

Appeal No. UKEAT/0302/16/RN

EMPLOYMENT APPEAL TRIBUNAL
FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 28 March 2017

Before

THE HONOURABLE MR JUSTICE KERR

BARONESS DRAKE OF SHENE

MR P GAMMON MBE

THE GOVERNMENT LEGAL SERVICE

APPELLANT

MS T BROOKES

RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant

MR NIAZI FETTO
(of Counsel)
Instructed by:
Government Legal Department
One Kemble Street
London
WC2B 4TS

For the Respondent

MS TERRI BROOKES
(The Respondent in Person)

SUMMARY

DISABILITY DISCRIMINATION - Disability related discrimination

DISABILITY DISCRIMINATION - Reasonable adjustments

DISABILITY DISCRIMINATION - Justification

There was no error of law in the Tribunal's decision that the Claimant, who has Asperger's syndrome, was discriminated against by being required to sit a multiple choice "Situational Judgment Test" as the first stage in a competitive recruitment process for lawyers wishing to join the Respondent.

The Tribunal's decisions that the Respondent had indirectly discriminated against the Claimant, had failed to comply with the duty to make reasonable adjustments and had treated her unfavourably because of something arising in consequence of her disability, were unassailable and correct in law.

A THE HONOURABLE MR JUSTICE KERR

B 1. This appeal proceeds by permission of Wilkie J. The case is about whether the Employment Tribunal was wrong in law to find that the Claimant, who has Asperger's syndrome, was discriminated against by being required to sit a multiple choice Situational Judgment Test (SJT), as the first stage in a fiendishly competitive recruitment process for lawyers wishing to join the Respondent, the Government Legal Service.

C 2. SJT, being a multiple choice test, is efficient in the sense that there are considered to be objectively right or wrong answers to each multiple choice question, which means marking can be done by a computer without human intervention or judgment. But the Claimant argued that because of her Asperger's she was unlawfully disadvantaged by the multiple choice method of testing and that the Respondent should have granted her request to be allowed to answer the questions in the SJT in the form of short narrative written answers.

D 3. The Respondent argued before the Employment Tribunal that it was justified in refusing the request. It argued that the case was not made out because the Claimant could not show that the testing method put those with Asperger's or other forms of Autistic Spectrum Condition (ASC), nor the Claimant herself, at a particular disadvantage; and because even if it did, the requirement was objectively justified as a proportionate means of achieving the legitimate aim of recruiting the best candidates by testing their ability to make effective decisions.

E 4. The claim was put as one of indirect discrimination (section 19 of the **Equality Act 2010** (EqA)) and of discrimination by failure to make the reasonable adjustment (section 20) of permitting short written answers to questions instead of multiple choice questions; that much is

A agreed. At one stage there was a dispute about whether there was also a third claim, for
discrimination under section 15 **EqA** because of something arising in consequence of the
Claimant's disability. The Respondent now accepts that the Employment Tribunal has made an
B unchallengeable finding that this claim was before the Employment Tribunal and was not
abandoned.

C 5. The appeal is against the findings of the Tribunal, presided over by Employment Judge
Barrowclough sitting with Messrs Quinn and Rowe at the East London Hearing Centre in May
2016, followed by a Reserved Decision dated 27 June 2016 and sent to the parties the next day;
and a refusal to reconsider that Decision, recorded in a letter dated 22 August 2016, on the
D ground that the request for reconsideration was an attempt to reargue the case on the evidence
but "with different emphasis".

E 6. Broadly speaking, the Claimant submits that this appeal also is an attempt to do that.
The Respondent, on the other hand - the Appellant in the appeal - criticises the findings of the
Employment Tribunal as perverse, or unsupported by or contrary to the evidence, both expert
and lay.

F 7. The Employment Tribunal found that the Respondent had indirectly discriminated
against the Claimant, had failed to comply with the duty to make reasonable adjustments and
G had treated her unfavourably because of something arising in consequence of her disability.
The Tribunal ordered the Respondent to pay compensation to the Claimant totalling £860 and
made a recommendation, under section 124(2) **EqA**, that the Respondent issue a written
H apology to the Claimant and review its procedures in relation to people with a disability
applying for employment, with a view to greater flexibility in the psychometric testing regime.

A 8. The Claimant is a now 33 year old law graduate from Sussex University. She sat the law course from 2008 to 2012, taking a year out when she gave birth to her daughter. She was diagnosed with Asperger's in 2009. When she sat her finals in 2012, adjustments were made. She achieved a Class 2:2 degree.

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9. The Respondent is a very large national legal organisation serving the legal needs of the government. In 2010, it introduced psychometric testing as part of its recruitment practices. Unlike many private sector legal organisations, it is prepared to recruit candidates with a 2:2 degree, but competition for jobs is intense: several thousand applications for about 35 places each year.

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10. The Claimant gave evidence on her own behalf, represented herself below and does so in this appeal. The Respondent's witnesses were two civil servants, and a consultant who had inherited responsibility for the recruitment process after the events leading to this claim. There was also evidence from two psychiatrists: one called by the Claimant, Professor Critchley, who had treated her since her university days; and Dr Rajpal, called by the Respondent, who had not met the Claimant but had been shown relevant documents. Both are experts in ASC and Asperger's.

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11. The outline facts leading to the claim were these. In May 2015, the timetable for the trainee solicitor application process was published. On 26 June 2015, the Claimant contacted the recruitment team and requested adjustments on the ground of, among other things, her Asperger's syndrome. On 30 June 2015, she was told that an alternative test format was not available but that time allowances were, as well as a guaranteed interview scheme but only for those who passed all three required tests; that is, the SJT and two other subsequent tests.

A 12. On 1 July 2015, the application process opened. On 28 and 29 July, the Claimant was in
contact with the Respondent, expressing concern about and complaining of a discriminatory
B impact on her as a result of the psychometric testing. She took part in the SJT, which does not
have a time limit, and submitted it online on 30 July 2015. She was informed on 4 August 2015
that she had not passed the SJT.

C 13. The Employment Tribunal, after making its findings of fact and setting out the relevant
statutory provisions, dealt with the issues and its reasoning and conclusions at paragraphs 23
and following in its Decision. It noted that the disability, namely Asperger's, was accepted by
the Respondent, as was its knowledge of that disability at the relevant time; and that the
D provision, criterion or practice ("PCP") was also agreed, namely a requirement for all
applicants in the trainee recruitment scheme to take and pass the online SJT.

E 14. It was agreed that the Claimant scored 12 points out of an apparently possible 22, below
the pass mark which, after the testing process had been completed, was set at 14. The Tribunal
went on to consider the question of whether the PCP put people such as the Claimant, as a
group, at a disadvantage compared to those who did not have Asperger's; and concluded that it
F did. There is no appeal against that finding. The Tribunal went on to find that the PCP put the
Claimant, in particular, at such a disadvantage. That finding is challenged.

G 15. The Tribunal then considered the issue of justification and concluded that while the PCP
served a legitimate aim - in that the SJT was there to test a fundamental competency required of
GLS trainees, namely the ability to make effective decisions - the means of achieving that aim
were not proportionate to it; and accordingly, the complaint of indirect discrimination
H succeeded. The claim in respect of reasonable adjustments also succeeded on similar

A reasoning. Finally, the claim for discrimination because of something arising in consequence of a disability, the Tribunal found, stood or fell with the indirect discrimination claim, and accordingly that succeeded as well.

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C 16. There were originally three grounds of appeal, but the Respondent accepts that the third ground - that there was no proper basis for deciding the section 15 claim in the Claimant's favour - stands or falls with the first or second grounds. We therefore need not deal separately with the third ground, but we deal now with the first and second grounds of this appeal.

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E 17. The first ground of appeal is that the finding that the PCP - the requirement to take and pass the online SJT - placed the Claimant at a particular disadvantage (see section 19(2)(c)) compared to persons who did not share her disability, and/or that she was put at a substantial disadvantage in comparison with a person who is not disabled (see section 20), was unavailable to the Tribunal on the evidence and perverse.

F 18. Mr Fetto, for the Respondent, made the following main submissions in support of his first ground. They were set out in considerable detail in a lengthy skeleton argument and amounted, in summary, to the following:

G (1) The Tribunal itself said the medical evidence was "inconclusive" and should have decided that such "inconclusive" medical evidence could not properly ground a finding that the Claimant was put by the PCP at a particular disadvantage compared to non-disabled candidates.

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- A**
- (2) Mr Fetto took us to passages in the medical evidence. He submitted, in effect, that the Employment Tribunal had illegitimately reasoned from the general to the particular and had wrongly found that, because people with Asperger's generally
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- may suffer disadvantage from such a PCP, the Claimant herself did; whereas, not all do; and some people with Asperger's actually do better using the multiple choice format of the psychometric tests.
- C**
- (3) He submitted that the Tribunal had impermissibly speculated on the issue of particular disadvantage by reference to its assessment of the Claimant in the Tribunal; it "substituted its own assessment for the SJT", in Mr Fetto's phrase.
- D**
- (4) The Tribunal did not properly assess the statistical evidence, which was based on a very small sample of self-declared candidates with ASC, overlooking the point that such evidence may not assist when the sample of people is very small.
- E**
- (5) The Employment Tribunal, on the other hand, rejected statistical evidence that favoured the Respondent, to which it ought to have had regard. That statistical evidence supported the proposition that no other candidate professing to have
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- ASC or Asperger's had requested an alternative test method, as the Claimant had.
- G**
- (6) The Tribunal had wrongly reasoned from the absence of an alternative reason for the Claimant's failure to pass the test, that the failure was likely to be attributable to her disability. She scored 12 out of a possible 22, with the pass mark being set
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- after the competition at 14.

A 19. In our judgment, eloquently though they were advanced by Mr Fetto, there is no merit in
these arguments. The reasoning of the Employment Tribunal was cogent and properly
B supported the conclusion it reached: that the PCP did place the Claimant at a particular
disadvantage, by comparison with non-disabled candidates who did not have Asperger's. The
Tribunal's reasoning was along the following lines:

C (1) The Claimant's disability, the Respondent's knowledge of it and the application
to her of the PCP were all accepted (see paragraphs 23 and 24).

D (2) The Tribunal found that there was a "group disadvantage" within section
19(2)(b), contrary to the Respondent's then submission (see paragraphs 25 to
28), against which there is no appeal.

E (3) The Employment Tribunal then turned at paragraph 29 to the issue of personal
disadvantage to the Claimant. It began by noting Professor Critchley's view that
some people with autism may still perform such tests well, on account of
typically logical thinking, and Dr Rajpal's view that it was not possible for him
F to comment specifically on the position of the Claimant as he had not met her.

G (4) The Tribunal went on to find, however, that the PCP did put the Claimant at a
personal disadvantage and relied on the following points:

H (a) that the Claimant fitted the profile of those who would ordinarily be
disadvantaged according to both experts, albeit that not all would (she

- A** lacked social imagination and would have difficulties in imaginative and counter-factual reasoning in hypothetical scenarios);
- B** (b) she is “intelligent, resourceful and capable” and was clearly committed to a career with the Respondent if she could achieve that;
- C** (c) she had experience as a paralegal, which would have given her experience of practical decision making;
- D** (d) there was no alternative explanation advanced as to why she did not perform better in the SJT than her mark of 12;
- E** (e) that others had not requested the adjustment did not mean that she was not personally disadvantaged nor would this factor tend to that conclusion, since everyone is different and the same disability may affect different people in different ways;
- F** (f) of the small number of those who had in the process declared themselves as having ASC or Asperger’s, only one had passed the test;
- G** (g) the Claimant had been considered by Professor Critchley as an individual at earlier stages in her academic career; he had focused on her personal position and had recommended specific adjustments; those adjustments had been made, and that was relevant to her position as an individual;
- H**

- A** (h) Professor Critchley had specifically said at an earlier stage that ambiguous lines of questioning, for which explicit examiner actions had not been given, would be unsuitable and that exams without reference materials
- B** would not be suitable; and
- (i) the Claimant had been found to require adjustments in a course that she was undertaking at the London Metropolitan University (LMU) as at
- C** January 2016, as was clear from a document that was before the Tribunal;
- (j) it was made plain that LMU, for its part, accepted the proposition that
- D** where applicable and appropriate, multiple choice questions should be replaced with questions requiring a short written answer.

E 20. In our respectful view, that reasoning was impeccable and beyond reproach. The Employment Tribunal was entitled to reject the Respondent's case on individual disadvantage, just as it had rejected the case on group disadvantage. The Claimant is correct to submit that there was evidence to support the finding on the latter issue. We have just set out that evidence,

F and so there is nothing in ground one.

G 21. The Tribunal was entitled to include in its assessment the features of the Claimant's demeanour, background and experience that it considered relevant to and probative of whether or not the Claimant had suffered personal disadvantage from the PCP, as compared to those who did not have her condition.

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A 22. The Tribunal was presented with what appeared to be a capable young woman who, with the benefit of adjustments, had obtained a law degree and had come close to reaching the required mark of 14 in the SJT, but had not quite managed it. The Tribunal was right to ask
B itself why, and was entitled to find that a likely explanation could be found in the fact that she had Asperger's, and the additional difficulty that would place her under due to the multiple choice format of the SJT.

C 23. The argument about the medical evidence being "inconclusive" arises from paragraph 38 of the Decision, dealing with the issue of "substantial disadvantage" under section 20 of the reasonable adjustments claim. The Tribunal rejected the submission of Ms Gray, who appeared
D below for the Respondent, that the "inconclusive" nature of the medical evidence meant that the Claimant had not established that she failed the SJT because of her disability.

E 24. The Tribunal said at paragraph 38 that it disagreed for the same reasons as previously set out in paragraphs 29 and 30, to which we have already referred above. The Tribunal referred to evidence from Dr Rajpal, who said in terms that the Claimant:

F "would have been less able than somebody who does not [have] Asperger's to do this [SJT] test. This test would have placed people with Asperger's at a disadvantage."

25. Mr Fetto said that was taken out of context. We do not agree. It was merely the Tribunal saying that the Respondent's own expert did not rule out what the Claimant was
G arguing for. The Tribunal then added at the end of paragraph 38:

H "38. ... Secondly, we think that in the circumstances of this case it is inevitable and inescapable that the medical evidence should be inconclusive; and that it is not really possible to say with any degree of certainty why the Claimant (or indeed many other candidates) did not pass the test, beyond the simplistic response that she chose the wrong options. On balance and in the light of all the evidence we heard and read about the Claimant and others with ASC or Asperger's, and since no other reason has been identified for why she failed, we are persuaded that the reason that the Claimant did not pass the SJT is because of her Asperger's."

A 26. That reasoning is not open to criticism. The reference to “inconclusive” medical
evidence meant only that the medical evidence was nuanced and not all one way. It did not
mean that the Tribunal was disabled from evaluating it in the light of other evidence, including
B that already assessed, and reaching a conclusion on the basis of that other evidence taken
together with the medical evidence.

C 27. The Tribunal did not need to go as far as it did in finding that she failed the test because
of her Asperger’s on the balance of probabilities - it would have been sufficient to find that the
PCP made it substantially more difficult to pass - but the validity of the reasoning is not
affected by the fact that the Tribunal went further by making the finding that on the balance of
D probabilities, the PCP made the difference between her passing and failing to obtain a mark of
14.

E 28. In the second ground, the Respondent attacks the finding of the Tribunal that the
requirement to sit the SJT in the form of multiple choice questions was unjustified both for the
purposes of section 19(2)(d) and for the purposes of section 20(3) **EqA**. The submission of Mr
Fetto was that as a general rule, not of law but of practice, where a test of competency is
F “commensurate with”, i.e. inextricably linked with, the competency itself, it should not be
treated as unjustified and should not require adjustment.

G 29. He submitted as follows in his skeleton argument (paragraph 22):

“22. As a matter of principle:

a. Where a test for competency is commensurate with that competency, it should generally be treated as justified, and as requiring no adjustment.

b. An employer should not have to adapt a test to the point where it no longer effectively tests whether someone would be able to do the job.”

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A 30. He cited in support of those propositions the decision of an Employment Tribunal at
London Central, Employment Judge Pearl sitting alone, in **Lowe v Cabinet Office**
2203187/2010; **Burke v College of Law** [2011] EqLR 454, a decision of this Appeal Tribunal;
B and **Wade v Sheffield Hallam University** [2013] EqLR 951, another decision of this Appeal
Tribunal.

C 31. The Respondent relied on evidence in witness statements that were before the Tribunal
from Mr Kavanagh and Ms McGibbon. Mr Kavanagh was a recent addition to the team at the
company called TMB, which, acting as a consultancy, had devised the SJT and other
D instruments of recruitment used in the recruitment process. Ms McGibbon had worked for the
Respondent for many years and had responsibility for administering the recruitment process.
Mr Fetto relied on evidence from Mr Kavanagh that there was a:

E **“15. ... continuous link between the answers given and the standards of performance in role of
the incumbent trainees who provided the answers, [such that it was] possible to say for certain
with the multiple choice answer format, that an applicant has or has not demonstrated the
competency being tested.”**

F 32. Ms McGibbon similarly expressed the view in her witness statement that the SJT
multiple choice format was particularly useful. The evidence of both witnesses was to the
effect that, in their opinion and in their experience, a written answer narrative format would not
be as useful a tool because, among other things, it would require the application of subjective
G human judgment. Mr Kavanagh also said that it would be expensive and would cause logistical
difficulties.

H 33. Mr Fetto criticised the finding that the refusal of the Claimant’s request was not a
proportionate means of achieving the agreed legitimate aim. As we understood his
submissions, he was not saying that those with Asperger’s would be unable to meet the relevant

A competency, namely being able to make decisions effectively; but that, rather, those with Asperger's would only be able to make decisions effectively, as the competency required, if they could also manage the multiple choice format of the test.

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34. He submitted, in effect, that the Employment Tribunal should have treated this case as a case of the type personified by the facts in Lowe, where the method of testing and the competency itself were found to be inseparable and effectively the same thing, so that the one
C could not be treated as distinct from the other. Specifically, he also submitted that the Employment Tribunal took account of an irrelevant consideration, namely that unsuitable candidates could be "weeded out" at a later stage in the process.

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35. The difficulty we have with Mr Fetto's submissions on this ground of his appeal, is that the case he says that the Employment Tribunal should have accepted, was properly rejected by
E it without any error of law or flaw in the reasoning process. The Employment Tribunal reasoned thus, at paragraph 31 and following of its Decision.

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36. It summarised the submissions of Ms Gray for the Respondent below, which were along similar lines to what was set out in the witness statements of Ms McGibbon and Mr Kavanagh, to which we have just alluded. The Tribunal then summarised, at paragraph 32, the Claimant's short answer: that while she did not dispute the need for candidates' decision making powers to
G be properly measured, that could be done without scrapping or fundamentally modifying the SJT. It could be done by permitting a small number of persons such as herself who requested it, to perform the SJT in a different format, using narrative short written answers.

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A 37. The Tribunal reasoned at paragraph 33 as follows. It stated that it rejected the Respondent’s submission that the difficulties or handicaps of those with ASC or Asperger’s:

“... go beyond the method of assessment and that they lack the necessary analytical abilities, judgement, and the capacity to deal with ambiguity in practice ...”

B 38. Mr Fetto said that it was not open to them to reject that submission, but we consider that it was. They went on to give good reasons why they rejected it. Those are set out in the remainder of paragraph 33 and the following paragraphs. They pointed to the absence of any **C** direct support in the evidence of either expert for the Respondent’s proposition. They rejected the suggestion in the Respondent’s witness evidence that working as a government lawyer was “unique”; whilst it was clearly challenging, so is legal work in other organisations, such as **D** commercial ones.

39. They performed properly the balancing exercise required to determine an issue of proportionality of this kind. At paragraph 34, they set out the factors on the employer’s side of **E** the balance, accepting that it would:

“... not be ideal to have to run two such different methods of assessment alongside or in parallel, and that inevitably there would be difficulties in comparing candidates’ responses/ answers, and potentially a degree of subjectivity and/or lack of objectivity would be present. ...”

F 40. They then went on to balance that against the factors on the employee’s side of the balance; and they properly decided that those factors outweighed the points on the employer’s **G** side of the balance. In conclusion, at the end of paragraph 34 of the Decision, they said as follows:

“... it is not asserted on the Respondent’s behalf (and there was no evidence that) there was insufficient time from when the Claimant first raised [her] request for an alternative method of assessment on 26 June 2015 up to the date the competition closed (31 July) within which to make the requested changes; and even had that been the case, the Claimant had indicated that she was prepared to be considered for selection in June 2017.”

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A 41. Mr Fetto criticised that finding at the end of paragraph 34, pointing out that Mr Kavanagh's evidence had included the proposition that it would have taken too long to organise the adjustments that the Claimant had sought in 2015.

B 42. It is true that Mr Kavanagh's witness statement did make such an assertion, but that is of no consequence because of the further findings of the Tribunal at paragraphs 40 to 42, including in particular the finding at paragraph 42 that the Respondent's refusal to agree to amend the SJT was "on principle rather than on practical grounds".

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D 43. Indeed, in those paragraphs the Tribunal engaged in further discussion about the issue of proportionality, in the context of the justification defence erected in opposition to the reasonable adjustments part of the claim. That discussion includes specifically the manner in which, at paragraph 41, the Tribunal distinguished the Lowe case. The reasoning is similar to that deployed in support of the conclusion already referred to in the indirect discrimination claim; and the conclusion is just as much open to the Tribunal in the latter context of the reasonable adjustments claim.

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F 44. There was nothing wrong with that reasoning, nor the conclusion to which it properly led. We agree with the Claimant that there was evidence to support the findings made and with the Employment Judge in his Reconsideration Decision that the Respondent was attempting to reargue the factual case, then under the guise of a review application and, we consider, now under the guise of an appeal on a point of law. The appeal raises no point of law and is dismissed.

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POSTSCRIPT

45. It is suggested, in an application for permission to appeal made by Mr Fetto, that there is a clear perversity challenge that this Appeal Tribunal has failed to unmask in the Judgment just given; in that the Tribunal was perverse to reject the Respondent's submission below that the difficulties and handicaps of those with Asperger's go beyond the method of assessment and they lack the necessary analytical abilities, judgment and capacity to deal with ambiguity; i.e. the submission rejected by the Tribunal.

46. If we have understood his application correctly, Mr Fetto contends that this Appeal Tribunal must have been wrong not to overturn the rejection of that proposition by the Tribunal below. We see no reason why it was not open to the Tribunal to reject that proposition on the evidence, for the reasons given in the main Judgment. Permission to appeal is refused.