Briefing

Managing redundancy

Abridged content for sample purposes

Business Disability Forum
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Introduction

Managing redundancy

This is one of a series of briefings, published by Business Disability Forum, which provide practical guidance for employers on specific topics relating to the employment of disabled people. It will be particularly useful for personnel or human resources managers, occupational health advisers, line managers and employment agencies.

This guide will help you to ensure that disabled people you employ are not discriminated against if your organisation has to identify employees for redundancy. It will also help you to manage employees who retain their jobs after redundancies have been made. It will be useful for anyone involved in the redundancy process but in particular equality and diversity officers and line managers as well as personnel or human resources managers who will be more familiar with the redundancy process.

This paper will take you through the redundancy process step by step and help you to identify areas where you may need to make reasonable adjustments for disabled employees so that every employee is treated fairly during this difficult process. It will also help you to understand the law that applies to redundancy and its interaction with the Equality Act 2010 so you can avoid legal risk.

In the area of retention and redundancy this means ensuring that disabled employees are not unfairly selected for redundancy because of their disability or reasonable adjustments. It also means ensuring that the redundancy processes are accessible to disabled staff so everyone has equal opportunity to demonstrate their abilities and value to your organisation.

Redundancy and disability

What is redundancy?

Redundancy, if all the correct procedures are followed, is a lawful and fair way of dismissing employees for whom the employer no longer has work. As the word itself suggests, there is no longer anything for that employee to do and so the employer has to terminate their contract of employment.

You can, therefore, only lawfully make employees redundant if:

- The business as a whole is closing.
- A particular branch, office or workplace is closing.
- Fewer employees are needed to do particular work.

When are dismissals not redundancies?

If the employee's job still needs to be done but they are not able to do the work for any reason, including a disability, they are not redundant. This means that if an employee resigns for any reason this is not a redundancy situation, even if the employee does not have another job to go to.

An employee whose contract is terminated by the employer because they are no longer able to do their job, even with reasonable adjustments, is also not redundant if the work they used to do still needs to be done by another employee.

Reasonable adjustments to retain employees

Employers must ensure that all reasonable adjustments that would have enabled the disabled employee to retain their job, or do another job for the organisation, have been made before the employee's contract of employment is terminated in these non-redundancy situations.

Employers have a duty under the Equality Act 2010 to make reasonable adjustments to remove barriers that place a disabled employee at a substantial disadvantage so that they can do their job.

Redeployment as a reasonable adjustment under the Equality Act 2010

If no reasonable adjustments would enable a disabled employee to do their current job, employers must look for suitable alternative vacancies to which the employee can be transferred. Remember that vacancies might be suitable if other reasonable adjustments are made, e.g. changing hours or location, providing equipment or allocating non essential duties the disabled person cannot do to someone else.

In the case of Archibald v Fife Council, the House of Lords noted that the law states that it is

a reasonable adjustment to transfer a disabled person to a suitable alternative vacancy. This means that it is not enough simply to alert an employee of internal vacancies for which they can apply. Disabled employees who need to be redeployed as a reasonable adjustment should not be required to take part in competitive interviews for vacant posts.

This is redeployment as a reasonable adjustment under the Equality Act 2010 and is different to redeployment of an employee, disabled or not, who is at risk of redundancy.

There is more about the redeployment of employees at risk of redundancy below.

If a disabled employee cannot do their job even with reasonable adjustments and there is genuinely no other suitable alternative vacancy in the organisation, the employer can terminate the employee's contract. This may be a fair dismissal but the employee is not redundant and is not entitled to a redundancy payment. This is because that employee's job still needs to be done and the employer will have to find someone else to do the work.

For more on whether or not an adjustment is reasonable see the 'reasonable adjustments - line manager guide' and the 'reasonable adjustment request form' available from www.businessdisabilityforum.org.uk.

Ill-health retirement and Permanent Health Insurance (PHI) schemes

In this situation an employee who has been paying into a pension scheme might be able to take early ill health retirement. Whether or not this is possible will depend on the terms of the pension scheme.

Similarly, an employee who has ill health or disability insurance may be able to make a claim

on that policy. Remember, however, that to make a claim on such a permanent ill health or PHI scheme the employee needs still to be employed. Terminating the employment will result in the employee no longer being able to claim on the insurance policy and may lead to claims for breach of contract.

It is possible to make employees who are on long term sick leave redundant whether or not they are claiming on such PHI policies if one of the situations outlined above applies (i.e. the business is closing). For more on this see the contrasting cases of Aspden v Webbs Poultry & Meat Group (Holdings) Ltd, First West Yorkshire t/a as First Leeds v Haigh [2008] [1996] and Hill v General Accident [1998].

In Aspden it was held that dismissing an employee who was on sick leave and benefiting from

an insurance scheme was breach of contract. In Haigh, dismissing the employee on capability grounds before his eligibility for an insurance scheme had been established was held to be unfair dismissal.

In Hill, however, the dismissal of an employee on long term sick leave was held not to be breach of contract because the dismissal was for redundancy and so not simply to avoid paying sick pay and allowing the employee to become eligible for sickness accident benefit or an ill health retirement pension. This, however, is a complex area and you should take advice from your lawyers before taking any action.

When can employers make redundancies?

Closure of the business

This is when the employer ceases or intends to cease carrying on the business in which the employee is employed.

Closure of a particular workplace

This is when the employer closes down the place where the employee was employed to work, for example a particular branch, site or office.

Fewer employees are needed to do particular work

This is a less clear cut scenario than when the whole business or part of the business closes but there may be redundancies if, for example:

- There is less work available perhaps because the employer has fewer customers or contracts.
- Fewer employees are needed because of new technology or the use of external contractors.

Mobility clauses

It is not uncommon for employees of large organisations to have 'mobility clauses' in their contracts which allow the employer to move the employee to a different work location. If you can find suitable work for employees who worked in a place that is closing down at another site, these employees are not redundant and can be expected to take the work offered.

However, you should bear in mind that a disabled employee might not be able to re-locate because of their disability. For example, there may be no parking or accessible public transport to the new location, or the disabled employee may live in adapted accommodation they would have to give up to relocate to another part of the country. The mobility clause may well place such an employee at a substantial disadvantage because of their disability.

In this situation it is likely to be a reasonable adjustment under the Equality Act 2010 not to invoke this mobility clause. This may, however, mean that you have to make the employee redundant.

Suitable alternative employment – redeployment of employees at risk of redundancy

You must try to find suitable alternative employment for employees at risk of redundancy. Failure to do so may lead to claims for unfair dismissal. This means that you must identify possible vacancies at the outset to which redundant employees could be transferred. Remember to take into consideration reasonable adjustments that could be made to those vacancies. For example, could the job be:

- Performed part-time?
- Done from a different location or from home?
- Suitable for a disabled employee if particular equipment were to be provided, i.e. voice recognition software?
- Re-organised so that some non essential duties were performed by someone else?

Employees at risk of redundancy should be told about all possible alternative positions even if these involve a reduction in salary or grade or relocation. Do not make assumptions about disabled employees; they may be as willing to relocate, retrain or work reduced hours as non disabled employees if the only alternative is redundancy.

If an employee unreasonably refuses the offer of a suitable alternative position they are not redundant and so are not entitled to redundancy pay. The onus is, however, on the employer to show that the job is 'suitable' and that the employee is being 'unreasonable' in refusing it.

Whether or not the job is suitable will depend on objective criteria such as pay, conditions, location and status. Subjective criteria, however may also make the alternative position unsuitable,

for example, extra travelling time or the requirement to work shifts that adversely affects an employee's caring responsibilities for children or elderly or disabled relatives.

Similarly if an employee accepts a suitable alternative position they are not redundant and so are not entitled to redundancy pay provided the offer of the alternative job is made before the old contract ends and the new job starts no later than four weeks after the end of the old contract.

Trial periods

All employees redeployed into a job that has different terms and conditions to their old, redundant post are entitled to a four-week trial period within which to decide if the new job really is suitable.

This trial period is particularly important for disabled employees. If the new post needs reasonable adjustments that have not been implemented when the employee starts work, it would be a reasonable adjustment to extend this trial period to give the employee time to assess the suitability of the post with reasonable adjustments.

If the alternative post is unsuitable and the employee wishes to terminate the contract, they will be treated as having been dismissed at the date their original contract came to an end. An employee in this situation is entitled to redundancy pay unless the dismissal was for some unrelated reason such as gross misconduct.

They are also entitled to be given a notice period which should be either the period specified in the contract or a 'reasonable period' in the absence of such in the contract, but you can pay the employee in lieu of notice if this is permitted by the contract of employment.

Employer question

We are closing a department and so the whole team of five people who work there is potentially redundant. Having reviewed the business there is a vacancy to which we can redeploy one of these employees. We think that all five could do the available job but one of them is a man who is the sole breadwinner for a young family. Another employee has a visual impairment which

is likely to make it harder for him to get another job elsewhere. Can we take these factors into consideration when deciding who to redeploy to this vacancy and who to make redundant?

Business Disability Forum answer

This is a difficult situation but you must make decisions about who to make redundant on the basis of fair and objective criteria in order to keep people whose skills will benefit your organisation the most. If there is only one job vacancy you must ensure that you assess each employee at risk of redundancy carefully against the job description and person specification to ensure that it is given to the best candidate for the role.

Remember, however, to make reasonable adjustments that the disabled person might need to do the job. If this reveals that one person is more suited to the role than the others you should give the job to that person regardless of their personal situation or that of the others. Doing otherwise might lead to claims for unfair dismissal from the employees that you make redundant.

If all the candidates are genuinely equally qualified for the role you could offer it to the disabled person. This is because it is lawful for most employers to positively discriminate in favour of disabled people. If you are a public sector organisation you could give the job to the disabled employee, as this could fall under your equality duty to promote equality of employment for disabled people.

Collective consultation

If the employer has an already agreed procedure, such as with a trade union, this must be followed unless you can show reasonable reasons for not doing so. If you recognise a union or there are elected employee representatives in your organisation it is best practice to consult them about the selection criteria.

Redundancies of 20 employees or more

If an employer proposes to make more than twenty employees redundant within 90 days it must consult 'appropriate representatives' of employees 'affected' by the proposed redundancies. Remember that those 'affected' by the redundancies may include people who are not themselves at risk of redundancy. The duty to consult is triggered even if you can find alternative employment for some of those affected and so will in fact make fewer than 20 people redundant.

'Appropriate representatives' are trade union representatives or if you do not recognise a union, elected employee representatives. If only some of the affected employees are members of the trade union then you must ensure that you consult both the trade union representatives and the other employee representatives.

If there are no employee representatives you must allow time for these to be elected. You should decide how many elected representatives will be needed to represent the affected employees and ensure arrangements are made for fair elections. You must not unreasonably prevent any affected employee from standing for election. This means that you must ensure that reasonable adjustments are made to enable disabled candidates to stand for election, i.e. ensuring that information is provided in accessible formats in a timely fashion, holding meetings in accessible venues and at reasonable times.

Line managers must allow elected representatives access to the affected employees and paid time off to conduct their duties, as well as the facilities they need. Remember that a disabled elected representative may need reasonable adjustments to fulfil their role, for example access to a support worker, a text phone or a sign language interpreter to communicate with the employees that they are representing.

The consultation with the union and/or elected representatives should be on:

- Ways of avoiding the redundancies.
- Reducing the number of employees to be dismissed, e.g. redeployment to other vacancies, reducing overtime, shorter working weeks or offering sabbaticals.
- Mitigating the consequences of the dismissals, e.g. counselling, or arranging outplacement services to help redundant employees to find another job. This could include working with Disability Employment Advisers at Jobcentre Plus.

You should approach the consultation with an open mind and be prepared to consider any representations or suggestions made to you about the proposed redundancies and the selection criteria for redundancy. You must also provide the appropriate representatives with the following information (in accessible formats as required):

- The reason for the proposed redundancies.
- The number and type of employees you propose to dismiss as redundant.
- The total number of employees of that type employed at the place where the redundancies are proposed.
- How you propose to select employees for redundancy.
- The timescale for redundancies.
- How any redundancy payments, other than statutory redundancy pay, are going to be calculated.

If the affected employees in your organisation fail to elect representatives within a reasonable time, you must provide every affected employee with this information, again in a format that they can access, e.g. electronically so it can be read by a screen reader, on tape or in easy read as required.

Consulting employees on sick leave

Some of the affected employees might be on sick leave when redundancies are proposed. Disabled employees who are on sick leave will be substantially disadvantaged by consultation meetings about your proposals that they cannot attend. You should obtain medical advice about an employee's ability to participate in the consultation process.

This may mean referring the employee to your occupational health department and obtaining reports, with the employee's consent from their GP or appropriate specialist. Depending on the advice received the employee may be able to take part in the consultation if reasonable adjustments are made. Reasonable adjustments could include:

- Agreeing a time for elected representatives to visit the employee at home.
- Providing transport to enable the employee to come into the workplace.
- Allowing the employee to be accompanied by a support worker or family member.
- Conducting the consultation by telephone.
- Deferring the consultation until the period of sick leave ends if a return date is known.

Penalties for failure to consult

Affected employees or their representatives who have not been appropriately consulted can bring an employment tribunal claim against the employer. The tribunal can make an award of up to 90 days' actual pay for each employee.

Disabled employees or representatives can bring claims under the Equality Act 2010 if reasonable adjustments were not made to the consultation process in order to remove barriers that placed them at a substantial disadvantage in the process.

Notifying the Secretary of State

The Secretary of State for Business Enterprise and Regulatory Reform must also be notified in writing of any proposal to make more than 20 employees redundant. This must be done before redundancy notices are sent to affected employees. Failure to do so is a criminal offence.

A copy of this notification should be provided to the union and/or elected representatives.

Selection for redundancy

Unless the whole organisation is closing down employers will need to select who should be retained and who should be made redundant. To do this, you must draw up selection criteria against which employees will be assessed.

The pool for selection

Consultation with the union and/or other elected representatives and disability and other networks will help to identify the pool of employees from which redundancies will be made.

If other employees do jobs that are the same or similar in other departments or areas of the business, you should consider widening the redundancy pool to include these employees.

Redundancy matrix

It is good practice to develop a redundancy matrix which lists the selection criteria that you

have decided to use in order to decide who should be made redundant. You can then allocate a score, usually on a scale of 1 to 10, to each employee against each selection criterion. If certain criteria are particularly important to your business you can give them extra weight in the scoring process. The completed matrix will show the employees with the lowest scores, who you can then provisionally select for redundancy.

When allocating scores, disabled employees should not be marked down for having reasonable adjustments. In some cases you may need to adjust a disabled employee's score as a reasonable adjustment.

The people responsible for selecting employees for redundancy must know about the reasonable adjustments needed by those employees at risk. If line managers of disabled employees are not involved in the selection process they should be consulted about their staff and asked if their staff have any reasonable adjustments that they want you to take into consideration.

The individual must of course also be asked about their adjustments or anything else that they think the selectors should take into consideration when making their assessment at the individual consultation stage.

Using Tailored adjustment agreements to record reasonable adjustments that have been agreed for an individual is a good way to ensure that such adjustments are taken into consideration. A template 'Tailored adjustment agreement' can be downloaded from the Business Disability Forum website at www.businessdisabilityforum.org.uk

Employer question

We are in the process of selecting employees for redundancy. We have drawn up selection criteria and intend to assess each employee at risk of redundancy against this. One of our elected representatives has told us that we cannot apply one of the criteria, flexibility, to disabled employees as it is discriminatory. Are they right?

Business Disability Forum answer

You need to assess how important it is to your business for remaining employees to be flexible and what exactly you mean by this term, e.g. to change hours or place of work, re-locate or take on additional duties? You may need to make the reasonable adjustment of not applying this criterion to a disabled employee who is substantially disadvantaged by this requirement if it isn't essential. Remember however, that it will not be the case that every disabled employee cannot meet this requirement and so you need to take a case by case approach, not the one suggested by the employee representative.

For example, a disabled employee who works from home as a reasonable adjustment may not be able to be flexible about where they work and so you should think about whether it would be a reasonable in all the circumstances not to apply the criterion to them. Another disabled employee may already move from site to site doing different jobs and so the requirement to be flexible will not put them at a disadvantage.

Selection criteria

Selection criteria must be justifiable and, as far as possible, objective. They must also be applied consistently, fairly and systematically. Failure to do so may lead to claims for unfair dismissal and discrimination.

You can select criteria that reflect the needs of the business, but it is important to apply them consistently and to be clear about what can and cannot be taken into consideration.

Listed below are commonly used selection criteria and suggestions for reasonable adjustments you may need to make to ensure that they do not discriminate against disabled employees.

Remember that you must make reasonable adjustments for a disabled person if you know, or could reasonably be expected to know, that the person is disabled and that the criterion applied will place them at a substantial disadvantage because of their disability compared to people without a disability. In deciding whether a possible adjustment is reasonable you need to consider the:

- Effectiveness of the adjustment in preventing the disadvantage.
- Practicality of the adjustment.
- Financial and other costs of the adjustment and the extent of any disruption caused.
- Extent of the employer's financial or other resources.
- Availability to the employer of financial or other assistance to help make an adjustment, for example through the Access to Work (AtW) scheme and the support of Jobcentre Plus.

Employer question

During a recent round of redundancies we were careful to ensure that the process was accessible to disabled people and to take known reasonable adjustments into account when selecting people for redundancy. An employee who has never told us about a disability or had any reasonable adjustments has now complained that he has been unfairly selected for redundancy because of his disability.

He had a heart attack last year and had a period of time off sick. Since his return he has been less productive than his colleagues. He did not indicate on his sick certificates that he was disabled and nor did he ask his line manager for reasonable adjustments at work. What should we do?

Business Disability Forum answer

The Equality Act 2010 says that you must make reasonable adjustments for employees who you know, or could reasonably be expected to know, are disabled and are substantially disadvantaged by the working environment or arrangements because of their disability. Many employees will not describe themselves as disabled and may be surprised to learn that they have legal protection. Fewer still will know that they can ask for 'reasonable adjustments'.

The onus was, therefore, on you as the employer to consider if this employee needed adjustments when he returned to work after his heart attack. His manager should have asked him if he was having difficulty with any aspects of his work and asked for advice from an occupational health adviser. It might then have emerged that he was finding it difficult to do certain aspects of his

job because he has heart disease. His productivity might have improved if it had been thought possible that he was disabled and simple reasonable adjustments had been made for him.

It is arguable therefore that you did or should have known that this employee was disabled when you were assessing him against your selection criteria for redundancy. Even if you did not, you have now been told that he has a disability and so you should reassess him in the light of the information you now have.

First, however you will need a report from an occupational health adviser who has had contact with the employee's GP or heart specialist as appropriate to find out what impact his disability has on his ability to work. You should then consider if it would be reasonable to discount the period

of sickness absence following his heart attack and to re-consider his productivity in the light

of reasonable adjustments that might improve this. This might improve his score sufficiently to remove him from the redundancy list. Failure to re-assess him may result in his bringing a claim for disability discrimination.

Content has been removed for sample purposes. Pages 19 to 54 are available in the full booklet.

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