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Tricky questions: redundancy and disability discrimination - reasonable adjustments

Restructuring is commonly used by employers to weather the economic storm. For a dismissal to be fair, it needs to be for a fair reason (which includes redundancy) and follow a fair process. However, there are additional considerations that an employer should take into account where disabled employees are affected, which, if breached, could result in financial and reputational high value claims against the employer.

In this article, we will explore some of the top challenges for employers when a restructuring exercise affects disabled employees.

Background

An employer must make reasonable adjustments for disabled employees to avoid substantial disadvantage created by the application of a provision, criterion or practice (PCP)[1]. The duty will only be triggered if the employer knows or ought reasonably to know that the individual is disabled and is, or is likely to be, placed at the substantial disadvantage in question (although employers are expected to do all that they reasonably can to find out whether this is the case). Adjustments can result in treatment of the disabled employee which is more beneficial than the treatment their colleagues receive - and this is permitted under the Equality Act[2].

An employee has a disability if they have a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities. When deciding on the reasonableness of a potential adjustment, employers should try and understand more about an employee's condition, by speaking to them and/or by seeking medical advice. In the context of a potential restructuring, consulting with the employee in good time is helpful as it can flush out the relevant issues and will almost certainly go towards the fairness of any dismissal.

Questions

1 Do we need to consider adjusting our selection criteria for disabled employees?

Yes - where redundancy selection criteria place a disabled employee at a substantial disadvantage, employers may need to consider adjusting these to level the playing field. Depending on the facts of the case, this could potentially involve discounting disability related absences[3] (an example included in the EHRC Code), or discounting disability-related effects (e.g., the fact that a dyslexic employee was prone to

[1] Section 20 of the Equality Act 2010.

[2] Section 13(3) of the Equality Act 2010.

[3] Robson v Domino Ltd ET Case No.1400506/09 R.

inaccuracies[4]), when scoring the employee against the criteria. It might also include applying an uplift to the disabled employee's scoring against certain criteria[5] - although what uplift is reasonable will again be fact-specific.

2 What if the adjustments to the selection criteria wouldn't have made any difference to the outcome?

There might still be an obligation to adjust the criteria. A 2011 employment appeal tribunal (EAT) decision (under the previous disability discrimination regime) held that adjustments to selection criteria were not required if this would not have avoided dismissal[6]. However, in a later case[7], the EAT held that there was a failure to make reasonable adjustments even though the employee would still have been dismissed regardless of any adjustments made. This was because it found that dismissal was not the only disadvantage which flowed from the employer's failure to adjust the criteria - the receipt of lower scores was itself a substantial disadvantage, which the reasonable adjustments should have addressed. On that basis, it was found that the adjustments had the potential to alleviate some element of the substantial disadvantage faced by the employee.

Legally therefore, even where an adjustment might not avoid dismissal, where there may be other disadvantages it might avoid, the safest route will usually be to make it (subject to reasonableness).

3 Is it a reasonable adjustment to delay a redundancy consultation for a disabled employee?

Yes potentially - it may be a reasonable adjustment to delay an individual consultation where, for example, the redundancy exercise involves only a handful of people, there is a definite end point to the need for the delay (e.g., the employer is awaiting a report from Occupational Health or the employee on sick leave is due to return to work shortly), and the delay is likely to alleviate the disadvantage to the employee.

Delaying the redundancy consultation is less likely to be a reasonable adjustment in a collective consultation process where the delay will impact the other employees involved, particularly if the length of the potential delay is uncertain. However, the employer should consider whether there are other reasonable adjustments that can be applied during collective consultation. For example, the employer may be able to communicate with and send updates on the redundancy consultation to an individual nominated by the disabled employee, or provide updates in a different format. Employers should discuss reasonable adjustments with their employees and also consider seeking medical advice.

4 Is it permissible to require a disabled employee to undergo an assessment or a competitive interview process?

It depends - employers need to consider whether requiring the employee to undergo the assessment or competitive interview process puts them at a substantial disadvantage because of their disability, compared to those who are not disabled. If it does (e.g., because they are not able to attend, or their performance is likely to be worse as a result of the disability), the employer should consider alternative ways of assessing the employee's suitability for roles into which they could be redeployed[8]. Examples of alternative measures include:

- Using selection criteria or a skills audit involving selection from a pool;
- Consulting the employee's manager for an assessment of their abilities.

If other methods are unworkable, the employer needs to consider any reasonable adjustments which could alleviate the disadvantage of the assessment or competitive interview process on the disabled

[4] Ms R Jandu v Marks and Spencer Plc 2200275/2021.

[5] Dominique v Toll Global Forwarding Ltd [2014] 5 WLUK 180.

[6] Lancaster v TBWA Manchester [2011] 6 WLUK 257.

[7] Dominique v Toll Global Forwarding Ltd UKEAT/0308/13.

[8] London Borough of Southwark v Charles [2014] UKEAT/0008/14.

employee and implement these if possible. Examples include:

- Conducting the interview elsewhere, for example, at the employee's home or remotely;
- Conducting the assessment in a different format, for example, via Q&A written responses;
- Delaying the assessment / interview (see Q5 below);
- Providing other support such as interview training.

5 As a reasonable adjustment, should the employer delay any assessment or competitive interview process until the employee's disability improves?

Potentially, yes. Employers are only required to make reasonable adjustments which would actually alleviate the identified disadvantage, and which are objectively reasonable. Whether or not an employer would be expected to delay the process for one employee depends on the factual circumstances and the evidence regarding the anticipated longevity of the employee's disability.

In a recent EAT case[9], it was held that a short delay of 11 days to the application deadline and 19 days to the interview deadline was not a reasonable adjustment because, given the evidence that the disabled employee suffered from a significant impairment from which recovery would be protracted, delays of this length did not have the potential to alleviate the effect which created the comparative disadvantage. Delaying for longer may have alleviated the identified disadvantage, however whether or not this is reasonable will likely depend on whether this causes a detrimental impact on other employees, or the business, and the extent of such impact.

As noted in Q2, where a delay has the potential to alleviate a disadvantage (even where dismissal would have occurred regardless), it will usually be safer to make the adjustment (subject to reasonableness).

6 Is it a reasonable adjustment to slot a disabled employee into an open role rather than expecting them to participate in an assessment process for alternative employment?

Potentially. If the disabled employee is put at a disadvantage in relation to a selection process, then there is a duty to make reasonable adjustments. "Slotting in" (i.e., not putting the employee through any application or assessment process at all) is an adjustment which would generally have the potential to alleviate the disadvantage, however we think that this would only be considered "reasonable" in exceptional circumstances.

Indeed, in a recent case, the EAT[10] held that "slotting in" was not a reasonable step for an employer to have to take in circumstances where other employees who had taken part in the process of selection (i.e., an interview process) would have been impacted. The EAT commented that reasonable adjustments are intended to remove the particular disadvantage, not to give the disabled employee a windfall advantage. Note in that case, the EAT found against the claimant on the basis that it was not an effect of the disability which prevented the claimant from complying with the identified PCP.

There might be other adjustments short of slotting in (e.g., assessing skills for an open role in an alternative way which alleviates the disadvantage - see Q5) which are more likely to be considered reasonable, depending on the circumstances.

7 Should employers make adjustments to vacancies (or create new vacancies) so a disabled employee can apply for them?

Yes potentially - depending on the circumstances. It may be a reasonable adjustment to make changes to vacant positions so that a disabled person who is at risk of redundancy is not prevented by their disability from doing the role, depending on the facts.

[9] Hilaire v Luton Borough Council [2022] EAT 166.

[10] Hilaire v Luton Borough Council [2022] EAT 166.

For example, an employee might not be able to travel far due to their disability, which would ordinarily bar them from performing a role as advertised. In a Scottish case[11], the employer was expected to adjust a role which was based 50 miles away to ensure the employee could carry out the work from the office where he had been working.

Creating a new role could, depending on the facts, be a reasonable adjustment. However, this does not extend to creating a new role which the business does not need. In practice, we think that in most cases a disabled employee will find it difficult to argue that the duty to make reasonable adjustments extends to creating new roles. However, where the employer does, in fact, have a lot of flexibility and effectively a "blank sheet" when planning a restructure, the risk will increase.

Where adjustments to potentially suitable alternative vacancies, or creation of a new suitable alternative vacancy would be appropriate, employers should ensure that the disabled employee and those running any application/interview process are made aware of these, so that the employee is encouraged to apply.

8 Where there is a vacancy that is suitable for an employee on maternity leave and a disabled employee, both at risk of redundancy, who has priority?

In a redundancy scenario, an employee on maternity leave will have priority for suitable alternative vacancies after the selection exercise has been carried out and their role put at risk[12]. This priority right is not subject to a test of reasonableness. Once a vacancy is deemed to be suitable and available, it has to be offered even if this has adverse consequences for the employer[13]. Therefore, it is likely that the woman on maternity leave would need to be prioritised above the disabled employee.

However, if more than one suitable vacancy is available for the women on maternity leave, the employer could choose which of those to offer to her, and which to offer to the disabled employee, to achieve the most beneficial outcome for all.

[11] Taylor v. Dumfries And Galloway Citizens Advice Services [2007] ScotCS CSIH_28.

[12] Reg 10, Maternity and Parental Leave etc. Regulations 1999/3312.

[13] Community Task Force v Rimmer [1986] IRLR 203.