

EAST AYRSHIRE COUNCIL

CABINET – 18 AUGUST 2010

SICKNESS ABSENCE AND ANNUAL LEAVE ENTITLEMENT

Report by Executive Director of Finance and Corporate Support

1. PURPOSE OF REPORT

- 1.1 The purpose of the report is to recommend proposed amendments to the Council's Policies and Conditions of Service relating to sickness absence and leave to take account of the European Court of Justice (ECJ) and House of Lords rulings in *Stringer v HMRC* and the ECJ ruling in *Pereda v Madrid Movilidad SA.*, subject to consultation with Trade Unions.

2. BACKGROUND

- 2.1 Cabinet at its meeting on 2 July 2008 approved the Council's current Absence Management Procedures for all Council employees. This was communicated to employees in PER Circular 2/09.
- 2.2 The Working Time (Amendment) Regulations 2007 increased the statutory leave entitlement to 28 days with effect from 1 April 2009 (pro rata for part time workers). This includes 8 UK public and bank holidays.
- 2.3 As a consequence of the European Court of Justice (ECJ) and House of Lords rulings in *Stringer v HMRC* and the ECJ ruling in *Pereda v Madrid Movilidad SA*, the Council's Policies and Conditions of Service relating to sickness absence and leave require to be reviewed to ensure compliance with the following key points:
- employees will accrue statutory leave during any period of sickness absence, whether paid or unpaid;
 - Employees may choose to take leave during sickness absence, however if they decide not to do so, they must be allowed to take leave on their return, even if this is in a new leave year;
 - where employees are sick during an annual leave period, the annual leave entitlement is not lost and must be granted for a different period which, if necessary, may be outwith the relevant leave year. This is subject to the statutory minimum entitlement (currently 28 days). At present, national conditions allow employers to request a medical certificate for leave to be re-instated;
 - employees whose employment terminates after a period of long-term sickness are entitled to receive payment in lieu of their outstanding statutory leave entitlement.
- 2.4 The *Stringer* and *Pereda* cases only concern employees' minimum statutory leave entitlement (28 days for full time employees) and do not apply to any contractual entitlement in excess of 28 days. Employers are still free to determine the conditions which apply to leave entitlement in excess of 28 days. For example,

employers can decide not to permit the carry forward of any leave in excess of 28 days into a new leave year.

- 2.5 Statutory leave, in the context of these cases, includes both annual and public holiday leave entitlement subject to the statutory minimum of 28 days for full time employees. Chief Officers and Craft Operatives are entitled to receive a substitute day when sick on a public holiday or while on annual leave. Accordingly, any calculation in relation to these employees' statutory leave entitlement (28 days for full time employees) must take account of any substitute days awarded.
- 2.6 The Council's Sickness Absence Management Policy defines long term absence as continuous absence from work of 4 or more weeks (28 days). The provisions of this report relate to situations where employees have been on sickness absence for more than 4 weeks.
- 2.7 Normal sickness absence certification and notification arrangements will continue to apply.

3. PROPOSED CHANGES

- 3.1 It is proposed to make the following changes to the Council's Policies and Conditions of Service relating to sickness absence and leave:

Annual Leave During a Period of Sickness Absence

- Employees on sickness absence will be entitled to apply for annual leave while they are off sick. Employees will not require to obtain a medical certificate from their doctor stating that they are fit for work, in order for them to take annual leave.

Comment

It is beneficial to encourage employees to take paid annual leave while on sick leave in order to avoid a build up of leave entitlement which potentially could be carried forward to the following leave year.

Employees cannot be compelled to take annual leave while on sick leave. However, the opportunity to receive full pay for any holidays taken during the sick leave period may be attractive to those employees on half or no pay.

Calculation of Sickness Entitlement

- Any paid annual leave granted during a period of sickness absence will not be taken into account when calculating employees' sickness allowance entitlement.

Comment

In practice employees' sickness allowance entitlement will be extended by the length of annual leave taken.

Carry Forward of Leave

- Employees, when notified in writing of the reduction in pay to half or no pay, will be advised of their outstanding leave entitlement at that time. They will also be advised that they may request to take any of their entitlement during sickness absence on giving the requisite notice. In addition, the letter will include the relevant conditions/restrictions relating to the carry forward of statutory leave beyond 31 January.

Comment

The letter advising employees of the reduction in pay will be updated accordingly.

- 3.2 All documentation used in the absence management process will be updated where appropriate to reflect the proposed changes.

4. OTHER CONSIDERATIONS

- 4.1 Although the Working Time Regulations 1998 do not allow statutory leave to be carried into the next leave year, the Council, as an emanation of the state can take account of the wording of directives and case law of the ECJ when they conflict with national law. It is anticipated that the Working Time Regulations will be amended in due course to reflect the ECJ rulings.

- 4.2 The Council allows employees on long term sick leave or unpaid leave of absence through illness to remain in employment where they are likely to return to work within the agreed timescale.

As these employees will now accrue statutory leave whilst on sick leave or unpaid leave of absence through illness, departments will require to liaise as early as possible with the Occupational Health Service to enable decisions to be taken regarding employment options. In all cases, account should be taken of the Disability Discrimination Act 1995.

- 4.3 Employees who return to work with outstanding statutory leave entitlement and who have an opportunity to take their entitlement prior to the end of the leave year cannot carry forward any statutory leave beyond 31 January.

- 4.4 Employees who return to work with outstanding statutory leave entitlement and who do not have enough remaining working days in the leave year to take this entitlement may carry forward any balance of statutory leave beyond 31 January.

- 4.5 Teachers who have been on long term sickness absence are entitled to the statutory minimum of 28 days for full time employees. Pro rata arrangements apply to part-time employees and those employed for any part of the leave year.

Teachers who are ill for a continuous period of at least 4 weeks within the summer vacation accrue credit of 2 days compensatory leave entitlement for each complete week of the holiday that is lost.

Teachers who are ill for a period of at least 2 weeks duration incorporating at least 1 week of any other vacation will accrue credit of 2 days compensatory leave entitlement for each full week of vacation lost.

A maximum of 10 such days compensatory leave entitlement may be accrued in any one leave year but such days are not in addition to statutory leave.

Where, due to sickness absence, a Teacher has not taken the statutory leave entitlement, which may include any compensatory leave, within a leave year will receive the appropriate balance of leave to ensure that they receive their full statutory leave provision for that leave year.

- 4.6 Employees on long term sickness absence who do not return to work prior to leaving the Council's service, for whatever reason, are entitled to receive a payment in lieu of their accrued but untaken statutory leave entitlement.
- 4.7 Before the ECJ and House of Lords rulings, employees on unpaid leave of absence did not accrue statutory leave. The current maximum period of unpaid leave of absence is 12 months. Accordingly, when applications for unpaid leave of absence are submitted then consideration of them by departments will amongst other things require to take account of the cost implications of the accrual of statutory leave.

5. COMMUNICATIONS

- 5.1 Employees will be advised of the proposed changes via Per Circular and the Council's Intranet site. The Employee and Managers Booklets on the Sickness Absence Management Policy will be updated accordingly.

6. TRAINING

- 6.1 The Corporate Managing Absence Training Course will be updated to reflect the proposed changes. In addition, a Toolbox Talk will be developed to advise employees of these changes at team meetings etc.

7. FINANCIAL IMPLICATIONS

- 7.1 Any additional costs arising from the proposed changes to the Sickness Absence Management Policy and Procedures will be met from within existing departmental budgets.

8. CORPORATE MANAGEMENT TEAM

- 8.1 The Corporate Management Team at their meeting on 14 June 2010 considered and approved the content of this report.

9. POLICY/LEGAL IMPLICATIONS

- 9.1 The proposed changes will ensure that the Council meets its legislative requirements as an employer.

10. RISK MANAGEMENT

10.1 The maintenance of effective absence management arrangements allows the Council to ensure that it is not exposed to the financial and organisational risks posed by high employee absence levels.

11. COMMUNITY PLANNING IMPLICATIONS

11.1 The proposals meet the pursuit of continuous improvement and Best Value within the Community Plan.

12. TRADE UNIONS

12.1 The proposed changes are subject to Trade Union consultation.

13. RECOMMENDATIONS

13.1 Cabinet is asked to:-

- (i) agree the proposed changes outlined in paragraph 3 above, subject to Trade Union consultation;
- (ii) agree that a report on this matter be submitted to the Joint Negotiating Committee for Teachers; and
- (iii) otherwise note the contents of the report.

Alex McPhee
Executive Director of Finance and Corporate Support
14 July 2010

LIST OF BACKGROUND PAPERS

1. Report by Depute Chief Executive/Executive Director of Corporate Support on Revised Absence Management Procedures for all Council Employees to Cabinet on 2 July 2008.
2. House of Lords and European Court of Justice rulings in *Stringer and others v HM Revenue and Customs*.
3. European Court of Justice ruling in *Pereda v Madrid Movilidad SA*.
4. Per Circular 2/09 – Revised Sickness Absence Management Policy –Chief Officers, Local Government Employees and Craft Employees

Any person wishing to inspect the Background Papers or wishing further information should contact Martin Rose, Head of Human Resources, telephone: (01563) 576092.

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