

THE INDUSTRIAL TRIBUNALS

CASE REF: 4123/17

CLAIMANT: **Kevin Owen Meier**

RESPONDENT: **British Telecommunications Plc**

DECISION

The unanimous decision of the tribunal is that the respondent discriminated against the claimant by reason of his disability and by failing to make reasonable adjustments for him and it awards compensation of £4,538.63 for loss of earnings and £12,500.00 for injury to feelings with interest on the award for injury to feelings of £1,400.00.

Constitution of Tribunal:

Employment Judge: **Employment Judge Greene**

Members: **Mrs F Cummings**
Mr I Carroll

Appearances:

The claimant was represented by Mr Tim Warnock, of counsel, instructed by Millar McCall Wylie Solicitor

The respondent was represented by Mr Michael Potter, of counsel, instructed by Napier & Sons Solicitors.

SOURCES OF EVIDENCE

1. The tribunal heard evidence from the claimant and, on his behalf, from Mary McLaughlin and Dr Chris Tennyson, and on behalf of the respondent from Sarah Goodrum and Alex Linley. The tribunal also received five bundles of

documents comprising 300 pages approximately, written submissions, a number of legal authorities and a statement of proposed reasonable adjustments and special arrangements agreed by the parties for the conduct of the hearing pursuant to the decision of the Court of Appeal in **Galo v Bombardier Aerospace UK [2016] NICA 25.**

THE CLAIM AND DEFENCE

2. The claimant claimed that he had suffered discrimination on the ground of his disability and that the respondent had failed to make reasonable adjustments for him as a disabled person contrary to the Disability Discrimination Act 1995, as amended. The respondent disputed the claimant's claims in their entirety.

THE ISSUES

3. The agreed issues for determination were as follows:

Legal Issues

- (1) Does the claimant suffer from a disability within the meaning of the Disability Discrimination Act 1995 (as amended)?
- (2) Has the claimant been discriminated against on the grounds of his disability contrary to the Disability Discrimination Act 1995 (as amended)?
- (3) Was the respondent under a duty to make reasonable adjustments for the claimant pursuant to the Disability Discrimination Act 1995 (as amended)?
- (4) Has the respondent failed in its duty to make reasonable adjustments contrary to the Disability Discrimination Act 1995 (as amended)? (PCP the requirement for all candidates to sit the respondent's situational strength test).
- (5) If so, can the requirement to sit the respondent's situational strength test be objectively justified?
- (6) With regards to the claims cited above:
 - (a) Are any of the claimant's complaints out of time?
 - (b) Does the treatment complained of involve a continuing act or state of affairs?
 - (c) Insofar as any complaints are out of time, should time be extended by the tribunal?
- (7) Subject to the above, what remedy is the claimant entitled to?

Factual Issues

- (1) What is the nature of the claimant's condition?

- (2) Does the claimant's condition have a substantial and adverse effect on his day to day activities?
- (3) Is the claimant's condition long term in nature?
- (4) What adjustments has the claimant previously required/been provided with throughout second and third level education?
- (5) What is the respondent's policy in relation to hiring individuals with disabilities?
- (6) What commitments has the respondent made as a 'Disability Confident' employer?
- (7) Has the claimant been treated as disabled within the meaning of the Disability Discrimination Act 1995 (as amended) by the respondent?
- (8) What is the aim/purpose of the respondent's situational strength test?
- (9) Did any alternative measures exist to allow the respondent to achieve this aim/purpose?
- (10) Does the respondent's situational strength test place candidates with Asperger's Syndrome/Dyslexia/Dyspraxia at a substantial disadvantage compared to candidates who are not disabled?
- (11) Did the claimant's condition place him at a substantial disadvantage when sitting the respondent's situational strength test when compared to candidates who are not disabled?
- (12) What score did the claimant achieve in the respondent's situational strength test?
- (13) What score was required to allow the claimant to proceed to the next stage of the application process?
- (14) When did the respondent become aware of the claimant's condition?
- (15) What adjustments to its application process did the respondent propose to the claimant?
- (16) What adjustments to the respondent's application process did the claimant request?
- (17) Did the respondent insist that the claimant was required to sit its situational strength test?
- (18) Did the respondent offer the claimant the opportunity to progress to the next stage of its application process without sitting its situational strength test?
- (19) Did the respondent propose any adjustments to the format of its situational strength test?

- (20) How many individuals did the respondent recruit through this application process?
 - (21) What impact, if any, have the alleged actions/failures of the respondent had on the claimant?
 - (22) What loss has the claimant suffered as a result of the respondent's actions/failures?
- 4.
- (1) At the outset of the claim the respondent accepted that the claimant has a disability for the purposes of the Disability Discrimination Act, as amended.
 - (2) By consent Legal Issues 5 and 6 and Factual Issues 2 and 3 are no longer in contention.
 - (3) The parties had previously proposed agreed reasonable adjustments and special arrangements for the conduct of the hearing which the tribunal accepted, pursuant to the decision of the Court of Appeal in **Galo v Bombardier Aerospace UK [2016] NICA 25**.

FINDINGS OF FACT

- 5.
- (1) The claimant was born on 1 April 1994. He has Asperger's Syndrome, dyslexia and dyspraxia. He has a very high IQ(139) and is a member of MENSA. English is his second language which he learned from aged eight onwards. He graduated from Queen's University Belfast in 2017 with a 2:1 degree in Computer Science. 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 settings, which trigger stress, the claimant loses the power to communicate effectively, including the power to speak.
 - (2) Asperger's Syndrome is a form of Autism Spectrum Disorder (ASD) and is a life-long and hidden disability affecting social interaction, social communication and social imagination/flexibility of thought. People with Asperger's Syndrome are often of average or above average intelligence, which is the case for the claimant.
 - (3) The manifestation of ASD varies from one individual to another and changes over time. However, the key deficits fall under three categories referred to at paragraph 5(2) above.
 - (4) Dr Christopher Tennyson, Specialist Clinical Psychologist advised the tribunal that individuals with ASD do not intuitively link cause and effect. Thus they may not necessarily see that their actions or words may directly lead to, or link with, certain outcomes. They may fail to pick up implied meaning and as a result may fail to integrate what has been said in the context of what has just taken place. Changes in volume of speech, tone of voice, the use of gesture etc may also be misinterpreted or misunderstood and can heighten levels of anxiety, for example, a raised volume may be perceived as being 'shouted at'. They dislike change to routine and despite

being well prepared for certain situations they are likely to struggle with sudden change, the unexpected and unfamiliar environments. As a consequence of these factors individuals with Asperger's Syndrome may struggle to recognise and therefore adjust their response in various social situations. They may struggle to recognise variances in social hierarchy unless this is made explicit and clear. This may result in them appearing "blunt" or "rude" when this is not their intention. There can appear to be a tendency to say what they see in an honest and direct fashion without a sense of awareness of how this might be interpreted by others, or make others feel.

- (5) Dr Christopher Tennyson, was of the opinion that the claimant would experience clinically significant difficulties in the areas of social communication, interaction and imagination/flexibility of thought. Dr Tennyson informed the tribunal that the claimant has developed, however, a range of skills and strategies to compensate for some of these difficulties, which enables him to superficially, at least, get by in a range of familiar social situations. However, novel social situations or situations which place specific demands in relation to social inferencing will put the claimant at a disadvantage to his peers who do not have a diagnosis of ASD. He is likely to require information that those without ASD may take for granted and will require social inferencing (ie, "reading between the lines") to be made explicit so that he can integrate this into his thought process and respond accordingly. This can have a bearing in a range of settings both social and occupational. Despite this the claimant has a range of strengths which include his ability to think logically, methodically, and pay attention to fine details, routines and processes which are simply a different profile of strengths.
- (6) Dr Tennyson reviewed the SST (Situational Strengths Test) and was of the opinion that the test would place individuals with ASD/Asperger's, including the claimant, at a substantial disadvantage over people without an ASD diagnosis for a number of reasons:-
- (a) the information within the questions could be interpreted as ambiguous, contradictory and requiring judgments to be made on missing information regarding social approaches and social hierarchy, key components of social communication and interaction, areas of impairment for those with ASD.
 - (b) Questions regarding changing workload and reprioritisation of deadlines without any specific details upon which a decision could be made (for example, specific information on the length of time a task would take, and its relative importance compared to other tasks required), would present real life challenges for individuals with ASD.
 - (c) Some of the answers to the SST tests appear to be broadly similar, perhaps with very subtle differences in terms of the subjective-value based judgment which might be attributable to them. In the real world having the information and time to discuss and plan accordingly could reasonably be expected to mitigate these difficulties but the questions lack real life validity, in Dr Tennyson's opinion.

- (d) The test required the claimant to infer the underlying principle of each statement and provide the most desirable response, as opposed to providing the most logical series of actions for the situation, as it would be difficult to do so given the lack of definite and explicit detail, and at times, contradictory information. The claimant's diagnosis of Asperger's Syndrome is the condition which will most likely adversely impact upon his performance within the SST.
- (e) Given that the claimant's cognitive assessment would place his overall IQ score within the 99.5th centile and his scoring on SST was within the first centile there is a very clear and substantial discrepancy and in the opinion of Dr Tennyson the claimant's ASD diagnosis will have played a significant role in this discrepancy.
- (7) Dr Tennyson concluded that while there may be some suggestions or amendments to the SST which might overcome some of the disadvantage to the claimant it is not clear that they would completely remove all the disadvantage and therefore Dr Tennyson concluded that the SST alone is unlikely to be the most reliable predictor of the claimant's suitability for the role and so should not be relied upon in the absence of other sources of information which may indicate his suitability for the role. Dr Tennyson suggested that some of the recommendations could include:-
- (a) a reduction of ambiguity by providing more specific details which were missing within the questions, but important in helping an appropriate decision to be made, as is likely to be the case in the real world.
 - (b) removal of answers which appear highly similar on face value – such subtle variations may not be immediately evident to someone with ASD.
 - (c) completing these competency based questions in an interview format, allowing the person responding to talk through their thought processes, as well as offering examples specific to their own experiences which will highlight the presence or absence of the skill required by the employer.
- (8) Dr Alex Linley, founder and chief executive officer of Capp and Co. Ltd, gave evidence to the tribunal. He is the subject matter expert in relation to the situational strengths tests as it was he who designed the original assessment concept and the first versions of this assessment tool.
- (9) The SST is a type of situation judgment test that is used to assess whether a person demonstrates attributes and behaviours that are identified as being desirable for a role. A situational judgement test of which the SST is a specific type, is a scenario-based assessment, in which a person is presented with a situation, and asked to indicate how they would behave or respond in that situation.
- (10) Situational judgement tests are considered, in the psychological research literature, to be some of the most robust, fair and defensible forms of behavioural assessment, especially for use in on-line settings. For this

reason, they are one of the most widely used selection methodologies, especially for high stakes assessment contexts.

- (11) Situational judgement tests also typically use scenarios as a means of 'levelling the playing field' by avoiding discrimination or bias on the basis of past experience. That is, any assessment which judges a person based on their past experience is inherently biased to candidates who have had the opportunity of having that relevant past experience.
- (12) For early career roles in particular, and also in service of diversity and inclusion across gender, ethnicity, disability, sexuality and social background, situational judgement tests often use scenarios that provide a realistic job preview of the role for which a candidate is applying, thereby seeking to provide equality of access and opportunity to all candidates, regardless of their situation or background.
- (13) The SST used by the respondent, presents a series of scenarios that cover a range of different situations that an employee may experience at the respondent's business. The candidate is invited to respond to each scenario by indicating what they would do in that situation, by rank ordering from most likely to least likely, a set of five different response options. This rank ordering methodology ensures that any binary response format is avoided, and so provides a more gradual and differentiated performance score, relative to a binary yes/no or right/wrong response format.
- (14) The SST is scored for each scenario that is presented, by reference to the rank order position of each of the five response options, contributing to an overall test score for the SST as a whole. The 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.
- (15) The respondent used the SST as a way of helping it identify and select candidates who are likely to be suited to and successful in roles at the respondent, and to move these candidates forward to the next stage of the recruitment process. The strengths assessed and tested are directly correlative to the skills and attributes required for given jobs.
- (16) The competencies or strengths that the respondent wishes to test in order to recruit appropriate persons fall under nine headings; team; drive; learner; change; customer; ownership; networker; improver; and commercial. In the documentation prepared by the respondent and Capp, these headings are set out. Alongside each heading there is a description of the particular competence or strength followed by three particular aspects of each competence or strength. This applies to all nine competences or strengths.
- (17) While these competences or strengths are the qualities that the respondent is seeking to find in suitable candidates, they are particularly tested in the STT and the subsequent interview.
- (18) Dr Tennyson was cross-examined in relation to six of these competences or strengths and of the particular identified aspects in relation to each

competence or strength. He was questioned about 10 of the 27 aspects and how specifically someone with the claimant's Asperger's Syndrome would cope or deal with these particular aspects. Dr Tennyson accepted in four or five of them they could present challenges to the claimant.

- (19) The nine headings do not appear to be weighted nor do the three subsections in relation to each heading.
- (20) The SST must be constant to be valid. Dr Tennyson's suggestion of a reasonable adjustment of, removing answers which appear highly similar on face value as such subtle variations may not be immediately evident to someone with ASD, would interfere with the consistency of the SST and therefore is not an adjustment that could be made if the SST were to remain valid.
- (21) While an interview format would be a possible adjustment, it would only be on the basis that the interviewer would merely state what is in the on-line test and could not engage in any discussion or explanation or answer questions with the candidate if the SST were to remain valid.
- (22) As part of the 2017 Graduate Recruitment Programme, the respondent's working instructions to its Budapest Recruitment Team have changed and they are reminded that a candidate may need adjustments at each stage right through the process where that candidate has a disability or is requesting reasonable adjustments.
- (23) The claimant allowed his mother, Mary McLaughlin, to help him with applications for work experience, work placement and suitable jobs while he focussed on preparation for his final year examinations at Queen's University Belfast.
- (24) On 13 March 2017 the claimant's mother, with his consent, sent an email and the claimant's CV to Thomas Gaskin, as requested, when she was attempting to apply on-line for a job with the respondent under the Graduate Recruitment Scheme. The job advertisement provided that:

"To be eligible to apply to the programme, you'll need to have 2:1 degree OR 2:2 degree with additional post grad degree.

As well as having a technical mindset and good problem solving skills you will need a strong judgment and an analytical approach to your work. In addition, you should have a good working knowledge of IP networks, protocols and network components, with the ability to communicate complex concepts.

You'll have immediate responsibilities in these specialist roles, so you'll also need to work well on your own and also as part of a team".

The salary was from £30,000.00 to £34,000.

- (25) The job was advertised via the respondent's Graduate Recruitment Scheme. It has a number of stages including an on-line application, SST, a Skype

interview and an attendance at an assessment centre and an interview.

- (26) Due to the large volume of recruits, the respondent contracts Futureboard Consulting to provide additional recruitment resources during the campaign. The respondent also has some administration resource provided by the respondent's HR share service at Budapest. These teams carry out most of the interaction with applicants. The initial stage of the process is automated and the application is not seen by a recruiter before the SST has been passed. The recruiters do not see the information contained in the diversity form. After the SST have been completed, applications are screened by a recruiter and scored for selection to go forward to the Skype interview. The Skype interview tests the same competences as the SST. This stage could be modified or by-passed for applicants who have declared a disability. The respondent would contact them to understand the most suitable interview format and what adjustments might be needed for the subsequent stages.
- (27) On 14 March 2017 at 17.05 Mr Gaskin, from the respondent, sent a standardised email to the claimant. In the email it stated, "here is a practice Situational Strength Test (SST) for the second stage of the process". The claimant's mother, who was conducting this application on his behalf, considered the content of the email to be a standard email and did not attach much weight to the reference to the SST although it was referred to as "the second stage" as she was assuming that the claimant would meet the 2:1 requirement and move to the interview stage automatically.
- (28) Later that day Ms McLaughlin completed the on-line application form on behalf of the claimant. In the application form Ms McLaughlin indicated that the claimant was disabled and wished to be considered under the Disability Confidence Guarantee Interview Scheme. In the "Diversity" section of the application Ms McLaughlin indicated that the claimant suffered from Asperger's Syndrome and dyslexia.
- (29) The respondent is a disability confident employer, as a member of the Disability Confident Scheme. The "... scheme aims to help you successfully employ and retain disabled people and those with health conditions ...".
- (30) Under the scheme the business is expected to:-
 - (a) "... Actively looking to attract and recruit disabled people".
 - (b) "Providing a fully inclusive and accessible recruitment process".
- (31) As part of the scheme the business is exhorted inter alia to:-
 - "(i) identify and address any barriers that may prevent or deter disabled people from applying for jobs, including where you advertise, the words you use and how people can apply,
 - (ii) get your recruitment process tested by disabled people, and if there is a barrier either remove it or provide an alternative way to apply,

- (iii) provide a short but accurate job description that clearly sets out what the job holder will be required to achieve, accepting there are different ways to achieve the same objective, and
 - (iv) make sure people involved in the recruitment are Disability Confident and know how to support disabled applicants".
- (c) "Offering an interview to disabled people who meet the minimum criteria for the job ... (this is the description of the job as set by the employer)".

Again the business is told that it should have made sure that you invite disabled people who meet the minimum criteria for the job when sifting job applicants.

- (d) Have,

"Flexibility when assessing people so disabled job applicants have the best opportunity to demonstrate that they can do the job".

To fulfil this the business should, inter alia:-

- "(i) plan for and make reasonable adjustments to the assessment and interview process,
 - (ii) offer extended or working interviews to enable disabled people to demonstrate their potential.
- (e) Proactively offering and making reasonable adjustments as required".

The scheme also states,

"... a Disability Confident employer will encourage disabled people to apply for their vacancies and support them when they do ...".

- (32) On 14 March 2017 at 20.51 the claimant received an automated email response from Risha@BTGraduateRecruitmentTeam. It thanked the claimant for his application and informed him that his application had moved to the next stage of the process, the Situational Strengths Test (SST). Whilst the email asked if the claimant had any technical issues, it did not seek any information about any disability or reasonable adjustment. It also informed him that he would get a separate email within 24 hours telling him how to log in and complete the test. A later email from Risha asked the claimant to complete the on-line test by 21 March 2017.
- (33) The claimant took the SST test on 19 March 2017. He considered the test to be very subjective. It sought responses to situations, which the claimant believed could change the next day, if done by the same person.
- (34) Thomas Gaskin, on 15 March 2017 at 11.54, sent an email to the claimant telling him that he should now do the SST and, once he had done this he

would be officially in the process that is being taken forward. The email did not make any reference to the claimant's disability or to seek any input from him as to whether any reasonable adjustments were required.

- (35) The claimant's mother assumed that the claimant would not have to complete the SST but that, if he did, it would not influence his progression to the interview stage. Ms McLaughlin then consulted the BT website to check again the description of the on-line tests. The website stated at that time:-

"All applicants complete a situational judgment test created specifically for BT. You will hear about some common scenarios you could face here, and we want to know how you'd respond. We care about how people will approach their jobs as well as what they do, because we are looking for people who would be a great fit for our culture and support our goal of using the power of communications to make a better world. We will provide a feedback report after this test and hope it's a useful experience for you, whether you pass it or not".

Ms McLaughlin had serious reservations about the ability of someone with Asperger's Syndrome to do well in the test.

- (36) By an automated generated email from Risha@BTGraduateRecruitmentTeam, of 19 March 2017 at 20.50, the claimant was informed that the respondent would not be taking his application forward on this occasion. It enclosed a report on the SST. The claimant's raw score was 29 out of a potential 180. The threshold to pass to the next stage was 73. Ms McLaughlin has considerable reservations about the appropriateness of the SST for those suffering from Asperger's Syndrome. The claimant was disappointed. After the SST 743 persons progressed to the first stage interview by Skype in this recruitment campaign with 166 persons ultimately offered appointment to the respondent's Graduate Programme.
- (37) The claimant did not wish to get a job just because he was disabled. He had his degree and believed he was as good as the next person. When he was informed that the respondent should have provided an interview under the Guarantee Interview Scheme, he believed the respondent either did not take his disabled status seriously or it did not adhere to the Graduate Recruitment Scheme. He believed he had been treated unfairly.
- (38) As part of the Graduate Recruitment Scheme the application goes to a Graduate Recruitment Team (GRT). The applications are anonymised. The "diversity" section is removed from the application that goes to the GRT. Although the respondent had been made aware that the claimant suffers from Asperger's Syndrome and dyslexia, its GRT was not aware of this. The GRT was aware that the claimant was disabled and wished to be considered under the Disability Confident Guarantee Interview Scheme.
- (39) Under the Guarantee Interview Scheme to which the respondent had signed up, the signatories give the following undertaking:-

"We guarantee to interview anyone with a disability whose application meets the minimum criteria for the post. By 'minimum criteria' we

mean that you must provide us with evidence in your application form which demonstrates that you generally meet the level of competence required for each competence as well as meeting any of the qualifications, skills or experience defined as essential. The Cabinet Office is committed to the employment and career development of disabled people (the minimum criteria means the essential competences as set out in the advertisement for the post) ...””.

- (40) The claimant considers the SST to be highly flawed in a number of respects. He believes that it is testing how you solve team problems using social skills. The claimant believes that it is not how people with Asperger's Syndrome tend to solve team problems. Those with Asperger's Syndrome, in the claimant's view, either avoid the problem by just getting their work done or fix the problems by doing extra work, that is avoiding their weaknesses and relying on their strengths.
- (41) The claimant has demonstrated an ability to meet the demands of team work and has achieved good scores in several modules which assessed team projects at university. Normally the claimant was the team leader in the team.
- (42) The claimant believes that he could have successfully taken up the role as graduate trainee with the respondent as he has successfully progressed through university and has achieved good grades. He did not expect that he would have to sit the SST or, if he had to sit it so that the automated programme could progress him to the next stage, that the SST results could be used to filter him out. The claimant believes this was discriminatory as the respondent had guaranteed him, as a disabled candidate, an interview which he did not get.
- (43) On behalf of the claimant, using his name, Ms McLaughlin sent an email to the BT Graduate Recruitment Team on 20 March 2017. In the email she expressed considerable reservations about the appropriateness of the SST for someone suffering from Asperger's Syndrome and dyslexia. She stated that she thought the claimant's score in the SST would be immaterial and that SST was arguably problematical for people with Asperger's Syndrome. She also asked for a number of policies relating to reasonable adjustments which apply to the design of the situational strength test for disabled candidates in general and for the claimant's particular disabilities; the respondent's policy on recruitment of people with Asperger's Syndrome and with dyslexia and any report or review from an autism specialist on the suitability of the SST for candidates with Asperger's Syndrome. She also asked that the scoring grid and the marks threshold for passing or failing the test should be provided.
- (44) On 31 March 2017 at 14.47 Ms Sarah Goodrum, HR Business Partner within Human Resources, replied to the claimant on behalf of the respondent. In the email Ms Goodrum said that the Graduate Recruitment Team progress candidates directly to interview stage if they meet the minimum requirements of the role. She then asserted that for the Graduate Programme the SST formed part of the minimum requirements of the role. She also informed the claimant that the test and scoring is automated and that his score was not

within the range that would enable it to proceed to the next stage. She further stated in the email that the on-line test is not time-bound and that in her view the respondent made it clear on its website that the on-line test is part of the process so that applicants can contact the respondent before reaching that point if they need to. She also talked about candidates having an adjusted interview format for them. In her email she also stated that as the respondent had received a very high number of applications that they needed some means of managing some aspects of the process automatically but consistently.

- (45) Ms McLaughlin was provided with an internal email from Judit to Ms Sarah Goodrum of 20 March 2017 at 12.04. The email referred to the claimant having failed the SST and was therefore rejected automatically. Judit enquired if the claimant should be resent the test so that he could have a second attempt. The email also stated that the screening step is where candidates under the Disability Policy progressed immediately to the next stage that is the V1/T1.
- (46) On 1 April 2017 Ms McLaughlin sent a further email to Ms Goodrum seeking further feedback about the test. The email also raised the question as to whether it was unreasonable not to make adjustments for candidates who might be disadvantaged by the design of the SST and who had been rejected automatically.
- (47) Ms Goodrum consulted a superior, Rae Ranasinghe, head of Talent Intre Recruitment with the respondent, who sought guidance from Capp, the owner of the SST. In his letter to Capp Mr Ranasinghe summarised the claimant's position and stated:-

“...

He is challenging that by the nature of the SST it is not conducive to an individual who has Asperger's. He is wanting

- (1) A report from the review by an Autism specialist on the suitability of the Situational Strengths Test for candidates with Asperger's Syndrome.
- (2) His scores and scoring.

Re.2 we know we can't share this, (Sarah has explained in her response), he's continued to challenge this.

Could you assist in how we respond?”

- (48) Maria Nitu from Capp replied on 4 April 2017 to Mr Ranasinghe and Ms Goodrum. She endorsed the refusal to provide the SST scoring mechanism as it would undermine the integrity of the test. She also stated:-

“... Kevin (the claimant) indicated he had Asperger's Syndrome. This is an Autism profile, which means that although it is generally considered that people with this Syndrome are intelligent and high-

functioning, it is still affecting individuals differently. For this reason, we recommend 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 involves, and any reasonable adjustments they need. Only if the adjustments they outline cannot be implemented due to the nature of the test, then the candidate can be allowed to bypass the Situational Strength Test. If this conversation did not take place with Kevin, then we would highly recommend that Kevin is encouraged to share more detail on how this condition is impacting him so that you may further evaluate if there are grounds for adjustments to this assessment.

Exactly because Asperger's Syndrome affects individuals differently, there is not a report that states whether the Situational Strengths Test is or is not suitable for candidates with this Syndrome, as this decision will be made on a case-by-case basis. This guidance is closely aligned with the British Psychological Society's best practice guidelines, and the guidance offered by the Business Disability Forum ...”.

- (49) Ms Goodrum replied on 6 April 2017 to the claimant, having ascertained beforehand from Mr Ranasinghe, his approval to her proposed email. In her email she stated to him:-

“Is this ok ...?

Separately we probably need to look at this going forward – it’s the first time I have seen any recommendation” at the start of the process the recruiter has a conversation with the applicant about the SST”.

Clearly we don’t accommodate that as a recruiter doesn’t touch the application until after SST stage.

I am not going to mention it in the response, as we haven’t offered that for any candidate and I don’t think it would be helpful: given that time to complete is not an issue, we couldn’t have done anything other than by-pass the SST completely and we haven’t done that for any applicant this year”.

- (50) Ms Goodrum used Maria Nitu’s letter as the basis for her letter to the claimant but was selective in what she used. In the email to the claimant she stated:-

“Asperger’s Syndrome is something that affects individuals differently and there is not a specific report that states that whether the Situational Strengths Test is or is not suitable for candidates with this syndrome. We do work hard to be as inclusive as possible but it’s also important to ensure we take forward candidates who are most likely to have a successful and enjoyable time on our programme.

I hope this is useful and do let me know if I can help any further”.

- (51) In the email to the claimant Ms Goodrum addressed the amount of time available to do the test but not how it would affect anyone with Asperger’s Syndrome. She refused to provide the scores and the scoring system.
- (52) Ms McLaughlin sent an email, on behalf of the claimant, on 17 May 2017. Ms McLaughlin is a Law Lecturer and she sent a copy to Ms Goodrum of the Court decision in **GLS v Brookes [2017] UKEAT**. Ms Goodrum replied on 25 May 2017 asking for more time to look into it.
- (53) The claimant’s mother wrote again, by email on 29 May 2017, seeking a response within a reasonable time. Ms Goodrum replied on 30 May 2017 seeking more time and promising further contact by 5 June 2017. On 6 June 2017 Ms Goodrum again asked for more time from the claimant. The claimant’s mother replied saying she had been corresponding since 19 March 2017 and that if she had not received a response by 9 June 2017 she would seek legal advice.
- (54) That week, after finishing his exams, the claimant became quite ill and his recovery was the priority for him and his mother.
- (55) On 12 June 2017 Ms Goodrum replied and stated in her email to the claimant:-

“We have now been able to fully review the points you have raised.

We believe the process we work to is fair. However we always look to support candidates with disabilities by making adjustments where possible and would expect that any adjustments needed to be requested by the candidate at the time of completing their application. We cannot find that you requested any adjustments from us but if you would like to now share the details of what those adjustments are with me then we will consider whether these can be accommodated. If so, we will arrange for you to retake the test as appropriate”.

- (56) Ms McLaughlin responded on 19 June 2017 that she was passing the matter to a lawyer.
- (57) On 20 June 2017 Ms Goodrum wrote to the claimant and stated:-

“If you would like to share what adjustments you wish us to consider for you in our process I am happy to take this forward for consideration. The roles for which you have applied are now moving forward so I would need confirmation from you by the end of tomorrow (Wednesday 21 June 2017) so that we can make any arrangements”.

- (58) The claimant’s mother responded on 22 June 2017 saying that the claimant should not have had to take the SST and that she had initiated a claim against the respondent.

- (59) The claimant's description of the impact on him of not getting the chance to demonstrate his qualities and competences for this job at the interview stage, seem to the tribunal to be rather understated, which perhaps is a consequence of his Asperger's Syndrome. He described his reaction as one of disappointment and that his disability status had not been treated seriously or the respondent had not adhered to its own scheme, which he regarded as unfair treatment of him. His mother fears that he is losing hope as a result of the experience.
- (60) Had the claimant been successful in his job application, he would have earned £28,250.00 per annum gross which the tribunal was told would amount to £22,649.77 net approximately per year. He would also have earned a bonus of £2,825.00 per annum gross which amounts to £2,034.23 net per annum. His net monthly wage would be £1,887.48 and his net monthly bonus would be £169.52. Had he been successful he would have begun employment on 4 September 2017. The claimant calculates his loss of earnings therefore from 4 September 2017 to 5 March 2018 to amount to £11,324.88 for salary and £1,017.18 for bonus, making a total loss of £12,342.06.
- (61) The claimant earned £150.00 between 26 February 2018 and 4 March 2018.
- (62) The claimant also claims a future loss of 12 months, comprising £22,649.76 for salary and £2,034.36 for bonus which amounts to £24,684.12.
- (63) The claimant has secured other employment from 5 March 2018 which will run to 22 April 2018 by way of a trial period. During that time he will earn £150.00 for seven weeks which totals £1,050.00.
- (64) The claimant is reasonably confident of securing the job on a full-time basis and if he does his annual gross salary will be £21,000.00 which amounts to £17,559.68 per year net. His weekly net wage will be £337.69. In a full year his income from this new post will be £16,246.05. The claimant claims that his loss of earnings amounts to £20,630.13.

THE LAW

6. (1) 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 relevant circumstances, including his abilities, are the same as, or are not materially different from, those of the disabled person (Section 3A(5) Disability Discrimination Act 1995, as amended).
- (2) A person discriminates against a disabled person if he fails to comply with the duty to make reasonable adjustments imposed on him in relation to the disabled person (Section 3A(2) Disability Discrimination Act 1995, as amended).
- (3) 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 it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice or feature having that effect. For the purposes of this section the disabled person concerned means a disabled person who is an employee of the employer concerned (Section 4A(1) and (2) Disability Discrimination Act 1995, as amended).

- (4) In **Royal Bank of Scotland v Ashton [2011] ICR632**, Langstaff J held that:-

“... an employment tribunal – in order to uphold a claim that there has been a breach of the duty to make reasonable adjustments and, thus discrimination – must be satisfied that there is a provision, criterion or practice which has placed the disabled person concerned not simply at some disadvantage viewed generally, but at a disadvantage which is substantial and which is not to be viewed generally but to be viewed in comparison with persons who are not disabled.”

- (5) As was noted in the House of Lords in its decision **Archibald v Fyfe Council [2004] UKHL32 [2004] IRLR 651 [2004] ICR 594** (per Baroness Hale at paragraph 47), the duty necessarily requires the disabled person to be treated more favourably in recognition of their special needs. It is thus not just a matter of introducing a ‘level playing field’ for disabled and non-disabled alike, because that approach ignores the fact that disabled persons will sometimes need special assistance if they are to be able to compete on equal terms with those who are not disabled ... (Harvey on Industrial Relations and Employment Law L at [398.01]).

- (6) To determine whether it is reasonable to take the step to comply with a duty to make reasonable adjustments regard will be had to the following matters:-

- (a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;
- (b) the extent to which it is practicable to take the steps;
- (c) the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;
- (d) the extent of his financial and other resources;
- (e) the availability to him of financial or other assistance with respect to taking the step; and
- (f) the nature of his activities and the size of his undertaking (Section 18B(1) Disability Discrimination Act 1995, as amended).

- (7) However, in the **Secretary of State for the Department of Work and Pensions v Allam [2010] IRLR 283, [2010] IRCR 665**, the EAT held that the correct statutory construction of Section 4A(3)(b) involved asking two questions;

- (1) 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;
- (2) 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)?

If the answer to that question was also negative, then there was no duty to make reasonable adjustments. Thus the employer qualified for the exemption if both of the questions were answered in the negative, **Ridout v TC Group [1998] IRLR 628, EAT** applied. Knowledge of a disability does not therefore, in itself, prevent an employer from being able to rely on Section 4(3)(b) of the DDA 1995. (Harvey on Industrial Relations and Employment Law L[405.01]).

- (8) When, on the hearing of a complaint under the Disability Discrimination Act 1995, as amended, of direct discrimination or failure to make reasonable adjustments, the complainant proves facts from which a tribunal could conclude, in the absence of an adequate explanation, that the respondent has acted in a way unlawful under the Act a tribunal shall uphold the complaint unless the respondent proves that he did not so act (Disability Discrimination Act 1995, as amended, Section 17A(1c)).
- (9) There are three broad bands of compensation for injury to feelings;
 - (a) The top band should normally be between £18,000 and £30,000. Sums in this range should be awarded to the most serious cases such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should the award of compensation for injury to feelings exceed £30,000.
 - (b) The middle band between £6,000 and £18,000 should be used for serious cases, which do not merit an award in the highest band.
 - (c) Awards between £500 and £6,000 are appropriate for less serious cases, such as where the act of discrimination is isolated or a one-off occurrence. In general, awards of less than £500 are to be avoided altogether as they risk being regarded as so low as not to be a proper recognition of injury to feelings (**Vento v Chief Constable of West Yorkshire (No 2) [2003] IRLR 102 CA**. as amended by **Da'Bell v NSPCC [2010] IRLR 19 EAT**) **De Souza v Vinci Construction (UK) Ltd EWCA Civ 879**).
- (10) Where a tribunal makes an award under the relevant discrimination legislation it shall, whether an application has been made or not, consider whether to award interest on any sum awarded (Regulation 3 Industrial Tribunals (Interest on Awards in Sex and Disability Discrimination cases) Regulations (Northern Ireland) 1996 No. 581).

- (11) The interest shall be applied at the same rate as is in force, during the period for which it is to be calculated, in relation to decrees in the County Court and shall be calculated as simple interest which accrues from day to day (Regulation 4, Industrial Tribunals (Interest on Awards in Sex and Disability Discrimination cases) Regulations (Northern Ireland) 1996 No. 581).
- (12) Where interest is being considered in relation to an injury to feelings award the date for beginning the calculation of the interest is the date of first act of discrimination and ends on the day of calculation when the award is calculated by the tribunal. (Regulation 5, Industrial Tribunal (Interest of Awards in Sex and Disability Discrimination cases) Regulations (Northern Ireland) 1996 No 581).
- (13) The power to award interest under the Regulations is discretionary, although, if the tribunal decides not to make an award, it must give reasons for its decision not to do so ... but the discretion relates only to the decision whether or not to award interest at all; if it decides to make an award there is no discretion as to the manner in which it is to be calculated, nor (save in exceptional circumstances) the period for which it shall be awarded. The tribunal must, however, consider whether to make an award even in the absence of a formal application ... (Harvey on Industrial Relations and Employment Law P1 [1130]).
- (14) When an act of discrimination results in the loss of employment, a tribunal will have to calculate future loss, and in so doing have to make decisions about the chances that employment would have continued had the discrimination not taken place. It is important that this is done by reference to calculating percentage probabilities, and not on a simple balance of probabilities. That approach was endorsed by the CA in **Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102, [2003] ICR 318** in (Harvey on Industrial Relations and Employment Law L [882]).

APPLICATION OF THE LAW AND FINDINGS OF FACT TO THE ISSUES

7. (1) It is accepted that the claimant is a disabled person for the purposes of the Disability Discrimination Act 1995, as amended.
- (2) The claimant suffers from Asperger's Syndrome, dyslexia and dyspraxia. Both his Asperger's Syndrome and dyslexia are life long conditions having an substantial adverse effect on his ability to do day to day activities. He had managed, with the reasonable adjustments in place throughout his academic career, to surmount the literacy difficulties imposed by his dyslexia. Likewise, he has had the benefit of reasonable accommodations which have enabled him to overcome some of the challenges of his dyspraxia and they should ensure that the ongoing impact of his dyspraxia is minimised. This claim focuses on his Asperger's Syndrome.
- (3) In March 2017 the respondent advertised for a job under the respondent's Graduate Programme – Network Engineering (52891).
- (4) The respondent is a Disability Confident employer and is a member of the Disability Confident Scheme required to, inter alia;-

- (a) provide a fully inclusive and accessible recruitment process.
 - (b) identify and address any barrier that may prevent or deter a disabled persons from applying for jobs,
 - (c) provide an accurate job description that clearly sets out what the job holder will be required to achieve,
 - (d) offer an interview to disabled people who meet the minimum criteria for the job,
 - (e) show flexibility when assessing people so the disabled job applicants have the best opportunity to demonstrate that they can do the job,
 - (f) plan for and make reasonable adjustments to the assessment and interview process,
 - (g) offer proactively and make reasonable adjustments as required.
- (5) The claimant did not progress to the interview stage in the respondent's graduate recruitment campaign because he did not pass the SST, which the respondent says was part of the essential criteria.
- (6) The tribunal accepts that the nine competences or strengths that the respondent had developed in order to select suitable candidates for its Graduate Programme are tested throughout the recruitment campaign and in particular at the SST and the Skype interview stages.
- (7) However, the tribunal does not accept that because the claimant did not pass the SST test, which measured these nine competences or strengths, that he would have not been offered a job with the respondent because in the other stages of the recruitment campaign, which test the same competences, he would not have succeeded likewise. The tribunal does not accept this because the claimant's complaint about the SST is not about the competences tested but the method used by the respondent to test them.
- (8) The respondent relies on the evidence of Dr Tennyson in relation to aspects of the competences or strengths with which the claimant would have difficulties as indicating that the claimant would not have succeeded in the respondent's recruitment campaign. The tribunal does not accept that this evidence leads to that conclusion. In so concluding the tribunal had regard to the following matters:-
- (a) Dr Tennyson did not give evidence that the five or six aspects would be impossible for the claimant. Rather he accepted that they would pose challenges or difficulties for the claimant.
 - (b) There was not any evidence, before the tribunal, if the five or six challenging aspects specifically could be the subject of reasonable adjustments to enable the claimant to display his skills.

- (c) There was not any evidence before the tribunal of how many of the successful candidates had difficulties or found challenging five or six of the 27 aspects of the competences or strengths.
 - (d) The only evidence of how the claimant would fare in the 27 aspects was in the SST, as he did not have the opportunity of taking the Skype interview. The SST tested the 27 aspects in a way that substantially disadvantaged the claimant because of his Asperger's Syndrome and therefore cannot be relied on as an accurate way of assessing his skills and capabilities.
 - (e) Therefore the tribunal cannot conclude because the claimant did poorly in the SST that that poor performance would have been replicated in the later stages of the recruitment campaign, particularly if the claimant had the benefit of reasonable adjustments, which the respondent said it puts in place, if needed.
- (9) The tribunal accepts Dr Tennyson's evidence that the SST would put the claimant at a substantial disadvantage as compared to those not suffering from Asperger's Syndrome. He was doubtful if there could be adjustments that would remove the disadvantages to the claimant.
- (10) Dr Linley told the tribunal that while adjustments could be made to the SST, they must be such as not to undermine the consistency of the test. Specifically, someone talking the claimant through the test, offering examples from their own experiences which highlight the presence or absence of the skill required by the employer throughout the test would undermine it. An interviewer could only read the question to the claimant and nothing more if the SST was not to be undermined.
- (11) The job advertisement and the essential criteria for the post did not identify passing the SST as part of the minimum criteria. The claimant therefore met the minimum criteria for the job and should have been offered an interview. The respondent did not offer the claimant an interview and is in breach of its undertaking under the Disability Confidence Scheme.
- (12) In its policies and practice the respondent seeks to attract applications from candidates with disabilities as is clear from its membership of the Disability Confidence Scheme.
- (13) The respondent 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 the Disability Confidence Scheme. Though the respondent was aware of it, the respondent's recruitment team was not made aware of his disabilities, because the information about suffering from Asperger's Syndrome was on the monitoring form which did not go to the recruitment team, as is the respondent's practice. The recruitment team did know that the claimant was disabled but did not take any steps to be, "proactively offering and making any reasonable adjustments as required".
- (14) Even if withholding the monitoring form (Diversity Section) is done in the interest of fairness, the respondent did not take any step to consider whether

any information disclosed on it, particularly in relation to disability, is relevant to its commitment to “plan for and make reasonable adjustments to the assessment and interview process”. There was not any evidence before the tribunal to indicate that such a step could not be taken.

- (15) The respondent is therefore in breach of two of its undertakings under the Disability Confidence Scheme and it, at the very least, knew or ought to have known that the claimant was disabled and his disability was liable to place him at a substantial disadvantage as compared to persons without a disability.
- (16) The claimant did not request any specific adjustments. The duty to make reasonable adjustments falls on the employer. The onus is not on the employee to identify the specific reasonable adjustment but clearly if an employee can make suggestions it may strengthen his claim if such are deemed reasonable adjustments and have not been made.
- (17) The reasonable adjustments sought by the claimant are; that he should not have had to take the SST; but even if he had his score should not have been used to stop his application from proceeding to the Skype interview stage. The respondent insisted throughout that the SST was part of the minimum criteria and that the claimant had to take it. It did not offer to the claimant the opportunity to progress to the next stage without sitting SST nor did it propose any adjustments to the format of the SST.
- (18) It is clear the respondent could have made the reasonable adjustments of not requiring the claimant to sit the SST or not using the score against him if he sat it. Dr Linley accepted that this was a possibility depending on the nature of the ASD suffered by the candidate. In addition, as the subsequent Skype interview tested the same competences, the respondent would not have been prejudiced in securing candidates with the competences required for its job.
- (19) The tribunal is satisfied that the duty to make reasonable adjustments is engaged and that the respondent was under a duty to take such steps as are reasonable to prevent the PCP causing a substantial disadvantage to the claimant.
- (20) The duty to make reasonable adjustment applies to all stages of the process and the respondent failed to discharge that duty before the Skype interview stage. The respondent did not make any attempt proactively to offer or make reasonable adjustments for the claimant. Indeed, by reason of the process used by the respondent, even if the claimant had set out in detail in the Diversity Section the nature of his disability and proposed adjustments, the Graduate Recruitment Team would have been unaware of that. The application form proper merely asks if a candidate is disabled and does not seek further information.
- (21) The respondent's adviser from Capp, Ms Nitu 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 involves and any reasonable adjustments they need. The respondent did not

do that. Ms Goodrum says she was unaware of that. But even after she became aware of it, on 4 April 2017, she did not carry it out. It is interesting to note that the recommended approach from Ms Nitu is essentially the approach used by the recruiter after the SST stage and to prepare for the next stage. It is difficult to understand why the respondent would have a conversation about reasonable adjustments with a candidate at the Skype stage and not the SST stage. Indeed the internal correspondence suggests an unwillingness to carry out Ms Nitu's recommendation on the part of Ms Goodrum and her superior Mr Ranasinghe.

- (22) Ms Nitu also raised the possibility of bypassing the test if the adjustments necessary cannot be implemented. Again the correspondence suggests an unwillingness by the respondent to consider this as an option.
- (23) Ms Nitu gave a third piece of advice that if the conversation recommended by Capp at the outset did not take place, she highly recommended that the claimant is encouraged to share his details of how his condition is impacting him so that an evaluation can be made if there are grounds for adjustments to the assessment.
- (24) The respondent did not carry out this recommendation. Rather it restricted its request to the claimant to identify the reasonable adjustments rather than identify his condition and how it impacts on him.
- (25) The tribunal is satisfied that the reasonable adjustments proposed; that the claimant not take the SST or that if he did its score did not count against him, would have removed the substantial disadvantage to the claimant at that stage of the process. The tribunal is further satisfied that this would not prejudice the respondent's ability to recruit suitable candidates with appropriate competences as the next stage Skype interview tests the same competences.
- (26) These reasonable adjustments are therefore not impractical nor was there any evidence before the tribunal that the financial or other costs would disrupt any of the respondent's activities nor that the respondent lacked the financial resources nor that the respondent did not have available to it financial or other assistance with which to make such reasonable adjustments.
- (27) By not implementing the adjustments, which the tribunal considers would have prevented the substantial disadvantage to the claimant and were reasonable, the respondent was in breach of its duty to make reasonable adjustments. The respondent has therefore committed an act of disability discrimination from 14 March 2017.
- (28) The tribunal is satisfied that how the respondent conducted this recruitment campaign, as set out above, and how it impacted on the claimant, amounts to less favourable treatment of the claimant as compared to persons who do not have the claimant's disability and this was on the grounds of his disability.
- (29) Even if the tribunal were not correct in concluding that this was direct disability discrimination, the claimant can rely on Section 17A(1c) of the

Disability Discrimination Act 1995, as amended. Arising from the findings of fact the tribunal could conclude that the respondent had acted unlawfully under the Act, in the absence of an adequate explanation, thereby transferring to the respondent the burden of proving that it did not so act. The respondent has not provided an adequate explanation, specifically why knowledge of the claimant's disability could not have been made known to the Graduate Recruitment Team or why the recommendations of Capp were not implemented at all, or at least from 4 April 2017. In the absence of an adequate explanation the tribunal finds the respondent guilty of direct disability discrimination.

REMEDY

- (30) In light of the impact on the claimant of this act of discrimination the tribunal thinks that the appropriate level of compensation for the injury to feelings falls within the middle band of **Vento** and it measures it at £12,500.00.
- (31) Where a tribunal makes an award for injury to feelings it is obliged to consider making an award of interest from the date of the first act of discrimination, 14 March 2017, to the calculation date, 16 October 2018.
- (32) There was not any argument made to the tribunal as to why interest should not be awarded or the period of interest varied nor did anything emerge in the course of the evidence that amounted to exceptional circumstances that would enable the tribunal to conclude that serious injustice would be caused if an award of interest was made. Accordingly, the tribunal makes an award of interest on £12,500.00 which it calculates at £1,400.00.
- (33) The tribunal accepts that the claimant lost a chance of appointment to the Graduate Programme. In the absence of any evidence to the contrary it accepts that the percentage chance of appointment is 22%.
- (34) The respondent did not challenge the figures produced by the claimant as to the quantum of loss. It allows a future loss of 12 months. The value of the claimant's loss of a chance is 22% of £20,630.13 which the tribunal calculates at £4,538.63.

This is a relevant decision for the purposes of the Industrial Tribunals (Interest) Order (Northern Ireland) 1990 and the Industrial Tribunals Interest in Awards in Sex and Disability Discrimination cases (Regulations) (Northern Ireland) 1996.

Employment Judge:

Date and place of hearing: 5, 6, 7, 8, 9 and 14 March 2018, Belfast.

Date decision recorded in register and issued to parties: