

Judicial Communications Office

Monday 29 July 2019

COURT DISMISSES APPEAL BY BRITISH TELECOMMUNICATIONS IN DISABILITY DISCRIMINATION CASE

Summary of Judgment

The Court of Appeal¹ today dismissed an appeal by British Telecommunications plc (“BT”) against a decision of the Industrial Tribunal that BT discriminated against a man who applied for a graduate post by failing to make reasonable adjustments for his disability.

Kevin Owen Meier (“the claimant”) graduated with a 2.1 degree in computer science. He has Asperger’s Syndrome (“ASD”), dyslexia and dyspraxia. On 13 March 2017 his mother emailed an application with his CV to BT who had advertised network design and engineering opportunities for graduates. She supplied information that the claimant was a disabled person who suffered from ASD and dyslexia and was seeking to avail of the BT Disability Scheme (although BT’s recruitment team was not made aware of the contents of the monitoring information about the claimant’s disability and it was not BT’s practice to provide that information to the recruitment team).

BT is 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. Under the Guarantee Interview Scheme, BT guaranteed to interview anyone with a disability whose application met the minimum criteria for the position (i.e. 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 qualification skills or experience defined as essential). However in addition BT used a Situational Strength Test (“a SST”) to assess whether an applicant demonstrates attributes and behaviours identified as desirable for a role. The BT SST presents a series of scenarios covering a range of different situations with the candidate being invited to respond to each using a rank ordering of five different options.

On 15 March 2017, BT sent the claimant an email 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. The Court said that BT’s approach was therefore to treat a satisfactory outcome to the SST as a necessary criterion to be fulfilled in order to be considered for recruitment. It noted there was no evidence that this had been included in the minimum criteria. The SST followed the submission of the application form. It was not stated to be a qualifying criterion in itself. The claimant’s mother had grave misgivings about the ability of her son to do well in the SST but assumed that in view of the guarantee of an interview under the Graduate Recruitment Team (“the GRT”) he would in any event be interviewed. The Court heard, however, that the application that went to the GRT was anonymised and did not contain the information about the claimant’s disability. The GRT, therefore, was not aware that he wished to be considered under the DCS.

¹ Sir Paul Girvan delivered the judgment of the Court. The panel was Lord Justice Stephens and Sir Paul Girvan.

Judicial Communications Office

The claimant fared badly in the SST and was informed by email on 19 March that “based on the outcome of the test we will not be taking your application forward”. After the SST, 742 persons progressed to the first stage of interview by Skype with 166 persons ultimately being offered appointment. The claimant’s mother sent an email the following day criticising the use of the SST which she said was problematic for people with ASD and 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. BT’s HR team pointed out that the claimant could have contacted BT in relation to his disability. The owner of the SST, in an internal document to BT’s HR team, stated that when a candidate shares that they have autism at the start of the recruitment process, a recruiter should have a conversation with them about what the test involves and any reasonable adjustments they need. If the adjustments cannot 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, then the applicant should be encouraged to share more detail about how his condition is impacting on him so that BT might further evaluate if there are grounds for adjustments to this assessment.

In a response to the claimant’s mother dated 6 April, BT HR 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. It was added that BT had never bypassed the SST for any other applicant that year. In a letter to the claimant it was stated that “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”.

On 17 May, the claimant’s mother drew BT’s attention to a decision of the UK Employment Appeal Tribunal (“the EAT”) where the EAT upheld a decision that an applicant who had ASD had suffered from indirect discrimination as the employer had failed in its duty to make reasonable adjustments and had treated her unfavourably because of her disability². The EAT found 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 applicant at a personal disadvantage. BT HR replied on 12 June 2017 stating that the claimant had never identified what adjustments were needed and that it would consider whatever identified adjustments could be accommodated. The HR team did not make any reference to the adjustment provided for in BT’s Guarantee Interview Scheme (namely moving a candidate to the interview stage) and made no suggestion that the SST could or should be bypassed. The reply put the onus on the claimant to come forward with an adjustment to the SST. The claimant’s mother then pursued a claim to the Industrial Tribunal (“the Tribunal”).

The Tribunal concluded, on the evidence adduced, that BT knew from 14 March 2017 that the claimant was a disabled person suffering from ASD and dyslexia who was seeking to avail of BT’s Disability Confident Scheme. It said the GRT knew the claimant was disabled but did not proactively offer or make reasonable adjustments. The Tribunal further held that 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 and said that BT knew or ought reasonably to have known that the claimant was disabled and that his disability was placing him at a substantial disadvantage.

Counsel for BT submitted to the Court of Appeal that BT did not have the requisite knowledge to trigger a reasonable adjustment duty in April and did not know that the claimant was likely to be

² Government Legal Services v Brooks [2017] UKEAT

Judicial Communications Office

placed at a substantial disadvantage because of his disabilities. The Court, however, said it was 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. It commented that the duty to make reasonable adjustments lay on the employer and applied at all stages of the process including before proceeding to the interview. The Court also noted that BT did not follow the suggestion made by the SST owner that there should be a conversation between the recruiter and the claimant and that BT appeared to refuse to consider the option of bypassing the SST. The Court also commented that BT did not carry out the recommendation that the claimant be encouraged to share details of his disability and how it impacted on him so that an evaluation could be made if there were grounds for adjustments to the SST.

Central to the appeal was the contention that when BT's attention was drawn to the EAT's decision it sought to engage with the claimant with a view to making reasonable adjustments. The Court of Appeal, however, said that a fair reading of the email communication showed 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 Guarantee Interview Scheme and 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. The Court commented that 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 and accepted that the claimant acted reasonably in lodging proceedings:

“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 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. ... 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 Court of Appeal dismissed the appeal.

NOTES TO EDITORS

This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (<https://judiciaryni.uk>).

ENDS

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