Employment and Equal Opportunities Service

Chapter 7: Guidance for managing staff

This chapter will cover the following topics:

- Talking to staff and colleagues about their health or disability
- Performance Issues
- Managing attendance issues and sickness absence
- Managing staff with caring responsibilities
- Redundancy
- Avoiding unlawful discrimination in dismissals

Whilst the Ordinance will introduce a number of specific legal obligations on employers, the basic principles around good people management stay the same. Those employers who already have in place HR policies, and genuinely respect and value their employees, will find that they may only need to slightly modify how they manage situations such as dealing with performance issues, sickness absence, redundancies or conduct issues.

For smaller employers who might not be so familiar with how to deal with such issues, the aim of this chapter is to give a basic introduction to how discrimination issues can arise in common areas of managing staff. Whilst this guidance principally focuses on the Ordinance, and discrimination legislation, employers should be aware of other employee rights such as unfair dismissal. Simply because a dismissal is not discriminatory does not mean it is fair, although if a dismissal is discriminatory, it will also be found to be unfair – regardless of the length of service of the employee.

Accordingly, small employers are recommended to follow the relevant States of Guernsey Codes of Practice or Guidance when dealing with Disciplinaries (which covers both conduct and capability issues), Raising and handling Grievances or Redundancies. See also the section on the Employment and Equal Opportunities Service website on managing staff.

7.1 Talking to staff and colleagues about their health or disability

It is important to say from the outset that nobody has to tell their employer, or a potential employer that they are disabled. Indeed, there are specific restrictions which prevent employers asking about Protected Grounds such as disability during the recruitment process, apart from in limited circumstances. However, employers should do all they reasonably can to create an environment where people feel safe and comfortable to talk about disability.

Creating the right environment can help to:

- make sure disabled people get support and are not put at a disadvantage or treated less favourably;
- recognise the benefits of an inclusive and diverse workforce where disabled people aren't excluded;
- recruit and retain staff who often have more resilience and problem-solving skills as they have developed ways of living with a disability;
- avoid situations where an employer does not know someone is disabled and just thinks they cannot do their job or are not putting in any effort;
- improve wellbeing and productivity for everyone; and
- reduce sickness absence thereby increasing productivity for the business as a whole.

Where an employer is either aware, or ought to be aware that an employee has a disability, then an employer may have a legal responsibility to support them. For further guidance please refer to Chapter 2: What is a Disability?

When employees may want to talk about their disability

By creating the right environment, employees will feel more comfortable sharing information with their manager on a voluntary basis, which ultimately benefits the employer as ensuring the right support is in place from the outset can avoid issues which might otherwise arise.

Employees may share information because they:

- feel they need support;
- are struggling with an aspect of their role;
- are aware of a specific health and safety risk to them or others; or
- anticipate difficulties may arise.

Talking with someone about their disability

When a person is talking with their manager about their disability, the manager should take the lead from them. It is up to the individual how much they share, and the manager should be aware it might be a sensitive subject, especially if it is a recent diagnosis. During the conversation the manager should:

- listen carefully to the person;
- try to understand the impact of the disability on them;
- consider their circumstances;
- not make assumptions about what they can and cannot do;
- ask them about any support they might need; and
- ask how they would like their disability to be referred to or talked about, including what (if anything) they want colleagues to know.

Different people can deal with their disabilities in very different ways, some are entirely open about it, others will only provide information on a gradual basis. Either way it is important to reassure the person that they will be supported, and you can discuss how best this should take place.

Identifying a disability

A “disability” has a specific legal meaning, where an impairment is long term, i.e. it must last, or be expected to last for not less than six months or until the end of the person’s life.

Many disabilities will be obvious, for example, when you are dealing with a case of long-term sickness absence, it is highly likely in most instances the individual will have a disability.

It may be more complex when managing intermittent absences and performance issues, especially where an individual has stress or depression, which can be

more difficult to identify.

> **Example**
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> An employee who is absent from work with an “upset stomach” for a couple of days will not be considered to have a disability, on the basis an upset stomach is not a long-term impairment.
>
> Employers should be aware of patterns that may start to emerge in relation to intermittent short-term absences as that could be evidence of an underlying condition. For example, an upset stomach could be a symptom of a long-term condition such as of irritable bowel syndrome, or even it could relate to long-term stress and depression as this commonly leads to an increased number of short-term absences. Equally, both conditions can affect performance in the workplace.

The key is for employers to be aware of what is happening with their staff. Sometimes disabilities are identified through a sick note from a doctor, sometimes an employee may tell you that they have a disability, or alternatively an employer may be able to identify it before an employee is even aware they have a condition.

Where an employer is either aware, or ought to be aware, that an employee has a disability, then an employer has a legal responsibility to support them. The examples given above are where an employer ought to know or realise even if they haven’t been specifically told. The process by which an employer identifies that an employee has a disability is ultimately only the starting point, but it is important to remember that the law does not require a formal medical diagnosis from a doctor to prove a disability. Furthermore, an employer cannot simply ignore facts and circumstances which make them aware that there is a potential issue.

For further guidance please refer to Chapter 2: What is a Disability?

Using appropriate language

It is important when talking with a person about their disability that appropriate language is used, as this can affect how they feel and if inappropriate language is

used it may cause distress.

Whilst it might sound obvious, using inappropriate, offensive or negative terminology towards disabled people, including things some might consider as banter or jokes, is likely to amount to unlawful harassment. Ultimately, how we use language is a question of respect towards others, so you should be sensitive in the terms you use. Do not use words that are offensive or negative, for example spastic, wheelchair-bound, retard, cripple etc. The able bodied should also not be used as it implies others are not able bodied which could be upsetting or inappropriate. The correct term to use is non-disabled.

Employers are not expected to be experts, so a good starting point will often be to talk to the individuals themselves about their condition, and what language they use, and how they talk about it. Avoid passive phrases or words that make someone out to be a victim.

Ultimately use language that respects disabled people as active individuals with control over their own lives. The table below is intended to be helpful guidance around language related to a disabled person.

Avoid	**Use**
(the) handicapped, (the) disabled	disabled (people)
afflicted by, suffers from, victim of	has [name of condition or impairment] e.g. an individual who is registered blind or who has cerebral palsy
confined to a wheelchair, wheelchair-bound	wheelchair user
mentally handicapped, mentally defective, retarded, subnormal	Someone with a learning disability or people with learning disabilities
cripple, invalid	disabled person

spastic	person with cerebral palsy
able-bodied	non-disabled
mental patient, insane, mad	person with a mental health condition
deaf and dumb; deaf mute	deaf, user of British Sign Language (BSL), person with a hearing impairment
the blind	people with visual impairments; blind people; blind and partially sighted people
an epileptic, diabetic, depressive, and so on	person with epilepsy, diabetes, depression or someone who has epilepsy, diabetes, depression
dwarf; midget	someone with restricted growth or short stature
fits, spells, attacks	seizures
a special needs [child]	a child with special needs or additional learning needs

Where inappropriate or offensive language is used, it should be explained why it is inappropriate, how it makes people feel and why different terms should be used. Often the person who said it might not realise it is offensive, and so it is important to have a culture where this is called out by others, and not just left to the person with the disability.

Example

At the start of a training course, the presenter asks, “does anyone have any special needs”. Whilst the request may have been well-intentioned, it could make a person with a disability feel as though they are being singled out, and that the trainer has drawn unwanted attention to them.

It is recommended that such queries should be dealt with before the beginning of the course at the same time people are invited to attend. This is the time that attendees could be asked about reasonable adjustments. Aside from avoiding the potential embarrassment for the person this action moves the focus to the potential solutions to overcome any barriers so they can fully participate in the course.

Care must also be taken when using the euphemism “special needs”. The phrase may cause offense and should only be used in the context of providing additional targeted education to a particular person with a disability.

Confidentiality

An employer should keep details of anyone’s disability confidential, unless the individual confirms that they are happy for it to be shared with colleagues. Where information is to be shared, then it is recommended this should be agreed in writing with the disabled person, including:

- what information will be shared;
- who it will be shared with;
- who will share the information (e.g. the person themselves or the manager); and
- how the information will be shared.

There are limited circumstances where confidentiality might not be possible, for example when an employee uses a wheelchair or has an assistance dog, but even then, an employer should still agree with the individual what colleagues can be told. In addition, there will be other circumstances where there may be a need to

share certain, limited information, particularly where there is a health and safety risk.

Whilst the choice about sharing personal information will ultimately come down to the individual, employers who create an environment where someone is comfortable talking about how their disability and how it affects them. This will increase other people's understanding of their condition and also creates an open, inclusive and accessible work environment.

Conversations about reasonable adjustments

Where it is identified an employee has, or may have, a disability then employers are under a specific legal obligation to consult with that employee about any potential reasonable adjustments that they may require. There is no legal guidance about how and when employers must consult with employees, but this will often fit into existing procedures or day to day management of staff. It is recommended that an employer should follow up that meeting in writing with that employee, for example with a short email or note to confirm what has been agreed.

7.2 Dealing with performance issues

The key objective of a good performance process is to try to get the best out of an employee and improve the standard of their work – dismissal should only ever be seen as a last resort when all other avenues have been explored. Whilst there are a few additional considerations to take into account when dealing with poor performance in the context of a person with a disability, the fact someone has a disability does not fundamentally change either the process or its purpose.

Identifying a performance issue

The starting point whenever there is an issue with an employee's work performance, is that the manager should talk with the person about:

- how they're currently performing;
- what the employer expects; and
- what support might help.

This is relevant for any member of staff, regardless of whether you believe they have a disability or not. Often it is only by engaging in conversation with the

individual that you are able to identify if there is an issue. It is recommended that after any conversation of this nature that an employer should keep a record of what has been discussed and agreed with the person.

Consulting with an employee about reasonable adjustments

Where it is identified an employee has, or may have, a disability and there are potential performance issues, the employer should talk to the employee about their condition, in order to understand whether or not the two are linked. If they are, the employer is under a legal obligation to consult with the employee about potential reasonable adjustments.

It is important to note that this initial conversation should be a private conversation between the staff member and line manager. This conversation should not take place in front of colleagues, although it may in some cases be appropriate to include someone from HR (for larger employers) and/or a colleague of the employee's choosing.

There is no legal guidance about how and when employers must consult with employees, but it would be sensible if this is incorporated into existing performance management procedures, and it is anticipated that this should take place as early as possible, and certainly before any formal sanction is imposed.

Example

A long serving employee was put on a performance improvement plan (PIP) as a result of a sudden drop in their work performance which included a number of emotional outbursts. Prior to putting the employee on the PIP, the manager did not investigate the circumstances, and so was unaware the employee had been going through a divorce, which had exacerbated an underlying mental health condition.

The employee had tried asking for support but the manager did not listen. The PIP might have been avoided by making reasonable adjustments around their work. This demonstrates the importance of the informal stage of performance management, because had the manager discussed the issues with the employee beforehand, they would likely have identified these issues.

Dealing with employees who do not wish to discuss reasonable adjustments

Whilst there is a specific legal obligation on an employer to consult about reasonable adjustments, it is equally important that employees positively engage with this process. Where an employee is unable to fully participate because of their condition, for example they have stress or depression, an employer should consider what reasonable adjustments might assist with the consultation. It could be appropriate to consult with them in writing to avoid the need to meet in person, or to allow a family member or friend to support the employee in the consultation. It would be wise to ask the employee what might be the best approach might be.

In addition, some people may simply not wish to discuss their condition with their employer or may not accept that there are performance issues. This could make it difficult to consult effectively about reasonable adjustments.

Where this is the case and an employer thinks a reasonable adjustment would help with a performance issue they should:

- ensure that the individual understands the performance criteria and how they are not meeting them;
- explain why they believe a reasonable adjustment would help;
- try to talk with the person to see if they can find a way forward together;
- be sensitive and take the person’s lead in how much they want to share about their disability;
- record in writing their efforts to engage; and
- follow a capability or performance procedure if they cannot get a better understanding of the issue by talking with the person.

Carrying out a formal capability or performance procedure

Before the commencement of any formal capability or performance procedure it is recommended that in most instances an employer should have sought to discuss the issues with the employee on an informal basis and, if they were aware that the employee had a disability, consulted with them about any reasonable adjustments. It is important to recognise every situation is different, and the process to be followed will depend on the needs of the employer as well as the employee.

A performance review should be a two-way individual conversation between a manager and an employee. It should give both parties a chance to discuss how the employee is doing. It is best practice to discuss performance on an ongoing basis and not just when a problem has been identified. The performance review should be transparent and both parties should leave with a set of of SMART (Specific, Measurable, Achievable, Relevant and Time-Bound) objectives or next steps to take and an agreement to follow up any outstanding issues. If there is a sudden change of performance or other behaviour which is out of character this could be an indicator that there may be an issue which an employer should discuss with the employee.

Before taking any action, the employer must carry out a full and fair capability or performance procedure. This would typically include:

- discussing with the employee their ability to do the job and their performance in the role;
- if it is known that the person has a disability, reviewing whether that will affect their capability to undertake the role;
- consulting with the employee about the reasonable adjustments already in place, how they are working or might need to be changed, and any other adjustments that could be considered; and
- reviewing evidence of the performance issues and the effectiveness of any adjustments that have been put in place.

Sometimes, depending upon the nature of the disability, it might be useful to obtain medical guidance about the impact on the performance of an employee, and any adjustments that are needed or already in place.

Termination of employment due to performance issues

Circumstances may arise where an employer has to consider terminating the employment of a disabled person due to performance issues. Where the disability is the cause of the poor performance, a dismissal in these circumstances will be deemed to be because of something arising as a consequence of that person's disability. Unless the employer is able to objectively justify the dismissal, it will be considered to be discrimination arising from disability. See Chapter 1.4 Discrimination arising from disability. Discrimination in these circumstances requires an employer to either be aware of the disability or that they should have been aware of the disability. Where there has been a significant change in

behaviour or performance of an employee, then an employer would generally be expected to have made some enquiries to understand if there is an underlying issue.

In order to be in a position to objectively justify any dismissal, an employer would be expected to be able to demonstrate that its treatment was a proportionate means of achieving a legitimate aim. This means that the employer:

- following an investigation, has reasonably concluded that the person cannot do the essential functions of their job;
- has tried every option to remove barriers and provide support to the employee;
- has considered whether there are any other suitable roles that could be offered to the employee;
- has checked (including consultation with the employee) that there are no other reasonable adjustments that could be made to their role or the way in which the work is done, e.g. distributing the work differently within a team; and
- has concluded that dismissal is the only appropriate action in the circumstances.

It is important that the employer records the detail of the above actions.

Example

An employee who is known to have dyslexia is recruited to undertake a supervisory role that involves reviewing written documentation prepared by junior staff and makes a number of costly mistakes for the business. Prior to initiating a formal performance process the employer should consult with the employee about potential reasonable adjustments, and particularly consider any technological solutions such as listening aids that might assist the employee. However, if the employer simply dismissed the employee without first taking this step (notwithstanding the cost of the mistakes), any dismissal would be considered to be discriminatory.

7.3 Managing attendance issues and sickness absence

One common misconception amongst employers is that where an employee has a disability the employer cannot do anything about poor attendance or long-term sickness absence. It is important to state from the outset, that the legislation does not seek to prevent employers dealing with these issues. Provided a fair process has been undertaken and there has been proper consideration around potential reasonable adjustments, it is not unlawful to dismiss an employee with a disability either because they are unable to regularly attend work, or they are absent from work on a long-term basis. However, dismissal should be seen as the last resort, and is not the overriding purpose of a good attendance management policy, which should focus on getting employees back to work.

Whilst this chapter principally focuses on employees with a disability, it should be noted that similar issues can arise in relation to employees who are either carers (which is of itself a separate Protected Ground) or those who are associated with a disabled person. See Chapter 1.3 discrimination by association.

Consulting with an employee about reasonable adjustments

Where it is identified an employee has, or may have, a disability and that is either leading to short-term intermittent absences or a long-term sickness absence, then employers should talk to the employee about their condition, as often this will help an employer to confirm if they do have a disability. In addition, employers are under a specific legal obligation to consult with employees about potential reasonable adjustments.

There are no legal requirements or formalities in relation to how and when employers must consult with employees, but it is assumed this will simply fit into existing sickness absence procedures, taking place as part of either a return-to-work interview, or an absence review meeting. Whilst there is a specific legal obligation on an employer to consult in these circumstances, it is equally important that employees engage positively with this process. Where an employee is unable to fully participate because of their condition, for example they have stress or depression, an employer should consider what reasonable adjustments might be appropriate to enable them to consult with the employee, such as by consulting with them in writing.

Medical guidance

In most instances, it is envisaged that employers and employees should be able to identify and agree between themselves what reasonable adjustments should be made that will either help reduce short-term intermittent absences related to a disability or allow an employee to return from a long-term sickness absence.

Medical evidence can be sought to confirm the duration of an impairment (in order to determine whether the impairment constitutes a disability) and can also be useful in order to gain a better understanding of an impairment as part of making reasonable adjustments. Generally, an employer cannot force an employee to agree to undergo a medical assessment, although if an employee does refuse, an employer is still entitled to take decisions based on the information available to it.

It is important to remember that in obtaining, with the employees' consent, and considering any medical report that an employer must comply with the Data Protection (Bailiwick of Guernsey) Law, 2017. Health related information falls under the category of what is known as "special category data" which places additional obligations and safeguards. The employer can also consult with others (with the employee's permission) about reasonable adjustments.

Reasonable adjustments and return to work

After an extended period of sickness absence, it can be daunting for employees to return to work, regardless of the reason for absence, but particularly when it has involved any mental health issues.

A phased return to work is a very common reasonable adjustment that allows an employee to ease back in to work in a controlled and measured manner. There is no single right way to do a phased return to work, and the key is that it needs to be workable for both employee and employer, although typically this is based on a reduced number of working days and hours.

It is also important to consider the type of duties that an employee should undertake. This is especially important where the role has a physical element to it, and particularly if the reason for the employee's absence was a physical impairment such as a serious injury or chronic condition. Depending on the nature of the impairment, that adjustment may either be temporary or permanent.

Example

A senior employee has been absent from work on a long-term basis due to stress and depression.

Having consulted with the employee, and their doctor, the employer puts in place a 12-week phased return to work, initially doing 4 hours a day for 3 days a week, undertaking straightforward administrative tasks, gradually building up to resume their full duties at the end of the period.

As the employee has exhausted their right to sick pay, the employer pays the employee their salary on a pro rata basis according to the hours worked.

Example

A bricklayer employed by a house building company, sustains a serious back injury, and as a result is unable to lift anything heavy. Following a period of absence to recover, it is agreed that the employee will take on a vacant role of painter and decorator which involves lighter duties.

Termination of employment due to health issues

From time to time circumstances may arise where an employer has to consider terminating the employment of a disabled person, due to either poor attendance or long-term sickness absence. Where the disability is the cause of the poor attendance or long-term sickness absence, a dismissal in these circumstances will be deemed to be because of something arising in consequence of that person's disability. The employer must be able to justify the dismissal, otherwise it will be considered to be discrimination arising from disability. See Chapter 1.4 Discrimination arising from disability.

Whilst discrimination arising from disability requires an employer to either be aware of the disability, or that they should have been aware. In most instances when an employee has poor attendance over an extended period, it would normally be considered that an employer should be aware that there may be an issue.

Managing the potential conflict between possible disability discrimination and an organisation’s capability (or performance) procedure can be a very difficult area for an employer. Also, it will hinge on all the particular facts and circumstances of an individual case.

For the dismissal to be disability discrimination, the employer must be aware of the disability. If the reason for dismissal was because of poor absence, it could be argued that the employer ought to have been aware of the possibility of a disability because the extended absence acted as an indicator of a problem. It might be helpful to have policies that involve trigger points relating to absences to distinguish disability related sickness absence from other illness absence.

In order to be in a position to justify any dismissal, an employer would be expected to be able to demonstrate that its treatment was a proportionate means of achieving a legitimate aim. This means that an employer should investigate the issues, and explore the alternatives. Particularly in the case of long-term absences it is often helpful to have obtained a medical opinion, to not only understand the nature of any condition, but in particular the prognosis. This might also be useful to advise when an employee might be in a position to return to work including on a phased back-to-work basis.

In addition, an employer would be required to provide evidence to show that they have considered and consulted with the employee over any potential reasonable adjustments that could be made that would avoid the need to dismiss them. If there were adjustments that could have been made, but were not made, then that will mean that any subsequent dismissal will be considered to be discriminatory.

Example

A lorry driver has had a stroke and as a consequence has become partially sighted meaning they are unable to drive. The employer would be expected to understand whether or not the partial loss of sight was likely to be permanent or temporary, and if so, how long this may be. In addition, an employer would be expected to give consideration to alternative roles that the employee may be able to undertake, such as within an office. If the driver is dismissed without consideration of the duration of disability, the consideration of reasonable adjustments or a different role, this may be unlawful.

7.4 Managing staff with caring responsibilities

One feature of the Ordinance that is different to the UK and Jersey is that Carer Status is separately recognised as a Protected Ground. As a result, this will be something new to all employers in Guernsey, both large and small. A carer is someone who provides care or support on a continuing, regular or frequent basis to another person who is considered to be disabled, and they either live with that person or are a close relative.

For further guidance please refer to Chapter 2: What is carer status?, which explains in greater detail including explaining who is considered “a close relative”

Discrimination and carer status

It will be unlawful to discriminate, victimise or harass a person because of their carer status.

In relation to indirect discrimination, employers may not initially appreciate that there is a provision, criterion or practice in place that puts those with caring responsibilities at a disadvantage. The employer may also not be aware that the employee has caring responsibilities.

Example

An employee is the primary carer for their spouse who has epilepsy. Their spouse regularly has severe seizures, so occasionally the employee has to leave work urgently and return to their nearby home to look after them.

The employer announces that they are transferring the employee's team to another location, at the other end of the island, which will mean the employee is significantly further away from their home. The requirement for the employee to work at another location further away from home could be considered to be a provision, criterion or practice that put carers at a disadvantage, therefore, it would be for the employer to objectively justify the relocation.

This would include looking at whether the employer's aim is legitimate and whether the proposed solution to relocate is a proportionate way of achieving that aim or whether another solution might be possible, such as whether the employee can work from home.

For further guidance please refer to Chapter 1: What is Indirect Discrimination?

Hours of work and flexible working

The most common consideration that will affect an employee with carer status will relate to their hours of work, and the conflict with their caring responsibilities, thereby placing them at a disadvantage when compared to others. This often leads carers to make flexible working requests where they have regular caring commitments during their working hours. This might be to request changes to their working hours, to work from home, or occasional requests for time off, often at short notice, where those caring commitments arise on an ad hoc basis.

It is important to note that even though there is currently no statutory framework around making flexible working requests in Guernsey, and many employers do not even have a policy, carers may still make a request, and if an employer intends to reject any such request, it will need to be able to objectively justify that refusal. In addition, it should also be noted that similar consideration will also

apply to requests for flexible working made by women with childcare responsibilities, on the basis that if the employer is unable to objectively justify a refusal, then this can also amount to indirect discrimination on the grounds of sex under the Sex Discrimination (Employment) Ordinance, 2005.

The first stage of the process is for an employer to identify that it has a legitimate aim. There is no fixed list of reasons for refusing a request, (unlike the UK or Jersey), although the following points would likely be relevant:

- Inability to reorganise the work among other staff
- Inability to recruit more staff to cover the hours
- Negative effect on quality
- Negative effect on the business' ability to meet customer demand
- Negative effect on performance
- Insufficient work for the employee to do during the hours requested
- Future planned changes to the business

To show that its actions were proportionate, an employer does not need to show that it had no alternative course of action; but it must demonstrate that the measures taken were reasonably necessary. The actions will not be considered reasonably necessary if the employer could have used less discriminatory means to achieve the same objective, therefore it will always be necessary for the employer to consider alternative options. It might be that, even if the request from the employee is not possible, an employer should consult with them to try to identify a compromise that works for both parties, or if the employer is unsure if it could work, then a trial of this change could be undertaken.

Example

An employee who works at a small estate agency, makes a request to compressed hours over 4 days. This means they would work 9am to 7pm over 4 days so they can have Thursdays off to provide care for their mother who needs to attend hospital once a week for treatment.

The employer is worried the business will lose sales and get complaints if the employee is not available on Thursdays. For these reasons, the employer considers refusing their request. However, the employer agrees to trial the compressed hours for 10 weeks, and to then make a decision.

During the trial, other staff successfully deal with customer enquiries on Thursdays and the employee meets their sales targets. The employer also finds some customers like being able to reach the employee outside normal office hours on the days they work longer hours.

As the trial is a success, the employer agrees to continue with the new working hours.

7.5 Redundancy

Whilst it would clearly amount to direct discrimination to select an employee to be made redundant because they had a Protected Ground, it is also unlawful to discriminate against an employee in the arrangements when deciding who to make redundant. =So, when undertaking a redundancy exercise an employer must consider whether or not there is a provision, criterion or practice which might indirectly discriminate against employees who have a Protected Ground, as well as whether there are any reasonable adjustments to consider for any employee who may have a disability.

Adjustments to the redundancy consultation and redeployment process

As part of any fair redundancy process employers will need to consult with employees about a potential redundancy as well as exploring redeployment

opportunities. No matter how good the process adopted by employers, or how sensitive they are to the impact upon their employees, the reality of being placed at risk of redundancy is a stressful process, which is likely to have an impact on the mental health of affected employees. The situation is likely to have a greater impact on any employees who may already have a condition such as depression. The employer should consider what adjustments are made to the process. This might be holding meetings off site or allowing employees to provide written comments.

Consulting with an employee about reasonable adjustments and redundancy

Where it is identified that an employee has, or may have, a disability and there is a potential redundancy situation, an employer is under a specific legal obligation to consult with them about potential reasonable adjustments.

There are no legal requirements or formalities in relation to how and when employers must consult with employees, but this could fit into existing redundancy consultation procedures, and it is usually anticipated this stage would take place at the initial meetings, and certainly before any decision was taken.

Adjustments to scoring

Employers should always be mindful of the duty to make reasonable adjustments when scoring a pool of employees who are at risk of redundancy using redundancy selection criteria. For example, where an employee has had disability-related absences or additional unpaid leave absences related to their carer status, selection for redundancy on the basis of a poor attendance record/score may amount to discrimination and adjustments should be made to disregard these absences.

7.6 Avoiding unlawful discrimination in dismissals

Guernsey already has legislation in place which requires employers to follow a fair procedure when dismissing someone for misconduct. Following a fair process when dismissing any employee with a Protected Ground will also help employers avoid unlawful discrimination.

A fair process

It is recommended that all employers should have a disciplinary procedure to deal with misconduct issues that arise from time to time. This should follow the Code of Practice on Disciplinary Practice and Procedures in Employment,, and they should be both fair and consistent in the operation of that process, to avoid unlawful discrimination.

Example

An employer invites an employee to attend a disciplinary hearing with a view to dismissing them for gross misconduct. The date is set for a day which happens to be a religious holiday for the religion that the employee holds. Unless the employer is able to objectively justify that the hearing must be conducted on that specific day (which the worker may well be unable to attend), this is likely to be indirect discrimination due to the Protected Ground of religion or belief.

Consulting with an employee about reasonable adjustments

Where it is identified an employee has, or may have, a disability and there is a potential disciplinary situation, then employers are under a specific legal obligation to consult with employees about potential reasonable adjustments.

There are no legal requirements or formalities in relation to how and when employers must consult with employees, but this may fit into existing disciplinary procedures, and it is usually anticipated this stage would take place at the initial meetings, and certainly before any decision was taken.

Discrimination in dismissals

If the reason for a dismissal is because of something arising in consequence of a person’s disability, then unless the employer is able to objectively justify the dismissal, it will be considered to be discrimination. Discrimination in these circumstances requires an employer to either be aware of a disability, or that they ought to have been aware.

In order to be in a position to objectively justify any dismissal, an employer would be expected to demonstrate that they have investigated the issues and explored the alternatives.

This would then support that the decision to dismiss was a proportionate means of achieving a legitimate aim.

Example

An employee has Tourette Syndrome, which causes unwanted, involuntary muscle movements and sounds known as tics. This involves a tendency to have involuntary outbursts of swearing and making other obscene remarks. Following one outburst a colleague makes a complaint and the employee is dismissed.

The dismissal in these circumstances would be considered to be arising from a disability, and so the onus would be on the employer to be able to objectively justify the dismissal and to have considered whether a reasonable adjustment could be made. If prior to dismissal, the employer had never consulted with the employee about reasonable adjustments that would help manage their condition, such as working in a quieter environment or regular breaks, the dismissal is likely to be discriminatory.

The discriminatory dismissal will automatically be unfair for the purpose of the Employment Protection (Guernsey) Law, 1998 (as amended).