



**EMPLOYMENT TRIBUNALS (SCOTLAND)**  
**Case No: 4107455/2019**

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**Final Hearing**  
**Glasgow Employment Tribunal on 23 and 24 February 2022**

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**Employment Judge M Robison**

**Mr A Aslam**

**Claimant**  
**In person**

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**Santander UK PLC**

**Respondent**  
**represented by**  
**Mr N MacDougall QC**  
**Counsel**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

The claim for unfair dismissal is not well founded and is dismissed.

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**Reasons**

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1. This hearing was listed to take place in person following an attempt to hear the case by CVP and then in person (hybrid) on 8 and 9 March 2021, both of which had to be aborted due to technical difficulties.
2. Following an unsuccessful attempt on the part of the claimant to obtain representation, this hearing was relisted to take place in person on 23, 24 and 25 February 2022.
3. Shortly prior to the hearing, the respondent make an application to convert the in person hearing to CVP, which was refused given previous technical issues. An alternative application for the respondent's counsel (who required to self-

isolated) “attend” by video, with all other parties attending in person, was granted.

4. Prior to the hearing due to take place in March 2021, there had been a good deal of case management of this case, which included four preliminary hearings and various case management orders.
5. In particular, at a preliminary hearing presided over by Employment Judge Gall on 9 June 2020, an unless order was issued, which required the claimant to produce further particulars and further information regarding his health condition.
- 10 6. The claimant was advised by letter dated 12 August 2020 that his disability discrimination claim had been dismissed on the grounds that he had not replied to the unless order by the time limit and in the level of detail required to comply.
7. A further case management preliminary hearing took place on 16 September 2020 presided over by Employment Judge I McPherson. At that hearing, the issues for determination by the Tribunal were listed at paragraph 39, paraphrased as follows (page 66-67):
  - a) What was the reason for the claimant’s dismissal?
  - b) Has the respondent established a potentially fair reason for dismissing the claimant?
  - 20 c) Did the respondent act reasonably or unreasonably in treating that as sufficient means for dismissing the claimant?
  - d) Was the dismissal procedurally unfair? If so, would the claimant have been dismissed in any event?
  - e) If there was an unfair dismissal, what remedy should be awarded by the Tribunal?
  - 25 f) Should the claimant be reinstated or re-engaged and if so, on what terms?
  - g) If the claimant is to be awarded compensation, in what amount, and should it be reduced for any reason?

8. The claimant was reminded that these were the issues to be determined at the outset of the hearing. He confirmed on questioning that he was still seeking reinstatement. Mr MacDougall confirmed that he would ask their third witness supplementary questions relating to that matter.
- 5 9. Mr MacDougall pointed out that although the claimant was seeking compensation in the event that his claim was successful but he was not reinstated, no schedule of loss had been lodged. I noted too that no vouching showing mitigation of loss had been lodged either. In such circumstances, I agreed with Mr MacDougall that in the event that the claimant's claim was  
10 successful but his request for reinstatement was not, then a further hearing could be listed to determine that question. Thus the question at paragraph 39(g) was deferred.
- 15 10. At the hearing the Tribunal heard evidence from Mr Philip Adamson, who was business manager and line manager of the claimant's team leader. He undertook a review and prepared a report for a stage 3 capability hearing. The Tribunal also heard from Mr Graeme Cumming, operational manager, who heard the stage 3 capability hearing following which the claimant was dismissed, and Mr Christopher Flight who heard the claimant's appeal. The Tribunal also heard from the claimant.
- 20 11. A joint file of productions was lodged, with documents referred to by page number as appropriate.

### **Reasonable adjustments at hearing**

- 25 12. A number of reasonable adjustments had been put in place to allow the claimant to attend and participate in the hearing.
13. However, at the outset of the hearing, it became clear that further adjustments would be required to allow the claimant to fully and fairly participate in the hearing given his condition.
- 30 14. Witness statements had already been ordered, and although the claimant had not been able to supply a witness statement, it had been directed, following

the aborted hearing on 9 March 2021, that the respondent's witnesses would read out their witness statements slowly so that the claimant could digest their evidence in real time.

- 5 15. It became apparent however that because the claimant could not write notes to assist in cross examination, and could not retain the points which he wished to dispute until after the end of examination in chief, that further adjustments were required.
16. Mr MacDougall very helpfully agreed that the claimant could ask any cross examination questions at appropriate junctures during examination in chief.
- 10 17. A further adjustment was required to allow the claimant to work with the productions and witness statements, and so a Tribunal clerk assisted him throughout the hearing to turn the pages.

### Findings in fact

- 15 18. The claimant was initially engaged with the respondent into the branch network on an on-call contract commencing 28 November 2016.
19. He undertook training and was due to provide support as a customer service adviser across two or three local branches. He was required to work as and when the branches needed cover and did not have any set number of hours per week.
- 20 20. However upon completion of his training, the claimant advised that he was not capable of carrying out a number of the duties in branches. This related particularly to issues with his mobility.
- 25 21. As a result, HR business partner Liz Scott enquired whether there were any roles which might be suitable for the claimant in the contact centre. She took advice from Health Safety and Wellbeing consultant Emma Hunter.
22. The respondent obtained a report from the claimant's GP, who recommended obtaining a report from an occupational health physician. The respondent also obtained a report from the claimant's consultant (whom the claimant saw only

rarely) who described his condition but ultimately also advised on obtaining an occupational health report.

- 5 23. A report was then obtained from an occupational health physician dated 5 July 2018 which indicated that the claimant could carry out a role in the call centre (because he could move around freely) with necessary adjustments.
24. At the time there was one role type available, which was a telephony role within the Business Banking Switch Enquiries (BBSE) team.
- 10 25. In or around late 2019, a number of call handlers were recruited to the BBSE team on a temporary basis along with the claimant. If they passed the training, they would remain in role until June 2019, when they would be redeployed as appropriate.
- 15 26. The role involved following a “decision tree” by taking customer details, checking whether the caller was an existing customer, carrying out necessary ID&V (identification and verification) checks and following set processes in order either to transfer the caller to the relevant team.
27. This role was considered suitable for the claimant because it required little interaction with customers and limited knowledge of policies and procedures, accessed through software called i-Exchange, an internal search function, which gives step by step guidance on how to complete the selected process.
- 20 28. The claimant commenced the four week training in December 2018. All aspects of the training had to be completed successfully, and required sustained 80% accuracy rate in the way role play calls were handled.
- 25 29. The new recruits were to be trained in four groups, but on the first day of training (10 December 2018) a decision was made by Liz Smith (contact centre training consultant) that the claimant would benefit from one to one training. Ms Smith arranged for the four groups to be merged into three so that the trainer for the group the claimant was initially assigned, Kirsty Green, would provide the claimant with the required one to one training.

30. Ms Green provided daily updates to managers and advised that she found the claimant's inability to retain information particularly challenging.
31. Jamie Lawson, the claimant's line manager, took over the one to one training on 7 January 2019 when Ms Green was on leave. After almost two weeks of dedicated training the claimant was still struggling to retain information and continued to fail to pass the initial stages of his training, specifically relating to ID&V. Although new recruits were normally given only three attempts, the claimant was given up to six attempts, but after that he was still unsuccessful in completing all of the tests.
32. A further week of one to one training was then undertaken with Ms Green. Ms Green raised further concerns with Ms Smith about the lack of progress the claimant was making.
33. The training had been going on for six weeks by this point, and the rest of the training groups had moved onto handling live calls and new training groups were about to be enrolled into the training academy.
34. Given the lack of progress, a review meeting was arranged by Philip Adamson, business manager, which took place on 4 February 2019. Minutes of that meeting were produced (pages 136 – 143).
35. At that meeting the claimant asked for adjustments to the role, and specifically that he receive only one call type and which would obviate the need to use i-Exchange to navigate multiple processes depending on call type.
36. This adjustment was not possible because the respondent does not have the software to limit calls to just one type. Calls dealt with by BBSE team were already limited to non-Santander customers, although staff needed to check whether or not the customer was new at the beginning of every call. There was no way of filtering calls from existing customers out with the software the respondent had. This would have required an investment in a new system across the entire business. Even if that were possible, the claimant would still have been required to use i-Exchange to navigate through certain processes depending on what the new customer required.

37. While the claimant suggested that yet further adjustments could be made, he did not suggest what those might be. Mr Adamson did not recollect the claimant mentioning a footstool to him, but did recollect this being mentioned by Ms Green, and understood that footstools were widely available.
- 5 38. During the meeting, Mr Adamson reviewed some of the claimant's recorded training calls. Even after listening to the calls, the claimant was not able to recollect what had happened. In Mr Adamson's view these calls were not handled correctly. The claimant's accuracy rate was recorded at 41%. Others who achieved such a score would not have been permitted to continue the training for as long as the claimant.
- 10 39. Mr Adamson was of the view that the claimant did not understand what was required from him in order to successfully carry out the role. This was despite the view of the occupational health physician who he believed did not appreciate what the call centre role entailed.
- 15 40. No alternative roles were available at that time, and in any event all other roles within the call centre required more interaction with customers, more knowledge of company processes and a more advanced skillset when compared with the BBSE role.
- 20 41. Mr Adamson decided that a Stage 3 Capability Hearing would require to take place to determine whether anything further could be done in order to make him capable of performing his role.
- 25 42. The claimant had been advised prior to joining the call centre to make contact with Access to Work, as individuals not employers must contact them directly. This was confirmed to Mr Adamson when he contacted them on the claimant's behalf. The claimant did not make the necessary arrangements to arrange for Access to Work to attend the office.
43. By letter dated 4 March the claimant was invited to a Stage 3 Disciplinary Hearing (Capability) to take place on 12 March 2019. Mr Adamson prepared a Stage 3 Disciplinary Management Report (Capability) (pages 89 – 143) which

was enclosed. The letter advised that the outcome could be that the claimant's employment was terminated on ground of ill health capability.

- 5 44. The meeting was chaired by Mr Graeme Cumming. Mr Adamson attended the hearing to present his findings. Minutes were taken of that meeting (pages 177 – 183) by Mr Colin McLeod. The claimant chose not to be accompanied by a union representative.
- 10 45. At the hearing, Mr Cumming got the impression that the claimant did not fully understand what was required of him to successfully carry out the role within the call centre. The claimant advised him that he had difficulty retaining information. He was not able to explain the i-Exchange system, which is a basic but vital system, despite carrying out six weeks of one to one training. The only suggestion the claimant had was that he should be given more time to complete the training.
- 15 46. Mr Cumming noted that he had already been given additional time to undertake the necessary training in excess of his peers and remained unable to successfully complete even the most basic parts of the training.
- 20 47. Mr Cumming was particularly concerned about the claimant's inability to use the ID&V system and the i-Exchange system, which he considered presented significant risks to the business and its customers, as well as not complying with regulatory requirements. He was of the view that there were no further adjustments which could be made which would enable the claimant to successfully complete his training.
- 25 48. Mr Cumming therefore made the decision to dismiss the claimant on the grounds of ill-health capability. This decision was confirmed in writing on 18 March 2019 (pages 184-185).
- 30 49. That letter confirmed that he took account of the fact that the claimant had undertaken intensive training without success; that he was still unable to carry out correct processes, to demonstrate where guidelines can be accessed or to safely access customer information without undue risk exposure, which he described as key; that he did not believe any further support would get him to



the required standard of performance; and there were no alternative roles in the bank.

50. The letter noted that the claimant's medical condition had severely impacted on his ability to successfully complete the training. It noted that the following adjustments had been made: one to one training; reduction from 16 to 15 hours; specialist chair; additional monitor; desk fan; specialist mouse and keyboard; access to disabled toilets, personal emergency evacuation plan; access to wheelchair; base on ground floor.
51. The claimant was advised that he could appeal. An appeal hearing took place on 15 May 2019 and was chaired by Mr Christopher Flight. This date had been rearranged to accommodate the claimant's union representative, although the claimant advised after meeting her on the day of the hearing that he did not wish her to accompany him.
52. At the appeal, the claimant asserted that he was capable of completing the training; that he was determined despite the difficulties of his condition, but admitted that it did affect his mental capacity and that it was only going to get worse.
53. During the hearing the claimant raised the fact that he should have been provided with a stool in order for him to raise his leg to assist with pain in his leg, although this was not associated with his condition. Mr Flight was not aware of this having previously been requested; but in any event the parts of the training he struggled with involved his ability to concentrate and retain information. Given that was the symptom of multiple sclerosis and not leg pain, he did not understand how that would have assisted him in passing his training.
54. Given the previous findings, and the fact that the claimant did not put forward any further additional arguments or documentation, Mr Flight upheld the original decision to dismiss. This decision was confirmed in writing by letter dated 16 May 2019 (pages 336 – 337)

**Relevant law**

55. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 98(1) of this Act provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Capability is one of the potentially fair reasons for dismissal.
56. Section 98(4) provides that 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, 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 dismissal and this is to be determined in accordance with equity and the substantial merits of the case.
57. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed and the penalty of dismissal were within the band of reasonable responses (*Iceland Frozen Foods Ltd v Jones* 1982 IRLR 439). The Tribunal must therefore be careful not to assume that merely because it would have acted in a different way to the employer that the employer therefore has acted unreasonably. One reasonable employer may react in one way whilst another reasonable employer may have a different response. The Tribunal's task is to determine whether the respondent's decision to dismiss, including any procedure adopted leading up to dismissal, falls within that band of reasonable responses. If so, the dismissal is fair. If not, the dismissal is unfair.
58. In a dismissal for capability, the classic test is set out in *Alidair Ltd v Taylor* 1978 ICR 445, which requires the Tribunal to consider whether the employer honestly believed the employee was incompetent or unsuitable for the job; and if so, whether the grounds for that belief were reasonable.

## Submissions

59. Mr MacDougall had prepared written submissions which he read out for the claimant's benefit. These covered the issues to be determined and the relevant law. He set out the respondent's position in relation to each of the issues for determination, which are discussed below in Tribunal deliberations.
60. The claimant took issue with one aspect of Mr MacDougall's submissions, specifically he said that it was false to suggest that he accepted that he was having difficulties operating in a customer facing role, because he had never in fact worked in such a role with the respondent.
61. The claimant made brief submissions, supplementing the points that he had made during the course of the hearing. I understood his position to be that he was of the view that the respondent had not made sufficient or appropriate adjustments to accommodate his needs as a disabled person. His position was that he had asked for a stool to raise his leg but that had not been provided and if it had, he would have been in less pain and could concentrate better.
62. It should be noted that the claimant during submissions also raised a possible adjustment of "slicing" or cutting calls, which I understood meant restricting calls to certain types. The claimant suggested that this adjustments had been made by previous employers in the same sector.
63. I pointed out to the claimant however this was not a matter which had been raised during the course of evidence and in particular he had not asked Mr Adamson about it. I therefore relied on Mr Adamson's evidence regarding that issue, namely that the software utilised by the respondent was not capable to filtering calls in that way.

## Tribunal deliberations and decision

64. It should be noted that this case related only to the question of unfair dismissal. As noted above the claimant's claim for disability discrimination had been dismissed following his failure to provide sufficient information to prove his disability status. Notwithstanding, there was clearly some overlap between the

facts relied on to support a claim for failure to make reasonable adjustments and the question of whether the dismissal for incapacity was fair. I considered each of the issues identified for determination in turn

*What was the reason for the claimant's dismissal?*

- 5 65. The respondent had asserted that the reason for the dismissal was capability, and specifically ill health capability. Mr MacDougall relied on the evidence of Mr Cumming and the letter of dismissal. That letter (page 185) stated that claimant's employment was ended due to ill health capability. That follows a summary of the reasons, which includes reference to the fact that the claimant was still unable to carry out correct processes after significant one to one training.
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66. Given the evidence, both oral and documentary, there is no doubt that the genuine reason for dismissal was capability, and I so find.

*Have the respondents established a potentially fair reason for dismissing the claimant?*

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67. The *Alidair* test requires the Tribunal to consider first whether the respondent honestly believes that the claimant is incapable of performing his job, and secondly whether the grounds for that belief are reasonable.
68. The evidence which the Tribunal heard from each of the respondent's witnesses was that the claimant was not capable of performing his duties. As Mr MacDougall submitted, there was no substantive challenge to that evidence
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69. Although in submissions the claimant had taken issue with Mr MacDougall's assertion that he was having difficulty operating in a customer facing role, and specifically that he had not undertaken any such roles, his evidence was that he had raised concerns that due to his conditions he would not be able to operate in a branch (which would have been a customer facing role). For that reason he was transferred to the call centre and provided training with other employees, and then one to one training. The Tribunal heard evidence that concerns were raised by the individuals providing the training about the
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claimant's ability to retain information and use the processes required for the job, resulting in a management review by Mr Adamson. The conclusion of that report was that the claimant "was unable to demonstrate competence or the ability to read and understand the risk identification and verification process to allow his progression into a live call taking environment" (page 95).

70. Mr MacDougall relied on that report, and the evidence of the other witnesses, to submit that the respondent therefore did have reasonable grounds for the genuine belief that the claimant was not capable of performing his employment.

71. Given the respondent's reliance on the capability question, and given the evidence relied on to support their decision that dismissal was on that ground, and that being a potentially fair reason for dismissal, I find that this has been established.

*Did the respondents act reasonably or unreasonably in treating that as sufficient means for dismissing the claimant?*

72. The reason for dismissal having been established, the key question for the Tribunal is whether the respondent acted reasonably in treating that as sufficient reason to dismiss.

73. I accepted Mr MacDougall's submission that proper training, supervision and encouragement are essential to the reasonableness question, but even with that some employees may still fail to make the grade; and there is no obligation on employers to offer alternative employment.

74. Mr MacDougall relied on evidence which shows that the respondent made significant efforts to enable the claimant to work for them, in particular the decision to provide one to one training, to allow additional attempts to pass tests and extended period of training. He pointed out that the respondent had made a number of other reasonable adjustments which related primarily to the claimant's disability rather than his capability, which included moving the claimant to the call centre.

75. Mr MacDougall submitted that there was more than adequate training and support was provided to the claimant; that there was no other position available or adjustment that could be made that would allow the claimant to continue in employment.
- 5 76. The respondent's witnesses gave evidence about how the claimant had been treated during his employment. I noted that the respondent went to significant lengths to seek to accommodate the claimant. I noted that they accepted that his mobility issues meant that he could not easily operate in a branch, if at all. I noted that there was involvement of the health and well-being consultant and  
10 that medical reports were obtained.
77. Although the report of the occupational physician appeared to suggest that the claimant could work in a call centre with necessary adjustments, I accepted Mr Adamson's evidence that the author did not appear to appreciate what was actually involved in work at a call centre.
- 15 78. In particular, I noted that the claimant was given significant one to one training which was very resource intensive, and for two weeks took up 50% of the time of his line manager; he was given additional opportunities to pass tests, but still after six weeks of one to one training and additional opportunities he did not meet the required standard. I accepted Mr McDougall's submission that  
20 more than adequate training and support was provided, and that there were no other positions or adjustments available which would allow the claimant to continue in employment.
79. I noted in particular that the respondent's witnesses were particularly concerned about risks to the business and their customers. This related  
25 specifically to the mandatory requirement to identify and verify callers which is a regulatory requirement. Mr Cumming at the stage 3 hearing was particularly concerned about that and about the claimant's inability of understand the i-Exchange system, a vital component of the job.
80. Given the additional opportunities afforded to the claimant, including additional  
30 opportunities to pass key tests, but the claimants lack of success in these and

being unable to demonstrate an ability to carry out the role to a satisfactory standard, I accept that dismissal in these circumstances for reasons of incapability were reasonable, and fell within the range of reasonable responses.

5 *Was the dismissal procedurally unfair? If so, would the claimant have been dismissed in any event?*

81. Mr McDougall submitted that the generally accepted steps for a fair procedure, namely proper investigation, warning and chance to improve, were complied with.

10 82. The respondent's witnesses gave unchallenged evidence about the process that had been undertaken in reaching the decision to dismiss. Mr Adamson undertook a review. He interviewed the claimant and produced a comprehensive management report. The claimant was warned about that the failure to improve might include progressing to a stage 3 meeting when his  
15 employment could be terminated. He presented that report at the stage three meeting. The claimant chose not to be accompanied at that meeting by a union representative, but in any event was given the opportunity to state what further adjustments he might need.

83. By the stage of the stage 3 meeting, the claimant had received around six  
20 weeks of one to one training; he had been given more opportunities than others to complete the mandatory tests; he had failed to complete other tests.

84. The claimant was also given the opportunity to appeal. Although he says that he had previously mentioned the need for a stool, there is no mention in the minutes of either the review meeting or the stage 3 meeting. In any event Mr  
25 Flight was quite clear that this was not related to the condition, which he accepted related to lack of memory retention, and that this would not have made any difference to that key problem.

85. It is clear therefore that the claimant was provided every opportunity to improve but after significant and prolonged additional training he was not able to  
30 perform basic and important tasks.

86. I accept therefore that a fair procedure was followed in this case.

### Conclusion

87. I conclude therefore that dismissal for capability reasons following a fair procedure was reasonable in the particular circumstances of this case.

5 Dismissal in these circumstances was therefore fair. Although I was aware that the claimant was seeking reinstatement, such an outcome cannot be considered where the claimant was fairly dismissed. Although the claimant gave evidence that because of new medication and a new diet regime his condition had stabilised, that is not a matter which can be taken into account  
10 when dismissal is found to be fair.

88. All three witnesses recognised, as I do, the determination of the claimant to continue working and not to let his condition prevent him from contributing in that way. Unfortunately, despite extensive efforts of the respondent, the claimant was simply not able, due to his condition, to meet the minimum  
15 standards requirement to undertake the role without the respondent significantly compromising safety of the business and its customers.

89. My conclusion therefore is that the claimant was fairly dismissed for capability reasons. Given that decision, there is no need to consider issues or reinstatement or compensation. This claim is therefore dismissed.

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25 **Employment Judge: M Robison**  
**Date of Judgment: 4 March 2022**  
**Entered in register: 7 March 2022**  
**and copied to parties**