



Weightmans

White Paper Conferences Ltd

Redundancies, Disability & Sickness Data

23 May 2017

Mark Landon

Partner, Employment

0207-822-1905

mark.landon@weightmans.com

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Questions

- In a redundancy situation...
 - Should you remove directly and/or indirectly disability-related absences from sickness data when 'scoring' individuals in a selection exercise?
 - How far must you go into understanding a disability?

Key principles in disability cases

- Decisions about how best to handle disabled employees when undertaking a redundancy exercise, including whether to adjust procedures (e.g. selection criteria) and ultimately whether to dismiss, rest with management
- However, management must make (and be able to evidence) well-informed decisions involving a fair and reasonable process...
 - ‘Band of reasonable responses’ approach
 - Potential contributors → HR, OHA, Disability expert, H&S assessor
 - Robust paper trail

Redundancy dismissals – legal considerations

- **Fair dismissal principles** – notably adopting a fair procedure throughout...
- **Disability discrimination:**
 - Discrimination arising from disability) ...both include the concept of
 - Indirect disability discrimination) justification...which in turn depends upon the employer fulfilling...
 - The Duty to make reasonable adjustments → cornerstone of disability law
- n.b. potential impact of **Age discrimination** / **Health & safety legislation** /

Redundancy dismissals – legal considerations

- **The duty to make reasonable adjustments** – comprises three elements:
 - Where an employer’s provision, criterion or practice*; or
 - Where a physical feature of the employer’s premises**; or
 - Where the non-provision of an auxiliary aid or service**...

puts a disabled person at a substantial disadvantage in comparison with non-disabled people, the employer must make reasonable adjustments to prevent that disadvantage

* e.g. redundancy selection procedure

** may be indirectly relevant, e.g. if contributed to sickness absence(s)

Redundancy dismissals – legal considerations

- Factors when considering what is ‘reasonable’:
 - the effectiveness of an adjustment – may need expert guidance
 - the practicability of an adjustment (& remember Health & Safety)
 - the cost of an adjustment (the employer must bear all the cost)
 - the employer’s financial or other resources
 - the availability of financial or other assistance
 - the type and size of employer

- The ultimate decision re reasonableness rests with the Employment Tribunal

Redundancy dismissals – legal considerations

Reasonable adjustments may include...

- Re-allocating duties
- Transferring the disabled person to an existing vacancy (n.b. evolving case law)
- Altering working hours
- Assigning to a different place of work or training, or arranging homeworking
- Time off for rehabilitation, assessment or treatment
- Arranging training / mentoring for the disabled person & others
- Acquiring or modifying equipment, instructions, etc.
- Permitting flexible working

Disability dismissals – recent case law

Discrimination arising from disability:

- Hall v Chief Constable of West Yorkshire Police [2015] EAT
- Risby v LB Waltham Forest [2016] EAT
 - Need only be a "loose" causal link between the disability and any unfavourable treatment
 - Employers have an opportunity to defend a claim by showing that either the unfavourable treatment was justified or else that they did not know / could not reasonably have known that the employee was disabled

Disability dismissals – recent case law

Reasonable adjustments and absence management:

- Griffiths v Secretary of State for Work and Pensions [2015] CA
 - PCP = the requirement to maintain a certain level of attendance at work, rather than the attendance policy – this requirement would substantially disadvantage disabled employees with disability-related sick absences
 - The reasonable adjustments duty was engaged, even though the absence management policy was applied equally to everyone – duty is activated once there is evidence that a PCP places a disabled person at a substantial disadvantage because of their disability

- Urso v. Department for Work & Pensions [2017] EAT
 - An employer must do all that it can reasonably be expected to do to find out if a worker has a disability;
 - The employer should have been on notice of the employee's potential underlying disability and should have investigated the known symptoms, even if the GP report didn't refer to the actual condition (PTSD)...
- ...Employment Tribunals do appear to be fond of hindsight in this regard

Redundancy dismissals & disability – practical issues

- Maintain accurate records & a robust paper trail
- Think carefully about your redundancy procedure & selection criteria:
 - What sort of skills do you need to retain?
 - Is the redundancy process, including any selection criteria, relevant & robust in terms of achieving your aims?
 - Are there any aspects of the redundancy process or selection criteria which might disadvantage people due to a protected characteristic such as disability &/or age? ...If so...

Redundancy dismissals & disability – practical issues

- In what way(s) does the process or criteria potentially disadvantage the employee in question?
 - Hindsight factors...

...Is there some potentially historic disadvantage, e.g. a past failure to implement a reasonable adjustment which now results in the candidate being scored lower? &/or
 - Current factors...

...Is there some potentially current disadvantage, e.g. because a disabled candidate finds it hard to fully engage in the redundancy process – in which case can adjustments be made now?

Redundancy dismissals & disability – practical issues

- Typically, the issue will come down to reasonable adjustments and the question of justification...
- Hindsight factors arguably create the greatest problem...e.g. if an employee has attendance warnings on his/her record which should not have been given...in this case an employer may need to retrospectively make allowances;
- However, if there are no hindsight factors (e.g. because suitable reasonable adjustments were implemented before deciding – with justification at the time – that an attendance warning should be given) then the employer is in a stronger position...

...although due consideration should still be given to the employee's submissions about any current factors which impact...

Redundancy dismissals & disability – practical issues

- Re current factors...
 - Is the employee genuinely disadvantaged? ...if yes...
 - Are there reasonable adjustments that could be implemented to circumvent that current disadvantage?...
 - ...if yes, implement the adjustments and continue with the redundancy procedure;
 - ...if no, would you be justified in selecting the disabled employee for redundancy based upon the selection criteria and procedure adopted?

Q & A

- Any questions?

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Contact Details

Mark Landon – mark.landon@weightmans.com

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