

Neutral Citation No: [2019] NICA 43

Ref: GIR11016

*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: 29/07/2019

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

BETWEEN:

BRITISH TELECOMMUNICATIONS PLC

Appellant

and

KEVIN OWEN MEIER

Respondent

Before: Stephens LJ and Sir Paul Girvan

SIR PAUL GIRVAN (giving the judgment of the court)

Introduction

[1] This is an appeal by British Telecommunications PLC ("BT") against a decision of the Industrial Tribunal ("the Tribunal") given on 23 November 2018 in which the Tribunal unanimously decided that BT discriminated against Kevin Owen Meier ("the claimant") the respondent on this appeal by reason of his disability and by failing to make reasonable adjustments for him. It awarded compensation of £4,538.63 for loss of the chance of appointment and £12,500 for injury to feelings together with interest of £1,400 thereon.

[2] Mr Potter appeared for BT and Ms McGreenera QC appeared with Mr Warnock for the claimant. We are grateful to counsel for their helpful and detailed written and oral submissions.

Factual Background

[3] BT advertised network design and engineering opportunities for graduates. The job advertisement provided that to be eligible to apply for the programme an application would need either a 2.1 degree or a 2.2 degree with additional post-graduate degree. As well as having a technical mind-set and good problem solving skills an applicant would need strong judgment and an analytical approach

to work. In addition the applicant would need to have a good working knowledge of IP networks, protocols and network components with the ability to communicate complex concepts. He or she would have immediate responsibility in those specialist roles so he or she would also need to work well on their own and also as part of a team. The salary was £30-£34,000.

[4] The claimant who was born on 10 April 1995 graduated from Queen's University Belfast, in 2017 with a 2.1 degree in computer science. He has a very high IQ (139). He has Asperger's Syndrome, dyslexia and dyspraxia. During his educational career he had the benefit of note-takers for classes, scribes, a prompter, an Asperger mentor and extra time for examinations. In stressful situations and unfamiliar stressful settings he loses the power to communicate effectively including the power to speak. Asperger Syndrome is a form of Autism Spectrum Disorder ("ASD"). It is a lifetime disability affecting social interaction, communication and imagination and flexibility of thought. People suffering from the condition are often above average intelligence and as in the case of the claimant the manifestation of ASD varies and changes over time.

[5] The claimant allowed his mother, Mary McLaughlin, a law academic, to help with his job application and with his consent on 13 March 2017 she emailed an application with the claimant's CV. Information was supplied that the claimant was a disabled person who suffered from Asperger's Syndrome and dyslexia and was seeking to avail of the BT Disability Scheme. The appellant's recruitment team was not made aware of the contents of the monitoring information about his disability and it was not BT's practice to provide that information to the recruitment team.

[6] BT is what is called a "disability confident employer" being a member of the Disability Confident Scheme ("the DCS") which aims at helping an employer to employ and retain disabled people. Under the DCS the business is expected to be actively looking to attract and recruit disabled people and to provide a fully inclusive and accessible recruitment process. As part of the DCS the member employer is exhorted to identify and address barriers preventing or deterring disabled people from applying for jobs; have recruitment processes tested by disabled people; provide short and accurate job descriptions; and make sure that people involved in the recruitment are disability confident and know how to support the disabled applicant, offering an interview to disabled people who meet minimum criteria. The employer should make sure that disabled people who meet their criteria for the job should be invited to interview. Employers in the DCS should plan for and make reasonable adjustments to the assessment and interview process and offer extended working interviews to enable disabled people to demonstrate their potential.

[7] Under what is called the Guarantee Interview Scheme BT guaranteed to interview anyone with a disability whose application met the minimum criteria for the position. By minimum criteria was meant "evidence in the application form which demonstrates that the (applicant) generally meets the level of competence

required for each competence as well as meeting any of the qualifications skills or experience defined as essential.”

[8] A Situational Strength Test (“a SST”) is a type of situational judgment test used to assess whether a person demonstrates attributes and behaviours identified as desirable for a role. Such tests are considered in psychological research literature to be some of the most robust forms and robust and defensible forms of behavioural assessment especially for online situations. They are typically used to level the playing field for applicants. BT’s SST presented a series of scenarios covering a range of different situations with the candidate being invited to respond to each scenario using a rank ordering of five different options. A test score is calculated as both a raw score from the sum of the scenario scores and a standardised score relative to the performance of a comparison sample of other test takers. The competences tested fell under the following headings: team work; drive; learning; changing; customer care; ownership; networking; improving and commercial.

[9] On 15 March 2017 Mr Gaskin sent an email to the claimant telling him that he should complete the SST and once that was done he would be officially in the process that was being taken forward. BT’s approach was thus to treat a satisfactory outcome to the SST as a necessary criterion to be fulfilled in order to be considered for recruitment. There was no evidence that this had been included in the minimum criteria and the SST followed the submission of the application form and was not stated to be a qualifying criterion in itself.

[10] The claimant’s mother had grave misgivings about the ability of her son to do well in the SST but she assumed that in view of the guarantee of an interview under the Guarantee Interview Scheme he would in any event be interviewed. As it turned out the claimant fared badly in the SST achieving a raw score of 29 out of a potential 180. The threshold to pass to the next stage was 73. The claimant was informed by BT by email on 19 March that:

“We are sorry to let you know that based on the outcome of the test we will not be taking your application forward.”

On the face of it this document amounted to a rejection of the applicant as a candidate. After the SST 743 persons progressed to the first stage of interview by Skype with 166 persons ultimately being offered appointment.

[11] As part of the BT Graduate Recruitment Scheme the application in anonymised form went to the graduate recruitment team (“the GRT”). The fact that the claimant was disabled was recorded and noted in the BT diversity section but the application that went to the GRT did not contain that information. The GRT was thus not aware that the claimant was disabled and wished to be considered under the Disability Confident Guarantee. No attempt was made by the diversity section or anyone else in BT to consider with the recruitment team the question of what

steps should or could be taken in relation to a candidate suffering from ASD, dyslexia and dyspraxia even on the basis of an anonymised and unidentified candidate.

[12] The claimant's mother in an email on 20 March 2017 criticised the use of the SST which was problematic for people with ASD. She pressed for BT's policies relating to reasonable adjustments to be applied to the design of the SST for disabled candidates and for the claimant's particular disability. Ms Goodrum of HR in BT pointed out that the claimant could have contacted BT in relation to his disability in relation to the SST. Further email communication from the claimant's mother raised the question whether it was unreasonable to make adjustments for those who might be disadvantaged by the design of the SST. Ms Nitu of CAPP, the owner of the SST, in an internal document addressed to Ms Goodrum stated that the claimant had indicated he had Asperger's Syndrome. This was an autism profile. Although it is generally considered that people with this syndrome are high functioning, it affects individuals differently and for this reason CAPP recommended that when candidates share that they have autism at the start of the recruitment process a recruiter has a conversation with them about what the test involved and any reasonable adjustments they needed. Only if the adjustments they outlined could not be implemented due to the nature of the test then the candidate should be allowed to bypass the SST. If this conversation had not taken place with the claimant then it was highly recommended that the claimant be encouraged to share more detail on how this condition was impacting on him so that BT might further evaluate if there were grounds for adjustments to this assessment. Ms Goodrum in her reply dated 6 April pointed out that BT did not accommodate a recruiter having a conversation with the applicant as a recruiter did not touch the application until after the SST stage. She said that she was not going to mention it in the response as BT had not offered that for any candidate and she did not think it would be helpful given that time to complete was not an issue. She thought that BT could not have done anything other than bypass the SST completely and BT had not done that for any applicant that year. She went on to write to the claimant. In her letter to the claimant she said that Asperger's Syndrome was something that affected individuals differently. There was not a specific report that stated whether a situational strength test was or was not suitable for a candidate with the syndrome. While BT did work hard to be as inclusive as possible it was important to ensure that the employer took forward candidates who are most likely to have a successful and enjoyable time on the programme.

[13] Subsequently, the claimant's mother on 17 May 2017 drew BT's attention to the decision in Government Legal Service v Brooks [2017] UKEAT. In that decision the EAT upheld the decision of an employment tribunal that the applicant who suffered from Asperger's syndrome had suffered from indirect discrimination on the part of GLS which had failed in its duty to make reasonable adjustments and had treated her unfavourably because of her disability. It found there had been a group disadvantage for those suffering from Asperger's syndrome and that the requirement that the applicant should take part in an online multiple choice

situational judgment test was a criterion or practice which put the claimant at a personal disadvantage. Not having received a reply she pressed for a response within a reasonable time. On 30 May 2017 Ms Goodrum asked for time to reply and promised a reply by 5 June 2017. The claimant's mother said she had been corresponding since 19 March and if she did not receive a reply she would take legal advice. On 12 June 2017 Ms Goodrum replied stating the claimant had never identified what adjustments were needed. BT would consider whatever identified adjustments could be accommodated. It must be noted that Ms Goodrum made no reference to the obvious adjustment provided for in BT's own Disability Scheme, namely moving the candidate to the interview stage. Her communication made no suggestion that the test could or should be bypassed. The email threw the onus on the candidate to come forward with an adjustment to the SST. On 22 June 2017 the claimant's mother stated that the claimant should not have had to take the SST and that she was now pursuing a claim.

[14] As the Tribunal pointed out in paragraph 6 of its decision a person directly discriminates against a disabled person if on the ground of the disabled person's disability he treats the disabled person less favourably than he treats, or would treat, a person not having the particular disability whose relative circumstances including his disabilities are the same as or are not materially different from those of the disabled person (Section 3A(5) Disability Discrimination Act 1995 as amended). Also a person discriminates against a disabled person if he fails to comply with a duty to make reasonable adjustments imposed on him in relation to the disabled person. (Section 3A(2) Disability Discrimination Act 1995 as amended). Where a provision, criterion or practice applied by or on behalf of the employer places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled it is the duty of the employer to take such steps as is reasonable in all the circumstances of the case for him to have to take in order to prevent the provision, criterion, practice or feature having that effect. For the purposes of the section the disabled person concerned meant a disabled person who was an employee of the employer concerned (Section 4A(1) and (2) Disability Discrimination Act 1995 as amended). This includes an applicant for a job.

[15] In The Secretary of State for the Department of Works and Pensions v Alam [2010] IRLR 283 the EAT held that the correct statutory construction of section 4A(3)(b) involved asking two questions:

- (i) did the employer know both that the employee was disabled and that his disability was liable to affect him in the manner set out in section 4A(1)? If the answer to that question is No, then there is a second question, namely;
- (ii) ought the employer to have known both that the employee was disabled and that his disability was liable to affect him in the manner as set out in Section 4A(1)?

[16] On the evidence adduced the Tribunal concluded that BT knew from 14 March 2017 that the claimant was a disabled person suffering from Asperger's Syndrome and dyslexia who was seeking to avail of BT's Disability Confident Scheme. The recruitment team knew that the claimant was disabled, it did not pro-actively offer or make reasonable adjustments. The tribunal accepted the evidence of Dr Christopher Tennyson, a specialist clinical psychologist. He concluded that individuals with ASD including the claimant would be placed at a substantial disadvantage over people without an ASD diagnosis (see the Tribunal's findings of Fact Para 5(5) and (6)). In his opinion the claimant would suffer clinically significant difficulties in the areas of social communication, interaction and imagination/flexibility of thought. BT did not take any steps to consider whether any information in the monitoring form was relevant to its commitment to plan for and make reasonable adjustments to the assessment and interview process. BT knew or ought reasonably to have known that the claimant was disabled and that his disability was placing him at a substantial disadvantage.

[17] Mr Potter did not accept that BT had the requisite knowledge to trigger a reasonable adjustment duty in April and did not know that the claimant was likely to be placed at a substantial disadvantage because of his disabilities. However, we are satisfied that the Tribunal was fully entitled to conclude on the evidence that BT knew of his disability and failed to take any steps to consider whether information on the monitoring form was relevant to their commitment to plan for and make reasonable adjustments.

[18] The Tribunal held in light of the evidence that while the claimant did not request any specific adjustments the duty to make reasonable adjustments lay on the employer. BT could have made reasonable adjustments of: (a) not requiring the claimant to sit the SST; and/or (b) not using the results of the SST to stop him proceeding to the Skype interview stage. The duty to make reasonable adjustments applied at all stages of the process and BT failed to discharge that duty before the Skype interview. BT did not follow the suggestion made by CAPP that there should be arranged a conversation between the recruiter and the candidate about what the test involved or what reasonable adjustments needed to be carried out. BT appeared to refuse to consider the option of bypassing the SST. It did not carry out Ms Nitu's recommendation that the claimant be encouraged to share his details of his condition and how it impacted on him so that an evaluation could be made if there were grounds for adjustments to the assessment. We conclude that the Tribunal was correct and fully entitled to reach the conclusions which it did.

[19] The Tribunal further concluded that the reasonable adjustments (that the claimant should not take the SST or that the score should not count against him) would have removed the substantial disadvantage from which the claimant was suffering. The reasonable adjustments were not impractical; would not have disrupted BT's activities and did not put a strain on BT's resources. The Tribunal was further satisfied as it was entitled to be that BT had the ability to recruit

candidates with appropriate competences at the next stage of the Skype interviews tested by the same competences. In the result the Tribunal was led to the inevitable and correct conclusion that BT had committed an act of disability discrimination from 14 March 2017.

[20] Central to the appeal was Mr Potter's contention that when BT's attention was drawn to the Government Legal Services v Brooks decision it sought to engage with the claimant with a view to making reasonable adjustments. Counsel asserted that BT was prepared to make a reasonable adjustment at that stage. However, a fair reading of the email communications shows that BT was still failing to face up to the commitment to allow the claimant to proceed to an interview stage notwithstanding its guaranteed interview commitment in the Scheme. It was not in terms offering any reasonable adjustment. It expected the claimant to propose a reasonable adjustment without itself recognising that the employer had a legal duty to consider what reasonable adjustments would be appropriate. It was maintaining its view that the SST was a necessary criterion to be passed or at best adjusted in some way for persons in the claimant's position without itself taking any pro-active steps to ascertain how it would fulfil its statutory duty and fulfil its commitments under the DCS. Ms McGreenera QC correctly argued that it was clear that BT had in fact made no proposal of a reasonable adjustment. There was nothing preventing BT from properly engaging at an early stage in relation to the positive duty placed on it to make reasonable adjustments for the claimant as a disabled candidate. We accept counsel's argument that the claimant acted reasonably in lodging proceedings protectively.

[21] It was at the stage at which BT rejected the claimant as a candidate because of his failure to satisfy the SST that BT's primary act of a disability discrimination by reason of a failure to make reasonable adjustments occurred. While BT may have sought to give the impression that it was in some way treating the claimant as still in the competition it never in terms withdrew its rejection of him as a candidate. It never in terms accepted that it was proposing to make the reasonable adjustments which the Tribunal properly found were necessary to deal with the claimant's disability.

[22] At the outset of the appeal it was agreed between the parties that if the question of reasonable adjustments was answered in favour of the claimant and against the appellant it would be unnecessary to proceed to consider the Tribunal's conclusion that a case of direct discrimination had been made out. In view of the conclusions we have reached the question of the direct discrimination issue does not arise. We conclude that no error can be detected in the reasoning or in the fact finding of the Tribunal in its decision that BT was liable for disability discrimination by reason of its failure to make reasonable adjustments. The Tribunal's assessment of compensation was not challenged by the appellant. In the result we must dismiss the appeal.