

White Paper Conference

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Redundancy

What are the golden rules for comparing disabled and non-disabled employees for the purposes of redundancy, where disability-related absences and adjustments may have impacted performance?

Rule 1

Have an "inclusive employer" mindset

- What type of employer do you want to be?
- The disability employment gap is real
- Legislation is aimed at levelling the playing field
- Redundancy situations require:
 - Empathy
 - Awareness
 - Support



Rule 2

Build in planning time

Fail to prepare,
prepare to fail!

Don't rush the
planning stages –
they are crucial

Get ahead of
disability
considerations /
issues

Train managers

- EDI training
- Redundancy specific training
- Refreshers
- NEVER hurt

Rule 3

Be aware of your risks

Comparison situations arise in both 'selection in' and 'selection out' aspects of redundancy. In either case, selection forms an integral part of fair and non-discriminatory decision-making

What are the risks of getting it wrong?

- Legal – unfair dismissal, disability discrimination
- Practical – time, costs, disruption, reputation



Be aware of your risks

- Employees with two years' qualifying service
- Fair dismissal:
 - The reason (or principle reason) for dismissal was one of the five potentially fair reasons – i.e. redundancy
 - The employer acted reasonably in all the circumstances (including size and administrative resources) in treating that reason as a sufficient reason for dismissal

Employment Rights Act 1996



Be aware of your risks

- No length of service requirement
- Disability discrimination:
 - Direct discrimination
 - Indirect discrimination
 - Discrimination arising from disability
 - Duty to make reasonable adjustments

Equality Act 2010



Be aware of your risks

Duty to make reasonable adjustments

- Applies if the employee is put at a "substantial disadvantage" in comparison with people who are not disabled due to a PCP, physical feature or lack of an auxiliary aid.
- Employer must know (or reasonably be expected to know) that employee is disabled AND likely to be put at substantial disadvantage.



Rule 4

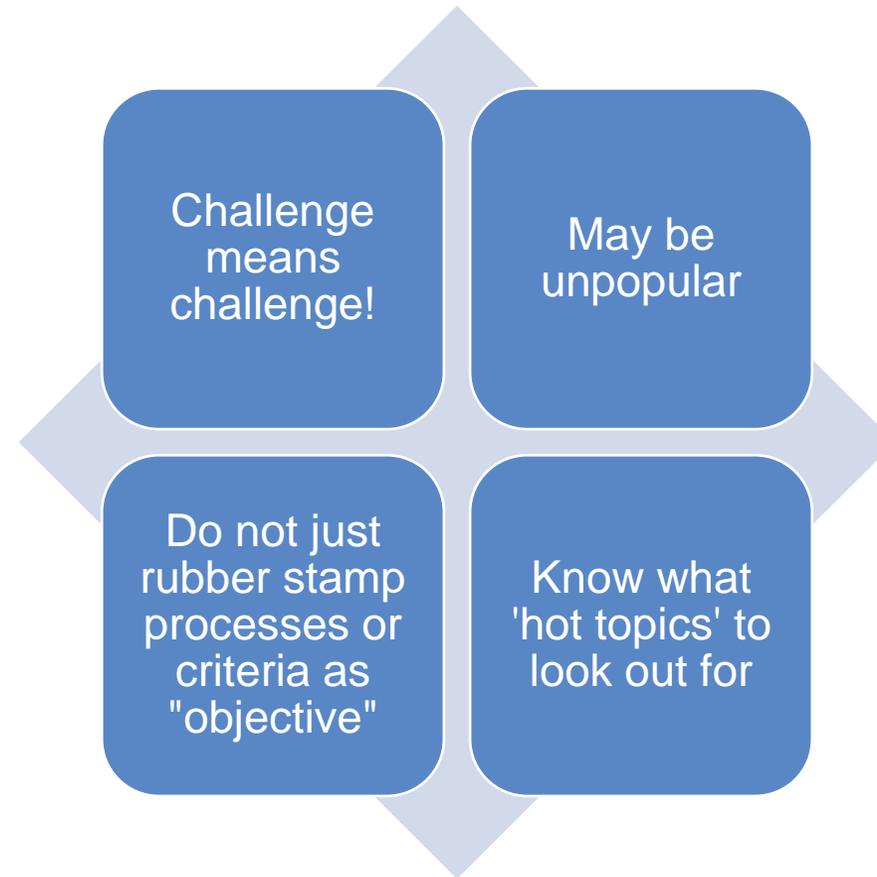
Know your employees

- How will you know if there are disabilities to take into account?
 - Actual knowledge
 - Constructive knowledge
- Ongoing, transparent dialogue
- Look out for flags and involve managers
- Ask questions (*Donelien v Liberata*)



Rule 5

Challenge your criteria



Challenge your selection

Comparison in redundancy selection – hot topics

- Health and attendance records (*Espie v Balfour Beatty Engineering Services Ltd*)
- Disability-related absence (*Cox v City Centre Training (Northern) Ltd*; *Robson v Domino UK*)
- Profitability and productivity (*Eagles v Howard Kennedy Services Ltd*)
- Omitting or altering selection criteria is not all about the end result (*Dominique v Toll Global Forwarding Ltd*; *Menezes v Coin Street Community Builders*)

Challenge your selection

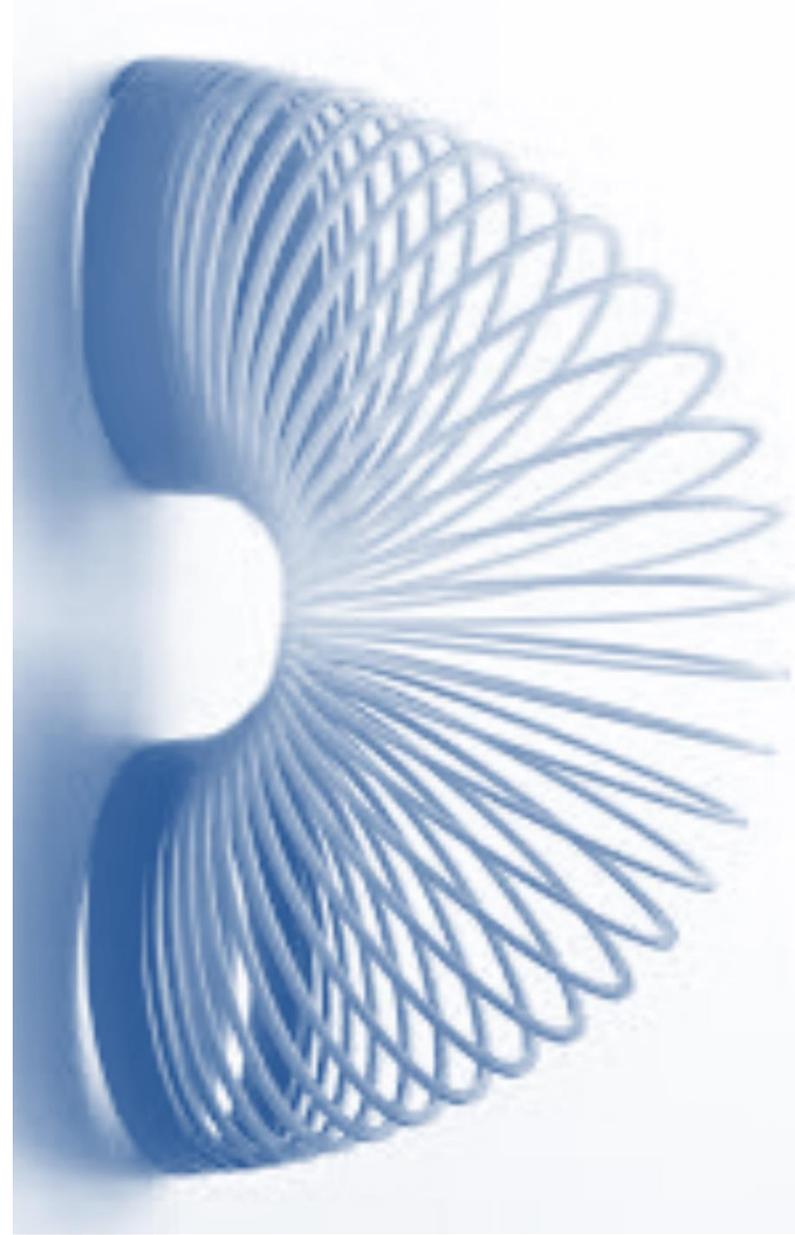
Comparison in selection for alternative employment – hot topics

- Trial period (*Lee v University of Westminster*)
- Competitive interviews and assessments (*London Borough of Southwark v Charles*; *Wilebore v Cable and Wireless Worldwide Services Ltd*)
- Vacant post at higher grade/new role (*Archibald v Fife Council*; *Wade v Sheffield Hallam University*)
- Offering alternative employment in priority (*Steers v S Walsh and Sons Ltd*; *Redcar and Cleveland Primary Care Trust v Lonsdale*)

Rule 6

Prepare to be flexible

- Fact specific area - one size will never fit all
- Be ready to adapt as issues are raised
- Speak to employees **and** managers, let them influence direction where needed
- May need to flex timings (*Doran v Department for Work and Pensions; Parvez v Mackenzie Tools and Productions Ltd; See v Westfield Shopping Towns Ltd*)



Rule 7

Be open-minded

What else can you consider?



Golden Rules

- Rule 1: Have an "inclusive employer" mindset
- Rule 2: Build in planning time
- Rule 3: Be aware of your risks
- Rule 4: Know your employees
- Rule 5: Challenge your selection
- Rule 6: Prepare to be flexible
- Rule 7: Be open-minded

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