

PERSONNEL COMMITTEE – 17TH OCTOBER 2017

ITEM 5B DISABILITY LEAVE GUIDANCE – SUBMISSION BY UNISON

Union attendance at Personnel Committee is pretty rare. This isn't because there is always agreement. It's because the differences are minor or representation seems futile. This is an important issue for a handful of disabled staff and for the Council's reputation as a reasonable employer.

Why is the council getting tough with disabled people? My guess is that it's about the reporting of absence statistics. Charnwood being in the upper quartile for attendance, and the lower quartile for caring for its disabled staff. The council's focus should be about helping staff deal with their disabilities. What's needed?

Being flexible.

Allowing disability leave for all disability related absences.

Allowing pre-arranged disability leave.

Allowing disability leave when absence cannot be pre-arranged.

This is what the current Scheme provides. The proposal does not genuinely support disabled people and I ask that you reject it.

I ask you to stop being a politician for a few minutes and set aside any preconceptions or any pre-meeting agreements. This issue is not really a union matter at all. This is about the needs of only 11 people (according to HR) out of a staff of around 500. Only 2 of these are UNISON members.

Some minor concessions were offered at JNCC but these fall well short of what is needed. What is needed is the current Scheme, and to have it applied as written without equivocation. At JNCC:

- No explanation was given for changing the current Disability Leave Scheme (2008). If it was appropriate then, what has changed? We are told the scheme is out of date in the "current environment", but have received no explanation what is meant by this.
- No explanation was given for staff having to use annual leave or flexitime to deal with epileptic seizures, temporary blindness, emergency stomach pumping, etc. NB. One member of staff has 30 disability appointments every year; that's a big slice out of their annual leave entitlement.

It is the opinion of the unions that the current Scheme fully meets the Public Sector Equality Duty and the Equalities Act 2010 and is not at risk of legal challenge. The proposed Guidance and amendment to the Attendance Policy does not give the assurances that all disability related leave should qualify; it does not provide the flexibility for these 11 staff to ensure that they qualify if absences are unpredictable. The purpose of the proposed Guidance is to give HR the ability to deny help to disabled staff. Why would a good employer wish to treat disabled people this way?

Please also read the attached report to JMTUM attached. Please recognise the important differences between the current Scheme and the proposed Guidance and reject the proposal. Please support your disability employees.

Thank you

Colin Bailey

Branch Secretary

UNISON



Report to Joint Negotiation and Consultation Committee

Introduction

This is a plea to the elected representatives of the Council from a handful of staff who suffer from recognised disabilities. These are amongst the hardest working members of staff. Two of these people are known to me and are UNISON members. They suffer from diabetes, epilepsy and gastroparesis. Currently they feel persecuted and are persecuted for being disabled because the current Scheme is not applied as it should be, and as it is written. At the moment we have a flexible and generous Scheme that your HR contractor unilaterally refuses to implement correctly. This was the reason for UNISON requesting a revision to the current Scheme. The proposed "Guidance" removes most of the benefits of the "Scheme". It is inflexible. Granting disability leave is an ethical issue that requires Councillors to step in and throw out its contractors proposal.

The 5 or 6 individuals affected by your decision today need your help and support to have unavoidable absences recorded as disability leave and not as sickness. Sickness absence triggers the added stress of the Attendance Policy and all the meetings and paperwork that goes with it. With a workforce of 500 people, any cost of applying the current Scheme to the Council is negligible.

Disability Leave Scheme

Why is the current Scheme being revised?

The Scheme, as written, has the flexibility that is needed but parts are clumsily written; this has led management to "cherry-pick" the contents and not apply the provisions as generously as intended. Therefore, UNISON requested that the current Scheme be revised to make it clearer.

The proposed guidance removes much of the generosity and spirit of the Scheme. It's clear that the current Scheme was carefully written to ensure "flexibility"; this is to ensure that all disabled people are treated compassionately and equally no matter what their disability might be. No conditions are excluded and pre-arrangement is preferred but not essential.

When was the current Scheme created?

The current Scheme was presented to the Personnel Committee on 24.01.2008 where it was withdrawn to enable an Equality Impact Assessment to be carried out. It was then taken to the next meeting of the Personnel Committee and approved at that meeting 28.02.2008. The Committee was Cllrs. Shepherd, Jane Hunt, Bush, Preston, Slater and Wilson.

The current Scheme begins by making a firm commitment to disabled staff:

Introduction - commitment to equal opportunity

The Council is committed to the elimination of all forms of unfair and unlawful discrimination both in the provision of services and in its role as an employer. It is our belief that everyone has the right to be treated with dignity and respect. We are committed to, and will work towards, the elimination of unfair and unlawful discrimination against disabled people to ensure equal treatment in all our procedures, practices and access to Council services.

My question is, "What has changed since the Equalities Act 2010 that requires the Council to reduce the provisions in the current Scheme" Nothing.

HR have said that the current Scheme goes beyond the legal requirement. The Council should be applauded for doing so. The Council voluntarily goes beyond the legal requirement in lots of instances, most recently in voluntarily adopting the Dying to Work Charter.

HR have said that the Scheme is out of date and not suitable "in the current environment". What environment?

Are staff with as disability any less disabled or less in need of support now than they were when the current Scheme was voluntarily entered into? No.

Does the Council want to treat some disabled people less favourably than others? I doubt it. The current Scheme recognises that some people need more support from their employer than others.

The role of HR

As a contractor, Leicestershire CC HR regularly update policies and procedures and the unions understand and accept this. The unions have requested the updating of a Disability Leave Scheme (2008) that has been wilfully misapplied by HR. Having met the legal minimum any further provision to support disabled employees is an ethical issue, and therefore it is for Councillors to decide. Not the Council's contractor.

It begs the question whether the Council's recent commitment to the Dying to Work Charter will be eroded in 9 years' time?

Who is affected by this?

At JMTUM it was agreed that "a handful of staff" apply for disability leave each year. I'm aware of two of these staff. At the meeting on 23rd May HR stated that if the proposed guidance was more generous, more people would apply. Firstly, the current Scheme has not led to a flood of applications, and the unions are not requesting anything that is not already in the Scheme. Secondly, why should the Council want to discourage applications from disabled staff? Gayle went onto say that some people with disabilities use flexitime. The flexitime scheme was not introduced so that disabled staff should be forced to build up credit to attend

disability related absence. It is unfair to expect staff to use up flexitime and annual leave because they have a disability.

The Council encourages job applications from disabled people and should make every effort to support them through their probation period and through their ongoing service.

You have before you the current Scheme, the proposed Guidance, and the current Scheme as amended by UNISON for the purposes of this meeting.

At JMTUM the proposed Guidance was described by Gayle as being similar to the current Scheme with the main change being the reduction in the entitlement from 15 days to 10 days per annum. Please read the documents as you will see that the guidance omits many of the provisions of the current Scheme. The elements that are absent from the proposed guidance are highlighted.

Purpose of the Disability Leave Scheme

The Council recognises that disabled employees may have cause to be absent from work for disability-related reasons. These may include **(but are not limited to)** absences for consultant's appointments, physiotherapy, hearing aid adjustments/replacements, counselling/therapeutic treatment. There may also be disabled employees that have cause to be absent from work **on an irregular and unpredictable basis** due to impairment caused by their disability.

The Proposed Guidance states "Disability Leave should be pre-arranged and is for a specific period of time." The current Scheme recognises the reality of living with disability. How can staff predict a seizure that leads to a fall down stairs or biting off their tongue?

This may be due to **(but is not limited to)** chronic fatigue and adjustment to new medication, for example.

There can also be circumstances whereby there is a newly disabled employee, or a disabled employee whose condition has deteriorated, who requires a period of time off work to adjust to the change in personal and professional circumstances. During this period of leave, both the Council and the employee are able to assess the disability or condition and how it affects the job role, bridging the gap between a period of sickness that may have occurred and a return to work. **This may be where an employee has had an operation and requires a period of recuperation or rehabilitation afterwards, for example.**

Again, a period of recuperation following a disability related operation may well be unpredictable and it is not possible to pre-arrange disability leave.

It is recognised, therefore, that in all these circumstances the application of the Attendance Management Policy and Procedure will not be appropriate. The purpose therefore of this Scheme is to ensure there is a consistent and fair mechanism to supplement sickness absence procedures with specific provisions for paid Disability Leave.

According to the current Scheme, Attendance Management should be suspended for up to 15 days. The Scheme does not prohibit a further request for disability leave. This shows the required flexibility to meet an individual's unique circumstances.

Aims

The disability leave Scheme aims to support employees in managing their ongoing personal needs with a view to sustaining employment and personal well-being.

The Scheme also aims to ensure proper consideration is given to realistically assessing the abilities of the individual with a view to retaining skilled and experienced employees. This may result in a saving on early/ill health retirement payments. **It also demonstrates the Council's commitment to positive action towards disabled people which builds employee morale and promotes the Council as an employer striving for equal opportunities to the wider community. It is also a matter of good management practice.**

There is no intention that the Disability Leave Scheme should have an unfavourable impact on the effectiveness of the Council. Rather, it is about recognising the fact that many disabling conditions do not make people less efficient workers, but requires them to work in a different way. **The Disability Leave Scheme is about ensuring good practice in the workplace and it also aims to create an environment in which employees will feel more willing to discuss the onset of disability.**

Any costs incurred as a result of the Disability Leave Scheme should be affordable since there are likely to be very few cases each year.

Definitions

Disability – The Disability Discrimination Act describes disability as “A physical or mental impairment which has a substantial and long term adverse effect on a person's ability to carry out normal day to day activities”. Long term typically means 12 months or more. A disability can include hearing or visual impairments, a learning disability and mental illness. People living with HIV, multiple sclerosis or cancer are covered from the point of diagnosis.

The Proposed Guidance does not include any reference to mental impairment, HIV, multiple sclerosis or cancer while the current Scheme lists these and more importantly states **“The Council recognises that disabled employees may have cause to be absent from work for disability-related reasons. These may include (but are not limited to) ...”**. This clearly shows that any disability qualifies for disability leave.

It should be noted that someone who is no longer disabled, but who met the requirements of the definition in the past, will still be covered by this Policy. For example, a woman who, four years ago, experienced a mental illness that had a substantial and long-term adverse effect on her ability to carry out normal day-to-day activities, but who has experienced no recurrence of the condition, is still entitled to the benefits afforded by this Policy, as a person with a past disability.

Scope

The Scheme will apply to all existing disabled employees, at the point where a disabled person becomes employed or where an existing employee becomes disabled. The Scheme provisions can be considered for all full-time and part-time employees. There is no qualifying period for anyone wanting to be considered for the Scheme, although each case will be treated on its own merits.

The proposed Guidance should include this clause to ensure that staff are not discriminated against. “... **at the point where a disabled person becomes employed**” clearly includes new staff within their probation period.

Procedure

The employee will request a meeting with their line manager and, if possible, HR Advisor in the first instance. The employee will have the right to be accompanied during this meeting by their Trade Union Representative or a work colleague.

The line manager will then make a recommendation to the Service Director and the HR Business Partner. When making the assessment, **previous disability-related absences will be taken into account but will not provide either a floor or a ceiling for the period of leave agreed.**

This clearly shows that disability leave can be requested in the event that the 15 days has previously been granted.

The relevant Director and HR Business Partner can allow up to three weeks continuous paid leave to assist in any adjustment process.

The proposed Guidance should include this clause. Currently line managers are considering requests; this may inadvertently result in discrimination because of a manager’s concerns about service delivery. Managers may also be incorrectly influenced by the HR contractor.

Where a request is received for a more ad hoc arrangement, the amount of time granted will depend on the circumstances.

Agreement must be reached in advance in respect of the amount of disability leave to being granted. It may be the leave will be taken on a pre-planned basis **however in some instances this may not be possible. If this is the**

case, every attempt should be made by the disabled employee to give notice to their manager.

The Proposed Guidance prohibits the flexibility that some people require because they cannot pre-arrange disability leave for the reasons previously mentioned. Examples include reaction to medication, seizures, a fall and disabling symptoms being identified while the employee is absent.

What is required is trust and flexibility. With only 5 or 6 people requesting disability leave this should be straightforward. Unions do not condone abuse of Council policy. Abuse of the Scheme is covered below.

Disability Leave is one of a range of possible reasonable adjustments, other options must be considered alongside a request for leave. **This includes adjustments to duties and responsibilities, a change of hours, working from home or a different location.** It may be that through a process of consultation all parties feel that alternative employment is the favoured option. The Council will consider this only if the employee makes such a request or if reasonable adjustments have been exhausted and no solution found.

Working from home is an underused option.

Recording of Absence

When the disabled employee is off work for a disability-related purpose, the line manager will record the absence as disability leave via People Manager (now itrent).

It is important to record Disability Leave as such, and not as sickness. It distorts sickness absence statistics if wrongly recorded. This is particularly important for a member of staff who is already subject to the Attendance Policy.

In circumstances where the Scheme has been utilised and there are ongoing concerns in relation to the disabled persons employment which may include poor attendance, the provision of disability leave will be taken into account in weighing up an appropriate course of action. However this will be just one factor amongst many. **Disability leave will not however be taken into consideration for such things as redundancy selection.**

Sickness absences for non-disability related reasons will be recorded in the same way as non-disabled employees.

The unions accept this.

Financial Implication

There can be cost implications for Directorates as follows:-

(i) the provisions of the sick pay Scheme may apply and the Director, in conjunction with the Head of HR can allow up to three weeks additional leave

paid at the usual salary/wage. If a more flexible approach to taking leave is agreed the employees absence may need to be covered, possibly with the use of paid overtime for other members of the team.

(ii) the costs associated with loss of productivity during the disabled employees absence and/or with the recruitment and employment of someone who can provide temporary cover.

(iii) the potential costs attached to any assessments carried out depending on the length of the assessment and the agency that undertakes it. The Disability Employment Advisor (DEA) from the local job centre will assist in identifying the costs involved and how to access the appropriate assessment agency.

Liaison

In order for the Disability Leave Scheme to operate successfully, it is important that all parties meet on a regular basis to ensure everyone is fully aware of progress at each stage. This meetings should be documented and include:

- (i) when any medical prognosis is known and/or medical treatment is completed.
- (ii) advice about dates of an employment assessment if one is recommended.
- (iii) action plan at the conclusion of employment assessment
- (iv) advice about dates of any further action.
- (v) final report on completing a course of rehabilitation, with an action plan if further training is advised.
- (vi) dates of further training courses.

The key people who will be responsible for monitoring the progress of an individual are the line manager, **Service Director**, with support from HR Services.

Directors are currently excluded.

Abuse of the Scheme

Any abuse of the disability leave Scheme will be considered a serious disciplinary offence and may be regarded as Gross Misconduct under the Council's Disciplinary procedures.

The unions fully support this.

Grievances

If the employee feels this Scheme has not been applied in a fair or consistent manner, they can raise a grievance using the Council's Grievance Procedure.

The proposed Guidance does not include provision for an appeal/grievance

Review

The impact and progress of the Disability Leave Scheme will be reviewed from time to time in order to assess its effectiveness from both a personal and organisational perspective. The Council reserves the right to amend or withdraw the Scheme by giving reasonable notice.

It is not the current Scheme that needs to be reviewed but the HR contractor's intentional failure to implement it.

ACAS: Disability discrimination: key points for the workplace

The following are excerpts (Page 23-25) from the ACAS guidance "Disability discrimination: key points for the workplace".

Again, the elements that are absent from the proposed guidance are highlighted.

Sickness absence

Managing sickness absence so employers do not discriminate against disabled employees is a contentious area where legal opinions can differ. This is particularly so over 'absence triggers'. These are the number of days' absence when managers consider warnings, and possibly dismissal, unless attendance at work improves.

An employment tribunal may expect an employer to have modified its 'absence triggers', if that would have been a 'reasonable adjustment' in the particular circumstances of the individual case. What is 'reasonable' can depend on the alteration being sought by the disabled employee for an illness linked to their disability.

An employer is not expected to make unreasonable adjustments to its sickness absence policy and 'absence triggers' for a disabled employee. However, employers should bear in mind that disputes over sickness absence linked to disability might be considered under another type of discrimination claim – discrimination arising from disability.

There is a key difference regarding these two types of discrimination:

- a 'reasonable adjustment' in the management of sickness absence would be to proportionately modify policies or absence triggers so a disabled employee is not at a disadvantage compared to a non-disabled employee*
- discrimination arising from disability does not require a disabled employee to compare their treatment to how someone else is treated. Nevertheless, an employer should bear firmly in mind that it must consider and make adjustments which are 'reasonable' in the circumstances of an individual case. (IMPORTANT and added to amended Scheme.)*

For example... potentially reasonable adjustments

□ *Allowing ‘disability leave’ – for instance, for medical treatment, recuperation or rehabilitation, with a time limit agreed between employer and employee, and possibly allowing managers some discretionary flexibility.*

□ *Recording disability-related sickness absence separately from other illness absence for a time limit agreed between employer and employee, and possibly allowing managers some discretionary flexibility.*

□ *Discussing changes with the employee, and possibly an expert advisor, so they can return to work – for instance, this might mean a phased return, working from home on some days, going part-time or moving to another role.*

Assessing whether adjustments would be reasonable should include taking into account not only the impact on the employee, but also on others in their team regarding workload and resources. And a ‘reasonable adjustment’ should include:

□ *making clear, taking into account the employee’s disability, the level of attendance they are expected to meet, and*

□ *removing uncertainty about taking time off, within an agreed time limit, because of their disability.*

*Some employers have policies separating disability-related sickness absence from other illness absence. And some have a policy allowing ‘disability leave’. They are not legal requirements for employers, but are good practice in the Equality and Human Rights Commission’s Employment Statutory Code of Practice. Such policies are more common in the public sector, and in private or voluntary organisations carrying out work for a public sector employer. This is because of what is called the ‘**public sector equality duty**’ where these employers have a legal duty to prevent and eliminate discrimination. To find out more about the duty, see the companion guide, *Equality and discrimination: understand the basics*. Also, see this guide’s sections, *Disability and capability*, and *Life-threatening conditions*.*

Summary

On 5 April 2011, the public sector equality duty (the equality duty) came into force. The equality duty was created under the Equality Act 2010. It states:

“The Public Sector Equality Duty requires public bodies and others carrying out public functions to have due regard to the need to eliminate discrimination, to advance equality of opportunities and foster good relations.”

The unions request that the current Scheme be applied as written and not wilfully misinterpreted to the detriment of disabled staff. The unions see no reason for HR to overturn the Council's generous Scheme of 2008 and replace it with stricter guidance that is without empathy and compassion. The number of staff requesting disability leave is just a handful each year (around 1% of staff), so the cost to the Council of the current Scheme is negligible. The current Scheme includes flexibility for HR, managers and staff. The unions requested clarity while retaining flexibility. Staff with disabilities should not have to use holiday and flexi leave to manage their disabled absences in order to avoid Attendance Management. There needs to be flexibility so that disabled staff with certain impairments are not excluded from disability leave because the type of their impairment means absences are unforeseeable. The Council knows who these people are; the Council knows the conditions that they suffer from and produced a Scheme to support them in work. In simple terms the current Scheme can be summarised as No conditions are excluded and pre-arrangement is preferred but not essential.

The Council should be proud of the current Scheme and not diminish its support for disabled employees or discourage disabled people from coming to work for Charnwood.