

White Paper Conference on Redundancy – 23 November 2016

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The killer question

How do you use sickness data when creating a pool of employees for redundancy - whilst taking account of Equality Act restrictions and being fair to your business?

Should you make explicit adjustments to triggers or state something more loosely around "consideration"?

Creating a pool for redundancy

- First ask yourself: Why are you making people redundant?
- Fair selection for redundancy involves the fair application of objective selection criteria to a pool of employees
- An employer **should not create a pool using sickness data**
- An appropriate pool of employees should be identified first, and from that pool the employer should select those who are to be made redundant using objective selection criteria, one of which *may* be attendance.

What about sickness data in selection criteria?

- Employees should be selected for redundancy using objective selection criteria
- Attendance record (including sickness absence data) may be one of those criteria
- Think about other criteria as well, for example performance grades and disciplinary record
- Using an employee's attendance record could potentially be discriminatory if is not used in the correct way
- Different selection criteria may be given different weightings

Attendance data

- Rather than considering whether employees have reached any "triggers", look at employee's attendance record over a period of time and compare the number of days when they should have worked to the number to the number they did attend work
- Look at each individual absence and consider whether it should be discounted
- Absences related to pregnancy related illness should be discounted to avoid claims for discrimination on the grounds of sex/maternity

What about reasonable adjustments?

- Selection for redundancy on grounds of attendance may amount to disability discrimination on the basis that the employer should have made a reasonable adjustment where a disabled person is placed at a substantial disadvantage by a provision, criterion or practice ("PCP")
- The *EHRC Employment Statutory Code of Practice* (para 6.33) contains a list of potential adjustments that an employer may be required to make, including discounting periods of disability related absence when applying redundancy selection criteria to a disabled employee

Bonfield v West Yorkshire Probation Board

- Claimant had diabetes – placed at risk of redundancy
- Sickness absence for past 3 years part of selection criteria but “disability related absences” excluded
- 6 periods of absence, 2 diabetes related – claimant said more absence should be excluded as condition left her more prone to illness
- Duty to make reasonable adjustments was triggered, and employer should have done more to find out about other absences

Overall considerations

- Sickness absence can be used as one of the selection criteria when selecting employees for redundancy from a pool
- Consider making reasonable adjustments when scoring disabled employees in relation to their attendance record
- Be clear and consistent about scoring employees
- What is a reasonable adjustment will depend on the circumstances. The safest option is to discount all absences related to disability, but if you choose not to do this, be able to demonstrate why doing this would have imposed a disproportionate burden

Practical tips

- Obtain Occupational Health advice regarding disabled employees so that adjustments can be made which will help to prevent them taking periods of disability related absence/allow you to assess impact on absence
- Ensure reasons for absence are always recorded in the correct way
- Offer voluntary redundancy to all affected employees before compulsory redundancies have to be made
- Always consult with employees regarding their scores during the redundancy process and give them the opportunity to challenge any markings which they believe are unfair and/or discriminatory

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