

ALLEN & OVERY

Redundancy and Dismissal: Shaping New Law into Solution-Focused Answers for Employers

Redundancy selection



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Legal background

Unfair dismissal

Redundancy reason



Fair process

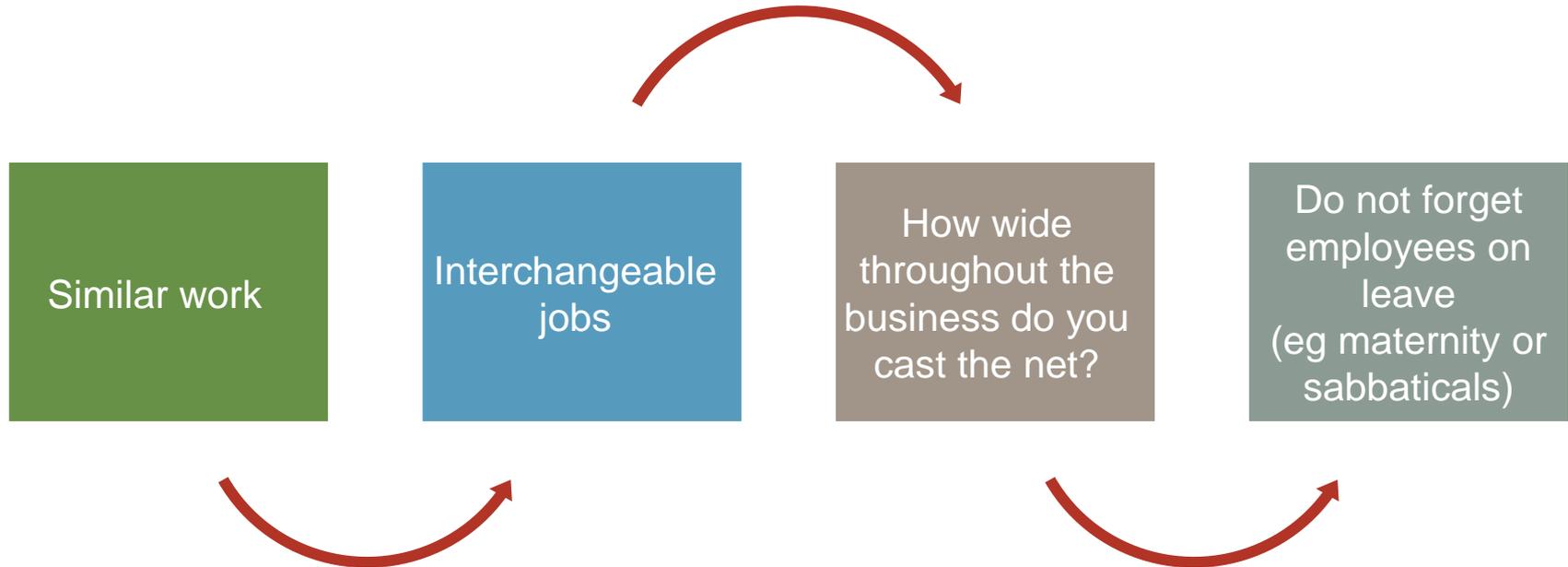


Fair dismissal

Discrimination

process and decision-making should not be tainted with discrimination

Pool identification



Poor for selection



Bumping (or transferred redundancy)

Selection criteria is applied to a class of employees wider than the scope of the redundancy situation

Before

A's job is redundant



B's job is not in scope



After

transferred

A takes B's job



B is redundant



Selection criteria – preliminary considerations

HR1 – Q5 method of selection for redundancy



Objective criteria



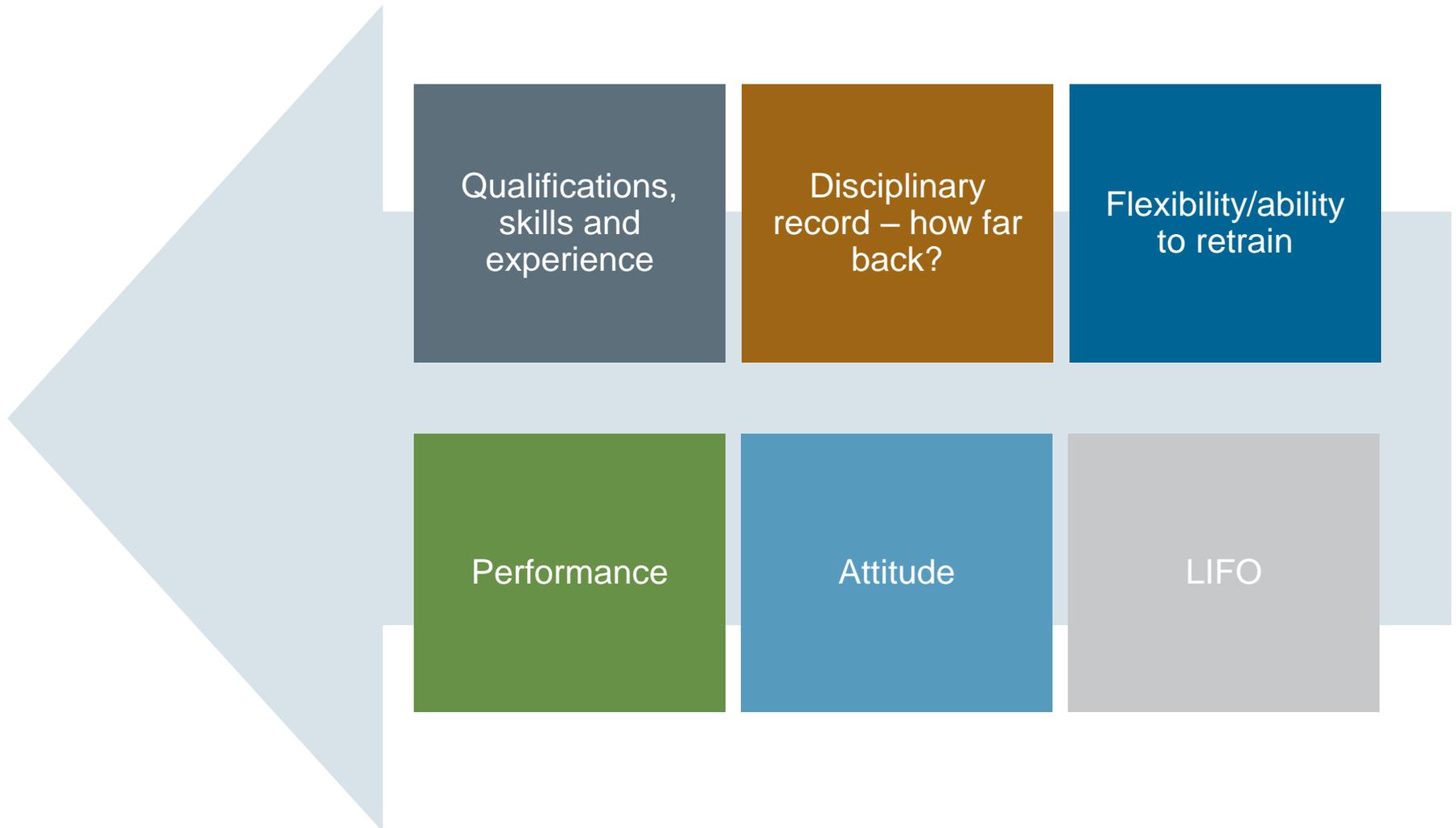
Fair and consistent application



Don't forget about voluntary redundancy

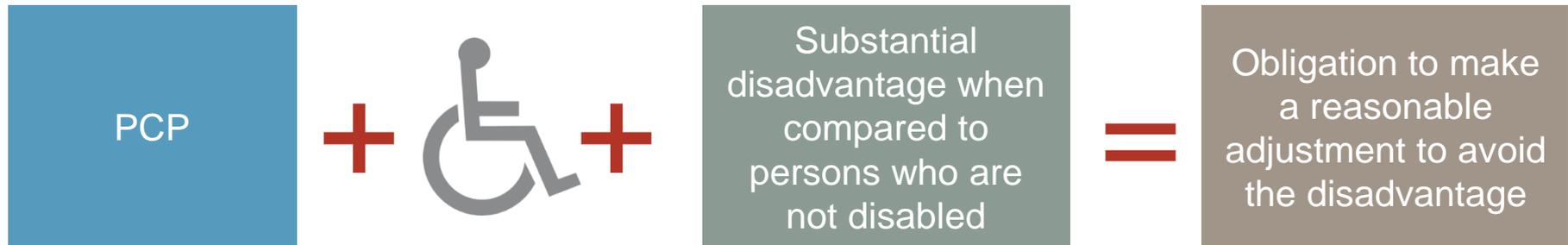


Selection criteria – backward looking



Selection criteria – absence data and disability

The Law



ECHR Code of Practice on Employment

This statutory Code gives a detailed explanation of the Equality Act 2010 – and assists tribunals in interpreting the law

Selection criteria – absence data and disability

Applying the law to redundancy

Selection
criteria
includes
absence data



Lower score than a
person without a
disability



Discount disability-
related absence

ECHR Code of Practice on Employment

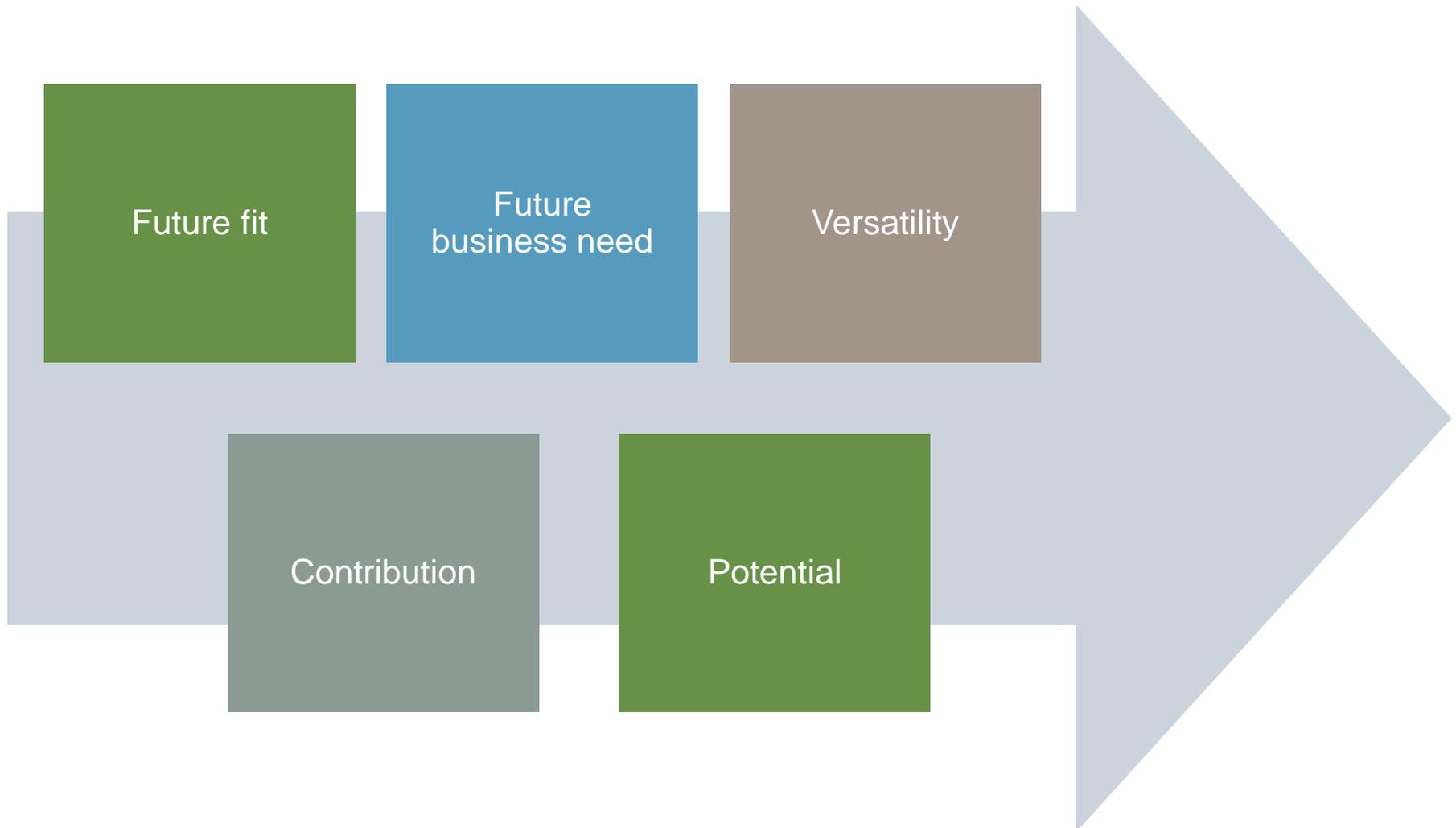
Because of his condition, a man with an autoimmune disease has taken several short periods of absence during the year. When his employer is taking the absences into account as a criterion for selecting people for redundancy, they discount these periods of disability-related absence

Altering selection criteria as a reasonable adjustments

- Should selection criteria be altered as a reasonable adjustment?
- Are subjective criteria permissible?
- The EAT considered these issues in this redundancy case
- EAT held that removing the selection criteria was not a reasonable adjustment as it would not have removed the disadvantage that posed a substantial disadvantage to the employee
- On subjective criteria, the EAT said that is dangerous to rely solely on it but this was a creative position and purely objective criteria may have been insufficient

Lancaster
v
TBWA Manchester
(EAT 2011)

Selection criteria – forward looking



Selection criteria and scores

▶ Individual scores should be disclosed during the individual consultation process

▶ Do not disclose the scores of other employees on a named-basis – you may be asked to disclose but there is no requirement to do so and it may infringe data protection rules

▶ All employees' scores will be disclosable as part of the litigation process so selection needs to be fair, transparent and defensible



Dealing with those on maternity leave

Special rules apply in that selection criteria must not be discriminatory against women or pregnant employees or those on maternity leave, and women on maternity leave get priority over other candidates in offering suitable alternative employment, but otherwise everything is the same

- Do not inflate the scores of those on maternity leave, effectively giving them the benefit of the doubt
- Case law has held that this can be discriminatory against a man
 - *Eversheds v De Berlin*
- The ECJ ruled in *Riezniece v Zemkopibas* that:
 - Selection criteria must be identical for all “at risk” employees
 - Using historical data is permissible but must not disadvantage the absent employee



Suitable alternative employment (SAE)

Fair process – an employer should look for SAE as an alternative to redundancy

The role should be comparable status (but do not rule out roles at a more junior level)

Selection for redundancy should be based on objective criteria but subjectivity can come into selection of candidates for alternative employment

In a reorganisation, a newly created role will be deemed a vacancy

If an employee unreasonably refuses SAE, he or she will lose the entitlement to statutory redundancy pay

Suitable alternative employment – maternity returners

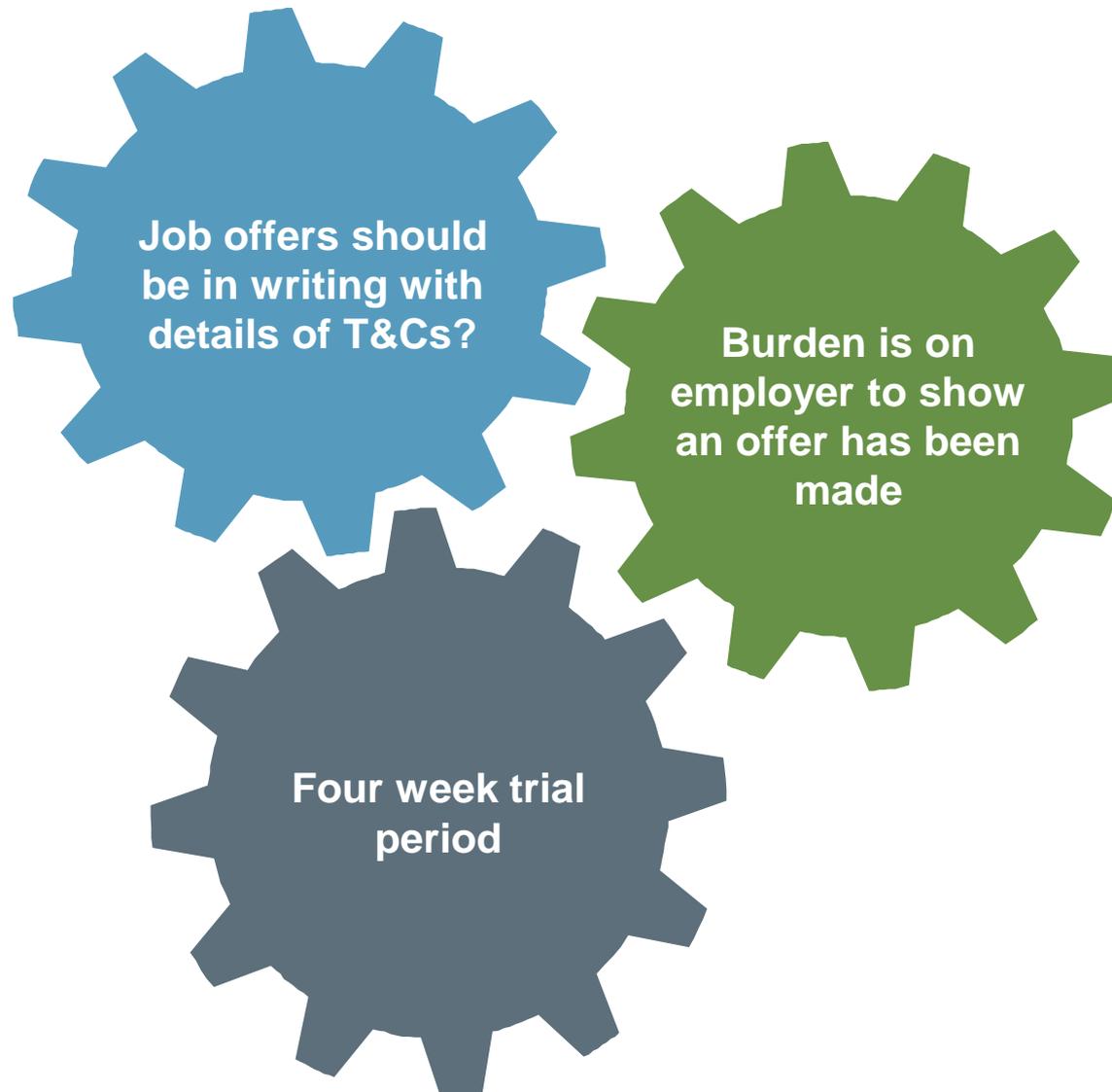
▶ A woman on maternity leave is entitled to be offered suitable alternative employment (in preference to others)

▶ First right of refusal goes to the woman even if she is not the best candidate for the job

▶ *Wainright v Sefton Borough Council* – obligation is triggered at the point the woman is put “at risk”



Communication of offers



Golden rules

If applying selection criteria, personal opinion should play no part in the process – can you back up your decisions?

Strive for smart selection

Every document tells a story, so ensure that yours is telling the one you want it to tell. Documents are disclosable in the litigation process, so careful documentation of decisions is essential

Watch out that discrimination does not taint the decision-making process – age, sex, pregnancy, race and disability discrimination are the most likely to impact