimant brings a complaint of discrimination arising from disability.
2. The Tribunal heard witness evidence from the Claimant and the following witnesses for the Respondent: Mr Ryan Wilce and Mr Lee Gregory.
3. I also considered the Hearing Bundle of 214 pages. References to page numbers in this judgment refer to the Hearing Bundle.

## Background and Hearing

4. A first preliminary hearing for case management took place on 2 June 2023 before Regional Employment Judge Pirani. He listed the claim for a further hearing to consider strike out or a deposit order (page 51).
5. A public preliminary hearing then took place before Employment Judge Roper on 25 March 2024. Judge Roper determined that the Claimant was disabled by reason of Autism Spectrum Disorder ("ASD") at the relevant time and made a deposit order in the sum of £100. The Claimant paid the deposit.
6. The case then came before Employment Judge Cadney on 11 September 2024. He listed the final hearing, which was to take place before a judge sitting with panel members.
7. On 16 April 2025, the Tribunal wrote to the parties saying that there was a risk of the hearing being postponed due to lack of judicial resources and asked for their views regarding the hearing being before a judge sitting alone and/or being conducted by video rather than in person. The Respondent did not object, but the Claimant stated that he objected to both. On 22 April 2025 Regional Employment Judge Pirani ordered that the case be heard before a judge sitting alone. The hearing took place in person.
8. At the beginning of the hearing, the Claimant said that he objected to the hearing being before a judge sitting alone and intended to appeal.
9. I talked through the timetable (page 90) with the parties. The Claimant said that he was struggling and asked if the judge could help him. I explained that the judge's role was to be neutral and so I could not help the Claimant with his case. However, if he wanted assistance with how to phrase a question, I could help with that. The Claimant said that he was autistic and would struggle. We talked about whether any adjustments were appropriate to help the Claimant. He did not request any specific adjustments but said that he would raise them as the hearing went on. He did not request any adjustments during the course of the hearing.
10. We took breaks at least every hour (sometimes more frequently) and I told the parties that anyone could ask for a break at any time if they needed it.
11. I instructed Ms Balmelli to ensure that questions were phrased with simple grammar, with no tag questions. I told the Claimant he could take additional time before answering if needed. The Claimant seemed to understand all of the questions which were put to him clearly.
12. The Claimant said that he was struggling to come up with questions for the Respondent's witnesses and again said that he objected to the hearing being before a judge sitting alone. I explained that a Tribunal Panel would also have had a neutral role, as between the parties. It would not be any different in that sense compared to a judge sitting alone.
13. To assist the Claimant to formulate his questions, I explained that the Tribunal would need to answer the questions set out in the List of Issues, taking him to

page 99 from paragraph 44 onwards. I also suggested that he could ask questions about things he disagreed with in the witness statements or things relevant to the List of Issues. I offered the Claimant breaks before and during his questions of the Respondent's witnesses in order to consider what he would like to ask, but he declined, saying that all the breaks in the world would not help and that he would still struggle. I helped the Claimant turn some of his points into questions for the Respondent's witnesses.

## The Issues

14. The following List of Issues was set out in the Case Management Order of Employment Judge Cadney dated 11 September 2024, as amended by the provision of further information regarding legitimate aims relied on by the Respondent.

### 1. Disability

1.1. *Employment Judge Roper determined on 25 March 2024 that the Claimant was a disabled person as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about, by reason of Autism Spectrum Disorder.*

### 2. Discrimination arising from disability (Equality Act 2010 section 15)

2.1. *Did the Respondents treat the Claimant unfavourably by:*

2.1.1. *dismissing the Claimant;*

2.1.2. *failing to uphold the appeal;*

2.1.3. *deciding that the Claimant was dishonest.*

2.2. *Did the Claimant's failure to disclose his convictions and/or subsequently lying about them when challenged arise in consequence of the Claimant's disability?*

2.3. *Was the unfavourable treatment because of that thing?*

2.4. *Was the treatment a proportionate means of achieving a legitimate aim? The Respondents say that their aims were:*

2.4.1. *employing staff who are honest;*

2.4.2. *following its own policies and procedures consistently;*

2.4.3. *maintaining the employer relationship by having complete trust and confidence in its employees.*

2.5. *The Tribunal will decide in particular:*

(1) *was the treatment an appropriate and reasonably necessary way to achieve those aims;*

*(2) could something less discriminatory have been done instead; and*

*(3) how should the needs of the Claimant and the Respondents be balanced?*

*2.6. Did the Respondents know or could they reasonably have been expected to know that the Claimant had the disability? From what date?*

**3. Remedy**

*3.1. What financial losses has the discrimination caused the Claimant?*

*3.2. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?*

*3.3. If not, for what period of loss should the Claimant be compensated?*

*3.4. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?*

*3.5. Is there a chance that the Claimant's employment would have ended in any event? Should his compensation be reduced as a result?*

*3.6. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*

*3.7. Did the Respondents unreasonably fail to comply with it by unreasonably failing to comply with it by not following any process for dismissal and dismissing summarily?*

*3.8. If so is it just and equitable to increase any award payable to the claimant?*

*3.9. By what proportion, up to 25%?*

*3.10. Should interest be awarded? How much?*

**The Facts**

15. The Claimant caused criminal damage to a vehicle and was given a 12 month conditional discharge in relation to the offence by Truro Magistrate's court in 2022. At the time of making a job application to the Respondent, this conviction was not yet spent.

16. The Respondent is a well known business which runs a chain of pubs and hotels nationally across the UK.

17. The Claimant applied for a role with the Respondent online. During the application process he ticked a box stating he did not have any unspent convictions. He was then interviewed by the Respondent. He was asked again in the interview whether he had any unspent convictions and said that he did not.

18. The Claimant started working as a Bar Associate at the Try Dowl Pub in Truro

on 13 May 2022. The Claimant signed an employment contract on the same day. The contract states at paragraph 17:

**"17 ARRESTS, CHARGES AND CRIMINAL CONVICTIONS**

*Your employment is conditional on your disclosing any criminal conviction not covered by the Rehabilitation of Offenders Act 1974. Any charge or criminal conviction (other than an offence under any road traffic legislation in the United Kingdom or elsewhere for which a fine or non-custodial penalty is imposed) received subsequent to your employment must also be disclosed to the pub manager within seven days of charge or conviction. If information comes to light which you should have disclosed, the matter will be regarded as a disciplinary issue and may lead to dismissal."* (page 186)

19. The Respondent has an Arrests, Charges and Criminal Convictions Policy (page 165). The policy sets out the following.

**"Employees failing to disclose a criminal conviction (or arrest for potential criminal act)**

*Failing to disclose a criminal conviction or an arrest for a potential criminal act is regarded as a gross misconduct offence. Managers must follow the investigation procedure and the disciplinary and dismissal policy and procedure if it is reported or discovered that employees have failed to disclose a criminal conviction (or an arrest for a potential criminal act).*

*Areas for investigation and review include employees' reasons for not disclosing the conviction or arrest and their track record at work to date; the risks which the conviction or arrest brings to the company, including potential damage to reputation, or to other employees or customers; its relevance to the job role (e.g. fraud or theft, where cash-handling is undertaken); alternatives, such as moving employees to a different or more suitable job.*

*Dismissal is not automatic or the only possible response, particularly where there are mitigating circumstances."* (page 166)

20. The Respondent was aware that the Claimant was autistic. On the first day of employment, the Respondent discussed with the Claimant whether any support was required in relation to this.
21. On 13 July 2022 the Respondent's head office received an anonymous complaint (page 119) which stated that the Claimant had been convicted of several crimes including damage to vehicles and saying that they would not be visiting the Respondent's Truro premises whilst the Claimant continued to work there. On 21 July 2022, a customer approached the pub manager of the Respondent's Truro pub and told him that the Claimant had a criminal conviction, telling the manager that they were concerned for the safety of females working with the Claimant.
22. Aaron Niles, the pub manager, was appointed to conduct an investigation. An investigation meeting was held on 26 July 2022. Mr Niles explained the complaints to the Claimant. The Claimant answered that *"There is a lot of*

*malicious gossip and lies, none are true and just causing a stir with my life... Obviously you can inform the police and the [sic] can clarify that this is not true. These people knew I lived in Plymouth and just using it against me for mistakes I've done in the past.*" (page 122). The Claimant explained that he had been convicted of criminal damage to vehicles, that he had lost track of how many times this had happened. He had been sentenced to community sentences and short prison sentences of three to six months. He stated that the behaviour was part of his autism and obsessive behaviour. The Claimant told Mr Niles that there had been no convictions since 2019.

23. Mr Niles decided to suspend the Claimant and initiate a disciplinary procedure regarding the Claimant's non-disclosure of convictions. The disciplinary meeting invitation letter enclosed the investigation meeting minutes, the complaints and a screen shot of a newspaper article referring to the Claimant being convicted of criminal damage in March 2022 (page 121). The Claimant was informed of his right to be accompanied to the meeting, which was scheduled for 8 August 2022. Mr Wilce, a pub manager, was appointed as the disciplinary manager.
24. In the disciplinary meeting, when asked about the allegation, the Claimant said: *"I can only apologise for lying, and I will say that I believe whatever happens in my past, that I didn't feel it was relevant to Wetherspoon knowing"* (page 132). Mr Wilce stated that the Claimant had been asked in the investigation meeting whether he had any convictions in Cornwall, and the Claimant said *"Yes, I lied about that. I'm not good at telling the truth.... For offenders, it's very hard to get a job, which is the way I saw it"* (page 133). During the meeting, the Claimant referred to being autistic and asked that his disability be taken into account in the decision. The Claimant admitted that he had an unspent conviction and stated that it would not be spent until March 2023.
25. The meeting was adjourned. Following the adjournment, Mr Wilce informed the Claimant that he was being dismissed with immediate effect. In his verbal comments, Mr Wilce stated that *"You have...provided me with no substance to make me believe that this will not happen again in the future"* (page 136). As set out in the dismissal letter (page 139), the Claimant was dismissed for lying by not disclosing an unspent conviction during his application process, lying in the investigation meeting about criminal activity since moving to Truro and risking the business reputation after complaints from customers, saying they would not return whilst the Claimant worked there. Mr Wilce considered that the Claimant had not offered any mitigation. The Claimant was informed of his right to appeal.
26. The Claimant appealed the dismissal on the basis that the dismissing manager had no understanding of his autism, and that this should have been considered as a mitigating factor.
27. Mr Gregory was appointed as the appeal manager. The appeal meeting was held on 8 September 2022. During the meeting, Mr Gregory asked the Claimant why he had lied during the application process, and the Claimant responded that *"It is a catch 22 situation, the Company may not have employed me if I had disclosed it"* (page 148). When he was asked whether he had deliberately lied, that Claimant responded *"Yes, I did yes. Ex-offenders still deserve an*

*opportunity*" (page 148).

28. When the Claimant was asked why he felt his autism had impacted his ability to be honest during the application process, the Claimant answered "*I have obsessive tendencies, and that is what caused the incidents in the first place. Nothing to do with people or working in a pub. I did not see what relevance it had to working in a pub. I had caused damage to vehicles, nothing to do with a pub*" (page 148). He later went on to say "*I have told the truth before and that has been held against me when I have applied for jobs. I do not blame Wetherspoon for that, but I believe that I deserved a chance.*" (page 148). Later when asked why he had lied to Mr Niles, the Claimant said: "*I didn't want to let him or myself down*". It was put to the Claimant that he was appealing a dismissal for lying but did not deny that he had lied. In response, the Claimant said: "*Someone with autism acts and thinks differently*" (page 150).
29. Mr Gregory put to the Claimant that he had lied on his application because he felt that he deserved the change, the Claimant responded saying: "*I knew in the back of my mind that I had this to say, but I held it back so it did not go against me. I had that in my mind, I wanted the job, I don't see why I should rot away on benefits when I can work*" (page 150).
30. Mr Gregory did not uphold the Claimant's appeal. In the appeal outcome letter (page 155), Mr Gregory set out that the Claimant had admitted to deliberately withholding information regarding his unspent convictions and that the Claimant thought he would not have been offered the position if he had disclosed his convictions. Mr Gregory stated that the decision to dismiss was based on the Claimant's dishonesty. He upheld that decision.

## **Discrimination arising from Disability**

31. The provision relating to discrimination arising from disability is set out at section 15 (1) of the Equality Act 2010 (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.
64. Pursuant to Trustees of Swansea University Pension and Assurance Scheme and anor v Williams 2019 ICR 230, SC, there is a relatively low threshold required to establish unfavourable treatment and engage section 15 EqA. It is an analogous to concepts of disadvantage and detriment.
65. Mr Justice Langstaff explained the approach Tribunals should take to establishing causation in Basildon and Thurrock NHS Foundation Trust v Weerasinghe 2016 ICR 305, EAT, as follows.

*"26. The current statute requires two steps. There are two links in the chain, both of which are causal, though the causative relationship is differently expressed in respect of each of them. The Tribunal has first to focus upon the words "because of something", and therefore has to identify "something" — and*

second upon the fact that that “something” must be “something arising in consequence of B’s disability”, which constitutes a second causative (consequential) link. These are two separate stages. In addition, the statute requires the Tribunal to conclude that it is A’s treatment of B that is because of something arising, and that it is unfavourable to B. I shall return to that part of the test for completeness, though it does not directly arise before me.

27. In my view, it does not matter precisely in which order the Tribunal takes the relevant steps. It might ask first what the consequence, result or outcome of the disability is, in order to answer the question posed by “in consequence of”, and thus find out what the “something” is, and then proceed to ask if it is “because of” that that A treated B unfavourably. It might equally ask why it was that A treated B unfavourably, and having identified that, ask whether that was something that arose in consequence of B’s disability.

28. The words “arising in consequence of” may give some scope for a wider causal connection than the words “because of”, though it is likely that the difference, if any, will in most cases be small; the statute seeks to know what the consequence, the result, the outcome is of the disability and what the disability has led to.”

66. Mrs Justice Simler also dealt with the question of causation in Sheikholeslami v University of Edinburgh 2018 IRLR 1090, EAT, in which she said:

*“this provision requires an investigation of two distinct causative issues: (i) did A treat B unfavourably because of an (identified) something? and (ii) did that something arise in consequence of B’s disability? The first issue involves an examination of the putative discriminator’s state of mind to determine what consciously or unconsciously was the reason for any unfavourable treatment found. If the “something” was a more than trivial part of the reason for unfavourable treatment then stage (i) is satisfied. The second issue is a question of objective fact for an employment tribunal to decide in light of the evidence.”*

67. In the same case, Mrs Justice Simler stated that in relation to determining whether the “something” arose in consequence of the disability, *“The critical question was whether on the objective facts, her refusal to return [the “something”] arose in ‘consequence of’ (rather than being caused by) her disability. This is a looser connection that might involve more than one link in the chain of consequences.”*

#### *Burden of proof in relation to EqA complaints*

32. 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.
33. Efobi v Royal Mail Group Ltd 2021 ICR 1263, SC, the Claimant is required to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the Tribunal could infer an unlawful act of discrimination.



34. Igen v Wong [2005] EWCA Civ 142 remains the leading authority in relation to the application of the burden of proof set out in section 136 EqA in relation to discrimination cases. It was not sufficient for the Claimant simply to prove facts from which the tribunal could conclude that the Respondent “*could have*” committed an unlawful act of discrimination. It is clear that the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent *did* commit an unlawful act of discrimination it can.
35. In relation to a complaint of discrimination arising from disability, the Claimant has the burden of proving (i) that they were treated unfavourably; (ii) that the “something” they rely on arose as a consequence of disability. If these elements are established and there are facts from which it could be inferred that the “something” was the reason for the unfavourable treatment, the burden of proof will shift to the Respondent (Pnaiser v NHS England 2016 IRLR 170, EAT).
36. If the burden of proof has moved to the respondent, it is then for the respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act. To discharge that burden, it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. That requires the Tribunal to assess not merely whether the Respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.

## **Discrimination arising from disability: Discussion and Conclusions**

37. The Respondent concedes that it had knowledge of disability at the relevant time.
38. It is not in dispute that the Respondent dismissed the Claimant; failed to uphold his appeal against the dismissal; and decided that the Claimant had been dishonest. It is not difficult for me to conclude that these are adverse actions towards the Claimant and constitute unfavourable treatment.
39. It is also agreed between the parties that this unfavourable treatment occurred because of the Claimant’s failure to disclose his convictions and subsequently lying about them when challenged.
40. I then need to determine whether the Claimant’s failure to disclose his convictions and/or his subsequent lying about them arose in consequence of the Claimant’s disability.
41. The only medical evidence provided by the Claimant to the Tribunal is that at pages 157 to 160. This includes the front cover of an “Autism Spectrum Disorder Report” (page 157), and the summary (page 158) which states “*Based on multidisciplinary assessment including direct observation and*

*developmental history, Robert 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. These deficits are not better explained by other disorders (especially Obsessive Compulsive Disorder) and there is no evidence of intellectual impairment".* Pages 159 and 160 are generic criteria for assessing ASD with tick boxes to mark whether they have been observed as applying to the Claimant. None of these criteria relate to difficulties with telling the truth. The Claimant refused to provide the full report to the Respondent and Tribunal despite this being requested by the Respondent. The Claimant stated in evidence that this was because it contained details in relation to his childhood which he felt were not relevant to his claim.

42. The Claimant sent an email to the Tribunal dated 13 February 2023 (page 37) in which he stated *"I have a communication impairment related to my Autism. My Autism makes it difficult for me to think things through clearly. I was fearful of declaring my criminal convictions because I thought I wouldn't get the job"*.
43. The Claimant provided a disability impact statement (page 161), which he informed the Tribunal was drafted with the assistance of the Citizens Advice Bureau. This states *"I withheld information about my conviction which was due to my condition and not an act of malice or deliberate dishonesty"*. There are no examples given in the impact statement of other instances where the Claimant's ASD has caused him not to be truthful.
44. In the Claimant's witness statement, he said at paragraph 5 *"before I got this job I had been unemployed for at least 2 years and during that time my Autism meant that I struggled to be accepted socially and that in turn increased my isolation and feelings of low worth. I desperately wanted to be accepted and I knew that by getting a job and having the opportunity to socialise and meet new people that would increase my quality of life. In order to achieve this I did not disclose my unspent conviction because I knew this would result in me not being considered for employment and that chance of increased quality of life being taken away from me. My Autism means I do struggle with telling the truth and I adapt my behaviour to fit in. I did not withhold this information through malice or a deliberate act of dishonesty"*. No other examples are given in the statement instances where the Claimant's disability has resulted in having difficulties telling the truth.
45. The Claimant's oral evidence was that he had made around 50 job applications since his dismissal from the Respondent and had disclosed his unspent convictions when making those applications, he told the Tribunal that this was likely the reason he had not been successful in any of those applications.
46. I also take into account the comments made by the Claimant during the disciplinary process about why he had not disclosed the conviction and why he had not been truthful when initially challenged (as set out at paragraphs 24 to 29 above). In essence, that he had previously disclosed convictions during job

applications and not been offered a role, so he had not disclosed the conviction in order to have a better chance of getting the role with the Respondent.

47. I find that the Claimant's failure to disclose his conviction and his subsequent lie when challenged was not something which arose in consequence of his disability. The Claimant makes a bald assertion in evidence that his failure to disclose the conviction arises from his ASD, however there is no medical evidence at all before the Tribunal which would support this link. Further, it is not consistent with the fact that (on his own evidence) both before and after applying for the role with the Respondent, the Claimant did disclose his convictions in job applications. His previous experience was that disclosing his convictions meant he did not get the jobs he was applying for. The Claimant was keen to work and based on his experience he concluded he would stand a better chance of being successful if he did not disclose his convictions. The Claimant therefore made an active decision that he would not disclose his unspent conviction to the Respondent in order to obtain the role. There is no medical evidence before the Tribunal that the Claimant's ASD causes him to lie. There are no factual examples provided by the Claimant. There simply is no evidence which might support the Claimant's assertion that there is a causative link.
48. The Claimant's disability arising from discrimination complaint is therefore not well-founded.

Approved by  
**Employment Judge Volkmer**  
**Dated: 16 May 2025**

REASONS SENT TO THE PARTIES ON  
31 May 2025

Jade Lobb  
FOR THE TRIBUNAL OFFICE