

Disabled employees and suitable vacancies

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What are we covering today?

If a disabled employee is not able to carry out his or her role, is it your duty to offer a suitable vacant position automatically – no matter whether he or she is the best candidate?

What is your “duty”?

- Equality Act 2010 – Regulation 20(3)
- *“where a provision, criterion or practice (“PCP”) 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.”*
- The Equality Act 2010 does not impose a general requirement on employers to place disabled employees into vacancies ahead of non-disabled employees.

EHRC Code of Practice Examples

- EHRC Code of Practice gives a (non-exhaustive) list of adjustments that it might be reasonable for an employer to make ([para 6.33](#)). This includes “transferring a disabled person to fill an existing vacancy”.
- Key points to note:
 - Vacancy
 - Suitable alternative
 - Retraining or other reasonable adjustments
 - Transfer to a higher grade

Archibald v Fife Council [2004] ICR 954

- The House of Lords stated that reasonable adjustments include allowing disabled persons to: “...*trump [fellow] applicants for new jobs, even if a disabled employee is not the best candidate, provided that the disabled employee is suitable to do that work...*”.
- Given that reasonable adjustments include re-training, arguably if the disabled person would be a suitable candidate with reasonable training, then that person should still trump other candidates and be provided with the training.

What could this entail?

- Employer may be expected to give priority to disabled employees during a reorganisation ([Kent County Council v Mingo \[2000\] IRLR 90](#))
- Changing a competitive interview process for suitable alternative employment, where the interview process itself would be disadvantageous to a disabled candidate ([London Borough of Southwark v Charles UKEAT/0008/14](#))
- Where a post which a disabled employee had been placed into by way of a reasonable adjustment was being removed, offer a new role without an interview ([Wolfe v North Middlesex University Hospital NHS Trust \[2015\] ICR 960](#))

However.....

- There is no general requirement to place disabled employees into vacancies ahead of non-disabled employees.
- There is no requirement to appoint if the employee doesn't meet an essential criteria of the role ([Wade v Sheffield Hallam University UKEAT/0194/12](#))

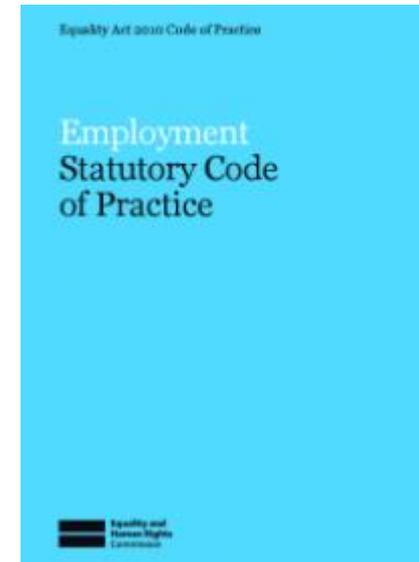
Does there have to be a vacancy?

- Depending on the circumstances employers might be required to redeploy a disabled employee even where no vacancy exists:
 - It would have been reasonable for an employer to devise a new job which took into account the employee's disability ([Southampton City College v Randall \[2006\] IRLR 18](#))
 - Swapping with another employee ([Chief Constable of South Yorkshire Police v Jelic UKEAT/0491/09](#))

Reasonable adjustments

- *“Ultimately the test of the ‘reasonableness’ of any step an employer may have to take is an objective one and will depend on the circumstances of the case”.*

(para 6.29 of the EHRC Statutory Code of Practice)



Summary

- There is no obligation to offer a disabled employee a suitable vacant position automatically.
- Putting a disabled employee into an alternative vacant post can be a reasonable adjustment, if they have the requisite skills and are suitable for the role and there are no other factors which would make it unreasonable to do so.
- However, every course of action depends on the circumstances and practicalities of each case.

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