HOUSE OF LORDS SESSION 2003-04
[2004] UKHL 32

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Archibald (Appellant)

v.

Fife Council (Respondents) (Scotland)

ON

THURSDAY 1 JULY 2004

The Appellate Committee comprised:

Lord Nicholls of Birkenhead

Lord Hope of Craighead

Lord Rodger of Earlsferry

Baroness Hale of Richmond

Lord Brown of Eaton-under-Heywood

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LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hope of Craighead, Lord Rodger of Earlsferry and Baroness Hale of Richmond. I agree that for the reasons they give, which in all essential respects are to the same effect, this appeal should be allowed.

LORD HOPE OF CRAIGHEAD

My Lords,

2. I have had the advantage of reading in draft the speech of my noble and learned friend, Baroness Hale of Richmond. Subject to the following observations, I agree with it. I too would allow the appeal and remit the case to the Employment Tribunal.

3. Mrs Archibald's complaint of unfair dismissal and of discrimination under the Disability Discrimination Act 1995 was presented in her application to the employment tribunal in these terms:

> "I feel that I was unfairly dismissed by Fife Council with effect from 12 March 2001 on the grounds of capability. As I am a disabled person in accordance with the terms of the Disability Discrimination Act 1995, I am of the opinion that I have been discriminated against by the council in the way that they sought redeployment opportunities for me."

4. I agree with my noble and learned friend Lord Rodger of Earlsferry that it is important, before examining the discrimination issue and to put it into its correct context, to identify the correct starting point. Section 8(1)(a) of the 1995 Act provides that there may be presented to an employment tribunal a complaint by any person that another person has discriminated against him in a way that is unlawful under Part II of the Act. Section 8(2) sets out the remedies that the tribunal may grant to the complainant if it finds that a complaint presented to it under the section is well founded.

5. The circumstances in which it is unlawful for an employer to discriminate against an employed person are set out in section 4(1) and (2) of the Act. Section 4(1) deals with discrimination by an employer against a disabled person in regard to offers of employment. Section 4(2) deals with discrimination by an employer against a disabled person whom he employs. The appellant was already in the employment of the council when she became disabled. So the basis for her complaint of discrimination must be found in section 4(2). Section 4(2)(d) provides that it is unlawful for a

person to discriminate against a disabled person whom he employs by dismissing him.

6. The tribunal's approach to the complaint under the 1995 Act is indicated by the following passage which appears at p 8 of the extended reasons for their decision:

> "As we understood the applicant's position, she did not seek to maintain that the dismissal itself amounted to unlawful discrimination in terms of section 4 of the 1995 Act but rather that in terms of section 5 of that Act discrimination had occurred here which was not justified and that, more particularly, the respondents had failed in their duty to make reasonable adjustments in terms of section 6 of the 1995 Act."

7. It is important however to appreciate that the only function of section 5 is to define what is meant by the word "discriminate" where it appears in section 4 of the Act. Section 5 is not, of course, unimportant. But it is to section 4 that one must go first in order to discover whether the employer's act was an unlawful act which entitled the complainant to apply to the employment tribunal for a remedy. The first step, then, is to identify the act which is said to have been unlawful. As I understand Mrs Archibald's case, it is the act which the council took on 12 March 2001 when it dismissed her from its employment because she was physically unable to do her job as a road sweeper.

8. An act of dismissal is only unlawful for the purposes of the 1995 Act if the employer discriminates against the disabled person by doing so. This proposition directs attention to sections 5 and 6 of the Act which Lady Hale has analysed. The steps by which the heart of the complaint in this case is reached are to be found in subsections (1), (3) and (5) of section 5.

9. At first sight, since the heart of the complaint lies in section 6, this appears to be a case of discrimination under section 5(2) which provides that an employer "also" discriminates against a disabled person if he fails to comply with a section 6 duty imposed on him in relation to the disabled person and he cannot show that his failure to comply with that duty is justified. But this was not a case about any physical features of premises occupied by the employer: see section 6(1)(b). And section 6(2) provides that section 6(1)(a), which refers to any arrangements made by or on behalf of an employer, applies only in relation to (a) arrangements for determining to whom employment should be offered - which is not this case - and

"(b) any term, condition or arrangements on which employment, promotion, a transfer, training or any other benefit is offered or afforded."

10. So the question is, in terms of section 5(1) read with section 5(3), whether the council can show that they were justified in dismissing Mrs Archibald for a reason related to her disability. The result of their dismissal of her on this ground was that, because of her disability, they treated her less favourably than they would have treated others in their employment who were not disabled from doing the job they were employed to do. They will not be able to show that their treatment of her was justified if they would not have been justified in dismissing her if they had complied with their duty under section 6 to make adjustments to prevent her disability having that effect: see section 5(3).

11. Mrs Archibald was employed by the council as a manual worker. It was an implied "condition" or an "arrangement" of her employment within the meaning of section 6(2)(b) that she should at all times be physically fit to do her job as a road sweeper. She met this requirement when she entered the council's employment on 6 May 1997. She underwent minor surgery in April 1999 as a result of which she became disabled. As a result she was no longer physically fit to do this job. This exposed her to another implied "condition" or "arrangement" of her employment, which was that if she was physically unable do the job she was employed to do she was liable to be dismissed.

12. Her disability placed her at a substantial disadvantage in comparison with others in the same employment who were not at risk of being dismissed on the ground that, because of disability, they were unable to do the job they were employed to do. These persons, a limited class, were her "comparators". There was nothing that the council could have done by way of adjustment to the manual labour job to cure that fact that she was unable to do that job due to her disability. But she was not so disadvantaged that she could not conceivably have been employed by them at all. If she had been given a job to do which she was physically able to do, the disadvantage which she was under in comparison with others in the same employment who were not at risk of being dismissed on the ground of disability would have been removed.

13. So the question comes to be whether there were steps which the council could have taken by way of adjustment to the conditions of her employment to remove the disadvantage which she was under because she was at risk of dismissal because she was unable to do the job she was employed to do because of her disability.

14. The council, very commendably, went to considerable lengths to help her find an alternative position within their own organisation for which she was suited which did not involve the use of manual labour. Section 6(3)(c) shows that this kind of adjustment was within the scope of the duty which the council were under in these circumstances. This paragraph includes, as an example of the steps that may be taken by way of adjustment, "transferring" the disabled person to fill another vacancy. A purposive meaning is to be given to the word "transferring" in this context. It is to be borne in mind that it is, after all, only an example. It is not be read as restricting the adjustment which is contemplated to a post on the same pay grade or at the same level of seniority.

15. 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.

16. As the determination of the employment tribunal makes clear, a substantial number of adjustments to the normal procedures were made in Mrs Archibald's case. Some of them involved positive discrimination in her favour, such as her automatic short listing for the available posts. This was within the scope of the duty, as it was necessary for the council to redress the position of disadvantage that she was in due to her disability. The crucial question is whether the council should have taken one more step and simply transferred her to a sedentary job for which she was suitable, or at least dispensed in her case with the need for competitive interviews.

17. The requirement for competitive interviews seems to have had its origin in section 7(1)(b) of the Local Government and Housing Act 1989, which provides that every appointment of a person to a paid office or employment under a local authority in Scotland shall be made on merit. It is to be found in section 10 of the council's Attendance Management Guidelines for Managers, which deals with cases of long-term or short-term sickness absence, including those due to disability. It requires all other options to be considered before dismissal is resorted to. Paragraph 10.5 sets out the procedure which is to be followed where the person is being redeployed to another service. Where the post is of the same or a lower grade, there is no requirement for competitive interviews to determine the employee's suitability for the post which is on offer. Applicants are to be considered in competition with other applicants, but all that is needed for this purpose is a meeting between the employee and an appropriate manager. But where the

post is of a higher grade, "this should be advertised and competitive interviews held."

18. The employment tribunal did not explore the question whether it would have been reasonable for the council simply to have transferred Mrs Archibald to a sedentary job for which she was suitable or whether the council's policy requirement for a competitive interview should have been dispensed with in her case. This was because the tribunal overlooked the opening words of section 6(7) of the 1995 Act, which qualify the proposition that nothing in Part II of the Act is to be taken to require the employer to treat a disabled person more favourably that he treats or would treat others. These words provide that the subsection is subject to the provisions of section 6 itself.

19. This means that section 6(7) is subject to the duty to make adjustments in relation to people who are at a substantial disadvantage because they are disabled in comparison with persons who are not disabled: section 6(1). The performance of this duty may require the employer, when making adjustments, to treat a disabled person who is in this position more favourably to remove the disadvantage which is attributable to the disability. Section 7(1) of the Local Government and Housing Act 1989, in its turn, is qualified by section 7(2)(f) of that Act, to which the opening words of section 7(2) make it subject. In terms of section 7(2)(f), section 7(1)(b) is subject to sections 5 and 6 of the 1995 Act. The result is that a disabled person can lawfully be transferred to a post which she is physically able to do without being at risk of dismissal due to her disability, provided the taking of this step is a reasonable thing for the employer to do in all the circumstances.

20. 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.

21. This is the point which lies at the centre of the issues that the tribunal will need to consider when the case is remitted to them and they are examining the steps that the council could reasonably have taken in all the circumstances by way of adjustment to the arrangements which exposed Mrs Archibald to the risk of dismissal on the ground of her disability.

LORD RODGER OF EARLSFERRY

My Lords,

22. I have had the privilege of considering the speech of my noble and learned friend, Baroness Hale of Richmond, in draft. I agree with her that the appeal should be allowed, for substantially the same reasons as she gives. Since the issues are of considerable importance for the working of the legislation, it may be helpful, however, if I explain those reasons in my own words.

23. The appellant, Mrs Archibald, made a complaint to the employment tribunal against her employers, Fife Council. She complained of unfair dismissal and discrimination under the Disability Discrimination Act 1995 ("the Act"). Since the council admitted that she had been dismissed, the onus lay on them to establish the alleged reason for the dismissal, viz capability. This meant that the proceedings began with evidence from the council's witnesses who dealt largely with the steps taken to help Mrs Archibald to obtain another post with the council after she became unfit to carry out her duties as a road sweeper Manual Worker Grade 1. In the event the tribunal found that Mrs Archibald had indeed been dismissed because she had not been capable, on medical grounds, of carrying out her job. The tribunal also considered that the council's decision to dismiss her fell within the band of responses open to a reasonable employer. The tribunal therefore dismissed her complaint of unfair dismissal. Mrs Archibald did not appeal against this aspect of the tribunal's decision. That left her complaint of disability discrimination.

24. The Act does not make it unlawful to discriminate against a disabled person in all circumstances. Rather, it outlaws that kind of discrimination in various fields, including employment, which is covered in Part II. Even within that field, however, the Act outlaws only those kinds of discrimination that are set out in section 4. Section 4(1) makes it unlawful for an employer to discriminate in certain ways against a disabled person who applies for a job; similarly, section 4(2) makes it unlawful for him to discriminate in various ways against a disabled person whom he employs or has employed. See *Rhys-Harper v Relaxion Group plc* [2003] UKHL 33; [2003] ICR 867. As I emphasised, at pp 930H - 931A, para 210, under reference to Court of Appeal authority, disabled persons invoke the Act not to enforce their contractual rights against their employers but to enforce their statutory rights under section 4(1) and (2) not to suffer discrimination in the field of employment. The words of Peter Gibson LJ in *Hall v Woolston Hall Leisure Ltd* [2001] ICR 99, 113B - C, at para 46, apply as much to the Act as to the other anti-discrimination statutes: it is the discrimination that is the core of the complaint, the fact of employment and the dismissal being the particular factual circumstances which Parliament

has prescribed for the disability discrimination complaint to be capable of being made.

25. When can an employer be said to "discriminate" against a disabled person in terms of section 4(1) and (2)? The answer is to be found in section 5(1) and (2). So the reason for considering whether an employer has "discriminated against a disabled person" in terms of section 5(1) and (2) is simply to discover whether he has unlawfully "discriminated" against that disabled person in terms of either section 4(1) or (2). Only unlawful discrimination under section 4(1) or (2) entitles the disabled person to a remedy from the employment tribunal under section 8(2).

26. In the present proceedings Mrs Archibald complains that the council "discriminated" against her unlawfully in terms of section 4(2)(d) by dismissing her. Before the employment tribunal she said that, by dismissing her, the council had discriminated against her, for the purposes of that provision, in two ways. She alleged, firstly, in terms of section 5(1), that in dismissing her because she was unable to do her work as a road sweeper, due to her disability, the council had treated her less favourably than they would have treated others who could do their work. Secondly, under reference to section 5(2) she alleged that, in dismissing her, the council had failed to comply with a section 6 duty imposed on them to transfer her to a vacant post within their organisation without requiring her to undertake a competitive interview for the post.

27. It was common ground that Mrs Archibald was a disabled person in terms of the Act and that the council had dismissed her because her disability meant that she could not do her job as a road sweeper. Therefore, for the purposes of section 4(2)(d), what the tribunal had to decide was whether, by dismissing her, the council had "discriminated" against her in either of the two ways set out in section 5(1) or 5(2).

28. So far as section 5(1) is concerned, again it was accepted that, in dismissing Mrs Archibald because she could not do her job as a road sweeper by virtue of her disability, the council had treated her less favourably than they treated or would have treated employees who were fit and could do their jobs. The tribunal held that, at the time when the council dismissed her, some two years after she became unfit, it was not clear when, if ever, Mrs Archibald would be fit to resume her duties as a road sweeper. Moreover, her absence from work was causing operational difficulties for the council. The tribunal therefore held that the less favourable treatment, viz the dismissal, of Mrs Archibald had been justified in terms of section 5(1)(b). Accordingly, it did not amount to discrimination in terms of section 5(1). In this respect the council had not "discriminated" against her unlawfully in terms of section 4(2)(d) of the Act.

29. The tribunal went on to consider Mrs Archibald's alternative allegation, that the council had discriminated against her in terms of section 5(2) of the Act by failing to comply with a section 6 duty in relation to her. The contention was that it would have been reasonable for the council to transfer her to fill a vacancy in their organisation without requiring her to undertake a competitive interview for the post. The tribunal held that this would have amounted to giving Mrs Archibald preferential treatment and that section 6(7) made it clear that there was no duty to do that. The council had therefore not failed to comply with section 6 and so had not discriminated against Mrs Archibald in terms of section 5(2). In this respect too the council had not "discriminated" against Mrs Archibald unlawfully in terms of section 4(2)(d).

30. I agree with your Lordships that the tribunal misconstrued section 6(7): the opening words of the subsection, "subject to the provisions of this section", show that there may indeed be a duty on the employer under section 6 to take steps even if those steps involve treating the disabled person more favourably than others. I also agree that section 7 of the Local Government and Housing Act 1989 permits a local authority to transfer a disabled person to another post in this way if that is done to fulfil a duty under section 6 of the Act. It follows that, if your Lordships conclude that the council were indeed under a section 6 duty to Mrs Archibald to take steps, the tribunal's decision that the council had complied with that duty was vitiated by their misunderstanding of its potential scope. In that event, the tribunal's decision on section 6 and section 5(2) would require to be set aside.

31. From her grounds of appeal to the Employment Appeal Tribunal it appears that Mrs Archibald did not challenge the employment tribunal's decision to reject her complaint so far as it was based on less favourable treatment discrimination under section 5(1). The same goes for her appeal to the Court of Session. In both courts the emphasis was on her complaint that the council had failed to comply with their duty to make adjustments under section 6(1), had therefore discriminated against her in terms of section 5(2) and so had, in that way, "discriminated" against her unlawfully in terms of section 4(2)(d) by dismissing her. This was also the thrust of the submissions on her behalf before the House. In my view, however, in a case like the present, where the alleged failure of duty relates to the procedures leading up to the disabled person's dismissal, it is not possible to divorce the alleged discrimination in terms of section 5(1) from the duty to take steps under section 6 and hence from the alleged discrimination in terms of section 5(2).

32. Section 6(1) prescribes a duty that is incumbent on an employer at any relevant time, before, during or after any period of employment. For that reason, in considering, for the purposes of section 5(1), whether an

employer has treated a disabled person less favourably than he would treat others, the tribunal must proceed on the premise that the employer will have complied with this duty. Hence, in terms of section 5(5), the employer's less favourable treatment of his employee will not be justified under section 5(1) and (3) unless it would also have been justified if the employer had complied with his section 6 duty by making any adjustments required by section 6(1). So, in the present case, before a tribunal can decide whether the council's less favourable treatment of Mrs Archibald was "justified" in terms of section 5(1) and (3), they must first determine whether the council owed her a duty to make adjustments, what the content of any such duty was in the circumstances and what the position would have been if the council had fulfilled any such duty that was incumbent on them. If, for instance, fulfilment of their duty under section 6 would have required the council to transfer Mrs Archibald to a vacant position within their organisation, they would not have been justified in dismissing her from her job as a road sweeper unless, for some reason, they would also have been justified in dismissing her from that other position. It follows that, in a case like the present, it is not possible to decide whether the employer discriminated against a disabled person under section 5(1) without first deciding any issue regarding a duty under section 6. Therefore, if your Lordships hold that there was a duty on the council under section 6, which might have required them to transfer Mrs Archibald to another position within their organisation, the tribunal's finding, for the purposes of section 5(1), that the council did not discriminate against her by treating her less favourably will be flawed and must, if necessary, be reconsidered by the tribunal.

33. The critical questions therefore relate to the duty of an employer under section 6(1) to take reasonable steps to prevent any arrangements made by him placing the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled. If the employer fails to carry out that duty, he discriminates against the disabled person under section 5(2) unless he can show that his failure to comply with the duty is justified by a reason that relates to the circumstances of the particular case and is substantial. In broad terms, the idea is that, if an employer leaves a disabled person at a substantial disadvantage from his arrangements when he should have taken steps to shield her from that disadvantage, he discriminates against her.

34. Before the anaesthetic procedure went wrong, Mrs Archibald was fit and able to carry out her duties as a road sweeper. Afterwards, she was not fit to do so. In this case what changed was not the terms, conditions or arrangements on which the council afforded Mrs Archibald employment; what changed was her fitness and hence her ability to carry out her job as a road sweeper. But, as Lord Hamilton remarked in the court below, at para 23, the sequence of events is not crucial:

> "Although under the subsection it is the arrangements (or some physical feature of the premises) which 'place' the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, I accept that there is no particular chronological sequence involved in such placement. A person already disabled may come to pre-existing arrangements; new arrangements may come to an already disabled person; existing arrangements may affect a person who has become disabled. It is the conjunction of the arrangements and of the substantial disadvantage to the disabled person concerned which is material."

The issue therefore is whether, after she became disabled, "any arrangements made" by the council placed Mrs Archibald at a substantial disadvantage in comparison with persons who were not disabled.

35. Section 6(1) envisages a comparison, but its exact nature is not spelled out. Lady Hale considers that the duty arises if the disabled person is placed at a substantial disadvantage in comparison with "non-disabled people generally". It respectfully appears to me, however, that, to be meaningful, the comparison must be with some limited class of persons who are not disabled.

36. The difficulty in identifying the appropriate comparators arises, in part at least, because section 6(1) is intended to apply in a range of situations. As section 6(2) shows, the "arrangements" in subsection (1) comprise not only the basis on which employment is afforded to an employee, but also the basis on which promotion, a transfer, training or any other benefit is offered or afforded. This means that in section 6(1) one cannot identify a single class of "persons who are not disabled" for the purposes of comparison. And indeed the draftsman has not tried to do so, preferring to leave it to readers to identify the description of the appropriate comparators, depending on the situation in which the discrimination is said to have occurred - in offering or affording employment, promotion, a transfer or any other benefit, as the case may be.

37. Moreover, section 6(2)(a) and (b) have been carefully crafted by reference to section 4(1) and (2). An examination of the two sets of provisions confirms that section 6(2)(a) applies only to arrangements for prospective employees. But the wording "offers or affords" in section 6(2)(b) has been chosen so that paragraph (b) covers the terms, conditions or arrangements on which employment is offered to prospective employees, as well as those on which employment and other benefits are afforded to current employees and, where appropriate, former employees.

38. These various factors suggest that the comparison envisaged in section 6(1) need not be with fit people who are in exactly the same situation as the disabled person. For example, if an employer offers a disabled person a job on terms that would place him at a substantial disadvantage by comparison with existing employees who are not disabled, that will trigger the section 6 duty to make adjustments. There is no need to compare the position of the disabled applicant with that of applicants who are not disabled. Even where a disabled person is employed, the comparison need not necessarily be with non-disabled persons who have the same job. This is obvious, for instance, in the case of promotion. Within a company the opportunity for promotion to a particular managerial post will often be open to employees who are currently doing a variety of jobs, in a number of different departments or divisions of the employer's business, whether in the same place or at the other end of the kingdom. In that situation the question under section 6(1) is whether the basis on which the employer affords his employees the opportunity for promotion places the disabled person at a substantial disadvantage in comparison with non-disabled people who are competing for the same promoted post, irrespective of where or what their current job may be. Mutatis mutandis the same applies to the other situations envisaged by section 6(2)(b).

39. Indeed, even where one is considering the terms, conditions or arrangements on which the disabled person is afforded employment, the comparison need not be with people doing the same job. Suppose, for example, that a disabled person works in an office with many other employees, but she is the only one doing her particular job. If she requires to attend a clinic for treatment for her disability at times which make it impossible for her to meet the conditions of the employer's scheme for flexible working, in terms of section 6(1) she will be at a substantial disadvantage by comparison with all the other employees in the office who are not disabled. Her employer will accordingly be under a duty to take reasonable steps to prevent the scheme from placing her at this disadvantage.

40. In that kind of case the disabled person is carrying out the work which she is employed to do but is placed at a disadvantage by the conditions of her employer's flexible working scheme. There it is easy to see that an "arrangement" made by the employer places her at a substantial disadvantage in terms of section 6(1). At first sight, the position is rather less clear where, as in the present case, an employee becomes disabled and, simply for that reason, is unable to carry out the essential functions of the job she is employed to do. As Lord McCluskey noted obiter, at para 43, the disabled person's disadvantage might seem to derive from the onset of her disability rather than from any arrangements made by her employer. Such an interpretation of section 6(1) would, however, overlook the provisions of the

Code of Practice which was issued by the Secretary of State under section 53(1) of the Act and was subject to negative resolution of either House of Parliament under section 54(4). Section 53(6) provides that, where any provision of the code appears to the court to be relevant to any question arising in proceedings under the Act, "it shall be taken into account in determining that question." The key question to be decided in this case is whether an employer may be under a section 6 duty to an employee who becomes unfit to carry out the main, or essential, functions of her job. It appears to me that examples in paragraphs 4.20 and 6.21 of the Code of Practice are indeed relevant to that question. The former says:

> "If an employee becomes disabled, or has a disability which worsens so she cannot work in the same place or under the same arrangements and there is no reasonable adjustment which would enable the employee to continue doing the current job, then she might have to be considered for any suitable alternative posts which are available. (Such a case might also involve reasonable retraining.)"

Paragraph 6.21 includes this example:

> "It would be justifiable to terminate the employment of an employee whose disability makes it impossible for him any longer to perform the main functions of his job, if an adjustment such as a move to a vacant post elsewhere in the business is not practicable or otherwise not reasonable for the employer to have to make."

These passages show, unmistakably, that the code proceeds on the view that an employer may have to make a reasonable adjustment under section 6 in the case of an employee whose disability makes it impossible for her any longer to perform the main, or essential, functions of her job.

41. Taking account of these passages in the Code of Practice, I therefore conclude that, for the purposes of section 6(1), the terms, conditions and arrangements relating to the essential functions of the disabled person's employment are indeed "arrangements made by the employer" which place the disabled person at a substantial disadvantage by comparison with persons who are not disabled if she becomes unable to carry out those functions.

42. If that is how section 6(1) is to be interpreted, what is the substantial disadvantage that the disabled person suffers in that situation by comparison with persons who are not disabled? It cannot be that she is required to perform the essential functions of the job, since that requirement is placed on everyone who holds the same job. Here, all road sweepers of Mrs Archibald's grade have to walk and sweep. In fact, however, the terms of the

disabled person's contract of employment do not mean that, once she becomes disabled, she is forced to perform the essential functions of her job despite being unfit to do so. Here, Mrs Archibald never swept a road after she became unfit. What actually happens if an employee becomes so disabled that she cannot perform the essential functions of her job is that, under her contract of employment, she is liable to be dismissed. That is the substantial disadvantage she suffers. The contractual term, whether express or implied, which provides for her dismissal in these circumstances constitutes the relevant "arrangement" for the purposes of section 6(1). That arrangement places the disabled person at a substantial disadvantage by comparison with persons who are not disabled, because she is liable to be dismissed on the ground of disability whereas they are not. The appropriate comparators are therefore other employees of the employer who are not disabled, can therefore carry out the essential functions of their jobs and are, accordingly, not liable to be dismissed on the ground of disability.

43. The employer is under a duty to take reasonable steps to prevent the terms of the disabled person's contract from placing her at this substantial disadvantage. As envisaged in section 6(3)(c), this may require the employer to transfer her to a vacant post where she will be able to carry out the essential functions of the job and so will not be at risk of being dismissed. That step would involve putting the disabled person in the new post, not merely giving her the opportunity to apply for the post and appointing her if her application was successful. Section 6(3)(c) is just an example. It may be that in some cases the employer's duty would require him to move the disabled person to a post at a (slightly) higher grade. It all depends on the circumstances. If the employer fails to take the steps that are reasonable, he discriminates against the disabled person in terms of section 5(2) and so discriminates against her unlawfully under section 4(2)(d) if he dismisses her. What steps are reasonable depends on the circumstances of the particular case, which the employment tribunal must establish.

44. Here, the council were undoubtedly under a section 6 duty to take reasonable steps. Mrs Archibald says that the council's duty was to transfer her to a vacant post in their organisation for which she was suited and in this way to prevent her from suffering the disadvantage of being dismissed, in accordance with the terms of her contract of employment, on the ground that she was not capable of doing the job of road sweeper. If that was their duty and the council failed to comply with it, by dismissing her they discriminated against Mrs Archibald unlawfully under section 4(2)(d). But whether or not that was their duty cannot be determined until the tribunal establish the relevant circumstances which will, of course, include the council's redeployment policy with its requirement for advertisement and competitive interviews for posts of a higher grade.

45. Since the council were under a section 6 duty to Mrs Archibald and the employment tribunal misconstrued the scope of that duty, their decision cannot stand. I would accordingly allow the appeal and remit the case to the employment tribunal to consider whether, by dismissing Mrs Archibald, the council discriminated against her unlawfully in terms of section 4(2)(d) and, in particular, whether they fulfilled their section 6(1) duty towards her.

BARONESS HALE OF RICHMOND

My Lords,

46. This case concerns the definition and scope of an employer's duty to make adjustments under section 6 of the Disability Discrimination Act 1995 and in particular whether it arises at all if an employee becomes totally incapable of doing the job for which she is employed but could do another job within the same organisation.

The legislation

47. According to its long title, the purpose of the 1995 Act is 'to make it unlawful to discriminate against disabled persons in connection with employment, the provision of goods, facilities and services or the disposal or management of premises . . . ' But this legislation is different from the Sex Discrimination Act 1975 and the Race Relations Act 1976. In the latter two, men and women or black and white, as the case may be, are opposite sides of the same coin. Each is to be treated in the same way. Treating men more favourably than women discriminates against women. Treating women more favourably than men discriminates against men. Pregnancy apart, the differences between the genders are generally regarded as irrelevant. The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment. The question for us is when that obligation arises and how far it goes.

48. The Act does not apply to everyone who has or has had some mental or physical impairment but only where that impairment 'has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities' (section 1(1)). It is lawful to discriminate against a spectacle wearer but not against a visually impaired person. This indicates that the Act is concerned with addressing the special needs of those with serious handicaps, in this case in the labour market. It is unlawful for an employer to discriminate against a disabled person in various ways in relation to the offering of employment, the terms on which she is employed, the

opportunities afforded 'for promotion, a transfer, training or receiving any other benefit' during employment, dismissing her or subjecting her to any other detriment (section 4). This section largely repeats equivalent provisions in the sex and race discrimination legislation. The difference lies in the meaning given to discrimination in section 5.

49. There are two sorts of discrimination. Section 5(1) deals with less favourable treatment, that is where:

> "(a) for a reason which relates to the disabled person's disability, he treats [her] less favourably than he treats or would treat others to whom that reason does not or would not apply; and
> (b) he cannot show that the treatment in question is justified."

50. Section 5(2) deals with a failure to make adjustments, that is where:

> "(a) he fails to comply with a section 6 duty imposed on him in relation to the disabled person; and
> (b) he cannot show that his failure to comply with that duty is justified."

51. The justification defence is special to disability discrimination. It recognises that there may be good reason for less favourable treatment or failing to make the necessary adjustments, but in each case this can only be shown if the reason for it is both material to the circumstances of the particular case and substantial (section 5(3) and (4)). Furthermore, less favourable treatment cannot be justified if an employer has failed to comply with his duty to make adjustments unless it would have been justified even if he had complied (section 5(5)).

52. This brings us to the duty to make adjustments contained in section 6, which so far as material reads as follows:

> "(1) Where -
> (a) any arrangements made by or on behalf of an employer, or
> (b) any physical features of premises occupied by the employer,
> place 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 arrangements or feature having that effect.
> (2) Subsection (1)(a) applies only in relation to -
> (a) arrangements for determining to whom employment should be offered;

(b) any term, condition or arrangements on which employment, promotion, a transfer, training or any other benefit is offered or afforded.

(3) The following are examples of steps which an employer may have to take in relation to a disabled person in order to comply with subsection (1) -

(a) making adjustments to premises;

(b) allocating some of the disabled person's duties to another person;

(c) transferring him to fill an existing vacancy;

(d) altering his working hours;

(e) assigning him to a different place of work;

(f) allowing him to be absent during working hours for rehabilitation, assessment or treatment;

(g) giving him, or arranging for him to be given, training;

(h) acquiring or modifying equipment;

(i) modifying instructions or reference manuals;

(j) modifying procedures for testing or assessment;

(k) providing a reader or interpreter;

(l) providing supervision.

(4) In determining whether it is reasonable for an employer to have to take a particular step in order to comply with subsection (1), regard shall be had, in particular, to -

(a) the extent to which taking the step would prevent the effect in question;

(b) the extent to which it is practicable for the employer to take the step;

(c) the financial and other costs which would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of his activities;

(d) the extent of the employer's financial and other resources;

(e) the availability to the employer of financial or other assistance with respect to taking the step.

This subsection is subject to any provision of regulations made under subsection (8).

(5) In this section, 'the disabled person concerned' means-

(a) in the case of arrangements for determining to whom employment should be offered, any disabled person who is, or has notified the employer that he may be, an applicant for that employment;

(b) in any other case, a disabled person who is -

(i) an applicant for the employment concerned; or

(ii) an employee of the employer concerned.

…

(7) Subject to the provisions of this section, nothing in this Part is to be taken to require an employer to treat a disabled person more favourably than he treats or would treat others."

The facts

53. Mrs Archibald was employed by Fife Council as a road sweeper Manual Worker Grade 1 from 6 May 1997. As a result of a rare complication during minor surgery on 25 April 1999, she became virtually unable to walk. It has never been disputed that she is a disabled person under the Act. The medical advice was that, for the foreseeable future, she could no longer carry out the job of road sweeper. She could not walk or sweep. She could however do sedentary work and was keen to do so. The council arranged for her to undertake a number of computer and administration courses to equip her with appropriate skills. The assessment was very positive and recommended that she was 'more than capable of carrying out work in an office environment'. Over the next few months, she applied for over 100 posts within the council. These were all on the APT&C scale rather than on the Manual Worker Grade 1 scale. The basic wage was very slightly higher than for the manual grade. According to the council's redeployment policy, people seeking redeployment at a higher grade had to undertake competitive interviews. Mrs Archibald failed to obtain any of these posts. She told the Employment Tribunal that she did not think that this was anything to do with her disability but rather that 'they' did not look past the fact that she was a road sweeper - someone coming from an industrial background having to compete with others from a staff background. 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 from 12 March 2001.

These proceedings

54. She appealed unsuccessfully within the council and then complained to an Employment Tribunal. The essence of her disability discrimination complaint was that she should not have been required to go though the competitive interviews if she could show that she was qualified and suitable for the job in question. The tribunal quoted part of section 6(7): ' . . . nothing in this Part is to be taken to require an employer to treat a disabled person more favourably than he treats or would treat others.' The council's policy was that competitive interviews were required if applying for a job at a higher grade. The tribunal therefore held that, as there was nothing apart from transferring her to another post that the council could have done, they were not in breach of their duty under section 6. The tribunal went on to say that, if there had been a breach, it would have been justified by the policy.

55. The Employment Appeal Tribunal dismissed her appeal, on the basis that there was nothing in the arrangements for the sedentary job interviews which placed her at a substantial disadvantage because the policy applied to everyone. Hence the obligation to make an adjustment had not been triggered at all. The Extra Division of the Court of Session ([2004] IRLR 197) also dismissed her appeal on the ground that the obligation to make an adjustment had not been triggered, but their reasoning was rather different. Before them, the focus had shifted from the arrangements made for the sedentary posts for which Mrs Archibald had applied, which did not place her at a disadvantage, to the arrangements made for the road sweeping post which she could no longer do.

56. Lord Hamilton held that the duty in section 6(1) was linked to the particular employment involved: that is, where the disabled employee is placed at a substantial disadvantage in the performance of that particular employment in comparison with people who are not disabled and it is open to the employer to make adjustments to the arrangements of that particular employment to prevent the disadvantage having that effect (paragraph 26). Lord MacFadyen held that the 'arrangements' could not include the 'fundamental essence of the job' so that the duty did not arise when the employee became incapable of doing the job at all (paragraph 37). Lord McCluskey also saw the duty as arising in relation to the requirements of the particular job, so that it did not arise if there was nothing the employer could do to make it possible for the employee to continue as a road sweeper (paragraph 44).

The arguments on appeal

57. It is common ground that the Act entails a measure of positive discrimination, in the sense that employers are required to take steps to help disabled people which they are not required to take for others. It is also common ground that employers are only required to take those steps which in all the circumstances it is reasonable for them to have to take. Once triggered, the scope of the duty is determined by what is reasonable, considered in the light of the factors set out in section 6(4). The debate is about what triggers the duty. The council argue that its purpose is to enable the disabled person to overcome the obstacles which her disability puts in the way of her doing the job for which she has applied or is already employed. The examples of steps which the employer may have to take, set out in section 6(3), are with the exception of (c) all adjustments which might be made to the particular job - adapting the premises, reallocating duties, altering the hours, modifying equipment, or providing training, interpretation or supervision. Once those obstacles have been cleared out of the way, there is a 'level playing field' and the disabled person is free to compete on her merits with anyone else. There is no positive discrimination

other than redressing the impact of the disability on her ability to do a job which she is otherwise well fitted to do. This duty cannot arise when the disability means that she cannot do the job at all and there is no adjustment to the arrangements for that job which can make any difference.

58. The Disability Rights Commission, which has taken up the case on behalf of Mrs Archibald, argue that in such a case the duty is indeed triggered. The control mechanism lies in the fact that the employer is only required to take such steps as it is reasonable for them to have to take. They are not expected to do the impossible. But among the possible steps is (c) - transfer to fill an existing vacancy, which must include an existing vacancy for a different job. Inability to do the present job cannot mean that there is no duty at all. The Act was clearly intended to apply to existing employees who became disabled as well as to would-be employees who were already disabled. This is reflected in paragraph 4.20 of the Code of Practice, issued by the Secretary of State and laid before Parliament under sections 53 and 54 of the Act, which says this under the heading 'transferring the person to fill an existing vacancy':

> "If an employee becomes disabled, or has a disability which worsens so she cannot work in the same place or under the same arrangements and there is no reasonable adjustment which would enable the employee to continue doing the current job, then she might have to be considered for any suitable alternative posts which are available. (Such a case might also involve reasonable retraining.)"

59. Underlying this debate there may be, as Mr O'Neill on behalf of the council argues, a fundamental philosophical difference about the permissible limits of the positive discrimination which the duty to make reasonable adjustments inevitably entails. The Act predates the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (the 'Framework Directive'). That Directive cannot constitute grounds for reducing the level of protection against discrimination already afforded by Member States (article 8.2). Nevertheless both sides seek to rely upon its principles. The council point to the opening words of recital 17 - 'This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, . . .' - while the Commission point to its concluding words - '. . . without prejudice to the obligation to provide reasonable accommodation for people with disabilities.' The council argue that it is a framework for equal, not preferential, treatment. Article 1 provides its purpose:

> "The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment."

60. The obligation to provide reasonable accommodation in article 5 is 'in order to guarantee compliance with the principle of equal treatment'. The Commission point out that article 5 continues: 'This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.' The Commission also argue that equal treatment is not limited to securing equality of opportunity. The Directive expressly contemplates positive action, both in general and in the particular case of disability, in article 7:

> "1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.
> 2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment."

61. None of this helps us much in defining the limits of what should be done to safeguard or promote the integration of disabled people in the working environment. But that is clearly an important overall aim which justifies making a reasonable accommodation in what the employer would otherwise do in order to cater for the needs of a specific disabled person.

Discussion

62. The task before us is essentially one of statutory construction. Section 6(1) applies to 'any arrangements' made by or on behalf of an employer. These arrangements have to relate either to the arrangements for determining to whom employment will be offered, or to 'any term, condition or arrangements on which employment, promotion, a transfer, training or any other benefit is offered or afforded' (section 6(2)). Subject to that, the term 'arrangements' is undefined. It could clearly relate to the council's redeployment policy, but in this case that did not put Mrs Archibald at a substantial disadvantage compared with anyone else. It could equally apply

to the terms on which Mrs Archibald held her road sweeping job. An employer's arrangements for dividing up the work he needs to have done into different jobs are just as capable of being 'arrangements' as are an employer's arrangements for deciding who gets what job or how much each is paid. Some employers might combine cooking and bottle-washing in one job while others might treat them quite differently. The job descriptions for all their posts are 'arrangements' which they make in relation to the terms, conditions and arrangements on which they offer employment Also included in those arrangements is the liability of anyone who becomes incapable of fulfilling the job description to be dismissed.

63. The next question, therefore, is whether those arrangements placed her 'at a substantial disadvantage in comparison with persons who are not disabled'. The answer to that was clear. The job description required her to walk and sweep and she could not for the foreseeable future do that. Hence she was eventually dismissed for incapacity. Any steps which the council might have to take under section 6(1) must be 'in order to prevent the arrangements … having that effect'. 'That effect' clearly refers to her being placed at a substantial disadvantage in comparison with non-disabled persons. So who are the non-disabled persons concerned?

64. If they are only non-disabled people doing the same job, then it could be said that the duty does not arise, because it is her disability rather than council's arrangements which has 'that effect' and there is nothing that the council can do in a case such as this to prevent its doing so. On the other hand, if they are not confined to non-disabled people doing the same job, then there may be things the council could do to prevent the job description having the effect of her being at a substantial disadvantage from others. In some cases they might be able to change or modify the job description. In others they might be able to transfer her to another job, a possibility expressly contemplated by section 6(3)(c). The former argument is difficult to reconcile with the inclusion of section 6(3)(c) as an example of what might be done. If one is only concerned with the particular job, one would not be contemplating transfer as the sort of step which might be required under section 6(1) (as opposed to offered as an act of benevolence). The former argument also involves reading words into section 6(1) which are not there. It is of interest that the Court of Appeal in *Clark v Novacold Ltd* [1999] ICR 951 declined to read into 'others' in section 5(1)(a) any requirement that those others should be otherwise in similar circumstances to the disabled person. For the reasons already explained, this Act does not require the sort of 'like for like' comparison which is involved in the Sex Discrimination and Race Relations Acts. I conclude, therefore, that the duty is triggered where an employee becomes so disabled that she can no longer meet the requirements of her job description.

65. The duty is to take such steps as it is reasonable in all the circumstances of the case for the employer to have to take. Could this ever include transferring her to fill an existing vacancy at a slightly higher grade without competitive interview? It is noteworthy that the council did do a great deal to help Mrs Archibald. They arranged retraining for her. They kept her on the books for a great deal longer than they normally would have done while she retrained and then looked for alternative posts. They automatically short-listed her for the posts for which she applied. They went rather beyond their normal policies in cases of redundancy or ill-health. They were behaving as if they did have a duty towards her under section 6(1) even if they did not think that they did. They would have been prepared to transfer her without competitive interview to another job at the same or a lower grade, even though there might be others better qualified to do it. But as she was at the bottom of the manual grade and all office jobs were nominally at a higher grade, there was no equal or lower grade job to which she could be transferred.

66. Section 6(3)(c) merely refers to 'an existing vacancy'. It does not qualify this by any words such as 'at the same or a lower grade'. It does refer to 'transferring' rather than 'promoting' her, but as a matter of language a transfer can be upwards as well as sideways or downwards. Furthermore, transferring her 'to fill' an existing vacancy is clearly more than merely allowing her to apply, short-listing or considering her for an existing vacancy. If that were all it meant, it would add nothing to the existing non-discrimination requirements: the employer is already required by section 4(2)(b) not to discriminate against a disabled employee in the opportunities afforded for promotion, transfer, training or any other benefit.

67. On the face of it, therefore, transferring Mrs Archibald to a sedentary position which she was qualified to fill was among the steps which it might have been reasonable in all the circumstances for the council to have to take once she could no longer walk and sweep. Is there any reason to hold to the contrary?

68. The Employment Tribunal thought that there was. They relied upon that part of section 6(7) which provides that 'nothing in this Part is to be taken to require an employer to treat a disabled person more favourably than he treats or would treat others'. But this is prefaced by the words, 'Subject to the provisions of this section, . . .': so that, to the extent that the duty to make reasonable adjustments requires it, the employer is not only permitted but obliged to treat a disabled person more favourably than others.

69. There is another possible reason to the contrary in the case of a local authority employer such as this. Section 7 of the Local Government and Housing Act 1989 requires all staff engaged by a local authority to be

appointed 'on merit'. This is an extremely important principle. Regrettably, local government does offer opportunities for corrupt appointment practices which have on occasions resulted in people being appointed who were not even competent, let alone the best person available, to do the job. Advertisement and competitive interview is one way of securing that appointments are made on merit. But this is not the only way of doing so. Furthermore, this obligation has always been subject to the requirements of the law relating to disabled persons. When the 1989 Act was passed, it was subject to the quota requirement in the Disabled Persons (Employment) Act 1944. This meant that a person who did not qualify 'on merit' might have to be appointed to fill the quota. Now that the 1944 Act has been replaced by the 1995 Act, the duty in section 7(1) is (in section 7(2)(f)) made subject to sections 5 and 6 of the 1995 Act. Thus local government appointments must always be on merit, subject to the duty to make reasonable adjustments. Usually, those will be reasonable adjustments in the post which is being offered so as to make it accessible to a disabled applicant. But section 7(2)(f) refers generally to sections 5 and 6, so that it is capable of including the step of transferring a disabled person from a post she can no longer do to a post which she can do, provided that this is a reasonable step for the employer to have to take.

70. This will depend upon all the circumstances of the case, having regard in particular to the factors laid down in section 6(4). An important component in the circumstances must be the council's redeployment policy. This currently distinguishes between transfer to a post at the same or a lower grade and transfer to a post at a higher grade. Generally it must be reasonable for a council to maintain this distinction. But it might be reasonable to expect a small modification either in general or in the particular case to meet the needs of a well-qualified and well-motivated employee who has become disabled. Manual grades are often technically lower than non-manual grades even if the difference in pay is minimal. The possibility of transfer to fill an existing vacancy might become completely illusory for a manual worker who became incapable of manual work but was assessed as very well fitted for low grade sedentary work if that person was always up against the problem presented by her background. We are not talking here of high grade positions where it is not only possible but important to make fine judgments about who will be best for the job. We are talking of positions which a great many people could fill and for which no one candidate may be obviously 'the best'. There is no law against discriminating against people with a background in manual work, but it might be reasonable for an employer to have to take that difficulty into account when considering the transfer of a disabled worker who could no longer do that type of work. I only say 'might' because it depends upon all the circumstances of the case. While the 1995 Act clearly lays great emphasis on the circumstances of the individual case, the general policy of

achieving fairness and transparency in local government appointments is also extremely important. The real question may be whether this case should have been seen as a sideways rather than an upwards move.

71. 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).

72. For these reasons, essentially the same as those given by my noble and learned friends Lord Hope of Craighead and Lord Rodger of Earlsferry, I would allow the appeal and remit the case to the Employment Tribunal so that it can consider whether the council fulfilled its section 6(1) duty to take such steps as it was reasonable in all the circumstances for the council to have to take.

Costs

73. As I have indicated, the tribunal will have quite a difficult exercise to undertake and it is not for this House to predict the ultimate outcome. This was a test case on a point of principle which the Commission wished to have resolved whatever the outcome of the individual case. If we were to make an order for 'costs in the cause' this would ignore the fact that the Commission have succeeded on the main point of principle which they wished to have accepted. In those circumstances the fairest result is that there be no order for costs or expenses either in this House or in the court below. There were, of course, no orders for expenses in the Employment Tribunal or in the Employment Appeal Tribunal.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

74. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hope of Craighead, Lord Rodger of Earlsferry and Baroness Hale of Richmond. For the reasons each of them gives, with which I agree, I too would allow this appeal.