

# Redundancy and Dismissal

What are you to do with a disabled employee, if you've adjusted his or her work-pattern but attendance or performance is not improving?

# The Basics: What is a Disability?

- **What is a disability?**
  - Depends - however, this is a much wider definition than the medical definition
  - *'A physical or mental impairment and the impairment has a **substantial** and **long-term** adverse effect on their ability to carry out **normal day-to-day activities**'*
    - 'Substantial': more than minor or trivial
    - 'Long-term': has lasted or is likely to last for 12 months or more
    - 'Normal day-to-day activities': wide definition
  - Certain conditions are automatically considered to be disabilities from point of diagnosis
  - Mental impairment?

# The Basics: Reasonable Adjustments

- Equality Act 2010 – ‘reasonable adjustments’ for disabled workers
- **What** does this mean?
  - Positive and proactive duty to take steps to remove or reduce obstacles faced by a disabled worker in relation to work premises or to work practices and covers:
    - A policy, criterion or practice
    - A physical feature
    - A lack of ‘auxiliary aid’
- **When** does the duty arise?
  - When employer knew or ought reasonably to have known of the disability and the substantial disadvantage it causes
- **What** is reasonable?
  - Fact sensitive, objective test - depends on the circumstances of the case
  - However, the adjustment should not impose a ‘disproportionate burden on the employer’

# Reasonable Adjustments: Formulating a PCP

## West v Royal Bank of Scotland 2017

- OH report resulted in long term disability benefits being removed after two years.
- Ergonomic workstation assessment required
- Share save and redeployment implications
- Claimed unfair dismissal and disability discrimination (arising from disability, indirect discrimination and failure to make reasonable adjustments)
- ET: rejected claims, employer relied on change in OH advice, not something arising from disability.
- EAT: remitted back to a new EAT on 3 grounds. It rejected a further ground of appeal concerning whether the failure to carry out a workplace ergonomic assessment prior to finding a post into which Ms West could be redeployed was failure to make reasonable adjustments.

# Reasonable Adjustment: Holistic approach required

## The Home Office v Kuranchie 2017

- Claimant had dyspraxia and dyslexia, had undergone a Workplace Needs Assessment, a number of adjustments had been made including compressed hours, an opportunity to schedule hospital appointments during the working week and assistive software
- These failed to ameliorate the disadvantage suffered by the claimant
- ET: failure to make reasonable adjustment to reduce workload
- EAT: Upheld, critical question is whether the Respondent has taken such steps as is reasonable to have to take to avoid the disadvantage, a holistic approach to that question is required.

# Reasonable Adjustments

## Carreras v United First Partnership Research and G4S Cash Solutions (UK) Limited v Powell

- Expectation of long hours can be a provision, criterion or practice (PCP)
- A PCP does not need to be a 'requirement'
- Pay protection might be a reasonable adjustment
- Employee consent required where adjustment is not compatible with their contract

# Redundancy and Dismissal

How long must you wait before

- (1) reviewing the arrangement or
- (2) dismissing the employee?

# Reviewing Arrangements and Trial Periods

- Factors to be taken into account:
  - Effectiveness and practicality – are the adjustments working?
  - Costs and resources of company
  - Disruption to the workforce
- Trial periods: a trial period *in of itself* is unlikely to be a reasonable adjustment. It can be used as a tool for assessing whether the proposed adjustment is reasonable. (*Environment Agency v Rowan 2007*)
- It would be prudent to adopt a trial period in an appropriate case to see whether a proposed step, such as home-working, is a reasonable adjustment.
- An employer who has failed to investigate the possibility of, for example, home-working by a trial period may find it difficult to establish that home-working was not a reasonable adjustment.

# Dismissal

## Permanently unfit employee

- Can dismiss an employee due to capability... but this should be viewed as the **last resort!**
- Prior steps?
  - Previous meetings with employee
  - Satisfied reason for dismissal is ill health and not something else
  - Employee must be aware that their absence may lead to dismissal
- If you do dismiss, you need to demonstrate you acted 'reasonably' – should have considered:
  - The nature of illness;
  - Likelihood of return;
  - Need to have someone doing the job; and
  - Employee's length of service

# Dismissal as a last resort

- Beware of tricky areas!
- Could you have waited longer?
  - Question of fact. Courts look at employer resources; use of sick pay; other staff covering the role; and the need to have someone doing the work.
- Was the employee properly consulted?
  - Consider medical evidence
  - Could reasonable adjustments have been made?
- Did you take reasonable steps to discover condition/prognosis?
  - Balance employee's views with that of medical professionals

# Key Points

- What is important here is...
  - That you have considered the issue of disability and adjustments
  - That you have discussed the options with the employee
  - That this is a consultative process – seek views and agree way forward, including trial periods if necessary
  - That you have documented the steps you have taken in case you are later challenged
  - Dismissal considered as a last resort

# Biography



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Amanda is a Partner in our Employment and Labor group. Amanda is accredited as a specialist in both Employment Law and Discrimination Law by the Law Society of Scotland. Her main areas of interest are all aspects of discrimination and industrial relations. She also has considerable experience in advising upon employment issues in the Education and Police sectors and a particular interest in sports law. She lectures widely on various matters and appears regularly in tribunals and the Employment Appeal Tribunal. Prior to joining Dentons (formerly MMS) as a Partner in 2001, Amanda was a Partner in the niche employment firm, Mackay Simon.



# Thank you

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