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GROUP

# White Paper Conference 2024

## *De-Risking Capability Dismissals and Managing Long Term Absence*

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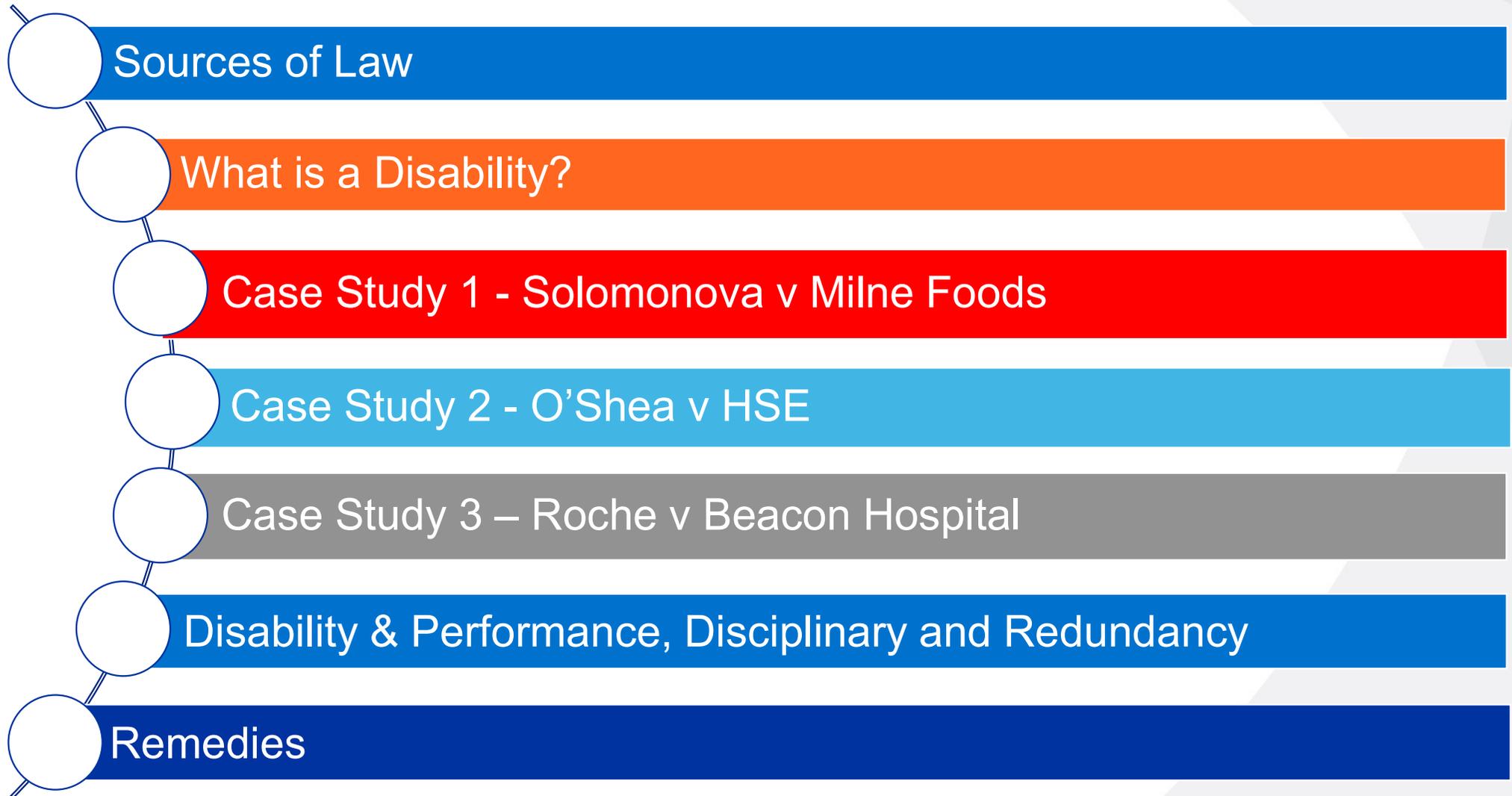
# Speaker - Karen Killalea

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# De-Risking Capability Dismissals - Overview



# Sources of Law

The Framework Directive – Council Directive  
2000/78/EC

The United Nations Convention on the  
Rights of People with Disabilities 2008

The Employment Equality Acts, 1998-2021

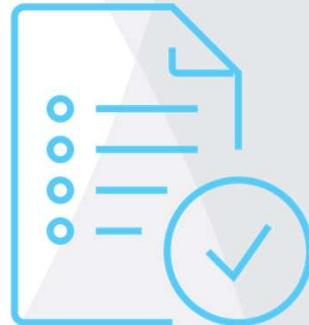
# What is a Disability?

## Employment Equality Act, 1998-2004

*“Disability” means*

- a) the total or partial absence of a person’s bodily or mental functions, including the absence of a part of a person’s body;*
- b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness;*
- c) the malfunction, malformation or disfigurement of part of a person’s body;*
- d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction; or*
- e) a condition, illness or disease which affects a person’s thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour;*

*and shall be taken to include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person.*



# What is a Disability?

## Disability – Legal Definition

- Medically diagnosed condition;
- Does not have to be a long term condition – can be short term or temporary;
- Sickness is not necessarily a disability;
- Interacts with barriers in professional life;
- The condition or symptoms may hinder full and effective participation in professional life.
- A Government Department v A Worker:
  - There must be a minimum level of symptoms manifest;
  - Effects or symptoms present to an insignificant extent are disregarded;
  - Mere unhappiness, ordinary occupational stress or disappointment is not a disability.

# What is a Disability?



## O'Rourke v JJ Red Holdings Limited 2010

Brief illness and attendance at hospital for tests ≠ Disability

Alcoholism  
Obesity  
Anorexia  
Allergy  
Hypersensitivity to Onions  
Vertigo  
Dyslexia  
Low BMI  
Work related stress

# Recap on some Key Concepts – Statutory Obligation to provide Reasonable Accommodation

Section 16 of the EEA

- *a person who has a disability is fully competent to undertake and fully capable of undertaking, any duties if the person would be so fully competent and capable on reasonable accommodation (in this subsection referred to as “appropriate measures”) being provided by the person's employer.*
- *“appropriate measures” - effective and practical measures, where needed in a particular case, to adapt the employer's place of business to the disability concerned, including the adaptation of premises and equipment, patterns of working time, distribution of tasks or the provision of training or integration resources ....*

# Recap on some Key Concepts – Statutory Obligation to provide Reasonable Accommodation

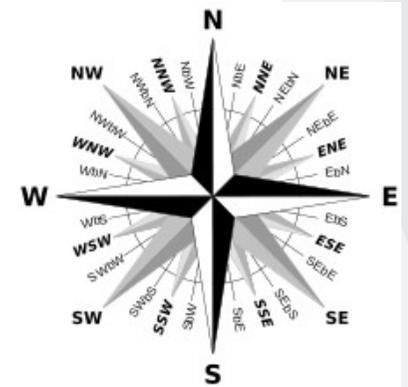
## Section 16(3) EEA

The employer shall take appropriate measures, where needed in a particular case, to enable a person who has a disability -

- (i) to have access to employment;
  - (ii) to participate or advance in employment; or
  - (iii) to undergo training, unless the measures would impose a disproportionate burden on the employer.
- (c) In determining whether the measures would impose such a burden account shall be taken, in particular, of -
- (i) the financial and other costs entailed;
  - (ii) the scale and financial resources of the employer's business; and
  - (iii) the possibility of obtaining public funding or other assistance.

# Recap on some Key Concepts - Nano Nagle Principles – Supreme Court

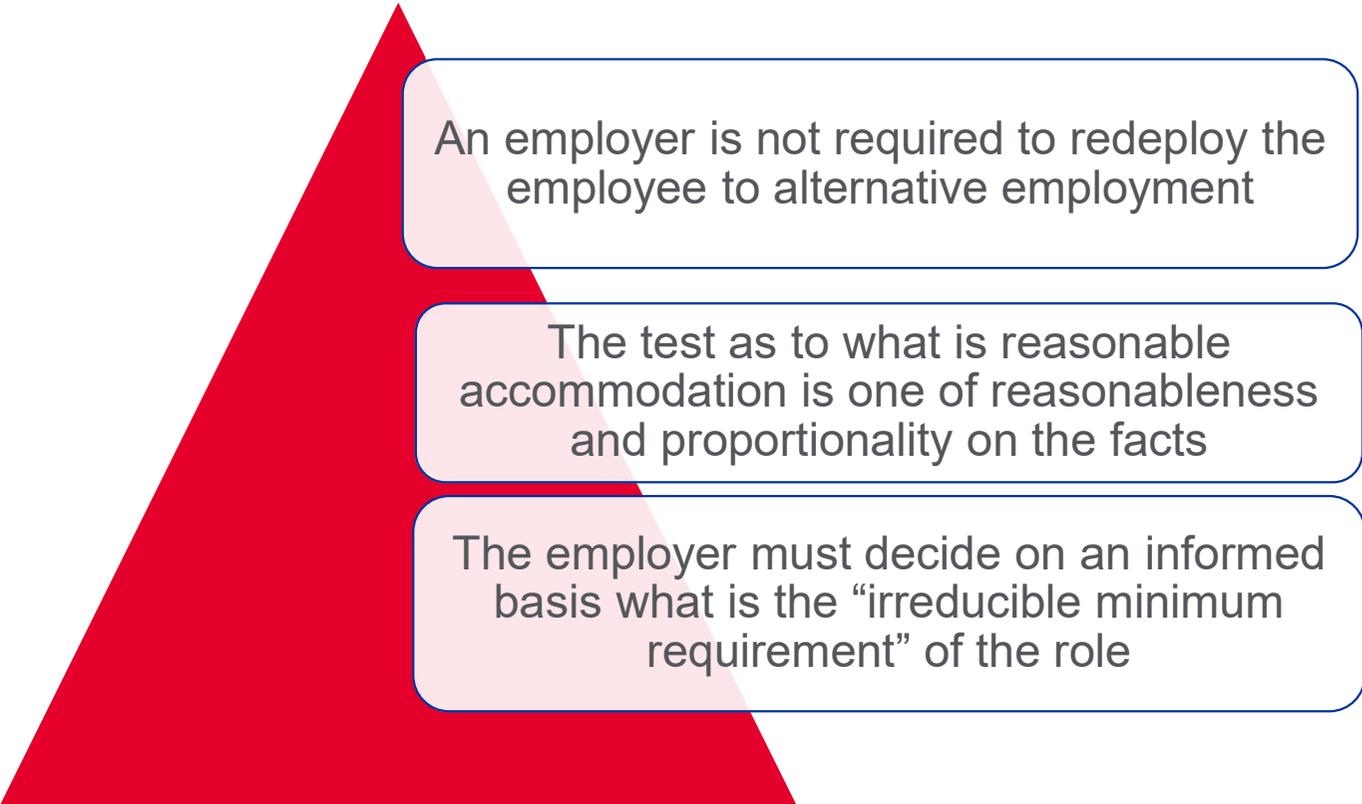
- Employer must look at the whole role and consider whether some core and non-core duties can be re-distributed;
- No obligation on employer to redeploy or to re-design the role;
- The employee cannot dictate what are appropriate measures – the employer must decide;
- The measures cannot place a disproportionate burden on the employer.



# Case Study 1 - HSE v O'Shea Labour Court 2022 – Key Learnings

- Regular Occ Health assessments
  - Redeployment to Light Duties
- Comprehensive Return to Work Programme
- Effective absence management programme

# HSE v O'Shea – Key Take Aways



An employer is not required to redeploy the employee to alternative employment

The test as to what is reasonable accommodation is one of reasonableness and proportionality on the facts

The employer must decide on an informed basis what is the “irreducible minimum requirement” of the role

## Case Study 2 - Solomonova v Milne Foods Ltd 2022 WRC

Medical advice since 2014 that she had a “severe reaction”

Working patterns altered and protective equipment provided

No redeployment

Employee walked off the line and was frequently absent

Employer’s concern about a “contagion effect” was not relevant



## Case Study 2 - Solomonova v Milne Foods Ltd 2022 WRC

The medical reports in 2014 and 2016 should have raised a red flag for the Respondent to consider its obligations under the Employment Equality Act, to take advice as to the best course of action in the circumstances and to document its actions.

- HR File was poor “dearth of documentation”
- Safety and protective equipment was inadequate and ineffective
- Other production lines and shifts could have been offered
- Employer’s fear of widespread opposition was irrelevant
- Awarded one year’s remuneration

# Recap on Key Concepts – the Westwood Tests Labour Court 2004

- The nature and extent of the enquiries which an employer should make will depend on the circumstances of each case.
- Employer must be in full possession of all the material facts concerning the employee's condition.
- Employee is given fair notice that the question of his or her dismissal for incapacity is being considered.
- Conduct a two-stage enquiry:
  - **FIRST** - What is the the factual position concerning the employee's capability including the degree of impairment arising from the disability and its likely duration – obtain up to date medical evidence available to the employer either from the employee's doctors or obtained independently.

# Recap on Key Concepts – the Westwood Tests

- **SECOND -**

- What if any special treatment or facilities may be available by which the employee can become fully capable?
- Consider the cost of such special treatment or facilities what constitutes nominal cost will depend on the size of the organisation and its financial resources.

- **FINALLY -**

- The employee must be allowed a full opportunity to participate at each level and is allowed to present relevant medical evidence and submissions.

# Case Study 3 – Roche v Beacon Hospital – WRC 2024

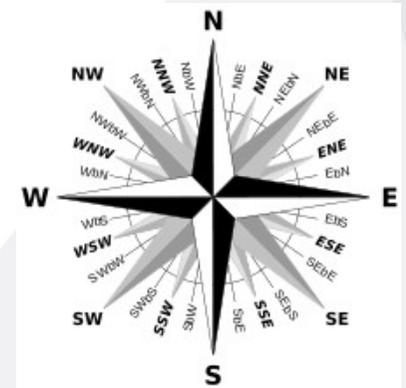
- Absence from July 2019 – October 2022;
- Repeated attempts to phone, email, meet, discuss were unsuccessful;
- Correspondence by Registered Post was necessary due to lack of engagement;
- Offer of redeployment within the same department;
- Company Doctor could not give a prognosis for return but recommended that the Complainant engage with the HR processes to facilitate a return to work;
- Respondent did not have a capability management process separate to the disciplinary process;
- Respondent maintained an accurate HR file documenting the efforts to engage while on leave;
- WRC found that the Complainant had not been discriminatorily dismissed.

# Roche v Beacon Hospital – Learning Points

Document the  
absence  
management  
process

A capability  
management  
process is  
recommended

No  
engagement by  
the employee  
means no  
obligation to  
design a return  
to work plan



# Disability & Performance & Disciplinary

- A written Capability Management Process is recommended with appropriate deviations and flexibility to accommodate a disability guided by medical advice; and
- A disciplinary process should operate on a level playing field, guided by medical advice.

# Redundancy and Disability – DW v Nobel Plastiques Iberica SA



Reasonable  
Accommodation  
& Fair Selection  
Criteria



Defence to  
Discrimination  
claim

# Remedies

- Up to two years remuneration or €40k not limited to financial loss
- Re-instatement or Re-engagement
- Effective, proportionate, dissuasive
- Order for Equal Treatment
- WRC/Labour Court directing HR Policy and Practice

# Remedies

## Chapter IV, Article 17 of the Framework Directive

### Sanctions

*“The sanctions, which may comprise the payment of compensation to the victim, must be **effective, proportionate and dissuasive.**”*

# Key Take Aways

- Be aware of your obligations under the EEA;
  - Put a Capability Procedure in Place;
  - Update your Absence Management Policy;
- Prepare an accurate and complete briefing for the Occ Health Referral;
  - Document your actions, proposals, conversations etc;
    - Keep a copy of all correspondence;
- The Employer ultimately makes an informed decision as to what is reasonable and proportionate.

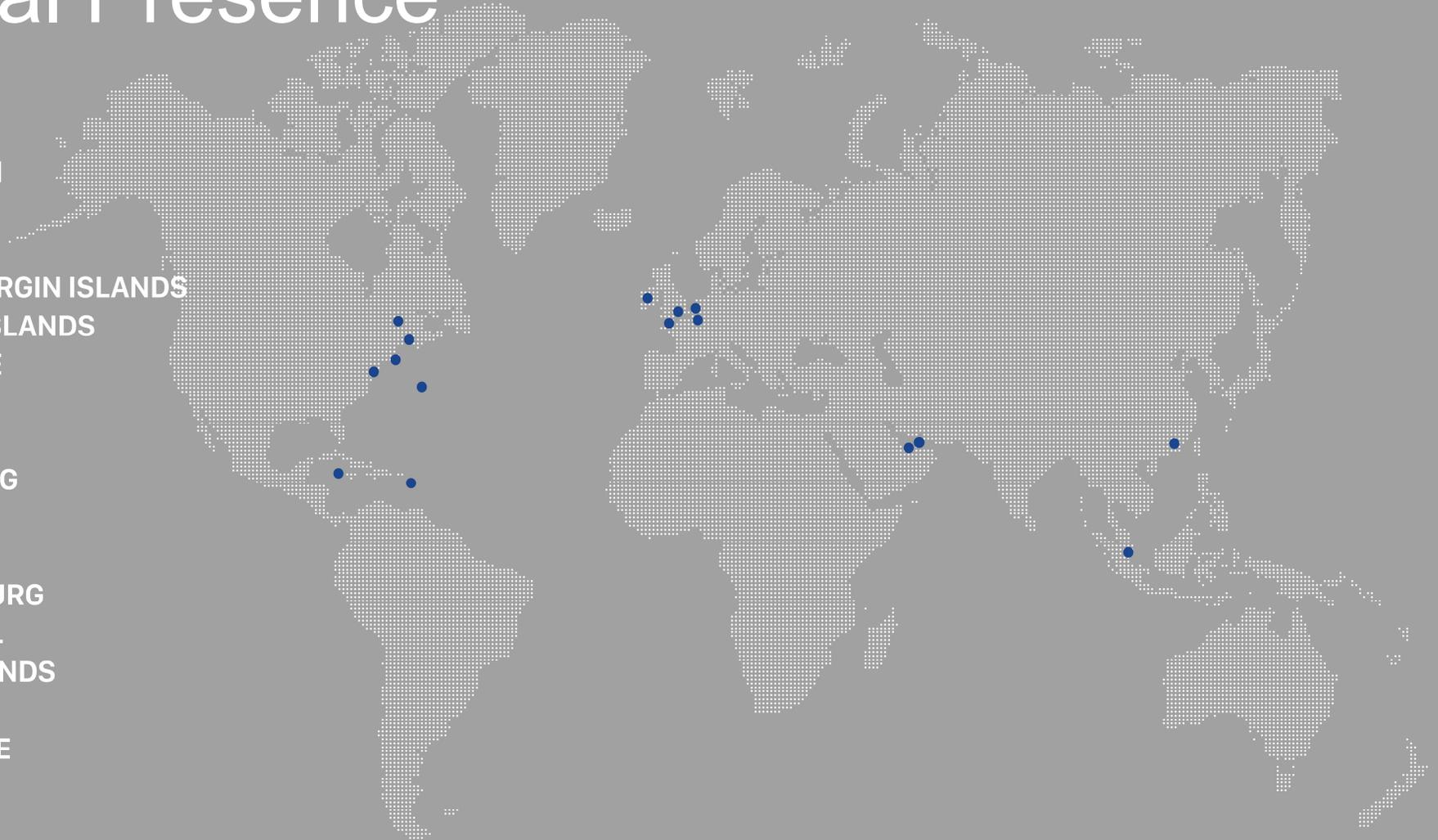


# Questions



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