



# THE EMPLOYMENT TRIBUNALS

**Claimant:** Mrs L Tully

**Respondent:** Your Move.Co.UK

**Heard at:** North Shields Hearing Centre    **On:** Wednesday 22<sup>nd</sup> &  
Friday 24<sup>th</sup> May 2019

**Before:** Employment Judge Johnson

**Members:** Ms L Jackson  
Mr L Brown

***Representation:***

**Claimant:** In Person  
**Respondent:** Ms H Hogben of Counsel

## RESERVED JUDGMENT

1. The unanimous judgment of the employment tribunal is as follows:-
  - i) the claimant's complaint of unfair dismissal is not well-founded and is dismissed
  - ii) the claimant's complaint of unlawful disability discrimination is not well-founded and is dismissed

## REASONS

1. The claimant conducted these proceedings herself, gave evidence herself, but did not call any other witnesses. The claimant produced statements from Ms Laura Withington, Mr Alex Loughran and Ms Danielle Wright. Unfortunately, none of those could attend the hearing for various reasons. No application was made by the claimant for the issue of a Witness Order to secure the attendance of any of those potential witnesses. Ms Hogben appeared on behalf of the respondent and called to give evidence Ms Victoria Cullen (Area Lettings Manager), Ms Liz Bolger (Area Sales Director) and Mr Paul Dunn (Regional Managing Director). Ms Hogben applied to have excluded those statements from the three persons who

were to give evidence on behalf of the claimant, on the basis that none were present to take the oath or to be cross-examined. The Tribunal decided that it would admit the statements, but only attach to them such weight as was appropriate in all the circumstances.

2. There was an agreed bundle of documents marked R1, comprising an A4 ring-binder containing 236 pages of documents. The Tribunal is grateful for Ms Hogben's assistance in the preparation of the bundle and her ability to speedily navigate that bundle so as to quickly identify the relevant documents. The claimant and the three witnesses for the respondent had all prepared formal, typed and signed witness statements, which were taken "as read" by the Tribunal, subject to questions and cross-examination and questions from the tribunal.
3. By a claim form presented on 17<sup>th</sup> August 2018, the claimant brought complaints of unfair dismissal and unlawful disability discrimination. At a private preliminary hearing on 22<sup>nd</sup> February 2019, Employment Judge Buchanan went to considerable lengths to discuss with the claimant exactly what her claims were about and then to accurately identify and record what the claims were and what were the issues which the Employment Tribunal would have to decide. A copy of the case management summary prepared by Judge Buchanan appears at page 44-57 in the bundle. At paragraph 16 headed "The Issues", Judge Buchanan records the following:-

Unfair dismissal

- 16.1 Does the respondent prove on the balance of probabilities that the reason for the dismissal of the claimant was related to her capability and so failing within Section 92(2)(a) of the Employment Rights Act 1996.
- 16.2 If so, were there reasonable grounds for that belief?
- 16.3 Had the respondents carried out as much investigation into the matter as was reasonable at the point of dismissal?
- 16.4 In particular;
  - a. Did the respondent carry out a reasonable assessment of the capability of the claimant?
  - b. Did the respondent reasonably assess and monitor the performance of the claimant in her role as Lettings Valuation Manager
  - c. Did the respondent allow the claimant a reasonable time to improve her performance?
  - d. Did the respondent provide reasonable targets for improvement by the claimant and did the respondent provide reasonable support to the claimant to enable her to achieve those targets?
- 16.5 Did the decision to dismiss the claimant fall within the band of a reasonable response?

- 16.6 Did the respondent follow a reasonable procedure in moving to dismiss the claimant?
- 16.7 If the decision to dismiss was unfair, what remedy is the claimant entitled to receive?
- 16.8 Did the claimant contribute to her dismissal by any culpable or blameworthy conduct on her part and should any remedy due to the claimant be reduced to reflect such conduct and if so by what percentage?
- 16.9 Has any unreasonableness on the part of the respondent in fact made any difference to the outcome? If so, should any remedy due to the claimant be reduced and if so by what amount?

**Failure to make reasonable adjustments**

- 16.10 Did the respondent apply a provision criterion or practice (PCP) of requiring letting valuation managers to travel to regional meetings within the area manager of Manchester and elsewhere?
- 16.11 If so, did that PCP put the claimant at a substantial disadvantage in relation to her work in comparison with a non-disabled letting and valuation manager?
- 16.12 If so, did the respondent fail to make reasonable adjustments to that PCP?
- 16.13 The claimant will contend that the following adjustments should have been applied:-
  - a. to allow the claimant to see minutes of the regional meetings which she had missed
  - b. to be given full information of any content or training she had missed at such meetings
  - c. to have been allowed to participate in such meetings in a manner other than one requiring personal attendance
  - d. to have observed the recommendations contained in any occupational health report received by the respondent on the claimant
- 16.14 Did the respondent know or ought the respondent reasonably to have known that the claimant was a disabled person at the material time and of the effects of her disability?

**Discrimination arising from disability**

- 16.15 Did the respondent know or ought the respondent reasonably to have known that the claimant was a disabled person at the material time?
- 16.16 Did the respondent subject the claimant to unfavourable conduct? It is noted and recorded that the claimant asserts the following acts of unfavourable conduct;
- a. putting the claimant on a performance improvement plan at various times in the period of her employment from March 2016 until dismissal
  - b. dismissing the claimant
- 16.17 Did the respondent so treat the claimant because of something arising in consequence of her disability? It is noted and recorded that the “something” is said to be the inability of the claimant to travel to meetings with the area manager, at which the claimant would have received training on issues which would have improved her performance.
- 16.18 Does the respondent show that the treatment was a proportionate means of achieving a legitimate aim? What aim was the respondent seeking to achieve?
4. It was confirmed at the commencement of this hearing that those issues remained the ones which the Employment Tribunal would have to decide. However, from time to time in both her evidence and cross-examination of the respondent’s witnesses, the claimant strayed into territory involving matters and issues other than those identified above. On a number of occasions the claimant informed the Tribunal that the reason why she had brought her claims was because of the way she had been badly treated in general terms by a number of the respondent’s employees throughout the period of her employment. The general tenor of the claimant’s complaints was that she considered herself to have been “bullied” by a number of colleagues following the TUPE transfer of her employment to the respondent in early 2016. On each occasion, the Tribunal had to remind the claimant that the only claims which it would consider were those contained in her claim form and the only issues which the Employment Tribunal would decide would be those which had been identified by Judge Buchanan (and agreed by the claimant) at the case management hearing on 22<sup>nd</sup> February.
5. The claimant was originally employed by an organisation known as Welcome Homes, as its branch manager. That company was sold to the respondent in March 2016, whereupon the claimant’s employment transferred to the respondent under the 2006 TUPE regulations. The claimant was allocated the position of Letting Valuation Manager following the departure of Mr Chris Chan, who occupied that role until shortly after the claimant’s arrival.
6. The claimant’s evidence to the Tribunal was that her salary was “a lot higher than the salaries Your Move paid to the branch managers and the letting valuation managers”. Under cross examination, the claimant clarified by stating that her

basic salary was higher than that of her colleagues. The evidence of Paul Dunn for the respondent was that, in terms of the total sums paid to the claimant and her colleagues, there was little difference if any between what was paid to the claimant and what was paid to her colleagues. The Tribunal accepted Mr Dunn's evidence in this regard.

7. The claimant believed that her enhanced salary package was a source of resentment to her new colleagues and that she quickly became isolated at the Gosforth branch and Heaton branch where she did most of her work. In particular, the claimant said there was "tension" between herself and Ms Janine Bainbridge, who was the Property Manager for the respondent in those branches. The claimant's evidence was that a number of her colleagues had conspired to complain about her performance with a view to causing trouble for her. As a result of what was said by her colleagues, the claimant was called to a disciplinary meeting by Mr Phil Bull, who was then the Area Sales Manager. During the process adopted by the respondent to investigate those matters, the claimant was exonerated of any improper conduct or behaviour. However, the respondent recognised the difficulties which existed between the claimant and the other members of staff and for that reason it was decided that the claimant should only work from the Gosforth office and not from Heaton
8. The claimant did not raise any formal grievance about these matters, although she was aware the respondent implemented a formal grievance procedure, under which such matters could have been dealt with.
9. Victoria Cullen became the claimant's manager and in her capacity as Area Lettings Manager, set up a series of regular meetings in Manchester, which all the letting valuation managers were required to attend. The claimant informed Ms Cullen that she was unable to attend these meetings because she suffers from stress, anxiety and agoraphobia, the cumulative effect of which was that she could not travel much more than 10 miles to undertake any part of her duties. The claimant was able to undertake her duties in the immediate vicinity of her office, but was unable to travel substantial distances and certainly not as far as from Newcastle to Manchester.
10. The respondent has conceded in these proceedings that the claimant's impairment amounts to a disability as defined in Section 6 of the Equality Act 2010. The respondent accepts that the claimant's disability effectively prevented her from travelling to Manchester to attend the regional meetings.
11. The claimant's evidence to the Tribunal was that "not attending the meetings did not go down very well with Your Move. Victoria asked if I would agree for HR to have access to my medical records which I did. I also had to have a telephone consultation with an occupational therapist, which I found very upsetting. Victoria felt missing these meetings was affecting my performance. It was agreed that the outcome from the occupational therapist was suggested that I receive notes from the meetings I had missed, however this did not happen."
12. Ms Cullen's evidence to the Tribunal was that she certainly would have preferred the claimant to have attended the regular meetings in Manchester, but that she did

accept that the claimant was unable to attend because of her disability. Ms Cullen further accepted that she had required from the claimant medical evidence to support the alleged impairment and to make the reference to Occupational Health. Once the appropriate medical and occupational health information was received, Ms Cullen accepted that it would not be possible for the claimant to attend those meetings. Ms Cullen's evidence to the Tribunal was that the meetings did not contain any particular training element, but were more a general meeting between colleagues to discuss the company's performance and to generate team-building. Ms Cullen confirmed that minutes of the meetings were immediately thereafter made available to the claimant, together with details of any presentations which were made at the meetings. Ms Cullen's evidence to the Tribunal was that the claimant's inability to attend these meetings had no adverse impact on the claimant's ability to perform her duties as a lettings valuation manager.

13. Under cross-examination from Ms Hogben, the claimant conceded that there was no training element in the meetings. The claimant accepted that her inability to attend those meetings had no impact on her ability to carry out her duties as a Lettings Valuations Manager. The Tribunal found that the claimant's inability to attend those meetings did not impact upon the claimant's performance of her role. In addition to providing the claimant with copies of any information provided at those meetings, Ms Cullen also gave the claimant the opportunity to travel to the meetings by train or to be driven there by a colleague. The claimant declined both of those proposals.
14. In May 2017, the claimant was found to have committed a serious act of misconduct when she fraudulently signed an expenses claim form, using the signature of her line manager. The claimant accepted that this was an offence which could properly have been categorised as gross misconduct and one for which she could have been summarily dismissed. The claimant was in fact given a final written warning by Victoria Cullen.
15. In January 2018, the claimant was invited to a further disciplinary hearing for an alleged act of serious misconduct. On this occasion, the claimant accepted that she had failed to follow the respondent's strict procedures relating to dealing with properties in which a member of staff has a personal interest. With regard to the particular property involved, the claimant had been specifically told by her branch manager not to deal with the file relating to this property, yet had continued to do so. The matter was again dealt with by Victoria Cullen, who found that the claimant had knowingly continued to deal with the property in breach of the policy and in breach of the specific instruction given by the branch manager. Although the claimant already had a live final written warning on her record, Ms Cullen decided not to dismiss the claimant, but to issue a further final written warning.
16. It was throughout these proceedings part of the claimant's case that capability was not the real reason why she was dismissed, but that the real reason was either because her salary was higher than that of her colleagues or because she could not attend the monthly regional meetings. The claimant readily accepted under cross-examination that, if the respondent had really wanted to be rid of her for either of those reasons, then they could have done so quite easily by dismissing her for either of these offences of gross misconduct. Ms Cullen's evidence to the

Tribunal was that she wanted to support the claimant and did not wish to lose her as an employee and that had she really wanted to be rid of the claimant, then she had a more than adequate opportunity to do so on each of these occasions. The Tribunal accepted Ms Cullen's evidence in this regard.

17. In July 2017, Ms Cullen identified that the claimant's performance had fallen below the standard which was both expected and required of her. The respondent implements a Company Capability Policy (page 97-98). The Tribunal accepted Ms Cullen's evidence that the respondent's business is performance driven, working in a sales environment and an extremely competitive market. The respondent maintains comprehensive data on the performance of each area, each branch and each employee. Targets are set against which performance is measured. The capability policy is designed to support those employees whose performance has fallen short of the necessary standard, to help them to improve their performance and to give them a reasonable period of time in which to do so. The claimant has made no challenge to fairness in general terms of the respondent's capability procedure, nor the way in which it was applied to her.
18. Ms Cullen met with the claimant on 12<sup>th</sup> July 2017 and decided to place the claimant on an informal four-week personal improvement plan (PIP) in line with the capability policy. Ms Cullen agreed with the claimant a target in respect of consultations, new instructions, applications and viewings. The claimant in her evidence accepted that she had agreed that these targets were both realistic and achievable. Thereafter, Ms Cullen had regular weekly meetings with the claimant to provide support and to monitor her performance. At no stage did the claimant raise any objection to the targets, or whether they were achievable. On 9<sup>th</sup> August 2017, the claimant accepted that she was not on track to meet her agreed targets. She was asked by Ms Cullen whether there was any further help or support that was needed, but the claimant stated that there was not. A further meeting took place on 16<sup>th</sup> August, where it was again identified that the claimant had failed to meet two of her five targets. She was asked whether she felt she required any further training to help her achieve her list in targets, but the claimant said she did not.
19. On 17<sup>th</sup> August Ms Cullen wrote to the claimant informing her that she was being required to attend a formal, stage one capability hearing in line with the company capability policy. That meeting took place on 23<sup>rd</sup> August, when the claimant was given the opportunity to explain why she had failed to meet the targets fixed under the PIP. No meaningful explanation was given by the claimant at that meeting (and none was given by the claimant in these proceedings). Ms Cullen decided to issue the claimant with a first written warning under the capability policy, which was issued on 25<sup>th</sup> August. The claimant was placed on a further four-week PIP which began on 4<sup>th</sup> September 2017. The following targets were set for the claimant:-
  - i) 10 new letting instructions
  - ii) 12 self-generated lettings consultations
20. By mid to late October 2017, after the four-week review period, the claimant had achieved those targets and the PIP was discontinued. The claimant's evidence to

the Tribunal was that she was never formerly informed that the PIP had been discontinued. Ms Cullen accepted that she had not informed the claimant to that effect in writing, but that the claimant had been told verbally and in any event must have been aware that the PIP was discontinued, because there was no need for any further regular weekly meetings about it.

21. In December 2017 the claimant's performance again fell below the necessary standard, but Ms Cullen decided not to instigate a formal capability procedure as she wished to give the claimant an opportunity to rectify her under performance. Ms Cullen had an informal discussion with the claimant in January 2018 and explained to her that her figures had slipped and that she would need to turn them around, otherwise she could end up on another PIP.
22. Ms Cullen's unchallenged evidence to the Tribunal was that the claimant continued to under-perform for the whole of January, February and March of 2018. The claimant was significantly behind her peers in the number of listings and consultations. Ms Cullen therefore re-invoked the capability procedure and on 11<sup>th</sup> April 2018 the claimant was placed on a further informal four-week PIP. Ms Cullen and the claimant discussed the claimant's performance and set a listing target calculated on an average of the 5 lettings valuation managers employed by the respondent in the claimant's region. That amounted to 12 listings per month. The claimant was asked whether she required any help, assistance or support to enable her to achieve that target but said she did not.
23. Ms Cullen continued to have weekly meetings with the claimant to assess her performance against those agreed targets. At none of those meetings did the claimant raise any issue about either the reasonableness of the target or the requirement for any additional support or training. The claimant never indicated that she had any concerns about being unable to meet the targets.
24. The final formal review meeting of the four-week PIP took place on 10<sup>th</sup> May 2018. The claimant had listed 3 properties against a target of 12. As a result, the claimant was invited by Ms Cullen to attend a formal stage two capability hearing in line with the company's policy. That meeting took place on 17<sup>th</sup> May and minutes appear at page 194-195. It is clear from the minutes that the claimant was given a full and reasonable opportunity to explain why she had been unable to meet her target. The claimant explained that the Gosforth branch had been short-staffed throughout the period of the PIP and that she had a result spent approximately 50% of her time on other duties so as to support the branch. On investigation by Ms Cullen, it was found that this was not an accurate assessment of the claimant's time. The Tribunal accepted Ms Cullen's evidence that, upon investigation, the claimant had been involved in only 1 sales valuation and 3 sales viewings for the residential side of the branch, rather than the lettings business. That would have taken only 2.5 hours and thus was nowhere near the 50% of her time alleged by the claimant. Following that meeting Ms Cullen issued the claimant with a final written warning on 22<sup>nd</sup> May 2018 (page 198-199). The claimant was told in that letter of her right of appeal to the final written, warning but chose not to do so.



25. At this capability meeting, the claimant agreed that she would be placed on a further PIP for 4 weeks, during which she would have to achieve 10 new letting instructions and 10 conversations with customers from the respondent's database who were identified as potential landlords, together with a conversion rate of 55%. Ms Cullen suggested to the claimant that she should spend some time with one of the highest performing lettings valuations managers in the area, but the claimant declined to do so.
26. Ms Cullen continued to have weekly review meetings with the claimant to assess her performance and to provide any support which the claimant may have required. The claimant failed to meet her targets, achieving only 3 of the 10 new sets of instructions. As a result the claimant was invited by letter dated 18<sup>th</sup> June to attend a stage three capability hearing and was warned that dismissal was a potential outcome.
27. The stage three hearing took place on 20<sup>th</sup> June. Minutes appear at page 202-204. It is clear from those minutes (and the claimant accepted in cross-examination) that she was given a fair and reasonable opportunity to explain her short-comings and to provide any mitigating circumstances or other reasons why she had been unable to meet her target. The claimant was unable to do so.
28. Ms Cullen concluded that the claimant's record of underperformance and the live final written warning issued on 22<sup>nd</sup> May were sufficient reasons to warrant dismissal. The Tribunal accepted Ms Cullen's evidence that she had done her best to assist the claimant to achieve what were agreed targets and that there was little, if anything else, which she could have done to help the claimant. Ms Cullen concluded that the claimant should be dismissed on grounds of capability. That was confirmed to the claimant in a letter dated 22<sup>nd</sup> June (page 205-207).
29. The claimant appealed against that decision. The appeal was heard before Mr Paul Dunn on 4<sup>th</sup> July 2018. Mr Dunn's evidence to the Tribunal was that he considered the grounds of appeal set out in the claimant's letter, particularly that she got off to a poor start in her employment with the respondent due to the strained relationship between herself and Janine Bainbridge. The letter states, "I had worked with Lucy McCloud some eight years ago and did not agree with the way she worked as she came across like a bully". The claimant referred to the busy workload and how she considered that she seemed to be the scapegoat for all of the lettings problems which occurred. The claimant also referred to a "personal issue" which she was going through at the time, breaking up with a long-term partner. The claimant specifically states:-

"I am sure I could have taken the bullying situation further, but I just wanted to get on with my job. I was under the spotlight for everything that I did and was always reporting back to Victoria or Liz. I just touched on a few issues just to let you know the situation I was experiencing. I am sure if I was on the same salary as the other LVM I would not have to experience the situation I am in today."
30. The Tribunal accepted Mr Dunn's evidence that he investigated the claimant's allegations about the salary differential and was satisfied that the claimant was not

in fact being paid any higher than the other LVMs in those two branches. Mr Dunn was satisfied that the difference in salary had no influence whatsoever on the decision to dismiss the claimant. Mr Dunn satisfied himself that the claimant's inability to travel to the LVM meetings also had no impact on the decision to dismiss her, nor upon her performance generally. At no stage has the claimant challenged the fairness of the procedure followed by Mr Dunn in considering her appeal. The Tribunal found that Mr Dunn had conducted a thorough, fair and reasonable appeal in all the circumstances of the case. In doing so, Mr Dunn dismissed the appeal.

31. The claimant presented her complaint to the Employment Tribunal on 17<sup>th</sup> August 2018.

32. The Law

32.1 The relevant statutory provisions engaged by the claims brought by the claimant are set out in the Employment Rights Act 1996 and the Equality Act 2010.

### **Unfair dismissal**

### **Employment Rights Act 1996**

#### **Section 94 The Right**

- (1) An employee has the right not to be unfairly dismissed by his employer.
- (2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

#### **Section 98 General**

- (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--
  - (a) the reason (or, if more than one, the principal reason) for the dismissal, and
  - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
- (2) A reason falls within this subsection if it--
  - (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
  - (b) relates to the conduct of the employee,
  - (c) is that the employee was redundant, or

- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.
- (3) In subsection (2)(a)--
  - (a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
  - (b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.
- (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--
  - (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
  - (b) shall be determined in accordance with equity and the substantial merits of the case.

## **Equality Act 2010**

### **Section 4 The protected characteristics**

The following characteristics are protected characteristics –

Age;  
Disability;  
Gender reassignment;  
Marriage and civil partnership;  
Pregnancy and maternity;  
Race;  
Religion or belief;  
Sex;  
Sexual orientation.

### **Section 6 Disability**

- (1) A person (P) has a disability if--
  - (a) P has a physical or mental impairment, and
  - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

- (2) A reference to a disabled person is a reference to a person who has a disability.
- (3) In relation to the protected characteristic of disability--
  - (a) a reference to a person who has a particular protected characteristic is a reference to a person who has a particular disability;
  - (b) a reference to persons who share a protected characteristic is a reference to persons who have the same disability.
- (4) This Act (except Part 12 and section 190) applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)--
  - (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and
  - (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.

### **Section 15 Discrimination arising from disability**

- (1) A person (A) discriminates against a disabled person (B) if--
  - (a) A treats B unfavourably because of something arising in consequence of B's disability, and
  - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

### **Section 20 Duty to make adjustments**

- (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
- (2) The duty comprises the following three requirements.
- (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

- (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.
- (6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format.
- (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty.
- (8) A reference in section 21 or 22 or an applicable Schedule to the first, second or third requirement is to be construed in accordance with this section.
- (9) In relation to the second requirement, a reference in this section or an applicable Schedule to avoiding a substantial disadvantage includes a reference to--
  - (a) removing the physical feature in question,
  - (b) altering it, or
  - (c) providing a reasonable means of avoiding it.
- (10) A reference in this section, section 21 or 22 or an applicable Schedule (apart from paragraphs 2 to 4 of Schedule 4) to a physical feature is a reference to--
  - (a) a feature arising from the design or construction of a building,
  - (b) a feature of an approach to, exit from or access to a building,
  - (c) a fixture or fitting, or furniture, furnishings, materials, equipment or other chattels, in or on premises, or
  - (d) any other physical element or quality.
- (11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.

- (12) A reference in this section or an applicable Schedule to chattels is to be read, in relation to Scotland, as a reference to moveable property.
- (13) The applicable Schedule is, in relation to the Part of this Act specified in the first column of the Table, the Schedule specified in the second column.

Part of this Act	Applicable Schedule
Part 3 (services and public functions)	Schedule 2
Part 4 (premises)	Schedule 4
Part 5 (work)	Schedule 8
Part 6 (education)	Schedule 13
Part 7 (associations)	Schedule 15
Each of the Parts mentioned above	Schedule 21

#### Section 21 Failure to comply with duty

- (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.
- (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
- (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

#### Section 136 Burden of proof

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

### 1. Impairment

Regulations may make provision for a condition of a prescribed description to be, or not to be, an impairment.

### 2. Long-term effects

- (1) The effect of an impairment is long-term if--
- (a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

(3) For the purposes of sub-paragraph (2), the likelihood of an effect recurring is to be disregarded in such circumstances as may be prescribed.

(4) Regulations may prescribe circumstances in which, despite sub-paragraph (1), an effect is to be treated as being, or as not being, long-term.

### 33. **Unfair dismissal**

In **Alidair v Taylor [1978ICR445]** the Court of Appeal said:-

“Whenever a man is dismissed for incapacity or incompetence, it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent. It is not necessary for the employer to prove that he is in fact incapable or incompetent. That involves two elements:-

- Does the employer honestly believe this employee is incompetent or unsuitable for the job?
- Are the grounds for that belief reasonable?”

34. What the Tribunal has to decide is whether there was material in front of the employer that satisfied the employer of the employee's inadequacy or unsuitability and on which it was reasonable to dismiss.
35. The test set down in **Alidair** means that an employer has to produce evidence of poor performance and show that this was its real reason for dismissing the employee. The availability of evidence of an employee's incapability will vary from job to job. Incompetence of sales people can often be shown by their failure to reach targets set by the employer. However, failure to meet such targets will not always justify dismissal. The Tribunal must take into account all the surrounding circumstances – whether the target was realistic, the reasons for the employee not attaining the target, how other sales staff fared and the employee's length of service.
36. An employee's unsatisfactory results in periodic appraisals or performance management reviews often form the basis for initiating capability procedures that may eventually lead to dismissal. However, before accepting that it was reasonable to dismiss for incapability, the Tribunal will often expect to see

evidence of incompetence in addition to the view of the manager responsible for conducting the employee's appraisal.

37. Once the reason for dismissal has been established, the question of whether the dismissal was fair or unfair in the particular circumstances of the case would be judged according to the "reasonableness" test set out in Section 98(4) above. The Tribunal should consider not only what steps a reasonable would have taken when faced with an employee who does not come up to scratch, but also what steps the employer should have taken at the very start to minimise the risk of poor performance and to create the conditions that allow an employee to carry out his or her duties satisfactorily. Proper training, supervision and encouragement are essential, especially where the employee had been promoted to a new job. If the employer fails to provide instruction and support at the outset, or sets unrealistic standards for an employee, any subsequent dismissal for poor performance may be unfair.
38. It is essential that a fair procedure is followed. The ACAS code states that "employers should carry out any necessary investigations, to establish the facts of the case". The general concept of fair play inherent in the disciplinary procedures should also guide management in considering a dismissal for inefficiency. This means that in general, an employer should be slow to dismiss an employee for incapability, without first telling the employee of the respects in which he is failing to do his job adequately, warning him of the possibility or likelihood of dismissal on this ground and giving him an opportunity of improving his performance **[James v Waltham Holy Cross UDC - 1973ICR 398]**. The following are usually considered to be the basic steps:-
- Proper investigation-appraisal of the employee's performance and identification of the problem
  - Warning of the consequences of failing to improve
  - A reasonable chance to improve
39. In the present case, the Tribunal found that the respondent's capability procedure was properly followed at each stage by Ms Cullen. The Tribunal found that the implementation and application of that procedure in the claimant's case included a proper investigation and appraisal of her performance and the appropriate identification of her shortcomings. The claimant was clearly warned of the consequences of her failure to improve and was also given a reasonable chance to improve on more than one occasion. It has never been part of the claimant's case that targets were unrealistic, that she was unaware of the potential consequences of her failure to perform and that she was not given a reasonable opportunity to improve.
40. The Tribunal found that the claimant's incapability was the real reason why she was dismissed. It was the "principle reason" as set out in section 98 of the Employment Rights Act 1996? The tribunal found that any salary differential was not the reason for the dismissal, nor was it an influential factor. The tribunal found that the claimant's inability to attend the regional meetings was not the reason for dismissal, nor was it an influential factor.



41. The tribunal found that the respondent has established that its real reason for dismissing the claimant was a reason related to her capability to perform the duties for which she had been employed. The Tribunal found that the respondent had followed a fair procedure throughout and that its decision to dismiss the claimant was one which some reasonable employers in all the circumstances of the case may well have arrived at. For those reasons the claimant's complaint of unfair dismissal is not well-founded and is dismissed.

Unlawful disability discrimination

42. The claims advanced by the claimant under this heading are of unfavourable treatment because of something arising in consequence of disability (contrary to Section 15 of the Equality Act 2010) and failure to make reasonable adjustments contrary to Sections 20 and 21 of the Equality Act 2010.
43. With regard to the S.15 claim, the claimant's case is that a disability prevented her from attending the regional meetings, which in turn meant she did not receive the appropriate training and information and that this eventually impacted upon her ability to meet her targets. The Tribunal found that the claimant's inability to attend those meetings had no impact whatsoever on her performance. The claimant has adduced no evidence to show that her inability to attend the meetings had any impact whatsoever on her performance. Indeed, under cross-examination, the claimant conceded that she could not identify anything said or done at those meetings which have made any difference to her performance. The Tribunal found that the claimant's disability was the reason why she could not attend the meetings. The Tribunal found that the claimant was dismissed because of her performance. However, that poor performance was not because of her inability to attend the meetings. Accordingly, it was not "something" which arose in consequence of her disability which led to the unfavourable treatment of being put on the PIP and her ultimate dismissal. That claim is dismissed.
44. It is accepted that the respondent applied a provision criterion or practice (PCP) of requiring the claimant to attend regular managerial meetings in Manchester. The Tribunal accepted that the claimant could not travel to Manchester to attend those meetings. However, the Tribunal found that the claimant was not placed at any disadvantage because she was unable to attend those meetings. All the relevant information which the claimant would have obtained had she attended the meetings, was provided to the claimant by different means. The claimant was unable to identify anything said or done at these meetings which did not make its way to her and which could or would have made a difference to her performance. Furthermore, even if there had been a disadvantage caused to the claimant by her inability to attend the meetings, that disadvantage was removed by the provision of the information immediately thereafter, by the respondent. For those reasons the complaint of failure to make reasonable adjustments is also dismissed.

**EMPLOYMENT JUDGE JOHNSON**

**JUDGMENT SIGNED BY EMPLOYMENT  
JUDGE ON 29 MAY 2019**

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