

Sickness absence and disability discrimination

TUC negotiator's guide



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Section one

Summary

Background

This resource, for trade unions reps, seeks to increase understanding of the law and its limitations in relation to sickness absence and disability discrimination. Specifically on questions both of absence, and of access to sick pay.

Legal protection against discrimination against disabled people was introduced with the Disability Discrimination Act 1995, and the law was subsequently strengthened and then merged with other equality laws into the Equality Act 2010 (“EqA”).

As a result of the law and of growing awareness of its existence, twenty years later it has become more unusual for disabled workers to face dismissal or unequal treatment for the simple reason of being disabled, especially among larger employers. Nonetheless, ignorance of the detail of the law remains widespread, and among other issues, unions have reported throughout this time that employers are continuing to get rid of disabled workers by using their sickness absence, capability or other procedures, without taking due account of the disability.

The TUC Disabled Workers’ Committee has reported continued concern about the extent of continuing discrimination since the TUC first published advice to unions in 2008. Subsequent developments (such as the introduction of the Equality Act, and new case law) led to publication of an updated version in 2013.

In 2016, with the decision of the Court of Appeal in the long-running case of *Griffiths v. DWP*, it again became necessary to revise TUC advice for this new edition, which replaces all previous versions. However, while interpretation of the law has shifted and been clarified, the essential elements for trade union representatives remain the same.

The central elements of this guidance

Reasonable adjustment duty

- The reasonable adjustment duty requires an employer to make changes to things like policies and procedures, working hours, equipment or job role to maintain a disabled person’s employment.
- What is reasonable will depend on the circumstances of the case. Employers will be expected to make some allowance in their sickness absence procedures for absences connected with a disability. But in cases of prolonged absence, especially if it is expected that poor attendance will continue in the future, it will often be considered

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unreasonable to expect an employer to disregard all disability-related absences.

The Equality Act

- In general, unions will be better advised to use the requirements of the EqA to resolve issues by persuading the employer to adopt progressive policies and procedures rather than going to tribunal. The Code of Practice associated with the EqA, as well as accompanying guidance, contain useful advice that can be cited in convincing employers of the need to adopt a new approach, as well as being usable in tribunal proceedings.
- Lack of understanding of the principles of disability discrimination law remains a serious problem with numerous employers, managers and union representatives needing training in (as a minimum) what the EqA requires. This is vital if genuine progress is to be made.
- It is important to also use the protection from discrimination arising from disability in the EqA. It may strengthen a case to frame it in this way too, arguing that certain disciplinary action or the dismissal of a disabled person because of absence is not justified in all the circumstances.
- In the public sector, the “equality duty” contained within the Equality Act puts greater emphasis on the employer taking steps to improve awareness of the barriers disabled people face in the workplace and the different needs they have, and changing policies accordingly. So the law ought to be of considerable assistance in this sector in changing practices and unions need to press for the maximum improvements in the employer’s policies and procedures while being aware

Disability related sickness absence and disability leave policy

- The critically important starting point for changing an employer’s approach is to get absence for reasons associated with disability counted separately from sickness absence.
- The other critical component of a non-discriminatory approach will be for the employer to adopt a “disability leave” policy. However, it is the content of such a policy that will determine how useful it is in practice, so it is vital to secure the best possible policy from the outset

Disability disclosure

- Creating an environment where the proper policies are in place ensures that disabled people may have some confidence in disclosing their impairment. This document will help to build the capacity of union reps to support those who choose to do so.

Section two

The legal position

What the law says

The Equality Act 2010 (EqA) defines disability as a physical or mental impairment that has a substantial and long term adverse effect on someone's ability to carry out normal daily activities. The definition includes people with hidden disabilities (such as diabetes, epilepsy, mental health), in particular because when considering the impact of someone's impairment you have to disregard the effect of any treatment, and progressive and recurring conditions. It also covers past disabilities. People with cancer, HIV and MS are automatically covered by the Act. The definition is a very broad one potentially covering many millions of people, although it is important to note that many of those who are protected by the EqA are not aware that they are, and do not necessarily consider themselves to be disabled. This can raise issues of disclosure that are considered later in this guidance.

The law specifies the forms of discrimination that are outlawed:

- **Direct discrimination:** that is, less favourable treatment because of disability, compared to someone whose circumstances excluding the disability are otherwise comparable. Such discrimination cannot be justified by the employer.
- **Discrimination arising from disability:** that is, treating someone less favourably because of something arising in consequence of a person's disability. Such discrimination is capable of legal justification by the employer if the treatment is a proportionate means of achieving a legitimate aim. In addition, there will be no discrimination if the employer shows that it did not know, and could not reasonably have been expected to know, that the person had the disability. This is a very broad type of discrimination.
- **Indirect discrimination:** this type of discrimination happens when an employer applies a provision, criterion or practice which puts or would put people with a different disability at a particular disadvantage compared to people who share the disabled person's disability; it is applied to the disabled person; and the employer cannot show that it is a proportionate means of achieving a legitimate aim. Before the EqA this type of discrimination hadn't previously applied to disability. It is aimed at tackling group disadvantage, and can be used to tackle policies and practices that are inadvertently detrimental – which may include sickness absence policies. There is no knowledge requirement for indirect discrimination.

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- Failure to make a Reasonable Adjustment. This is one of the key components of the disability provisions of the EqA. An employer is under a legal obligation to make reasonable adjustments to enable a disabled person to work or continue to work. There can be no justification for a failure to make a reasonable adjustment, but an employer is allowed to argue that an adjustment is not “reasonable”. There is a wide range of possible adjustments, including changes to physical aspects of premises and changes in someone’s work duties.

The EHRC’s Employment Code of Practice¹

The Employment Code of Practice, which the Equality and Human Rights Commission published to accompany the Equality Act 2010, is designed to provide clear guidance on how to interpret the law. It must be taken into account by courts and tribunals where relevant, but it does not itself have the force of law. Nonetheless, what it says in this area can be cited as a valuable addition to a union’s representations in negotiations. In particular, the following sections are useful in highlighting that: taking action against a disabled employee for absence may be discrimination; employers should not treat disability-related absences in the same way as other sickness absence; and that disability leave can be a reasonable adjustment.

When explaining **discrimination arising from disability**, the Code gives the following example (paragraph 5.3):

Example: An employer dismisses a worker because she has had three months’ sick leave. The employer is aware that the worker has multiple sclerosis and most of her sick leave is disability-related. The employer’s decision to dismiss is not because of the worker’s disability itself. However, the worker has been treated unfavourably because of something arising in consequence of her disability (namely, the need to take a period of disability-related sick leave).

And it goes on to explain:

In considering whether the example of the disabled worker dismissed for disability-related sickness absence (see paragraph 5.3) amounts to discrimination arising from disability, it is irrelevant whether or not other workers would have been dismissed for having the same or similar length of absence. It is not necessary to compare the treatment of the disabled worker with that of her colleagues or any hypothetical comparator. The decision to dismiss her will be discrimination arising from disability if the employer cannot objectively justify it.

The Code of Practice has a section on **disability-related absences** (paragraph 17.20), which says:

Employers are not automatically obliged to disregard all disability-related sickness absences, but they must disregard some or all of the absences by way of an adjustment if this is reasonable. If an employer takes action against a disabled worker

¹ www.equalityhumanrights.com/publication/employment-statutory-code-practice.

for disability-related sickness absence, this may amount to discrimination arising from disability.

It then gives this example:

Example: During a six-month period, a man who has recently developed a long-term health condition has a number of short periods of absence from work as he learns to manage this condition. Ignoring these periods of disability-related absence is likely to be a reasonable adjustment for the employer to make. Disciplining this man because of these periods of absence will amount to discrimination arising from disability, if the employer cannot show that this is objectively justified.

Finally, in **the list of possible reasonable adjustments** for disabled people (paragraph 6.33), the Code of Practice includes disability leave. The example given in the Code is as follows:

Example: A worker who has cancer needs to undergo treatment and rehabilitation. His employer allows a period of disability leave and permits him to return to his job at the end of this period.

A disability leave policy can include the provision of separate periods of time off for the purpose of (for example) treatment, therapy, rehabilitation, training or waiting for adjustments to be executed.

The TUC and many disability organisations have campaigned for this particular example of a reasonable adjustment to be included within the wording of the law itself, without success.

The failure of the Government to propose such a change to the law underlies many of the problems faced by trade unions in persuading employers of the arguments for introducing such a policy.

Sickness absence: the case law

The lawfulness of treatment by employers of disabled workers who have taken a period of absence that has triggered sickness absence procedures has been tested in a number of legal cases. The key decisions of the higher courts are given below.

In **Ring v Dansk almennyttigt Boligselskab & anor case (2013)** (case nos. C-335/11 and C-337/11), the European Court of Justice ruled that disabled workers were likely to be put at a disadvantage by a policy that allowed Danish employers to dismiss workers more easily when they had accumulated more than 120 days of absence. The Court said: *“a worker with a disability has the additional risk of an illness connected with a disability. He thus runs a greater risk of accumulating days of absence on grounds of illness, and consequently reaching the 120-day limit... It is thus apparent that the 120-day rule in that provision is liable to place disabled workers at a disadvantage and so to bring a difference of treatment indirectly based on disability.”* The ECJ concluded that such treatment of a disabled worker will only

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be justified if it is pursuing a legitimate aim and does not go beyond what is necessary to achieve that aim.

The Ring case can be used to show that the courts have accepted that applying a sickness absence procedure in a common way to all workers is likely to put a disabled worker at a disadvantage. Therefore, the focus should be on whether the disciplinary action or dismissal of a disabled worker for sickness absence is justified.

A dismissal is unlikely to be justified where there are potential adjustments that might have kept the disabled person in work which the employer failed to make (this was recently confirmed by the Court of Appeal in the **Griffiths** case – see below). However, some recent cases which have been argued purely in terms of a failure to make a reasonable adjustment to a sickness absence procedure have been problematic. Therefore, it is always advisable to consider cases both from the perspective of a failure to make a reasonable adjustment and as discrimination arising from a disability. The courts have recently suggested that there might be cases where there was no reasonable adjustment that the employer failed to make but the dismissal could be unlawful because it is not justified in all the circumstances of the case.

In **General Dynamics Information Technology Ltd v Carranza (2014)** (Case no. UKEAT/0107/14), Mr. Carranza claimed a failure to make a reasonable adjustment. He had been given a written warning for sickness absence and he was dismissed after a sickness hearing that had considered a letter from Occupational Health which said that, given his disability, his attendance pattern was unlikely to improve in the future. The employer had made some adjustments in the past. It had disregarded his disability-related absence so it had not counted towards the trigger for the final written warning. The employer had also disregarded two further short periods of absence that were disability-related after the final warning. The Employment Appeal Tribunal said it struggled to identify what further reasonable adjustment the employer could make. The claimant argued that the final written warning could be disregarded. But in response the EAT said: *“It would be remarkable and in my view regrettable if an employer, by showing leniency to a disabled person in respect of some short periods of absence late in an absence management procedure, thereby became required by law to disregard all disability-related absence prior to that time whatever the impact on the business of doing so.”* The EAT added that *“If this case had been put forward as a case of discrimination arising from disability, it would have been easier to analyse”*. Having said that, it added that even if it had been argued in that way, it believed it would have still failed as it thought the dismissal was justified in the circumstances of the case.

In the case of **Griffiths v The Secretary of State for Work and Pensions (2015)** (EWCA Civ 1265) the Court of Appeal referred to the judgement in the Carranza case, approving the comments the EAT made about the difficulty of analysing such cases purely in terms of a failure to make a reasonable adjustment.

Ms Griffiths also based her claim on the reasonable adjustment duty, arguing that a written warning she had received after a 66-day absence (62 days of which were disability-related) should be withdrawn. Again, her case failed because the Court found it difficult to identify an adjustment that it considered reasonable when there had been a lengthy absence that was already far above the absence trigger point and her condition was, according to medical reports, likely to lead to further periods of potential lengthy absence. The Court of Appeal said: *“an employer is entitled to say, after a pattern of illness absence, that he should not be expected to have to accommodate the employee’s absences any longer. There is nothing unreasonable, it seems to me, in the employer being entitled to have regard to the whole of the employee’s absence record when making that decision.”* Ms Griffiths had also asked for an extension of the trigger point in future. But the EAT said that, in practice, that was unlikely to be effective in removing the disadvantage she faced as it was likely that her absences would exceed the limited extension she was asking for. It said such an adjustment would be reasonable when the disabled employee was expected to have limited and occasional absences.

The Court of Appeal ended with a further reminder that the reasonable adjustment duty is only part of the protection for disabled employees. It said: *“It would be open to a tribunal to find that the dismissal for disability-related absences constituted discrimination arising out of disability... This would be so if, for example, the absences were the result of the disability and it was not proportionate in all the circumstances to effect the dismissal.”*

Sickness absence, sick pay and disability

The position of a worker off sick for disability-related reasons who runs out of their sick pay entitlement under an employer’s procedures has also been tested in law and the outcome is not favourable.

The only positive case was that of **Northamptonshire County Council v. Meikle** (2004 IRLR 703). It was found by the Court of Appeal that a visually impaired teacher had been discriminated against when the employer reduced her to half pay after the period of absence laid down in its absence procedures. However, the only reason that Meikle won this case was because the employer had failed to make the reasonable adjustment during the relevant time that would have made it possible for her to continue working. It was this failure that led the tribunal to rule on the issue of sick pay in favour of the claimant.

In the more recent **Ring** case, the European Court of Justice also held that absence that is caused by the employer’s failure to make reasonable adjustments that would enable the employee to get back to work should be treated differently from other absences.

Subsequently, the case of **O’Hanlon v. The Commissioners for HM Revenue and Customs** [2007] ICR 1359 led to a clear ruling by the Court of Appeal that the claimant had not been entitled to continue to receive full pay for her disability-related

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absences as a reasonable adjustment after the exhaustion of the time stated in the employer's procedures. In *O'Hanlon*, it was argued that full sick pay was needed for an absent employee while they were absent to relieve the stress and financial hardship associated with loss of pay. But the courts had little sympathy with this argument. One of the judges said: "*The Act is designed to recognise the dignity of the disabled and to require modifications which enable them to play a full part in the world of work, important and laudable aims. It is not to treat them as objects of charity.*"

O'Hanlon was relied on by the Employment Appeal Tribunal when deciding the case of **Royal Bank of Scotland v Ashton [2011]** (ICR 632). It ruled that the employer was not obliged to reinstate a disabled employee's sick pay after she was given a final written warning following lengthy absences.

"Reasonable Adjustments"

The employer should be reminded of their legal obligation to consider all reasonable adjustments. It may be necessary to agree that the employer can seek their own expert opinion on proposed adjustments, including use of their Occupational Health service (on the possible pitfalls of which, see below) if they have one. The law does not require them to make an adjustment that will not work (be effective), or would be unreasonably expensive or disruptive (something judged in relation to the organisation's size and resources).

What is "reasonable" depends on a legal definition, not a common sense definition, so it may be important (depending on whether the employer has adopted a collaborative, or a legalistic, approach) to understand this in Equality Act terms.

To do so means following these stages and addressing the relevant questions:

- Is there anything that can be done that would enable the worker to resume their original job?
- Has the disabled worker been involved in discussion about the possible adjustments? This elementary consideration is sometimes overlooked and can cause great difficulty.
- Can the job itself be "adjusted" to enable the worker to return to it? Could, for example, some of the duties be allocated to another worker?
- Would a phased return to work achieve the desired outcome?
- If the disabled worker cannot continue in their present job, is there another post within the organisation that they could take up? Case law (**Archibald v. Fife Council** (2004 IRLR 651)) has established that redeployment even to a higher graded post can be regarded as a reasonable adjustment. Such redeployment, that might require additional training and support, would likely be considered reasonable in any large employer.

When considering what is reasonable, particularly in relation to cost, employers need to think about what it would cost for them to take on someone new, train them up etc.

There has been unhelpful case law on reasonable adjustments and when the three month time limit for a tribunal claim starts to run (**Matuszowicz v. Kingston upon Hull city council** [2009] IRLR 288) so it is very important that as soon as it has become clear that someone needs an adjustment to help them do their job, you consider whether they need to bring an employment tribunal claim to protect their position.

The Equality Duty

All public sector bodies and those bodies that carry out what are known as “public functions” are liable to the equality duty, which covers a number of grounds including disability.

It has covered disability since 2006, with other grounds introduced with the Equality Act. The equality duty should be an absolutely vital tool in the hands of unions to secure much better disability employment policies from their employers.

Although many larger employers in the public sector have already reviewed their policies and have introduced good equality schemes, not all have, or else their understanding or implementation of it is open to further improvement. The equality duty places an obligation on public sector bodies proactively to eliminate discrimination and promote disability equality. Therefore, it would be legitimate and appropriate (depending on the circumstances) for a union to request a review of all policies and procedures that impact on disabled workers: attendance, sickness, capability, and redundancy procedures in particular, with a view to pressing for the employer (1) to separate absences due to disability from sickness absence, in order to discount them for the purposes of the procedures in question; and (2) that the employer should introduce a good disability leave policy.

Agency workers

Most disabled agency workers in the UK will have rights to equal treatment in the workplace. Where a disabled worker is employed by an agency and is assigned to work for an employer, they will be able to rely on the “contract worker” provisions of the EqA and as a result will have access to the same workplace policies as directly employed staff, including a disability leave policy agreed with the employer. The duty to make reasonable adjustments applies to both the agency and the end user employer. The agency has primary responsibility for making reasonable adjustments, with the end user being responsible for additional adjustments which relate specifically to their workplace. For more information on agency workers’ rights to reasonable adjustments see the EHRC’s Employment Code of Practice (paragraphs 11.10 to 11.14).

Government advice

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In addition to the references given above, unions might also find a useful lever for negotiations in the Government's advice to employers, published as Equality Act 2010: Duty on employers to make reasonable adjustments for their staff includes (at page 4) a list of possible adjustments that contains the wording "discounting disability-related sickness absence for the purpose of absence management". (As published by the Government Equalities Office, January 2013²).

Conclusions

The EHRC Code of Practice will be helpful in providing examples to employers of the kinds of adjustments they should make. It may also be useful to consult with occupational health or to get other medical advice on what could be done to help the employee back to work sooner (e.g. reduced hours, adjustments to the job).

The case law suggests that it will be difficult to argue for reasonable adjustments like disregarding all disability-related absences in cases where the disabled worker has had lengthy periods of absence which medical reports suggest are likely to recur in the future. Nevertheless, it is important to remember that what is reasonable depends on a variety of factors and the circumstances of each employer and individual worker.

Remember too that you don't have to focus solely on arguing for reasonable adjustments to the sickness absence procedure. It may also be beneficial to use the discrimination arising from disability provision in the EqA to say that the treatment of the disabled worker is not justified in all the circumstances of the case.

Finally, a prior agreement with the employer to count disability-related absences separately, and/or to introduce a disability leave scheme will protect more disabled employees from disciplinary action or dismissal in your workplace than relying on rights in the EqA and case law alone. That is why it is vital to seek to persuade the employer to adopt the good practice that is proposed below.

²https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/138118/Equality_Act_2010_-_Duty_on_employers_to_make_reasonable_adjustments_for....pdf

Section three

Good practice

Developing awareness and knowledge

Too many employers are still breaching the Equality Act 2010 and unions are too often failing to hold them to account for it. This sad statement reflects the reality that the Equality Act 2010, particularly its disability provisions, is still a very complicated law, that neither employers nor many workplace representatives have sufficient understanding of what it says in relation to disability, and that far too many disabled workers are likewise ignorant of their rights.

Despite all the efforts to promote greater understanding of disability, most people including most managers retain a simplistic and stereotypical perception that sees disability as affecting a small minority of the population – wheelchair users, blind people with guide dogs, and so on. Such a view all too easily feeds into a practice by managers that ignores the reality of disability and makes it harder to understand the number of people who meet the legal definition and the great range of impairments that are covered. This ignorance can be addressed by training.

More favourable treatment and counting absence separately

One of the keys to understanding disability discrimination law is to grasp the fact that in order to achieve equality of outcome, it is often necessary to treat disabled people more favourably. Employers may proceed on the understanding that they have derived from there having been decades of anti-discrimination law in the UK: they do not know the detail of the law, but they are doing the right thing if they treat everyone the same. The problem is that this is not the right approach to understanding the requirements of the Equality Act 2010 in relation to disability. On the contrary, in the context of absence procedures, it is precisely the practice of treating disabled people who have time off the same as non-disabled workers who take sick leave that may lead to unfair discrimination. By adhering strictly (and in their view, fairly) to trigger points in absence procedures that apply equally to all workers, employers and managers are in fact risking treating their disabled workers unfairly and, possibly – especially, if they have failed to take account of their obligation to consider making reasonable adjustments - illegally.

By seeking a separation of the way that disability-related absence is counted from sickness absence counting, unions are arguing for disabled workers to be treated not the same as their colleagues, but differently. But this is in order to achieve a fairer outcome, because it takes account of the fact that some disabled workers, because of their particular impairments, need adjustments to their working arrangements if they are to be able to deliver their work effectively. Overcoming this obstacle to understanding the disability provisions of the EqA is the first and one of the most

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difficult hurdles to achieving better absence procedures. If employers do not grasp this point, they are unlikely to understand why they should count disability-related absences separately or even less likely to understand why they should discount them altogether.

Training in disability equality

Such ignorance will often arise at line management level. The need for training for line managers in disability equality has always been identified by unions across all sectors. It is a key to securing better understanding. Many consultants now offer disability equality training and it is something that unions can argue for. In public sector organisations, liable to the equality duty, it should be easier to press for managers to receive appropriate training in all areas of equality law, but including a specific section on disability. The argument is simply that without acquiring knowledge and understanding, managers will not be able to comply with the duty, and by failing to do so may open the organisation up to legal challenge.

But union negotiators also need to understand disability discrimination in order to negotiate the best policies with employers, and at the very least, it is vital that union representatives are able to identify where the issue at stake is one of disability, not sickness, and to know where to get proper advice on how to proceed.

Therefore the first recommendation for a good practice approach is that it is an essential underpinning for there to be training for officers and workplace representatives in disability discrimination and disability equality.

Presenting the “business case”

It may be appropriate with some employers to advance the “business case” for trying to retain disabled workers who find they have to take time off work. This will not work with all employers, but there is considerable evidence that it can make good economic sense to try to retain workers rather than to lose them and have to recruit afresh. The Business Disability Forum (BDF) in particular has published advice recommending this approach to employers. The argument is simple: it is better to take the steps to retain the experience and loyalty of existing workers, even if in the short term this means allowing them additional time off, or a period of reduced hours, or a phased return from absence, than to lose them and have to start again. This will also encourage other workers to see the employer as sympathetic, considerate and progressive so will be good for overall staff morale.

There are of course circumstances in which such an argument will not have any weight and unions are best placed to decide whether to deploy the argument either as the basis for a new policy, or in individual circumstances.

If the employer can be persuaded of the value of becoming “disability-friendly”, this will encourage workers to disclose impairments that might have an impact on their attendance.

Disclosure

The issue that arises first is whether the worker will disclose that they are disabled either to their union representative, and/or to the employer.

Where workers are from an agency, or are fixed term, or part time, they may feel particularly vulnerable and even less likely to disclose any impairment that might impact on their attendance.

Where the worker has a visible impairment, this is not likely to be an issue, although even in these circumstances it can happen that members will refuse to define themselves as disabled for fear of the stigma attached to the term. Representatives and officers will need to be sensitive to such views, and to explain clearly the reason for the definition and the consequences of rejecting it.

Far more likely is that workers with so-called “hidden” impairments may refuse to disclose these. An enormous stigma remains attached to some impairments, in particular mental health conditions, and people who have, or have had, mental illnesses will be well aware that there continues to be 80 per cent unemployment among this group of people. The pressure not to disclose a condition may turn out to be a powerful obstacle, however, to retaining employment. In these circumstances it is particularly important that union representatives have a proper understanding of disability and are able to deal sensitively with members. A positive approach to (in particular) mental illness by both the union and the employer will help encourage members to disclose their condition (see appendices).

The best way to encourage members to disclose impairments is to have a disability-friendly and disability-aware workplace in the first place. Where this is not the situation, it will be all the more important that the union uses all avenues to assure members that it is there to represent everyone, so that members who find that they are going to need to take disability-related time off feel confident to approach the union for advice and support.

Counting disability absence separately

There are several issues to consider when deciding to approach the employer to argue that disability-related absences should be separated from sickness absence and disregarded when counting the absences that lead to triggers for managerial action.

A basic question both for this, and also if a policy of disability leave is to be negotiated, is what defines disability. It will be very difficult to secure any definition other than that laid down in the EqA itself, unless the employer is exceptionally progressive and willing to listen to arguments that absence related to any kind of impairment should not be treated as sickness for the purposes of attendance management. This approach would follow logically if the employer had agreed a full “social model” approach to disability, based on protecting anyone with impairments against facing a detriment – in this case, the detriment being represented by the sickness absence procedure.

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In the majority of cases, the employer is likely to want to stick with a tightly and legally based definition, in which case it is clear it must be the EqA definition. It will then be necessary for the policy to spell out that where someone is absent for a reason related to something that arises as a consequence of their disability, this absence will be counted separately from sickness absence, and will not be used in any calculation of absences used to trigger disciplinary procedures – or indeed from any other rights related to service - arising from absence. It is unlikely that an employer would sign up to such a procedure without some kind of time limits and these would have to be negotiated. The FDA union has negotiated such a policy and this is presented in the appendix.

Agency workers

Although the legal rights of agency workers have been improved as a result of the Agency Worker Regulations 2010, it is unlikely that a disabled worker on an agency contract would be entitled to access policies like disability leave policies that are negotiated with the employer and go beyond the legal rights in the EqA. It would of course represent good practice for unions to seek to ensure that any additional policies negotiated to protect disabled workers were extended to cover workers recruited on agency placements (etc).

Occupational Health (OH)

It will obviously be of benefit if the employer's OH advisers recommend that a member is covered by the EqA and that discounting disability-related absences would be an appropriate course of action. Many employers will turn routinely to their OH department to confirm such questions as to whether a worker is disabled within the EqA definition, what the current medical diagnosis of their condition is, and how long they might be expected to be absent. The employer will then have a professional medical opinion to rely on in the event of future legal proceedings, and as case law currently stands, this will normally provide a strong justification for action taken on the basis of that opinion. It is therefore of particular importance that union representatives are involved with the employer in the process leading to an OH referral, participating for example (and where possible) in preparing the questions to be asked of the medical experts.

If there is reason to doubt whether OH will operate in a properly neutral way, or that the OH people are qualified to report on a particular impairment, it may be a good idea for the union and the member concerned to consider commissioning an independent medical report, or persuading the employer to do so. If the employer will not, the question of who pays for such a report will have to be addressed. The findings of such a report can be presented to the employer and used to support the negotiation of a suitable arrangement to enable the disabled worker to return to work in due course. At worst, having such a report, and having presented it, might provide a basis for challenging the employer's actions in a tribunal if that becomes necessary.

Benefits for organising

Trade unions might also combine the work of promoting good policies and practices on sickness absence and disability discrimination with an organising approach. The union might carry out a survey within the workplace on disability issues, with the purpose of promoting better understanding of the issues covered here, and in the process also encourage workers to join the union. USDAW, for example, is using this way of reaching potential members at the same time as educating its own reps and other workers on disability discrimination. Such an approach might also uncover other examples of bad practice or disability discrimination that have gone unnoticed as a result of people being unaware of the law and their rights.

Section four

Disability Leave

The two policies that will contribute most to protecting workers from losing their jobs through the misapplication of sickness absence measures are to separate the counting of disability-related absences from sickness absence, and the establishment of a disability leave (DL) provision. Both policies are proposed in the EHRC Code of Practice, as has been explained above, but neither are a legal obligation on an employer (though an employer may have to permit disability leave as a reasonable adjustment for individual employees), so neither will happen unless unions negotiate them into being.

The concept of disability leave has been around since the 1990s but it has been very little taken up by employers. This is despite being campaigned for by unions and advocated by disability organisations. With the advent of the 2006 Disability Equality Duty (which has since been replaced by the Public Sector Equality Duty), it became more common in the public sector, and this sector provides the majority of examples of actual policies. Many such policies have not been in existence for very long, so it is hard to judge their effectiveness, and in other cases their interpretation has depended on the interpretation of the words on the page.

Some unions, such as PCS and UNISON, have produced model agreements for negotiators. The experience of individual unions in negotiating policies and then attempting to use them provides some important clues as to the main requirements of an effective policy. Some of these are identified below.

- The policy must identify who is eligible for DL. As explained above, in most cases this will have to be limited to those who qualify under the EqA definition. However, unions may need to consider that there can be grey areas, especially where the worker has a condition that is intermittent, and may recur in future but has not done so for a time; or where it may not yet have lasted twelve months. It would be best therefore to try to find a way of ensuring that people in these positions, who are often those who are most likely to need the protection of such a policy, are not excluded by the wording of the agreement.
- It is very likely that the agreement will specify that, since it is about disability, it is not about sickness absence. The civil service policies reported by PCS do not cover absence due to sickness even when the sickness is connected with an impairment. Unions will want to check carefully the wording of the agreement so that there is no doubt about what is and is not covered.
- Employers will normally insist on a time limit for periods or the total length of disability leave that can be granted. PCS report a limit of three months in any twelve. Where the employer insists on a time limit, the union will press for the

maximum length possible, and that it is not constrained by calendar periods – it is after all possible that a period of DL will straddle calendar or financial years.

- Probably the best approach is to try to secure agreement to a flexible approach, writing in that this is related directly to the circumstances in any given case. It should be possible to argue that as every individual's circumstances are unique, it is best for all concerned if the policy permits a degree of flexibility especially in terms of time limits, to be negotiated in each case. An agreement negotiated with a county council by the NUT and UNISON uses this approach.
- Retrospective application should be permitted. It is possible that a member's absence will have started before it becomes known that this is disability-related, in which case it should be possible to redefine the absence as DL rather than sickness once this has been clarified.
- The policy needs to specify what sort of absence qualifies for DL. It will be important that it has a wide and, preferably, non-exclusive range of possibilities. The essential elements are that the DL period should be available for all relevant possibilities - appointments, treatment, therapy, recuperation, training or retraining, assessments, and when waiting for the employer to complete the making of adjustments – and also include an element of flexibility so that it can be extended to cover unforeseen but clearly appropriate circumstances. The PCS agreements cover alternative therapies (where these have been recommended by a medical professional), counselling sessions and time to adjust to new medication. In addition, it might be applied as well when the worker requires a phased return to work, to cover part-time working during this period, in order to ensure that the worker remains on full pay during this time.
- It will be of the essence of the policy that DL is counted as continuous service from the point of view of all benefits that depend on service.

In conclusion, it should be clear that having a well-constructed DL policy, administered by a management that understands it, and with members supported by union representatives who are trained in dealing with disability discrimination, will reduce enormously the risk that members who have to take absences as the result of their impairment might fall foul of sickness absence procedures. However, as unions themselves have made clear, however well written an agreement, there will remain problems with interpretation, especially in the area of overlap between disability-related and sickness absences.

Section five

Appendices

Appendix One: counting disability-related absence separately

This section contains the relevant pages from the policy negotiated by the FDA with the Crown Prosecution Service.

1. Introduction

The CPS is committed to the fair and flexible treatment of those employees with a disability and compliance with its responsibilities under the Equality Act 2010, and as part of the Health, Wellbeing and Attendance strategy, the application of the departmental Managing Attendance Policy towards disability-related absences has been developed to improve the support provided to disabled employees.

This policy should be applied when managing absence that is directly attributable to an employee's disability. Under this policy, no disability-related absence shall count towards a trigger point under the procedure for dealing with non-disability related absences, and therefore no Attendance Improvement Notices should be issued in respect of disability related absences.

To enable this policy to work effectively, there needs to be greater emphasis on employees and their line managers working together to remove barriers to attendance at work. This will involve open, honest and constructive conversations which are essential to ensure all the help needed to return, or continue, to work is identified and put in place at the earliest opportunity.

This policy supports the delivery of CPS Values, in particular that we will be honest and open and we will treat everyone with respect, by providing a transparent process based on open dialogue, where employees experiencing disability-related absence will be treated fairly and with dignity.

2. Scope

This policy will apply to employees with a disability as defined by the Equality Act 2010.

A person has a disability for the purposes of the Act if he or she has a physical or mental impairment and the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities. Further information on defining disability is provided at Annex D.

3. Reasonable adjustment discussions between the line manager and employee

As soon as a line manager becomes aware that an employee they manage has or may have a disability, they should discuss with that employee whether he or she requires any reasonable adjustments to enable them to work effectively in their role. The line manager should not wait until the employee experiences any difficulties or is absent to have these discussions, unless it is these difficulties or absence that first makes the manager aware that the employee has, or may have, a disability.

As part of the reasonable adjustment discussions the manager and employee should discuss whether the disability is likely to affect the employee's attendance and, if so, with the help of the HRA, explore what help and support, including any necessary reasonable adjustments, are required to assist the employee to give regular and effective service. The manager should be proactive in identifying reasonable adjustments (see "How to: make reasonable adjustments for employees with a disability" guidance), and consider any suggestions that the employee may make themselves. It is the responsibility of the manager to decide whether any adjustments are necessary and reasonable, and although Occupational Health (OH) advice will not necessarily be needed in every case, managers may seek OH advice where the case is complex or there are any disagreements about whether the suggested adjustments would be effective, or where the line manager is unsure of what adjustments may be appropriate.

Where it is identified that an employee's attendance might be affected by their disability, the manager and employee should discuss what the likely level of absence might be and determine an appropriate Consideration Point (see below). In estimating this, the manager should consider:

- the employee's previous absence record, as past absence might indicate the likely level of future absence; and
- the stability of the condition, for example the possibility of temporary fluctuations due to a change in treatment or circumstances.

Employees are encouraged to seek advice from the Disabled Staff Network (DSN), Departmental Trade Union (DTUS) or Human Resources Advisor (HRA) when determining a consideration point.

Line managers should seek advice from the HRA in determining a Consideration Point and may also find DSN and DTUS input helpful.

All reasonable adjustments should be reviewed regularly and at least on an annual basis.

4. Consideration Point

Determining what is a reasonable level of absence to support a disability is not an exact science. In deciding what the consideration point should be line managers should take account of the absence record and stability of the condition, as referred to

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above. They should also consider what is reasonable for the Department to support in the individual circumstances: the line manager will have to take a view, supported by the HR Advisor, on what level of absence can be supported by the business, taking account of the impact upon the business' ability to deliver its service effectively.

To ensure that disabled employees are never disadvantaged when compared with their non-disabled colleagues, the level of the consideration point should not be less than the minimum trigger point set out in the Attendance Management policy. It should be determined based on the information available and through discussion with the employee. Managers are not expected to initiate formal assessments to form that view and should normally accept a diagnosis by the employee's GP if it is available. Where this is not possible, for example where the case is complex, there is disagreement, or the line manager is unsure, the case should be referred to

Occupational Health for advice if this has not already been done. Occupational Health will be able to advise on whether the employee's condition has stabilised if this is not clear, the effects of treatment etc., and be able to advise on reasonable adjustments that should be considered to maximise the employee's attendance.

Managers should, however, recognise that in some cases the likely level of absence may be unpredictable, for example, progressive conditions may have a differing impact upon attendance over time, or some employees may experience occasional "flare-ups" at unpredictable times from conditions which are normally managed and do not affect attendance. Therefore managers must review the likely level of absence, reasonable adjustments, and consideration point, whenever circumstances change, and be prepared to be flexible in how they manage such cases.

For details on what happens when a consideration point is reached or exceeded, please see section 11.

5. Reporting disability-related absence

Where an employee is absent due to disability-related reasons, they should report their absence to their line manager as per the managing attendance process.

6. Identifying disability-related absence

An absence will be considered disability-related if, had it not been for the disability, the absence would have been unlikely to have arisen. In many cases this may be self-evident, but some cases may be more ambiguous or complex. Where there are complexities, disagreements between the line manager and employee, or the line manager is unsure, OH advice may be sought. Ultimately, the decision as to whether an absence will be considered disability-related will be made by line management, taking into account all available information and advice e.g. OH advice, GP advice, employee representations etc.

As soon as a disability is identified, the line manager and employee should agree a consideration point.

7. Recording disability-related absence

Where an employee's sickness absence is related to their disability, it should be recorded as a disability related absence. Managers will need to enter the disability related absence on iTrent in the same way as other absences, however, in addition, they should indicate that the absence is disability related by ticking the "disability-related absence" tick box.

In cases where the employee is absent solely due to waiting for reasonable adjustments to be implemented, and would otherwise have returned to work, the absence should not be recorded as sickness absence but should be recorded as Disability Special Leave (see Section 15).

8. Non disability-related absences

If an employee has absences that are unrelated to a disability they should be managed in accordance with the procedure for managing non-disability related absence set out in the Attendance Management Procedure.

9. Keeping-in-touch

Where an employee is absent for disability-related reasons, keeping-in-touch arrangements apply as per the normal attendance management process. For further information on keeping-in-touch, see the "How to: Keep in Touch with the Employee" guidance booklet.

As soon as it is known that the absence is for disability related reasons, the line manager and employee should agree a consideration point.

10. Return-to-work discussions

The line manager should hold a return-to work discussion with the employee upon their return from absence, as per the standard managing attendance process. This should include discussions on reasonable adjustments and whether any further support is needed to assist the employee in remaining at work.

Where a consideration point has not already been set, the line manager and employee should agree a consideration point.

11. Disability-related absence – first review

Where disability-related absence reaches the consideration point, a formal disability related absence review should be conducted. The line manager will invite the employee, in writing, to the meeting to discuss the absence, any further support needed and review and inform the employee if the level of absence cannot be sustained. Employees have the right to be accompanied by their trade union representative or workplace colleague at the meeting. Details of arrangements for the review meeting are set out in Annex B.

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The aim of the review is to explore ways to help the employee maintain their employment whilst ensuring the business is able to deliver its services effectively. At the meeting, the employee and line manager should discuss whether the reasonable adjustments in place are working or whether any new adjustments may be needed in order to restore regular and effective service or secure a return to work. The line manager should also review whether there have been any temporary fluctuations that may have distorted the level of absence.

The line manager should establish whether the reasons for the consideration point being reached or exceeded and the consequent effect on the business, justify tolerance of the higher level of absence. In the case that the employee may need further absence, but a return to work is foreseeable and they are likely to provide regular and effective service upon their return, a reasonable adjustment might be to review/extend the consideration point further. Each case must be decided on its own merits and based upon what is reasonable.

Where, considering all of the evidence available, including OH advice, the manager determines that continued absence at the current level cannot be sustained, the manager should provide the employee with a “written notice of expectation of attendance” which sets out the standard of attendance that the business requires in order to effectively deliver the service; the help, support and reasonable adjustments that will be provided to help the employee achieve the standard of attendance required; and warns that continued absence at an unsustainable level may require a second review (see section 12). The notice should set out that the manager and employee will meet again within three months to review the progress if the absence continues at a level which cannot be sustained or, if after some improvement, there is deterioration in attendance which cannot be sustained, within 12 months of the written notice.

The employee may be notified of the outcome at the end of the formal meeting, and in any event, in writing within five working days of the meeting after the manager has had an opportunity to assess the information presented.

An employee who receives a “written notice of expectation of attendance” must always be notified in writing of the right of appeal and the appeals process. An employee who decides to appeal must do so within ten working days of receiving the notification. Any appeal will be raised and dealt with in accordance with paragraphs 169-179 of the Attendance Management Procedures.

A Written Notice of Expectation of Attendance should not be issued where a consideration point has not previously been set. In these circumstances, the review will focus on what support the line manager can provide to the employee and any reasonable adjustments that can be implemented to help the employee achieve the level of attendance required, including the setting of a consideration point.

To enable the employee to demonstrate an improvement in their attendance level, any reasonable adjustments implemented at this stage to help support the employee

to achieve the required level of attendance must be allowed to take effect before consideration is given to taking formal action.

Attendance should continue to be monitored and where attendance does not improve to a satisfactory level, a disability related absence review should be held to discuss the absence, any further support needed and review and inform the employee if the level of absence cannot be sustained.

12. Disability-related absence – second review

Where disability-related absence continues at a rate which cannot be sustained, or if, after some improvement, there is deterioration in attendance within the 12 months of the written notice of expectation of attendance being issued which cannot be sustained, the manager will conduct a second review meeting. Employees have the right to be accompanied by their trade union representative or workplace colleague at the meeting. The arrangements for review meetings are covered in Annex B.

Managers must have acted upon any recommendations from the first review meeting, such as implementing reasonable adjustments, before conducting a second review meeting.

The line manager will need to obtain and consider up-to-date information about the disability-related absence, including an up-to-date assessment from OH.

As with the first review meeting, the aim is to explore ways to help the employee maintain their employment whilst ensuring the business is able to deliver its services effectively. The line manager and employee must further explore whether any further help, support or reasonable adjustments will help the employee to return to work and/or provide regular and effective service.

Where, considering all of the evidence available, the manager determines that continued absence at the current level still cannot be sustained, the manager should provide the employee with a “final written notice of expectation of attendance” which sets out the standard of attendance that the business requires in order to effectively deliver the service, and the help, support and reasonable adjustments that will be provided to help the employee achieve the standard of attendance required.

Should the final review stage be reached, the employee’s overall attendance record (i.e. all non-disability related and all disability related absences) will be considered when determining whether the business can sustain the level of absence and this needs to be made clear to the employee at this stage. Therefore the notice will make it clear that in the final stage, all absences will be considered when determining whether the employee is likely to return to work within a reasonable timescale or provide regular and effective service over a prolonged period. This will provide an overall picture of the employee’s record of absence at the final review stage which will assist the manager in determining whether the pattern of absence may be sustainable.

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The notice should set out that the manager and employee will meet again within an agreed timescale (normally three months) to review the progress. The employee should also be informed that if the absence level continues or there is no sustained return to work, a final review meeting will be held to determine the likelihood of improved and sustained attendance/return to work and the employee's capability to meet the requirements of their job. It should also be pointed out that this could potentially lead to their dismissal.

An employee who receives a "final written notice of expectation of attendance" must always be notified in writing of the right of appeal and the appeals process. An employee who decides to appeal must do so within ten working days of receiving the notice. Any appeal will be raised and dealt with in accordance with paragraphs XX of the Attendance management Procedure.

13. Disability-related absence – final review

Following a second review, where the level of absence continues to be unsustainable and the line manager has serious concerns that the employee will be unable to return to work and carry out their full duties within a reasonable and acceptable timescale, or offer regular and effective service over a prolonged period, a final review must be held.

Prior to a final review meeting being held, the employee should be referred to occupational health for an up to date assessment and advice. The line manager should write to the employee, confirming that the level of absence is unsustainable and that they are being referred for an occupational health assessment. They should also be advised that OH will be asked as standard to consider whether ill-health retirement would be appropriate in the circumstances.

The aim of the referral is to seek advice from an occupational health advisor as to the prospect of a return to work within a reasonable and acceptable timescale or, in the case of short-term intermittent absences, the prospect of the employee being able to provide regular and effective service over a prolonged period. The referral should also seek to identify whether any further reasonable adjustments could be made that would enable the employee to return to work in a reasonable timescale or provide regular and effective service over a prolonged period. In addition, occupational health should be asked to confirm whether ill-health retirement would be appropriate. Following the referral, the line manager should produce a case-management summary, which will include the up-to-date OH advice.

Where occupational health advise that there is little prospect of the employee returning to work within a reasonable and acceptable timescale, whether on full duties or with reasonable adjustments in place, or there is little prospect that they will be able to provide regular and effective service over a prolonged period due to their medical condition, including with reasonable adjustments in place, the employee will be invited to a final review meeting. This meeting will be held by a manager at the requisite level of authority (Annex C). Employees have the right to be accompanied by their trade union representative or workplace colleague at the meeting. The

arrangements for review meetings are covered in Annex A. Where ill-health retirement has been considered appropriate by OH, see section 14.

The purpose of the meeting is to allow the employee the opportunity to provide further evidence to help make the decision as to whether dismissal will be the most appropriate course of action, or whether any further support or adjustments will enable the employee to restore their attendance within a reasonable timescale.

The meeting will consider the Case Management Summary and any evidence submitted by the employee, and the decision will take into account:

- the overall attendance record;
- the report from OH;
- An explanation of the absence by the employee
- based on advice from the OH, the likelihood of an improved attendance record in the future (in the case of short term sickness absence) or the likelihood of a return to work in the foreseeable future (in the case of long term sickness absence)
- the effect of the absence upon the Department's ability to deliver an effective service
- any further reasonable adjustments that will help to restore the employee's attendance within a reasonable timescale, including options for redeployment; and
- opportunities given for improvement and actions taken to date to both support the employee to restore their attendance and inform the employee of the seriousness of continued absence(s)

The manager conducting the meeting should be satisfied, from all of the evidence and advice from the HR Advisor, that no alternative option, through further reasonable adjustments (including a change to work duties, where appropriate), is likely to enable the employee to return to work within a reasonable timescale or enable them to provide regular and effective service over a prolonged period, before deciding that dismissal is the most appropriate course of action. Where the manager considers that dismissal is the most appropriate course of action, the manager may dismiss the employee with notice on the grounds of capability, confirming this decision in writing.

Where an employee is dismissed under this procedure, the Department will determine the level of compensation payable to them under the Civil Service Compensation Scheme, following the guidance on Compensation on Dismissal for Inefficiency.

The letter setting out the decision to dismiss must set out the level of compensation to be paid, and advise the employee of their right of appeal.

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14. Ill-health Retirement

The process for ill-health retirement is contained in the Attendance Management Procedure.

15. Disability Special Leave

Disability Special Leave is a form of special leave with pay, available to disabled employees who need to be absent because they are undergoing assessment, treatment or rehabilitation for a disability-related condition which cannot be undertaken outside normal working.

In addition, if an employee is awaiting a reasonable adjustment and cannot therefore undertake their normal duties, alternative employment on a temporary basis must be considered, so the disabled employee is not disadvantaged while waiting for reasonable adjustments to be implemented. However, where this is not possible, Disability Special Leave may be granted until the reasonable adjustments are available. Where the employee is absent solely due to waiting for reasonable adjustments to be implemented, and would otherwise have returned to work, the absence should be recorded as Disability Special Leave.

Disability Special Leave is not the same as sickness absence and does not count for the purposes of managing attendance.

Appendix two

The Unison model disability leave policy

The UNISON model Disability Leave policy

1 Introduction

1.1 The purpose of this agreement is to provide disabled employees with reasonable paid time off work for reasons related to their impairment.

1.2 This agreement covers all disabled employees of [THE EMPLOYER] (see section 5) and sets out what disability leave is available and the procedures for using it (see section 6).

1.3 This agreement complements, but is not restricted by, other equal opportunities policies and agreements, including [LIST OF RELEVANT POLICIES].

2 General Principles

2.1 Disabled people face discrimination and disadvantage in the workplace and society. The skills and experience of disabled employees are highly valued and UNISON and [THE EMPLOYER] are committed to supporting disabled employees

by removing access barriers, tackling discrimination that they face, and implementing best employment practice.

2.2 [THE EMPLOYER] and UNISON are committed to resolving any issues relating to disabled employees by negotiation and agreement where possible, and avoiding recourse to Employment Tribunals.

2.3 In accordance with the Disability Discrimination Act 1995 (DDA 1995) [THE EMPLOYER] will not discriminate against disabled employees but will consider and accommodate their needs as far as is reasonably practicable.

2.4 In accordance with the Disability Discrimination Act 2005 (DDA 2005) [THE EMPLOYER] will work actively to eliminate discrimination against and harassment of disabled people, promote positive attitudes to disabled people and encourage disabled people to participate in public life.

3 What is disability leave?

3.1 Disability leave is paid time off work for a reason related to someone's disability. It may be for a long or short period of time, and may or may not be pre-planned (see section 6).

3.2 The law says that all disabled employees are entitled to 'reasonable adjustments' where the physical working environment or practices place the disabled person at a substantial disadvantage compared with a person who is not disabled.

3.3 Disability leave is a 'reasonable adjustment' under the Disability Discrimination Act, and is in accordance with good employment practice as recommended by the Disability Rights Commission. However, not all disabled employees will necessarily need to take disability leave.

3.4 Disability leave will not be included for the purposes of assessing performance, promotion, attendance, selection for redundancy, and similar issues. To do so might discriminate against the disabled employee.

3.5 There is no maximum duration of disability leave. However with advice from Occupational Health and in consultation with the employee, UNISON and other relevant parties it may become clear that the employee is not be able to return to their previous job. In this case other reasonable adjustments include redesigning the job, retraining and redeployment, will be considered. Where no other option is possible consideration will be given to ill health retirement.

4 Disability leave and sick leave

4.1 Disability leave is distinct from sick leave, and includes time when an employee is well but absent from work for a disability-related reason.

4.2 If an employee is on sick leave and it becomes clear that they now qualify for disability leave, they will be transferred onto disability leave.

4.3 If time off work due to ill health is for a reason not disability-related, then it will be recorded as sickness absence.

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4.4 A high level of sickness absence for an employee may be a result of a disability. This possibility will be investigated and may trigger a change in the person's status to being disabled. Any absences that are disability related will be reclassified as disability leave.

5 Who is entitled to disability leave?

5.1 All employees who are disabled using the definition in the Disability Discrimination Act 1995 are entitled to disability leave.

5.2 The DDA 1995 defines disability as “a mental or physical impairment that has a substantial and long-term effect on a person's ability to carry out normal day-to-day activities”. ‘Long-term’ typically means 12-months or more, and HIV infection, cancer, and multiple sclerosis are included from the point of their diagnosis.

5.3 People who have had a disability in the past but no longer have one, still qualify as disabled under the DDA and are entitled to disability leave for disability related absences.

5.4 Disabled employees may choose to inform [THE EMPLOYER] and Occupational Health that they are disabled. While this is not obligatory, it is recommended that they do so to facilitate making reasonable adjustments. This information will be kept confidential.

6 Disability leave procedure

6.1 The effect of an impairment depends on the individual and their circumstances. To accommodate this requires some flexibility, so employees may take planned disability leave or unplanned disability leave.

6.2 Disability leave is one of a range of possible reasonable adjustments, also including working from home and flexible working.

6.3 Where disability leave is needed, agreement must be reached on the approximate number of days and approximate date of the leave. This may not be exact but will help in planning service delivery.

6.4 Planned disability leave is agreed in advance. It may be a number of individual days each year that a disabled person needs to take off. Typically this would be for treatment, rehabilitation or assessment related to their disability. It may also be a longer block of time needed for a specific reason, as indicated in 6.4.3.

6.4.1 The procedure for agreeing planned disability leave is as follows:

6.4.1.1 First stage

The disabled employee will meet with their Manager on a confidential, individual basis and discuss what reasonable adjustments they need, and the effect of their disability on performance objectives. Employees may choose to be accompanied by a union representative.

6.4.1.2 If agreement cannot be reached then the procedure goes on to the second stage.

6.4.1.3 Second stage

Further evidence and advice will be sought before a formal meeting. Information will be sought from other parties to help determine what constitutes a reasonable adjustment in the specific circumstances. This will include some or all of:

- A GP or specialist's report (with the employee's consent)
- A report from Occupational Health (with the employee's consent)
- Other information from the employee
- Advice from Human Resources
- Consultation with a UNISON representative
- Advice from the Disability Employment Advisor at the local Job Centre Plus

6.4.1.4 A meeting will then be held that will include the employee, the manager, a representative from Human Resources, and a trade union representative. All the evidence will be circulated to attendees prior to the meeting.

6.4.1.5 The following issues should be considered:

- Is the employee disabled under the DDA?
- the effectiveness of the proposed adjustment
- the practicability and cost of the proposed adjustment
- the resources of [THE EMPLOYER] and other financial assistance available (for example, Access To Work funding).

6.4.1.5 The impairment itself (as opposed to its effect) should not be considered, as it may be discriminatory to do so.

6.4.1.6 If agreement still cannot be reached then the employee has the option of utilising the grievance procedure.

6.4.2 Some examples of reasons for planned disability leave include (but are not limited to):

- Hospital, doctors, or complementary medicine practitioners appointments
- hospital treatment as an outpatient
- assessment for such conditions as dyslexia
- hearing aid tests
- training with guide or hearing dog
- counselling/therapeutic treatment

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- recovery time after blood transfusion or dialysis treatment
- Physiotherapy (sessional or residential)

6.4.3 A longer block of disability leave might be also be appropriate. This could be so that a newly disabled employee can make changes inside and outside of work; while physical or environmental adjustments are being made to an employees work environment; or if an employee has to undergo a more prolonged period of treatment, rehabilitation or recuperation.

6.4.4 Some examples of longer disability leave include (but are not limited to):

- a period of time off work while reasonable adjustments are made at work
- an operation, and recuperation and rehabilitation afterwards
- time while the employee is suffering from depression, stress, or mental illness
- a phased return to work of period of time off work for a newly disabled employee.

6.5 Unplanned disability leave covers disability-related absences that may previously have been recorded as sick leave. Not to separate disability leave from sick leave may discriminate against disabled workers.

6.5.1 These will be recorded in the same way, but separate from, the sickness absence procedure, and clearly identified as disability leave.

7 Review of planned disability leave

7.1 Where disability leave is agreed, it will be reviewed on an annual basis to assist in planning. These reviews will be supportive, and will not used to pressure employees into taking less disability leave than they need.

7.2 Staff who become disabled, or whose impairment or circumstances change, may request a review of their disability leave (or other reasonable adjustments) at any time.

8 Other Issues

8.1 If an employee is on disability leave for more than two weeks, their manager will brief them on their return to work of any changes that have occurred while they were off. In addition job advertisements, internal newsletters and similar materials will be sent to them in an accessible format so being on disability leave does not disadvantage them.

8.2 Consultation will take place at a local level about the impact of a member of staff taking disability leave, and if necessary centrally funded backfill will be provided.

8.3 Time spent on disability leave is counted as continuous service for all contractual benefits, including accruing annual leave, sick leave, pension rights and bonus.

8.4 Medical information about employees will be kept strictly confidential unless they agree to disclosure. Its use will conform to Part 4 of the Information Commissioner's Data Protection Act Employment Practices Code (Information about Workers' Health).

8.5 The amount and duration of planned and unplanned disability leave will be recorded when it is actually taken, using the designated forms.

8.6 Appeals about the amount of disability leave allowed, on correctly following the procedure, or on other aspects of this agreement will be dealt with under the grievance procedure.

8.7 Abuse of the disability leave scheme is a serious disciplinary offence, and will be dealt with under the disciplinary procedure.

Appendix three: the PCS model agreement

1. Introduction

1.1. (the employer) recognises that during their employment, staff may become disabled through illness or accident. Also, it is recognised that those with existing disabilities may undergo changes to their condition/impairment. In either case, it may be necessary to change either the job done by an individual, the way the job is done and/or to provide them with additional or different equipment and/or training. Awareness training may also be required by managers and/or colleagues.

1.2. (the employer) does not view disability as a barrier to employment, or to continued employment. Rather, they are committed to retaining staff who become disabled, to retain their skills and abilities. They recognise that this is far better, for themselves and the individuals concerned, than funding ill health retirements or dismissals/resignations.

1.3. (the employer) accepts that in many cases sick leave is not an appropriate response for individuals who need to undergo assessments and/or retraining. They are committed to ensuring that, when an individual is fit for work, even if they are not fit for the work they were previously doing, the individual will not be expected to take further sick leave, but will be granted a period of 'disability leave'.

1.4. Disability leave is a form of special leave with pay, which can be granted by line managers, with the advice of Personnel or Occupational health services, as appropriate. It should not initially be granted for a period of more than 3 months. Disability leave can be granted retrospectively.

2. Aims of the Scheme

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2.1. The aims of the disability leave scheme are:

2.1.1. to enable (the employer) to retain the skills and experience of staff who become disabled or who's condition changes during employment.

2.1.2. to enable staff who become disabled or who's condition changes during employment to concentrate on dealing with changes in their life without the added concerns of sickness absence or the threat of reduced pay or job loss.

2.1.3. to allow a period of time when there are no pressures to administer sickness absence management, to permit proper assessment and the procurement of necessary equipment and/or training, or to allow for the identification of a suitable alternative post.

2.1.4. to be proactive in the management of absence, by looking at the underlying reasons for it and ensuring that staff are given the earliest opportunities to return to work and/or to be reclassified as not absent on sick leave.

3. Part-time working

3.1. In certain cases, individuals are able to return to work on a part-time basis far earlier than they could return to full-time employment. In such circumstances, disability leave could be granted, to cover those periods when the individual is not able to work. This can be done for a set period of set hours, or for a gradual re-introduction to full-time work.

4. Length of disability leave

4.1. The length of disability leave required will vary from case to case, depending on the situation.

4.2. There is no maximum period for disability leave, but it is considered that periods in excess of 12 months would be exceptional.

4.3. Initially, disability leave should be granted for a period of up to three months. This should be reviewed throughout the period and extended as necessary.

4.4. The aim of the scheme is to allow 'such time as is needed', for the individual and the employer to make the necessary arrangements to facilitate a return to work, with any necessary equipment in place and any required training provided. It is this, rather than any arbitrary limit, which should govern the length of disability leave required.

5. Effect on other terms and conditions, including pay

5.1. Disability leave is a form of paid special leave. As such, all time spent on disability leave will be treated as reckonable service for annual leave, incremental progression, pensionable service.

5.2. If a report falls due within a period of disability leave, the report will be written as if the individual had been in service and performing at the same level as before they commenced disability leave. The only exception to this will be where

performance had significantly deteriorated before the period of disability leave commenced. In these circumstances, the report will take into account the effects of the disability that led to the need for disability leave and will be adjusted to reflect the performance of the individual before these effects came into being.

6. Defining 'disability'

6.1. Although the Disability Discrimination Act (DDA) has been one factor in the decision to establish this procedure, it is not necessary for an individual to fully meet the definition of disability within the DDA before they can be granted disability leave. In particular, we would not expect an individual to have a 'long-term' impairment.

6.2. In this context, 'disability' is considered in relation to employment. Any individual who is unable to continue to work in his/her current environment, using processes which are used by the majority of employees can be considered as 'disabled'.

6.3. The idea is to assess whether the individual could resume/continue work in adapted premises or with special equipment, or by learning new skills (either for their current post or another).

7. Triggering disability leave

7.1. The need for disability leave may be triggered by:

7.1.1. an accident or illness, including mental illness, resulting in disability;

7.1.2. deterioration of an existing disability;

7.1.3. long term, or frequent, absence resulting from disability;

7.1.4. deterioration of performance as a consequence of disability.

7.1.5. recognition by the individual that a problem exists;

7.1.6. an application for ill health retirement, where specialist employment advice has not been sought;

7.1.7. concerns relating to health and safety.

7.2. The decision to award a period of disability leave should be taken by the individual's line manager, in consultation with the individual. Advice may be sought from OHS and/or personnel.

7.3. Where an individual is refused an application for disability leave, they can take a complaint through the normal grievance procedures.

8. Interaction between sick leave and disability leave

8.1. Disability leave differs from sick leave in that, when the individual returns to work, changes will be needed either to the workplace, their duties, the equipment and/or their working practices.

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8.2. Employees may start on sick leave, but should be transferred to disability leave as soon as:

8.2.1. it becomes apparent that they have a longer term condition that will necessitate some changes in the way they do their current job; and

8.2.2. they are ready to take part in the assessment process, to establish what changes are required.

8.3. Where there is a delay in establishing their suitability for disability leave, perhaps because medical reports have to be called for, the start date of the disability leave should be set retrospectively, to the point at which they would have been able to return to the adapted environment.

9. Managing the scheme and minimising absence

9.1. The intention of the scheme is to allow for the return to work of the individual, to a suitable post with necessary equipment and training, in the shortest possible time.

9.2. Appointing a Case Manager

9.2.1. When a case requiring disability leave is suspected or identified, a case manager will be appointed. This will usually be the individual's line manager. At the line manager's request, this task can be allocated to another individual of equivalent or higher grade, either from within the workplace or from Personnel or Equal Opportunities Unit. The individual may also request a Case Manager other than their line manager. In such cases, discussions should be held, with the individual, to establish the reasons for the request.

9.2.2. The Case Manager is responsible for liaising with the disabled person, their Trade union rep, and any outside bodies that may be involved.

9.3. Medical Advice

9.3.1. Medical reports may be called for, as appropriate, from:

- the disabled person's General Practitioner, or Specialist/Consultant;
- the Occupation Health Advisers.

to determine whether Disability Leave is appropriate, which may include information on the future prognosis of the condition.

9.3.2. Such reports may, at the same time, make recommendations on possible adjustments and fall within part of the assessment process below.

9.4. Assessments

9.4.1. It is important that the Case Manager speedily makes arrangements for suitable assessments. Out of these assessments will come recommendations of a practical nature as to what can be done to assist the individual. They will also assist in determining what period of disability leave might be appropriate.

9.4.2. Assessments can be obtained from:

- Disability Employment Adviser, through the local Employment Service Jobcentre;
- Occupation Health Adviser, if suitably qualified;
- An employment specialist from a local or national disability organisation, specialising in the particular disability.

9.4.3. Wherever possible, the Case Manager should ensure that individuals do not have to undergo a series of different medical checks and assessments. In selecting who should carry out the assessment, the Case Manager will therefore need to explain the background and ensure that a full report, with practical recommendations will be forthcoming. It is not expected that one assessment should lead to recommendations for further assessments by different people.

9.4.4. The assessment report should include:

- Summary of current situation;
- recommendations relating to the provision of any equipment;
- recommendation about training, including timescales and sources of such training;
- recommendations on appropriate organisations or individuals who can deliver the training;
- areas of work, or posts, that would be suitable;
- viability of return to current job;
- any other adjustments, to premises or procedures that may be required.

9.4.5. In considering assessments, and particularly in assessing the expectations or by the individual of their own abilities, it should be remembered that a newly disabled person may have a very low opinion of what they may be able to do. Until they are made aware of the possible adaption, from a knowledgeable source, their own assessment may be unduly pessimistic.

9.5. Implementation Planning

9.5.1. Following receipt of the assessment, the Case Manager should arrange a meeting with the disabled person, to discuss an implementation plan for the recommendations. This meeting may also involve the disabled person's trade union rep and others who will have responsibility for implementation of all or parts of the plan. The plan should include time periods within which equipment, training etc. should be delivered. Such meetings should be held in a convenient location, which may not be the workplace.

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9.5.2. In cases involving absence for mental illness, including stress-related mental illness, depression and anxiety, consideration should be given to seeking to involve the individual's General Practitioner, or Mental health professional in these meetings.

9.5.3. Depending on the length of time involved and the nature of the case, it may be necessary to convene further meetings to report on progress. The key purpose of these is to maintain the impetus to deliver required changes and to keep the individual informed on developments.

9.5.4. Written reports should be maintained for all such meetings, and copied to all present.

9.6. Expected Outcomes

9.6.1. It is expected that periods of disability leave will lead to one of the following outcomes:

The employee is able to continue in their current job, with necessary adaptations or equipment;

The employee is able to carry on in their current post following a period of rehabilitation/training, to equip them with new skills.

Following assessment and consideration of all possible adaptations and adjustments, it is agreed that the employee should be redeployed to a different post/location/duties.

The employee is unable to fill any post on a full allocation. In such circumstances, consideration will be given to the possibilities of a Supported Employment placement.

It is accepted that there will be cases where it becomes obvious, at any stage of the process, that a return to work of any kind is not feasible - or not desired by the individual. In such circumstances, the normal processes for handling long-term absence will apply. If an application for Ill Health retirement is subsequently refused, it will be open to re-assess the suitability of the case for disability leave.

10. Costs/Budgets

10.1. (the employer) accepts that there will be cost implications in the operation of the disability leave scheme. These costs are expected to be significantly less, however, than funding the management and direct costs of long-term sick absence and ill health retirements.

10.2. In recognising that these savings will have impact on central budgets, the funding of necessary adaptations etc. will be drawn from a central budget, under the control of the (Departmental) Equal Opportunities Officer.

10.3. (the employer) is committed to paying for any training, assessments, support or other alterations or services that are not available through any schemes operated by the Employment Service, or where reliance on such schemes would add unacceptable delay to the resolution of the case.

10.4. There should be no undue delays introduced into the resolution of a case for budgetary reasons.

11. Redeployment to alternative posts

11.1. It is recognised that, where Job Advertising is in operation, this may work against the best interests of a disabled person seeking redeployment to an alternative post, as managers may not prefer a disabled person to a pool of non-disabled competitors.

11.2. It is therefore agreed that, once such a need for redeployment has been established, all such vacancies will be initially offered to the individual on disability leave. Provided that they meet the main criteria - or adaptations can be made to enable them to meet them, including additional training - and they express an interest in the post offered, it will be allocated to them.

11.3. Where such posts are at a pay level below that of the previous post, the individual will retain their current pay and grading, including any allowances, and pay progression will continue as if they still held the higher grade post.

Annex - additional points for agreement to include short-term disability-related absence as disability leave.

1. Introduction

1.1. (the employer) realises that staff with certain medical conditions may periodically require time away from work for tests or treatment, or for sickness related to their condition. The employer accepts that it is not appropriate for this time to be classed as sick absence and it will, instead, be classified as disability leave.

2. Length of disability leave

2.1. Short periods of disability leave (occasional days) may be granted to cover hospital or other visits to medical specialists etc. for tests, treatment time and for sick absences related to the individual's medical condition.

3. Triggering disability leave

3.1. Subject to medical advice, where necessary, line managers may allow individuals to apply for occasional days to be classified as disability leave, where there is sick absence related to an existing medical condition or a need for treatment or tests related to the condition.

4. Managing short term absences

4.1. Certain conditions (e.g. arthritis, epilepsy, diabetes) can have variable effects or may require occasional attendances for tests or treatments.

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4.2. Where a medical practitioner has certified that an employee has such a condition, absences required for sickness, tests or treatment related to the condition will be recorded as disability leave and not as sick leave.

4.3. Such absences will not be counted towards any ‘trigger points’ or action levels within any sickness absence management scheme. However, it must be recognised that such absences are not free from all scrutiny: where the level of such absences reach a point to cause concern, it shall be open for the line manager to refer the details of the case to the occupational health advisers and/or Personnel section for advice on how to proceed in line with the legal requirements of the Disability Discrimination Act. The line manager should make the individual aware that this action is being taken and any resulting advice received.

4.4. In certain circumstances, an individual’s medical condition can combine with another illness, so as to delay their ability to return to work. For example, an individual with asthma may take longer to recover from a heavy cold than someone without asthma. Wherever possible, in such circumstances, the line manager and the individual concerned will agree the amount of additional absence, related to their pre-existing medical condition, and this amount of the absence period shall be classified as disability leave, under these paragraphs.

Appendix four: an actual DL policy

The following agreement has been made between a major local government employer and Unison and the NUT.

1. What is Disability Leave?

1.1 Where the effect of an employee’s disability results in an employee requiring leave which is directly associated with their disability, this will need to be accommodated as far as reasonable within the terms of the DDA.

1.2 Managers should always consider whether it is possible to reduce the extent of disability related absence through reasonable adjustments. Section 6 of the DDA specifically identifies the provision of leave as a reasonable adjustment where a disabled person needs to be absent from work for “rehabilitation, assessment of treatment”. (e.g. the routine assessment of hearing aids, hospital or specialist check-ups including monitoring of related equipment or treatment).

1.3 Disability Leave does not apply to absence through sickness, whether it is related to a disability or not, which is determined by either self-declaration or self or medical certification.

2. Who does Disability Leave apply to?

2.1 Disability leave is not a right, as such each case will be considered on its merits.

2.2 It will apply to employees who have completed the Equalities Monitoring Form and declared that they have a disability. Otherwise the Council would not be

obliged to consider making adjustments and adaptations. The HR service will be able to advise managers whether an employee is eligible.

2.3 Employees who have had a disability in the past but no longer have that disability will be able to apply for disability leave for follow up appointments related to their disability (e.g. check ups or ongoing assessments to ensure that treatment has been effective).

3. What are legitimate reasons for requesting Disability Leave?

3.1 an employee requesting disability leave is not ill but needs to have time off for a disability related reason. The following are some examples of disability related reasons but is not an exhaustive list. All of these must be related directly to the employee's disability

- specialist hearing or sight examinations
- assessment for diabetes, HIV, dyspraxia
- training with a guide, hearing or companion dog
- training in the use of specialist pieces of equipment
- training in the use of Braille, Moon, signing, lip reading, deaf/blind manual
- counselling or therapeutic treatment e.g. relating to a mental illness
- recovery time after a blood transfusion or dialysis
- physiotherapy either sessional or residential
- to allow time for adjustments or adaptations to be made.

4. How does an employee request Disability Leave?

4.1 if an employee wishes to take disability leave they should in the first instance seek approval from their manager

4.2 Leave can be requested for a single day or a series of individual days depending on the circumstances

4.3 If the manager requires clarification they should arrange to meet with the employee to discuss the request

4.4 The manager may seek advice prior to responding from their Directorate HR team and the Equality Employment Officer

4.5 In normal circumstances, a manager will be expected to grant the request for disability leave, unless there are objective operational reasons for refusing the request

If their request is refused, the employee can refer the matter to a representative of the Network for Employees with a Disability or the HR Manager, Disability Employment Lead.

Section six

Other TUC resources

Union representatives and negotiators may also find it useful to consult other advice on disability and work published by the TUC.

Disability and Work is a comprehensive guide to disability equality in the workplace covering both the law, and good practice. It is available free from TUC Publications or can be downloaded from the disability pages of the TUC website, www.tuc.org.uk/sites/default/files/extras/disabilityandwork.pdf.

Promoting Disability Equality was produced by the TUC to advise unions covering the Public Sector on how to make best use of the recent Disability Equality Duty. This can be downloaded from the disability pages of the TUC website, <https://www.tuc.org.uk/equality-issues/disability-issues/disability-discrimination/trade-unions/promoting-disability>

Representing and supporting members with mental health problems at work was written for the TUC by Michelle Valentine and can be obtained free from TUC Publications, or downloaded from the disability pages of the TUC website, www.tuc.org.uk/sites/default/files/extras/mentalhealth.pdf.

Also available from TUC Education is a workbook, <https://www.unionlearn.org.uk/publications/mental-health-and-workplace>

“You don’t look disabled: supporting members with invisible impairments provides case studies of unions supporting members whose impairments are not apparent. It can be downloaded from the TUC website, <https://www.tuc.org.uk/equality-issues/disability-issues/resources/you-dont-look-disabled-supporting-members-invisible>*Delivering equal treatment for agency workers: TUC bargaining guide* can be downloaded at: <http://www.tuc.org.uk/workplace/tuc-20147-f0.pdf>.

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