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**Alternative  
employment for  
disabled employees –  
what are your  
obligations?**

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**MARIAN BLOODWORTH  
EMPLOYMENT PARTNER  
KEMP LITTLE LLP**

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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?

## Two possible scenarios

1. An individual scenario where a disabled person cannot carry out their own role but can carry out another role.
2. Same scenario but against the backdrop of an internal reorganisation or redundancy situation involving other employees.

**What duties apply in each case?**



## Assessing the individual's health and situation

- **Key question:** are they likely to be **disabled** in accordance with the Equality Act 2010 (section 6(1))?
- **Definition:** *"A person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities".*
- If so, Equality Act obligations apply, **including** duty to make reasonable adjustments
- And if they are not disabled?
- In practice?

## Duty to make reasonable adjustments – what does the law require?

- Applies where a disabled person is placed at a **substantial disadvantage** by reason of:
  - the employer’s provision, criterion or practice (PCP)
  - a physical feature of the premises
  - the employer’s failure to provide an auxiliary aid
- Employer must “*take such steps as it is reasonable to have to take to avoid the disadvantage*”.
- Employer must have **knowledge** of the disability for duty to apply **or** could reasonably be expected to know

## The obligation and risks of non-compliance

- **Positive obligation** to treat disabled persons more favourably in order to reduce or remove the disadvantage
- Risk of non-compliance with obligation? Grievances and claims for:
  - failure to make reasonable adjustments
  - direct disability discrimination
  - indirect disability discrimination
  - discrimination arising from a disability (DAFD)
  - constructive dismissal /unfair dismissal claim

## Steps to take before needing to consider alternative role - checklist

### Step 1

- Identify requirements of their current role
- Get medical evidence regarding their condition and prognosis and ability to do current role

### Step 2

- Assess medical evidence and consider whether condition likely to amount to disability
- Consult with employee and line manager

### Step 3

- Consider potential reasonable adjustments to current role
- Trial (if appropriate) of reasonable adjustments

## No adjustments possible to current role.....

- What are your options now?
  - Alternative role?
  - Newly created role?
  - PHI?
  - Ill-health early retirement?
  - Termination by reason of capability/ill health?
  - Negotiated exit?



## Why you need to consider them for an alternative role...

- Reasonable adjustments duty applies where a disabled person is placed at a **substantial disadvantage** by reason of the employer's provision, criterion or practice (PCP)
- What is the PCP in our case? And is the duty triggered?
- Caselaw and EHRC Code makes clear that reasonable adjustments obligation includes considering employee for a different role or existing vacancy

## Factors to consider

- Can they do the alternative role?
  - Health
  - Skill set
  - Do they need additional training/retraining?
  - What about the cost?
- Will not be a reasonable adjustment if they are completely unsuitable for the role
  - *Wade v Sheffield Hallam University*

## Considering them for alternative roles – your obligations

- Do they have to go through a competitive interview for the role?
- What if the role is at a higher grade?
- What if there are better candidates?

– *Archibald v Fife Council*

## *Archibald v Fife Council – key quotation*

“

***Section [6(3)(c)] merely refers to 'an existing vacancy'. It does not qualify this by any words such as 'at the same or a lower grade'. It does refer to 'transferring' rather than 'promoting' her, but as a matter of language a transfer can be upwards as well as sideways or downwards. Furthermore, transferring her 'to fill' an existing vacancy is clearly more than merely allowing her to apply, short-listing or considering her for an existing vacancy.***

”

“

***·If that were all it meant, it would add nothing to the existing non-discrimination requirements: the employer is already required by section [4(2)(b)] not to discriminate against a disabled employee in the opportunities afforded for promotion, transfer, training or any other benefit.***

”

Baroness Hale  
House of Lords 2004

## Considering them for alternative roles – your obligations

- Could include giving them priority over those at risk of redundancy
  - *Kent County Council v Mingo*
- Do you need to create a new role for them?
  - *Southampton City Council v Randall*
- Can you require another employee to swop roles with them?
  - *Chief Constable of South Yorkshire Police v Jelic*

## Scenario 2 – redundancy/restructuring backdrop

- Could introduce complexity if there are others with statutory priority for alternative vacancies, such as:
  - woman on maternity leave
  - employee on adoption leave
  - employee on shared parental leave
- How to manage competing rights:
  - statutory preferential rights (Reg 10 MPL Regs 1999 and equivalents)
  - vs. duty to make reasonable adjustments



## Scenario 2 – how to manage competing claims for any vacancy

- No clear case law
- Would Reg 10 (and equivalent) rights trump duty to make reasonable adjustments?
- Question of timing.....
- .....and management of legal risk
- Highlights importance of medical evidence that disabled employee is fit to carry out the alternative role

## To conclude

- Duty to make reasonable adjustments means employer is obliged to:
  - Offer an existing vacancy for which the employee is potentially suited (with any necessary training), without the need for a selection process
  - Even where others are better suited to the role
- And may be obliged to consider creating a role, or asking another employee to swop roles
- Where the search for alternatives **co-incides** with a redundancy or restructuring, bear in mind the competing statutory priorities of other affected employees

## Practical steps

- Ensure Line Managers are aware of obligations regarding disabled employees
- Collate a list of vacant positions and keep it updated
- Ensure internal recruitment function is appropriately briefed
- Importance of audit trail to show compliance with obligations
- Explain statutory obligations to other employees to reduce risk of misunderstandings/grievances

## Contact info



**Marian Bloodworth**  
Employment Partner

**KEMP LITTLE**

Cheapside House  
138 Cheapside  
London  
EC2V 6BJ

TEL           +44 (0) 20 7600 8080  
FAX           +44 (0) 20 7600 7878  
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