Archibald v. Fife Council  
[2004] UKHL 32

**Country:** United Kingdom  
**Region:** Europe  
**Year:** 2004  
**Court:** House of Lords  
**Health Topics:** Disabilities  
**Human Rights:** Freedom from discrimination, Right to work

**Facts**

Susan Archibald claimed that her employer, Fife Council, had discriminated against her on the grounds of her disability under the Disability Discrimination Act 1995 (the Act).

Fife Council had employed Ms. Archibald as a road sweeper since 1997. She underwent a minor surgery in April 1999, which due to a rare complication left her virtually unable to walk. This condition meant that she would be unable to continue her work as a sweeper, but she was capable of and willing to do sedentary work.

Fife Council arranged for Ms. Archibald to be trained in the skills required for an office job. Afterward, they assessed that she was “more than capable of carrying out work in an office environment.” She then went on to apply to over 100 posts within the council but was unable to obtain employment, as these posts were all slightly above the level of her previous employment. Eventually, as she was still unable to return to work as a road sweeper, and the redeployment procedure had been exhausted, she was dismissed on grounds of incapacity.

Ms. Archibald complained to the employment tribunal of disability discrimination. She contended that the council was in breach of s 6(1)(a) of the Act, which provided that it was the duty of the employer to take such steps as was reasonable, in all the circumstances of the case, to prevent any arrangements made by or on behalf of an employer from placing a disabled person at a substantial disadvantage in comparison with persons who were not disabled. Section 6(3) listed such measures, including transferring an employee to fill an existing vacancy (s 6(3)(c)). Section 6(7) of the Act provided that subject to the provisions of s 6, nothing in that part of the Act was to be taken to require an employer to treat a disabled person more favourably than he treated or would treat others.

The employment tribunal dismissed Ms. Archibald’s claim on the basis of s 6(7). Ms. Archibald then appealed to the House of Lords.

**Decision and Reasoning**

The Court found that the employment tribunal was incorrect in its assessment of the scope of s 6. It held that it was open to an employer to ameliorate a disabled employees disadvantage under ss 6(1)(a) and 6(3)(c) by transferring the employee upwards, as well as sideways or downwards, or to transfer the employee without placing them through a competitive recruitment process. In this case, where there had been no equal or lower grade job to which the employee could be transferred, transferring Ms. Archibald to a sedentary position which she was qualified to fill was among the steps which may have been reasonable in all the circumstances for the council to take once Ms. Archibald could no longer undertake the work in her previous position.

Further, to the extent that the duty to make reasonable adjustments required it, an employer was not only permitted but obliged to treat a disabled person more favourably than others. Section 6(7), which provided that an employer was not required to treat a disabled person more favourably than others, was prefaced by the words “subject to the provisions of this section.” The employment tribunal had therefore erred in disposing of the case on these grounds without considering whether an upwards transfer that bypassed the recruitment process might have been reasonable.

The House of Lords sent the case back to the employment tribunal to assess on the facts whether or not transferring Ms. Archibald would be a reasonable measure as required by s 6(1)(a). The appeal was allowed.
“The duty which rested on the council under section 6(1) is described in the side note to section 6 as a duty to make adjustments. But it is not simply a duty to make adjustments. The making of adjustments is not an end in itself. The end is reached when the disabled person is no longer at a substantial disadvantage, in comparison with persons who are not disabled, by reason of any arrangements made by or on behalf of the employer or any physical features of premises which the employer occupies.” Para. 15.

“The tribunal did not consider whether the policy requirement ought to have been adjusted in Mrs Archibald's case to remove the disadvantage which she faced due to the fact that she was at risk of being dismissed because she was not longer able to do her job as a road sweeper. That disadvantage could have been removed by transferring her to a sedentary post for which she was suitable from her previous post as a manual labourer. If that had been done, her disability would no longer have exposed her to the risk of dismissal on the ground that she was not physically able to do the job that she was employed to do.” Para. 20.

"None of this was considered by the Employment Tribunal, which disposed of the case on a ground which was clearly wrong. They did not address the question of reasonableness. They did address the question of justification under section 5(2)(b), but did so without the benefit of the Court of Appeal's decision in Collins v National Theatre [2004] EWCA Civ 144 that the justification must be something other than the circumstances which are taken into account for the purpose of section 6(1). As the council's redeployment policy is an important part of those circumstances, it should not be independently relevant as a justification under section 5(2)(b).” Para. 71.