

The logo for Anderson Strathern, featuring a stylized 'AS' monogram in red and the company name 'Anderson Strathern' in white serif font.

AS Anderson
Strathern

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?

Chris McDowall (Partner)

EHRC Statutory Code of Practice

- Came into force on 6 April 2011 and was last updated on 4 September 2015. Assist courts and tribunals when interpreting the Equality Act 2010.
- The Code does not impose legal obligations but tribunals and courts must take into account any part of the Code that appears to them relevant to any questions arising in the proceedings.
- Para 6.33 – highlights that transferring a disabled person to fill an existing vacancy as being one of a number of adjustments that it might be reasonable for an employer to make.
- **EHRC Example:** An employer should consider whether a suitable alternative post is available for a worker who becomes disabled (or whose disability worsens), where no reasonable adjustment would enable the worker to continue doing the current job. Such a post might also involve retraining or other reasonable adjustments such as equipment for the new post or transfer to a position on a higher grade.

Equality Act 2010

Duty to make reasonable adjustments will arise when:

- A provision, procedure or practice applied by the employer puts a disabled person at a substantial disadvantage in comparison to those who are not disabled - s20(3)
- A physical feature of the employer's premises puts a disabled person at a substantial disadvantage in comparison to those who are not disabled – s20(4)
- A disabled person would be put at a substantial disadvantage but for the employer's provision of an auxiliary aid – s20(5)

Archibald v Fife Council [2004] IRLR 651

- House of Lords case under the DDA.
- Duty to make adjustments is triggered when the disabled employee becomes so disabled that she can no longer meet the requirements of her job description.
- Job description = PCP
- The arrangements for her job placed her at a "substantial disadvantage" in comparison with non-disabled employees.
- The court held that a reasonable step for an employer to take would be to transfer the employee to an existing vacancy, which could be for a different job, or to an existing post at a higher grade without requiring the employee to undertake competitive interviews.
- Mrs Archibald did not, therefore, need to be the "best candidate".

Reasonableness

Wade v Sheffield Hallam Uni:

- Employer is entitled to decide that the disabled employee does not meet the requirements of the new role i.e. not appointable.
- It is not therefore a breach of the employer's duty to make reasonable adjustments by not offering a new role without competitive interview in those circumstances.

Southampton City College v Randall:

- May be reasonable to devise a new job which takes account of the employee's disability.
- Fact specific case – employer was undertaking a reorganisation and had a blank sheet of paper so far as job specifications were concerned.

Reasonableness (2)

Chief Constable of South Yorkshire Police v Jelic:

- Swapping roles may be a reasonable adjustment.
- Even where non-disabled employee was happy in his role.
- Fact specific – Special nature of the police role (duty to obey lawful orders) was an important factor in this case.

Answer

Question posed - 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?

- Answer is “yes” provided the disabled employee is genuinely suitable for the role. By “suitable”, we take it to mean they have skills/experience/qualifications to perform the duties of the role perhaps with other reasonable adjustments being made to facilitate that e.g. change of hours, work location etc.
- As ever, the case law demonstrates that the facts of each individual case must be fully considered when deciding on whether a disabled employee should be placed in an alternative role without competitive interview.
- Practical considerations
 - Make sure the skills/experience/qualifications specified are genuinely required to perform the alternative role and are not a “nice to have”.
 - Where appropriate seek external guidance/support which could include expert OH advice or other medical or professional advice, conducting a workplace or risk assessment.
 - Consider the level of training that will be required and the time for the disabled employee to be to able get “up to speed” and any impact on the organisation at a result.