

TRAFFORD COUNCIL

Report to: Employment Committee
Date: 29 June 2020
Report for: Decision
Report of: Sara Saleh, Corporate Director of People

Report Title

Workforce update – Covid-19 related absences

Recommendation(s)

It is recommended that Employment Committee notes the content of this report and supports the proposed approach outlined.

Contact person for access to background papers and further information:

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Relationship to Policy Framework/Corporate Priorities	This proposal aligns with the council's Corporate Priority 'Successful and Thriving Places'.
Financial	We may have employees who aren't working and where this is the case we want to ensure that all available options are explored to ensure that we have a robust and risk assessed approach to pay.
Legal Implications:	There is the potential for employees to take a claim to tribunal, however this proposed approach should reduce this risk.
Equality/Diversity Implications	There are potential implications for certain protected characteristics, and these plus mitigations are outlined in the report.
Sustainability Implications	Not Applicable.
Staffing/E-Government/Asset Management Implications	A reasonable approach should mean we maximise available staffing.
Risk Management Implications	The risks and mitigations are outlined in the report.
Health & Wellbeing Implications	Good management practice, Risk Assessment and signposting staff to health and wellbeing support should reduce any potential impact.
Health and Safety Implications	People risk assessments form part of the process.

1.0 Background

- 1.1 Since the start of the Coronavirus pandemic, it has been a very difficult and worrying time for our staff. Many will be dealing with different concerns including: health and wellbeing of self and family; losing loved ones to the virus; managing childcare and homeschooling; managing finances; managing working hours, and; isolation from friends and family.
- 1.2 Of particular concern will of course be health, and many will have anxieties about catching the virus and the impact that this might have on their own health and that of those that they live with or care for.
- 1.3 Since the move to working from home for some of our workforce, we have still had a large number of staff working outside of the home in order to deliver our critical services and any issues relating to being able to work, or not work outside of the home have been dealt with so far.
- 1.4 However, as we plan our recovery approach and we gradually move towards more staff working outside of their home, we may have more issues in relation to staff saying that they aren't prepared to do so.
- 1.5 The schools will be facing these potential scenarios already as they look to wider opening, and this will also impact on the Council services that support schools.

The queries we have already received include:

- My child is in a year group which is able to return to school, however the school have confirmed that this remains a voluntary decision and I have decided that my child will not return to school. My caring responsibilities therefore will continue.
 - I have no medical condition or caring responsibilities that prevent me from returning to a work location, but I am increasingly worried about returning to my work place and I am starting to experience panic attacks.
 - I do not feel able to return to work/school, even though I understand that all appropriate health and safety and wellbeing measures are being implemented, but I will tender my resignation if I am asked to return to the work place.
- 1.6 Whilst we are continuing to support staff health and well-being and want to minimize any risk to them, we also need to ensure that we have appropriate resource for our services and find a balance between the two. We may have managers who are in a position where they have a member of staff who is refusing to work outside of their home for various reasons and we need to agree the best approach when this situation arises, so where possible, we can have consistency in our approach across the organisation, including schools.
 - 1.7 A key consideration is whether a failure to return to work would be regarded as a potential conduct matter, where it is deemed safe and reasonable for the employee to work. Further, if this progresses under the disciplinary policy, whether a disciplinary sanction would be considered.

2.0 Scenarios

- 2.1 There are different likely scenarios where staff may have concerns about working outside of the home or may not be able to, which could lead to refusal.
- 2.2 When starting to consider what the best approach is to dealing with those who refuse to work outside of the home, it is important to differentiate between those who may be unable to, as opposed to those who don't want to.
- 2.3 Employees who may be unable to return to the workplace include those who are:

a) in one of the 'clinically vulnerable' groups;

For those staff in the 'clinically extremely vulnerable group' it has been agreed that they will not work outside of the home until national guidance changes. For those in the 'clinically vulnerable' group an individual risk assessment should be undertaken to inform the level of risk and measures that can be put in place to reduce it.

b) a carer for an individual in the 'clinically extremely vulnerable' or 'clinically vulnerable' group, or living with someone in one of these groups;

For those with caring responsibilities or who live with someone at risk, an individual risk assessment should be undertaken to inform the level of risk and measures that can be put in place to reduce it.

c) A parent/carers for dependents (either child(ren) not able to return to school/nursery, and/or an elderly relative)

An employee may have been able to balance their work with caring commitments for dependants whilst working from home – however if they are required to work some or all of their hours in the office or in another setting, they may not be able to as their dependent / relative cannot safely be left on their own. They have no options for care arrangements for their relative and so in this scenario, continuing to work at home may be the best option.

However, employees who are unwilling to return to the workplace include those who are:

d) choosing not to send their child to nursery or school when they can do;

Where a parent could send their child to school or nursery but chooses not to (without a valid reason), and they cannot work at home, they are making themselves unavailable as they do have an option for childcare.

e) just generally anxious or just don't want to, with no compelling reason not to work outside of the home.

It is employees in groups d) and e) above that we now need to contemplate and the approach for those 'unable' and those 'unwilling' will differ.

3.0 National guidance

3.1 Our advice to date has been based on the LGA national and Employers local guidance, our Legal Team and ACAS.

3.2 ACAS

'In such scenarios an employer should listen to any concerns staff may have and should take steps to protect everyone.....if someone still does not want to go back to work, they may be able to arrange with their employer to take the time off as holiday or unpaid leave. The employer does not have to agree to this. If someone refuses to attend work without a valid reason, it could result in disciplinary action.'

3.3 North West Employers

3.3.1 North West Employers have given some advice on possible approaches but to date there is no definitive set of guidelines for those who refuse to work after all possible options have been explored.

3.3.2 Our approach, based on their advice and guidance so far has been to put the emphasis on;

- Putting in place a series of individual circumstances rather than a blanket approach
- Looking at individual circumstances and what return to work options may be possible, where any contribution to the council's efforts is better than none
- Undertaking a risk assessment with the employee and a return conversation to ascertain what measures and adjustments can be put in place;
- Explanation of protective measures that will be in place to try and reduce anxiety levels
- Demonstrate adjustments for their particular circumstances
- Emphasize health and wellbeing benefits of reintroduction to work in reducing isolation
- Explain that circumstances have now changed sufficiently for council/school to believe that safe for staff to return to work and the steps taken to do this
- Provide a clear statement of the employer's reasonable expectations and employee response

3.3.3 If all options are exhausted and there is still individual refusal, having established an expectation of return to work then their absence from work can be facilitated through one (or mix) of a number of alternatives that provide for approved absence from work rather than a single solution as outlined below:-

- expansion of flexi-time or annualised hours working to enable deficit time to be re-paid over a longer future period
- purchase of additional leave (same effect as unpaid leave)
- application for special leave / compassionate leave / carers' leave etc.
- use of leave accrued during period of non-working
- use of annual leave (which will expire quite quickly so only short term, or not available for employees contracted to work term time only)
- occupational sick pay (perhaps likely to jump to e.g. anxiety during which leave will continue to accrue)

3.3.4 The final and worst case position is to treat as unauthorised absence and take a disciplinary route approach. This will clearly be opposed by the trade unions and we will still have a decision to make on when non-payment starts.

3.3.5 Many of the suggested options for covering the period of non-working are not workable in schools. Also for Councils they may only be suitable for a short period of time. The obvious solution once the short-term measures have been used is a period of unpaid leave.

3.3.6 However, in the event that multiple people request unpaid leave which leaves the service unable to deliver an effective service due to insufficient staff, the option of unpaid leave may not be a possibility.

3.4 Legal Services

We have also sought advice from the Council's Legal Team who reiterated the fact that each case will need to be considered on its own facts and decisions taken on a case-by-case basis. They suggested that the manager looks to make reasonable adjustments to alleviate concerns and follow the government guidance to assist in the return to work. Where the employee isn't willing to return to work the manager offers alternative solutions such as taking leave or a period of unpaid leave. However if there is still no solution and the employee still refuses to attend work without a valid reason, it could result in disciplinary action but as a last resort. As the employee is in breach of their contract we could make a lawful deduction from their wages, i.e. unpaid leave. Strong evidence would be required to support such an approach in case of future litigation.

4.0 **Benchmarking**

4.1 We have made contact with the other nine authorities in GM to understand their position. We only obtained information from four. Three cited the fact that they are following the NWE0 guidance. The other detailed the fact that where an employee has concerns and the manager has sought to address them and they refuse, their contractual obligations will be reiterated and continued refusal will lead to their pay being stopped and it will be treated as a conduct matter under the disciplinary policy..

5.0 **Options for consideration**

5.1 We can take the approach outlined above in section 3.0 that has been endorsed by NWE0 as a reasonable approach, however if an individual then refuses to work outside of the home following all of the explorations to address concerns, we need to agree a fair and appropriate process and a set of principles. The main principles are set out below that then guide the recommendations.

- Open dialogue between the employee and their manager to try to reach an agreeable solution.
- Working from home will be an option and if this can't be arranged then consideration as to whether temporary alternative work from home can be found.
- The approach in terms of pay for those who are reluctant/refuse to work is differentiated by those who may be unable to work outside of the home and those who are unwilling to work, i.e. they don't have a compelling reason not to work outside of the home.

- Disciplinary action should only be taken after all other options have been explored and it is suggested that we don't apply sanctions given the exceptional circumstances of the situation.

6.0 Risks

- 6.1 Given the very difficult circumstances created by the pandemic, there is the potential for employee relations issues as we move to more staff moving back to working outside of their home. To minimise any implications, we will support managers to have early conversations with staff as part of their regular EPIC 'check-ins' to see how they are feeling and to discuss working in a setting outside of the home. We are producing supplementary guidance for managers to support these check-in conversations and also how they support employees who are in the vulnerable groups and those who have household members or who care for individuals in these groups. We have advised that Risk Assessments are undertaken which will inform the conversations and decisions to support these employees. Where employees are anxious about working outside of the home, continuous dialogue and support for staff from their manager is key.
- 6.2 Where an employee feels unable to work and after all options have been explored, employees could take internal action in the form of submitting a grievance or they could lodge a claim with the employment tribunal. . If they submit a grievance it would be investigated and an outcome decided upon and communicated as per the current arrangements in place.
- 6.3 Even if we decide not to apply any disciplinary sanctions employees could still lodge a claim with the employment tribunal for unlawful treatment on the grounds of unfair dismissal, unfair deductions from pay or discrimination. Although we would not be dismissing due to refusal to work, an employee could resign over the matter (particularly if unpaid leave was imposed) and claim constructive unfair dismissal. If we withhold pay they could claim unfair deductions from pay. Finally, there is always the potential for a discrimination claim. This would be most likely based on one of the following protected characteristics: age; disability; pregnancy and maternity; sex, and; race. This is because the first 3 are linked to the vulnerable groups, and the other due to the sharing of childcare and the national evidence that those from a BAME background may be more impacted by COVID-19.
- 6.4 For any defence we would have to evidence all of the steps we took to reduce risk as a reasonable employer. The proposal that if an employee's inability to work outside of the home is linked to the vulnerable groups as defined by the Government, full pay is considered, rather than no pay, mitigates some of this risk.
- 6.5 The other risk that has to be considered is our reputation as a good employer and the bearing this has on retaining and attracting employees. It is believed that taking a supportive and reasonable approach and not applying disciplinary sanctions is consistent with our aims in this area.

7.0 Recommended process

1. Managers hold return to work conversations as part of EPIC check-ins to understand how their employees are feeling. Undertake an individual risk assessment for employees in the vulnerable groups/with family members in these groups and those who are reluctant about or refuse to return to the workplace. This process should reassure and ideally agreement reached regarding whether the employee can safely return.
2. Where the employee still feels unable to return, consider whether working at home can be accommodated.
3. If the role cannot be undertaken from home consider whether temporary alternative work can be found and undertaken from home.
4. If no suitable, alternative work can be found and it is deemed to be reasonable for the employee to work from the options available to them and they refuse, the approach to pay is dependent on whether they employee is 'unable to work' or 'unwilling to work' – see section 2. For those who are unable to work they may stay at home on full pay on a case by case basis. For those who are unwilling to work, a period of authorised unpaid leave could be agreed, if the service can facilitate this.
5. Where a period of unpaid leave cannot be facilitated by the service, or cannot be mutually agreed, and the employee is still not willing to work, they are in a period of unauthorised absence which is a misconduct matter. A 2 step approach would be adopted. The employee is written to outlining the discussions to date, their contractual obligations and that if they do not return to work that their absence will be regarded as unauthorised absence and their pay will be stopped and it will be regarded as a disciplinary matter.
6. Where the employee fails to respond to this by an agreed date, a second letter to the employee will confirm that their continued absence is being considered as unauthorised and unpaid leave will commence on the date outlined until such time that they return to work.
7. A disciplinary fact finding exercise would be undertaken. Given the exceptional circumstances, the available management discretion will be utilised and it is likely that no disciplinary sanction will be applied.
8. The position will have to be monitored by the manager to try to agree as early a return as possible. Prolonged non-attendance beyond the current pandemic will require further advice from HR.
9. Managers should seek advice and guidance from their HR Business Partner team in the first instance. Head of Service involvement where unpaid leave might be imposed will be required to ensure fairness and consistency.