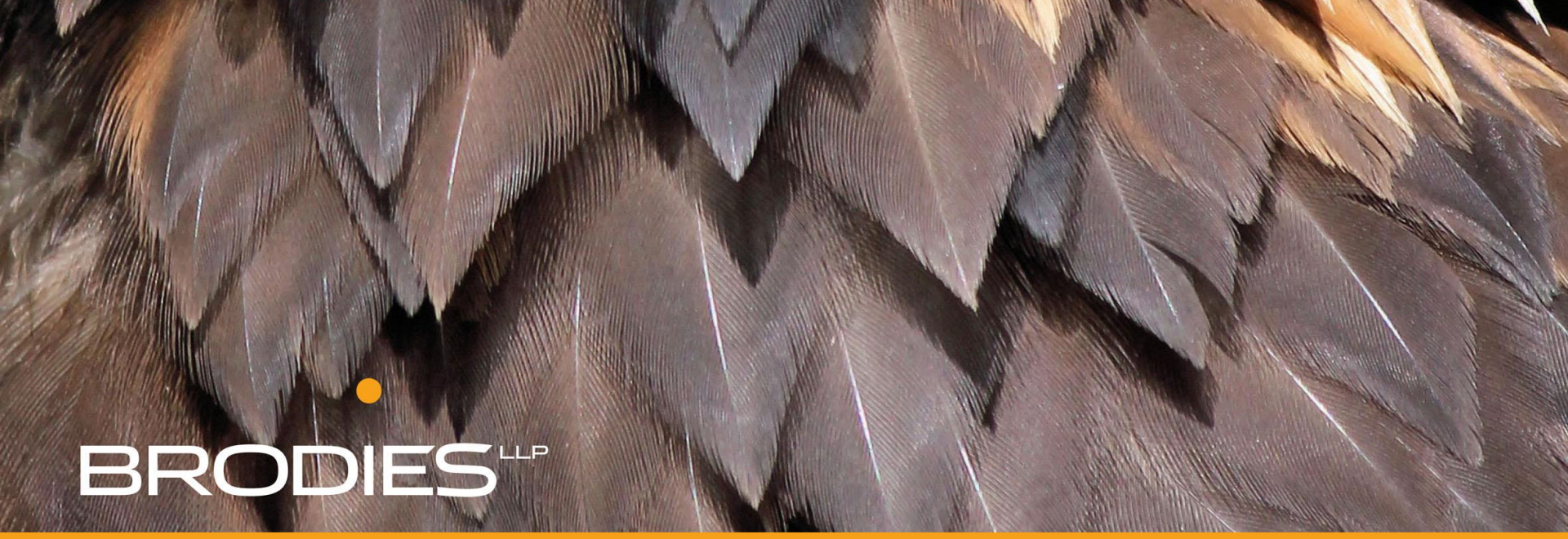

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Disability and redundancy – dealing with process and selection

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What are we going to look at?

- The ‘ordinary law’ relating to redundancy selection
- The rights of disabled employees in this context
- The practical effect of the case law

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A word about terminology and process

- The language used in redundancy and restructuring varies from organisation to organisation. E.g. ‘surplus’, ‘mapping’ or ‘matching’, ‘deleted’ posts, ‘red-circling’ or ‘red-ringing’
- The ‘process’ used often varies too – e.g. number of consultation meetings, how employee ‘preferences’ are taken into account, the treatment of volunteers
- But
  - redundancy dismissals are all set within a basic legal framework and
  - if you have your own procedure, you usually need to follow it

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What is a “redundancy”?

Situations you will come across most often:

- Site closure (“employer ceases to carry on the business in the place where the employee is employed”)
- Straightforward reduction in headcount (“employer’s requirement for employees to carry out work of a particular kind has ceased or diminished”)
- Role re-design/restructure (“employer’s requirement for employees to carry out *work of a particular kind* has ceased or diminished”) (Employment Rights Act 1996 s139)

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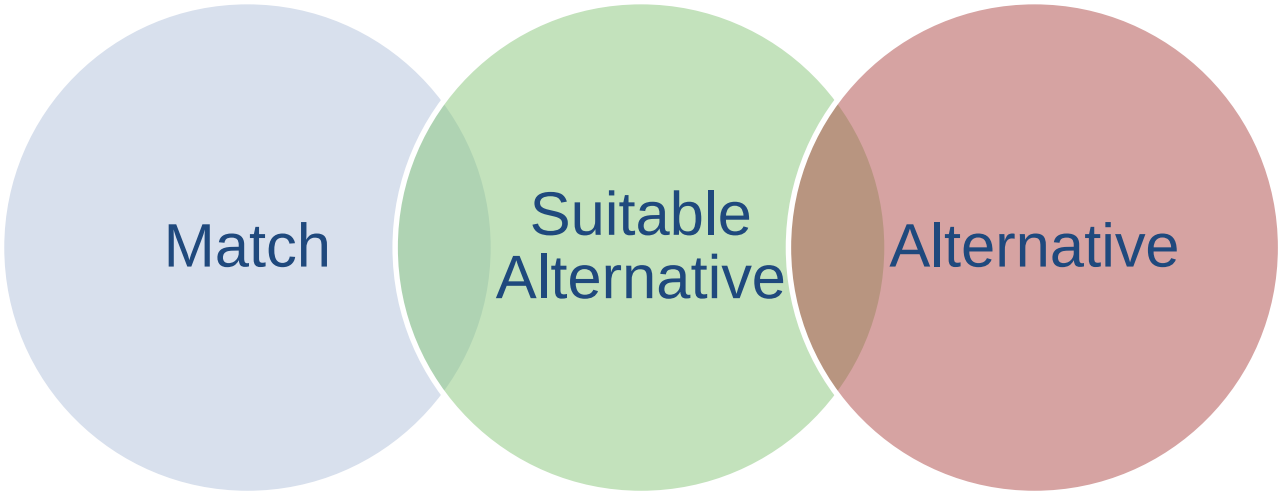
When is a redundancy not a redundancy?

- Sometimes changes in role are insignificant – and you can say that in fact there is no new role as such – e.g. a reduction in numbers means that everyone has to do a bit more of everything, but nothing that is really new
- Sometimes, however, you might reorganise the work so that the jobs look different. Maybe some responsibilities are shared out in a new way – is this a redundancy?
- Not always – sometimes you can say that the job is so close to what the employee is obliged to do under the terms of their contract that it is not a redundancy situation at all
- But there is often a thin line between a change that is not a redundancy and the creation of a suitable alternative role

Matching/Suitable/Alternative Employment



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Matching

- This is not a legal term
- Some organisations use the term matching to denote ‘suitable alternative employment’ – but it may be important to maintain a distinction between roles that can fit within the contract of employment and those that really do give rise to a redundancy situation (depending on what triggers enhanced redundancy rights)
- Matching might help avoid a protracted selection process

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Suitable alternative employment

- **There is NO magic formula!**
  - Suitable from the perspective of the employer and employee
  - Objective assessment of suitability but must also be viewed from the employee's perspective (reasonableness of refusal)
  - Consider employee's skills, aptitudes and experience
  - Comparison of terms of new role with previous role
- An employee's unreasonable rejection of an offer of "suitable alternative employment" will result in their dismissal with no (statutory) redundancy payment due

Restructures and suitable alternatives

- New roles will be ‘alternative’ or ‘suitable alternative’
- The advantage of deciding that it is ‘suitable’ may again be the ability to avoid giving redundancy package as an option
- The employee’s perspective matters also – their refusal may be ‘reasonable’
- Don’t look for a black and white answer! Sometimes it has to be grey and you need to stand back and think about what ‘feels fair’

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Securing fair dismissals

- Law is really only starting to catch up with HR practices in re-organisation
- In a restructure you will often be ‘selecting’ for redeployment
- Keep the three main obligations your head:
  - Fair pooling/selection – most important in a numbers reduction
  - Consultation – individual and collective where necessary
  - Redeployment – this tends to be the focus in a restructure

Selection criteria

- In an ‘ordinary’ redundancy situation - criteria must be **objective**
- Transparent, evidence based, not ‘subjective’.
- They can be focussed on the future needs of the business

Objective	Subjective
Absence	Motivation
Disciplinary record	Versatility
Skills/qualifications [specifics]	Flexibility
Experience of [specifics]	

Can you adopt a different approach in a selection for redeployment?

- *Morgan v Welsh Rugby Union*

- When an employer is selecting for an alternative role the criteria can be subjective.

- But when so many employers tackle redundancy exercises by deleting all of the posts and creating new ones – how can it be that the measure suddenly becomes subjective?

Making a choice of selection process

- Options on selection for new roles
  - Check your own process
  - Matrix/desktop – completed based on criteria that are as objective as possible
    - Quick and simple
    - Usually picks up data that already exists – e.g. performance scores
    - Can leave you open to accusations of subjectivity if scores are made up on the spot
  - Interview selection
    - Protracts process
    - May be viewed by employees as ‘fairer’
    - Can produce good objective data (useful if criteria appear more subjective)
    - Long-standing employees can be upset by it – one interview to demonstrate a life-time of skills

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The rights of disabled people

- Not to be discriminated against on grounds of disability – indirectly or directly
- Not to be discriminated against for reasons arising in consequence of disability
- To have reasonable adjustments made for them
- Remember that reasonable adjustments are a kind of ‘positive discrimination’. They often place an obligation on an employer to do more for a disabled employee than others – to try to level the playing field.

Reasonable adjustments

- No ‘standard’ list or test applies
- Reasonableness has to be judged in the particular context
- The old DDA contained the following tests for reasonableness:
  - The extent to which the adjustment would have ameliorated the disadvantage
  - The extent to which the adjustment was practicable
  - The financial and other costs of making the adjustment, and the extent to which the step would have disrupted the employer's activities.
  - The financial and other resources available to the employer.
  - The availability of external financial or other assistance.
  - The nature of the employer's activities and the size of the undertaking.

The list of potential adjustments….

- The EHRC Code of Practice makes direct reference to adjusting selection criteria

- The list can never be comprehensive, but the obvious ones are:

  - Discounting disability related absences in scoring (for absence)
  - Discounting periods of absence when assessing performance
  - Adjusting criteria to take account of the individual's disability
  - Changing the format for selection – e.g. no interview
  - Delaying selection
  - Avoiding competitive interviews
  - Delaying consultation
  - Trial periods
  - Alternative work/redeployment

Who identifies the adjustments?

- The employer has an obligation to think about them
- The employee can propose them
- The employee can continue proposing them when they raise a claim

Will it make a difference?

- A key principle for the reasonableness of an adjustment is that it will **make a difference**

- *Lancaster v TBWA EAT/0460/10*. If adjusting the criteria won't make a difference to selection – it won't be 'reasonable'

- BUT:

- *Dominique v Toll Global Forwarding* – EAT/0308/13 Even though the adjustment would not have made a difference to selection it might have avoided discrimination (and thus left exposure to an injury to feelings award)
- *Menezes v Coin Street Community Builders* - failure to secure professional support for an employee during a process was potentially discriminatory

Discounting absences

- The most obvious one….
- *Cox v City Centre Training (Northern) Ltd* - employer counted illness absence that employee said was connected to his diabetes. They also failed to take into account that his fatigue affected his performance (and thus his scores)
- *Robson v Domino UK* – employee with long period of absence in year in respect of which performance scores were being allocated. Failure to look back at previous service and adjust scores was discriminatory.

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Changing selection criteria?

- *Lancaster v TBWA* - panic and social anxiety disorder
- Scoring criteria were all to do with communication skills/very subjective
- Pool of three. L's score much lower than other two.
- The ET and EAT both agreed that even with potential adjustments to the selection criteria, he would still have scored badly – and the role was such that it was reasonable to retain the focus on communication skills.
- *Doolan v Interserve Facilities Management Ltd* – D was autistic – criteria such as 'flexibility; initiative; versatility' were applied to all roles in the process and not just the role that he was carrying out. ET concluded that he was placed at a substantial disadvantage as a result of the criteria applied.

Adjusting the reference period for scoring

- *Kelly v Land Rover*
- Two long periods of absence
- Performance criteria looked at over three years – K absent for a lot of it
- ET conclude period should have been extended to look at performance outwith that period and had a full interview process

Interviews and assessments

- The process:
  - Inability to engage because of absence? *London Borough of Southwark v Charles* – insisted that all employees attend for interview – a discriminatory PCP.
  - The alternatives – meetings at home; more informal interview; desk-top assessment.

Automatic appointment?

- Sometimes you should consider offering a role without a competitive process – *Wilebore v Cable and Wireless Worldwide Services Ltd; Archibald v Fife Council*.

- You may therefore have to give the job to someone who is not the 'best candidate'

- BUT

- You don't have to give a job to someone who patently can't do it
- *Wade v Sheffield Hallam University EAT 0194/12* – employee clearly failed to meet the essential criteria of the role and refused to accept that it was a different post. It was not a reasonable adjustment to appoint without an interview.

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Internal competition

- There may be resistance to appointing in a way that gives the disabled employee an ‘advantage’

- If you are meeting with resistance, adopt the following key rules:

- Avoid competition with external candidates
- In a ‘straight fight’ between internal candidates – make sure you are examining characteristics that are neutral vis a vis the disability
- An interview can help you to generate data to substantiate your position
- Focus on criteria that are as objective and measurable as possible
- Be careful with ‘marginal’ scoring decisions

Delaying consultation pending OH report

- *Aubry v SP Group Ltd*
- Employee absence for a 3 month period – neurological condition
- Adjustments were made – assessed over the 9 months he was in work rather than the full 12 months/ gave him one extra mark
- Even with that, he was selected for redundancy
- Only failure was to await outcome of an OH assessment on impact of condition - injury to feelings award of £2k
- Again – not clear that this adjustment would have made any difference

Holding up the process

- These decisions are frequently not being taken in isolation – a delay can have an impact on other cases

- Distinguish cases as follows:
  - Is the employee off long term?
  - Is their return forseeable?
  - Are others affected?

- *Parvez v Mackenzie Tools and Productions Ltd* – failure to delay was unreasonable – if they had waited things might have changed – (individual case)
- *See v Westfield Shopping Towns* – absent after redundancy announcement – protracted process but ultimately dismissed – held unreasonable not to delay because there were posts on the horizon that he could have applied for.

Trial periods

- May be a reasonable adjustment in itself?
- Not entirely clear – how would a trial period make it more likely that an employee is able to fulfil the role - *Lee v University of Westminster* (some doubt expressed by judge about this)

Alternative work

- *Steers v S Walsh and Sons* - failure to discuss alternatives because of assumptions about effect of multiple sclerosis

- *Redcar and Cleveland Primary Care Trust v Lonsdale* – employee was already redeployed to lower graded post because of her eyesight – role was redundant, but she was not allowed to apply for a higher graded alternative post.

Alternative work

- *Phillips v Great Western Ambulance Service NHS Trust*

- Role becomes redundant during a long period when employee unable to fulfil it
- Employee had been placed on ‘special leave’ and redeployment was not fully explored
- Failure to do so was discriminatory

- *Callaghan v I-Smart Consumer Services Ltd and ors* – ADHD – business re-organisation and employee suddenly asked to move teams. She reacted badly, and resigned. Employer had failed to make adjustment of allowing a phased transfer with close mentoring.

Creating unique roles?

- If cost reduction is the driver for change, this is less likely to be something you need to consider
- *Chief Constable of South Yorkshire Police v Jelic* – you may have to try and reconfigure roles so that an employee can be retained? That might mean remaining open minded to departures from standard job descriptions
- The Jelic case is generally regarded as having fairly unique facts – so difficult to say that it sets any kind of fixed precedent
- But there is no obvious reason why it would not be exported into a redundancy case depending on the facts

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The lessons

- Don’t expect a redundancy exercise to solve a problem with the management of a disabled employee
- Try to steer clear of criteria that are too subjective and gather good data about skills and performance
- Think carefully about the kind of adjustment you might need to consider for each individual – don’t make it a box ticking exercise
- Consider adjustments to both the process and the selection
- Think about additional support that might be useful or refer to OH if an assessment of the impact of the disability is needed
- Be open minded about adjustments to role descriptions and structures
- Warn the business in advance!

QUESTIONS?