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# How do you use sickness data safely when making employees redundant?

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# Question

- How do you use sickness data when creating a pool of employees for redundancy – whilst taking account of Equality Act restrictions and being fair to your business?
- Should you make explicit adjustments to triggers or state something more loosely around “consideration”?

# What is a “redundancy”?

- Situations you will come across more 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”
  - Section 139 of the Employment Rights Act 1996

# Creating a pool for redundancy

- Identify appropriate pool of employees
- From that pool the employer should select those who are to be made redundant using objective selection criteria
- An employer should not create a pool using sickness data

# Selection criteria

- Need to be transparent and evidence based, not subjective
- Can be focused on the future needs of the business

Objective	Subjective
Absence	Motivation
Disciplinary record	Versatility
Skill/qualifications	Flexibility
Experience	
Timeliness	
Length of service	

- Check your policy – it may specify the selection criteria to be used
- Fair selection for redundancy involves the fair application of objective selection criteria to the pool of employees

# What about sickness data in selection criteria?

- Attendance record - including sickness absence data – may be one of the selection criteria
- Think about other criteria as well, e.g. performance grades and disciplinary record
- Using an employee's attendance record could potentially be discriminatory if is not used in the correct way
- Different selection criteria may be given different weightings

# Attendance data

- Rather than considering whether employees have reached any “triggers”, look at employee’s attendance record over a period of time and compare the number of days when they should have worked to the number they did attend work
- Look at each individual absence and consider whether it should be discounted
- Absences related to pregnancy related illness should be discounted to avoid claims for discrimination on the grounds of sex/maternity

# What about reasonable adjustments?

- Selection for redundancy on grounds of attendance may amount to disability discrimination on the basis that the employer should have made a reasonable adjustment where a disabled person is placed at a substantial disadvantage by a provision, criterion or practice (**PCP**)
- The *EHRC Employment Statutory Code of Practice* (para 6.33) contains a list of potential adjustments that an employer may be required to make, including discounting periods of disability related absence when applying redundancy selection criteria to a disabled employee

# Bonfield v West Yorkshire Probation Board

- Claimant had diabetes – placed at risk of redundancy
- Sickness absence for past three years part of selection criteria but “disability related absences” excluded
- Six periods of absence, two diabetes related – claimant said more absence should be excluded as condition left her more prone to illness
- Duty to make reasonable adjustments was triggered, and employer should have done more to find out about other absences

# Robson v Domino UK Ltd

- Employee had long period of absence in year in respect of which performance scores were being allocated
- Performance scores being used as part of selection criteria
- Failure to look back at previous service and adjust scores was discriminatory

# Kelly v Land Rover

- Employee had two long periods of absence
- Performance criteria looked at over three years – employee absent for most of that time
- Employment Tribunal concluded period should have been extended to look at performance outside of that period

# Cox v City Centre Training (Northern) Ltd

- Employee, diagnosed with diabetes, was off sick during redundancy consultation
- Selection criteria included attendance – employee selected
- Employee said problems with toenail related to disability (diabetes). He offered to obtain medical advice to prove it
- Employer proceeded to dismiss
- ET concluded that discounting the disability-related absences would have been a reasonable adjustment. Plus, formed view that fatigue caused by diabetes impacted negatively on performance which harmed his scores

# Overall considerations

- Sickness absence can be used as one of the selection criteria when selecting employees for redundancy from a pool
- Consider making reasonable adjustments when scoring disabled employees in relation to their attendance record
- Be clear and consistent about scoring employees
- What is a reasonable adjustment will depend on the circumstances. The safest option is to discount all absences related to disability, but if you choose not to do this, need to be able to demonstrate why doing this would have imposed a disproportionate burden

# Practical tips

- Obtain Occupational Health advice regarding disabled employees so that adjustments can be made which will help to prevent you taking periods of disability related absence into account/allow you to assess impact on absence
- Ensure reasons for absence are always recorded in the correct way
- Offer voluntary redundancy to all affected employees before compulsory redundancies have to be made
- Always consult with employees regarding their scores during the redundancy process and give them the opportunity to challenge any markings which they believe are unfair and/or discriminatory

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