

# **The Educational Institute of Scotland**

## **Absence Management Policies**

### **Introduction**

- 1.1 The following resolution was approved by the 2011 Annual General Meeting:

“This AGM instructs Council to investigate Absence Management Policies in operation and to resist any attempts to remove occupational sick leave and any move to automatic disciplinary action as a result of poor attendance due to ill-health.”

- 1.2 The Committee decided to refer the terms of the second part of the resolution to the Salaries Committee for consideration.
- 1.3 The Committee wrote to Scottish Councils and Scottish Colleges in the first instance. The entitlement of the EIS to receive this information was reinforced with reference to the Freedom of Information (Scotland) Act.
- 1.4 The Committee notes that employers can dismiss employees on the grounds of capability. A capability dismissal relating to “skill, aptitude, health or any physical or mental quality” falls within one of the potentially fair reasons for dismissal under section 98(2) (a) of the Employment Rights Act 1996. The Committee accepts that there is a link between ill-health and disciplinary procedures.

### **Responses**

- 2.1 In order to provide assistance in addressing the issues, a pro forma was provided to the employers. 21 responses were received from Scottish Councils and 28 responses were received from Scottish Colleges.
- 2.2 9 out of 21 Scottish Councils (43% of respondents) reported that they operated Managing Attendance Policies and Procedures whereas 12 out of 21 Scottish Councils (57% of respondents) reported that they operated Sickness Absence Management Policies and Procedures.
- 2.3 With regard to Further Education Colleges, 11 out of 28 Colleges (39% of respondents) reported that they operated Managing Attendance Policies and Procedures and 17 out of 28 Colleges (61% of respondents) reported that they operated Sickness Absence Management Policies and Procedures.

## Analysis of Responses

- 2.4 Attendance Management Policies and Procedures are more extensive than sickness absence policies covering areas such as flexible approaches to the taking of annual leave and 'special leave' for necessary absences not caused by sickness. Constructive attendance management policies and procedures, developed in partnership with the trade unions, can make a positive contribution to reducing absenteeism. Such policies should include preventative measures aimed at reducing health risks in the workplace. Teachers returning to work after illness, injury or the onset of disability may be more vulnerable to risks to their health at work. They may also require adjustments to their work pattern or job tasks. Trade unions can help identify actions that will help employees to return to work safely after periods of absence.
- 2.5 It is a concern of the EIS is that some Scottish Councils do not always follow the provisions of the SNCT Handbook, or seek to re-define SNCT provisions, when considering the issue of teacher absence locally. The EIS remains of the view that it is not competent for any individual Scottish Council to resile from the provisions of the SNCT Handbook which are national matters.
- 2.6 The purpose of Attendance Management Policies and Procedures should be to provide a framework through which an employer can support individuals who are seeking to return to work and consider adjustments to the work situation to assist effective working.
- 2.7 However, in practice, Attendance Management Policies and Procedures are used to give management information surrounding the steps to be taken to achieve an improvement in employee attendance levels. The data is collected for a number of purposes
- To benchmark absence levels against national averages, or against other organisations
  - To compare absence levels between different locations and/or departments
  - To identify particular patterns of absence and any problem areas;
  - To devise plans to support employees to return to work and to improve employee attendance
  - To establish trigger points for individual attendance reviews.

- 2.8 Appendix 1 and Appendix 2 show "trigger points" for individual attendance review meetings in Scottish Councils and Further Education Colleges respectively. Once a trigger point has been reached, the line-manager will arrange a meeting with the employee to discuss the frequency, nature and impact of the absences.
- 2.9 Many teachers and lecturers do not feel that individual attendance review meetings are supportive to their individual circumstances. It continues to be an issue for the EIS that in order to address Council-wide concerns over absence rates, absence management and attendance management policies are increasingly target driven, unsupportive, inflexible and potentially punitive.
- 2.10 The Accounts Commission for Scotland has a duty under the Local Government Act 1992 to direct local authorities to publish certain information. The information enables comparisons to be made between different local authorities in a specified financial year and across different financial years. The information contained in Appendix 3 covers the period up to the end of financial year 2010/11 and reports on the average number of working days per employee lost through sickness absence for teachers and for all other local government employees.
- 2.11 In each Scottish Council, the absence rate of Scottish teachers is lower than the absence rate of other Council employees. This has consistently been the case over the last three financial years. The average number of days of absence per teacher in 2010/2011 was 6.1 days (an absence rate of 3.13%). The lowest absence rate for teachers was 4.5 days (an absence rate of 2.3%) and the highest rate of absence for teachers was 9.3 days (an absence rate of 4.8%).

### **Fitness to Work Statements**

- 3.1 Any absence management policy requires to take account of the medical advice set out in a fitness to work statement completed by an employee's GP.
- 3.2 On 6 April 2010 fitness to work statements were introduced to replace "sick notes". The certificate requires a doctor to determine that the patient is not fit for work or, where it is appropriate, that the patient "may be fit" for work. The Salaries Committee considered this matter and issued advice to local association secretaries and EIS-FELA branch secretaries. A copy of this advice is appended as Appendix 4.
- 3.3 The statement sets out four options (a phased return to work; amended duties; altered hours; workplace adaptations) which may assist a return to work. It is for the employer, in consultation with the employee, to make the decision whether or not to follow the recommendations given by the fit note. If the employer cannot or will not make the recommended changes, then the employee is

effectively considered to be unfit to work until they are fully recovered.

- 3.4 The Labour Research Department published the results a survey of union experience of the fit note system amongst union representatives in May 2011. Survey respondents indicated that phased return to work is the most common recommendation on fit notes (80%). 71% of respondents had seen amended duties recommended and 60% had seen altered hours proposed. Only 40% of respondents said that they had seen fit notes requesting a workplace adjustment, for example, a change of location.
- 3.5 While the TUC has supported giving workers the opportunity to have a phased return to work, it has consistently expressed concern that GPs do not know enough about occupational health. Survey respondents in the LRD Survey indicated that fit notes have been vague at times and have displayed a lack of understanding by GPs of the work undertaken by patients. From the employers' perspective, a common complaint was that GPs made suggestions that were impossible for the organisation to accommodate and that GPs did not understand the nature of individual jobs.

### **Health at work – an independent review of sickness absence**

- 4.1 The switch to fit notes came as a result of Dame Carol Black's 2008 *Review of the health of the working* population. In February 2011, the Coalition Government commissioned a further review of the sickness absence system in Great Britain. The review was jointly chaired by Dame Carol Black, National Director for Health and Work and David Frost, former Director General of the British Chambers of Commerce. The report was published by the Department of Work and Pensions (DWP) on 21 November 2011.
- 4.2 The central recommendation was that the Coalition Government should establish an Independent Assessment Service (IAS) which would provide an assessment of an individual's physical and/or mental function. It would also provide advice about how an individual could be supported to return to work. The service would replace GP certification.
- 4.3 Although the report recommends few major changes and also strongly rejects an insurance based scheme, some of the proposals could be used by employers either to challenge the advice from a GP or to force sick and injured employees back to work sooner than is good for their health. In addition, TUC has noted that the report fails to address the issue of 'presenteeism' where workers come in to work when they should be off sick, despite evidence that this is a major and growing problem in the workplace. The TUC is particularly concerned over how the assessment centres will work, as well as aspects of the job-brokering service on newly disabled workers. The TUC also rejects the comments on public sector absence and the proposals for a further review of occupational sick pay in this area.

- 4.4 The report stated that a common theme amongst employers across public and private sectors was a belief that the current certification system does not meet their needs. Employers reported that too few fit notes describe an employee as 'may be fit'. Evidence from the Department for Work and Pensions (DWP) suggests that around 10 to 15 per cent of fit notes are issued containing a 'may be fit' statement. Employers are also concerned that when a 'may be fit' note is issued, the advice given is often not as helpful as they would wish.
- 4.5 The report concluded that the fit-note system would be significantly strengthened if government guidance were changed to set out clearly for doctors that when issuing fit notes they should consider work in a general sense, not merely the specific job of an individual. It recommended that the Government revise fit note guidance to ensure that judgements about fitness to work move away from only job-specific assessments. This recommendation is a major concern for trade unions since employers could attempt to seek to move someone who has become disabled to another job rather than make adjustments to keep them in their existing one.

### **Advice to Members and EIS Representatives**

- 5.1 Detailed advice on Occupational Health was approved by the 2005 Annual General Meeting. This advice is appended (Appendix 5).
- 5.2 Interviews between teachers and lecturers and their doctor and/or representatives from occupational health are confidential and are covered by medical ethics. Therefore, there is no locus for an EIS representative to accompany a member, or for the employer to have a representative present, at any medical appointment.
- 5.3 EIS input may be necessary when an employee has a fitness to work statement which indicates that she/he may be fit to work with support through the options in the statement and the GP's advice. In such circumstances members may seek to be accompanied to any meeting.
- 5.4 While representation at any informal return to work interview is not required, it is essential that representation should be offered to the member in all formal absence monitoring meetings.
- 5.5 For the avoidance of doubt, it is the view of the EIS that a meeting ceases to be an informal meeting if the line manager attending the meeting is accompanied, for example, by another line manager or supervisor and/or a representative from HR/Personnel.
- 5.6 It is the advice of the EIS that a member should not agree to attend an informal discussion unaccompanied if more than one management representative is in attendance.

## **Further advice to Local Association Secretaries and Branch Secretaries**

- 6.1 Absence management procedures should be designed to provide a framework through which an employer can support individuals who are seeking to return to work and consider adjustments to the work situation to assist effective working.
- 6.2 Local Association Secretaries and Branch Secretaries should regularly review the contents and operation of absence management/attendance policies and procedures in workplaces.
- 6.3 Local Association Secretaries and Branch Secretaries should seek to ensure that absence management/attendance policies and procedures contain sufficient supportive mechanisms and provide an adequate framework through which an employer can support individuals who are seeking to return to work.
- 6.4 Where the absence is work related (including work related stress or the physical impact of workplace bullying or harassment), Local Association Secretaries and Branch Secretaries may act as a point of contact for the employer during the absence.
- 6.5 It is extant EIS policy that the determination of "trigger points" should be discussed with representatives of the EIS. In addition, the circumstances in which "trigger points" may be disregarded will require EIS representatives to make representation on behalf of individual members.
- 6.6 Local Association Secretaries and Branch Secretaries should seek to minimise a "target-driven approach" to absence management/attendance policies and procedures.
- 6.7 The responses from employers set out a number of formulae or approaches on the application of triggers. One such example is the Bradford Index which is based on
  - B is the Bradford Factor score
  - S is the total number of instances of absence of an individual over a set period
  - D is the total number of days of absence over the same set period.

The set period is normally a rolling 53 week period.

The Bradford Factor is derived from the formula  $B = s^2 \times D$

- 6.8 While the Bradford Index is a useful measure the issue is the point at which the trigger is set. Therefore, any discussion should focus on an appropriate formula and the triggers to be applied.

## **Recommendations**

- 7.1 It is recommended that the Employment Relations Committee notes the contents of this report.
- 7.2 It is further recommended that the co-ordination of the response of the EIS to any revision of fit note guidance by the Coalition Government be remitted to the Salaries Committee.
- 7.3 This report should be copied to Local Association Secretaries and Branch Secretaries in Scottish Colleges.
- 7.4 This report should be copied to the Salaries Committee.
- 7.5 It is recommended that Section 5 of this report be distributed to schools and colleges via the EIS Representatives' Bulletin and should be posted on the EIS website.

## **Absence Management Triggers**

### **Councils**

#### **Angus**

Absent on three or more separate occasions or for a total of 6 working days on a 12 month period.

#### **Argyll & Bute**

- Three or more instances of sickness absence in any three month period; or
- 10 or more days broken periods of sickness absence within any three month period; or
- Any other recurring recognisable pattern.

#### **Clackmannanshire**

- Identifying the worst 10% of absence cases in teams by reference to both the number of absences and the number of days lost in a period; or
- All absences extending over 28 days.

#### **Dumfries & Galloway**

- 2 or more instances of sickness absence in any two month period (the reasons for the absence being different); or
- 10 or more days' sickness absence in any 12 month period; or
- Any other recurring, recognisable pattern; or
- Any period of unauthorised absence.

#### **Dundee**

- Absences on 3 or more separate occasions, or for a total of 6 working days, over a rolling 6 month period;
- Absences on 4 or more separate occasions, or for a total of 10 working days, over a rolling 12 month period;

#### **East Ayrshire**

Three spells of absence in a rolling 6 month period or whose absence exceeds 5% on a rolling annual basis.

#### **East Dunbartonshire**

- Three occurrences of absence within a rolling 6 month period; or
- Any absence over 21 calendar days; or
- The absence has been identified as work-related; or
- Unauthorised absence.

#### **East Lothian**

- Three separate occasions in a rolling 12 month period; or
- Off sick, on a continuous basis, or is expected to be off, for a period of two weeks or more.

### **Edinburgh**

In any 6 month period, frequent and persistent short-term absence will normally be defined as:-

- 3 or more periods of self-certificated absence; or
- a total of 10 days of absence (including any self –certified days )

These attendance standards are designed to be used as trigger points which initiate a management review.

### **Glasgow**

- Three self-certificates or a total of 6 working days within 6 months; or
- 5 absences (self-certified and /or medically certified) or a total of 8 working days within 12 months; or
- Any period of unauthorised absence.

### **Moray**

- Absent for 14 cumulative calendar days in any 12 month rolling calendar; OR
- 4 separate periods of absence in any 12 month rolling programme; OR
- Particular patterns of absence.

### **Orkney**

- 6 weeks medically certified sickness absence in 12 months; or
- Three periods of absence in three months from work; or
- Any combination of the above on at least three occasions; or
- Particular patterns of absence.

### **Perth & Kinross**

- Three or more separate occasions (amounting to three or more working days in a 12 month period); or
- A total of 6 or more working days of sickness absence (over one or more occasions).

## **Renfrewshire**

- Three self-certificates or a total of 6 working days within a rolling 6 month period; or
- 5 absences (self-certificated and/or medically certificated) or 10 working days with a rolling 12 month period; or
- Any period of unauthorised absence.

## **Scottish Borders**

- Any absence of 20 days or more (long term)
- 4 or more periods of absence in any 12 month period (frequent short term)
- A period made up of 9 days or more in a 12 month period (short term)
- Reason for absence is stress/anxiety

## **Shetland**

- Three or more periods of self-certificated absence or a total of 10 days' absence or more within a 6 month period; or
- Any absence over four weeks in length.

## **South Lanarkshire**

- Third and subsequent short-term absences within a rolling 12 month period; or
- Any absence over 28 calendar days.

## **Stirling**

- 4 or more occasions of sickness absence in a rolling 12 month period; or
- 2 or more absences which in total exceed 10 days or more absence; or
- Any regular pattern of absence.

## **West Dunbartonshire**

- 3 occasions of absence in a rolling 6 month period; or
- 5 occasions of absence a rolling 6 month period; or
- 12 days in a rolling 12 month period.

## **West Lothian**

6 cumulative days within a rolling 12 month period or three separate occasions of absence within a 12 month period.

## **Western Isles**

- Three or more instances of sickness absence in any three month period; or
- 10 or more days' of sickness within any three month period; or

- Any recurring, recognisable pattern.

### Absence Management Triggers

#### Further Education Colleges

##### Aberdeen College

- Three occasions of absence (either uncertificated or self-certificated) in any 6 month period; or
- Total absences exceeding 5 working days' absence in a 6 month period, unless the absence is due to infectious disease, injury or surgery.

##### Ayr College

- Two periods of 10 days of sickness absence in a 6 month period; or
- If there is a pattern of absence.

##### Cardonald College

Where a member of staff is absent consistently for short periods which is usually uncertificated or self-certificated.

##### Carnegie College

Frequent and persistent short-term absences which give cause for concern in relation to the contribution of the individual to the service.

##### Clydebank College

When an employee's short-term absences (defined as lasting up to and including one working week) are deemed by the Director of Human Resources to have reached an unacceptable level an interview will take place.

##### Cumbernauld College

- An individual is absent more than three times over any rolling 12 month period; or
- Unacceptable patterns of absence e.g. Fridays and/or Mondays; or
- The reason given for the absence raises concern.

##### Dumfries & Galloway College

- Self-certified absences of three or more occasions in a 6 month period; or
- Unacceptable patterns of absence.

##### Dundee College

- 5 separate periods of absence, occurring within a 12 month rolling year; or

- 1 continuous absence lasting 30 days' or more.

### **Edinburgh's Telford College**

- 6 separate occasions of absence in any 12 month rolling period; or
- 10 days' absence (either continuous absence of that length or a total of 10 days' within a rolling period of 12 months); or
- Any identifiable pattern of absence.

### **Elmwood College**

- 10 days' absence or 6 separate occasions of absence within a rolling period of 12 months; or
- When an employee's continuous period of absence reaches 20 continuous days'.

### **Forth Valley College**

- More than once in a three month period; or
- Three periods of absence in a rolling 12 month period; or
- 10 or more working days in a rolling 12 month period; or
- Regular patterns of illness or specific days.

### **James Watt College**

- Absent on 3 occasions in the last 12 month rolling period; or
- The employee's individual absence rate exceeds 4%.

### **John Wheatley College**

- Three self-certificated or medical certificates of a total of 7 days (pro-rata for staff working less than 35 hours per week) absence within 12 months; and
- Any periods of unauthorised absence.

### **Moray College**

Three occasions of absence or total absences exceeding 5 consecutive days during any 12 month period. When an employee incurs a 3<sup>rd</sup> occasion of absence in a 12 month period, the employee will be referred to the Occupational Health Service.

### **Motherwell College**

Motherwell College uses the Bradford Factor Index. This reflects a member of staff's rate of absence with a weighting on the number of separate occasions of absence. For example, one period of absence of 7 days gives a score of 7 whereas 7 periods of single day absences gives a score of 343.

## **North Highland College**

In determining “excessive” note will be taken of norms of attendance both across the College, within sectors and exceptional variations of the norm throughout the year.

## **Newbattle Abbey College**

Newbattle Abbey College uses the Bradford Factor Index. An absence from work review will be triggered at 45 points.

## **Oatridge College**

- Each case of sickness absence will be looked at on its own merits and handled accordingly.
- Absences should be considered to be a problem when regular absence occurs, for example, at least once a month over a period of time or frequent absence for the same or related reason.

## **Perth College**

6 or more short/self-certificated absences in a period up to 12 months.

## **Sabhal Mor Ostaig**

- Four occurrences of absence in 24 weeks (of any length); or
- 9 days of absence in 52 weeks; or
- A single episode of absence lasting more than 21 calendar days.

## **South Lanarkshire College**

- Three or more occasions of absence on a rolling 12 month period; or
- 7 or more cumulative days on a 12 month rolling period.

## **Stevenson College**

- An absence which lasts over 6 weeks; or
- When regular absences occur, for example, at least once a month over a period of time or frequent absence for the same or related reason.

The following Colleges submitted their Absence Management Policies under the FOISA request but did not include the accompanying Absence Management Procedures.

Adam Smith College, Angus College, Borders College and Inverness College.

**Appendix 3**
**Days of absence per Employee**

<b>Council</b>	<b>Days lost per Employee</b>	<b>2008 /09</b>	<b>2009 /10</b>	<b>2010 /11</b>
<b>Aberdeen City</b>	Teachers	7.1	8.0	6.9
	Other LG employees	13.8	15.9	15.9
<b>Aberdeenshire</b>	Teachers	6.2	6.5	5.8
	Other LG employees	9.3	10.4	9.8
<b>Angus</b>	Teachers	6.5	7.3	5.9
	Other LG employees	11.6	10.5	9.8
<b>Argyll and Bute</b>	Teachers	5.6	7.4	7.9
	Other LG employees	9.4	10.5	10.0
<b>Clackmannanshire</b>	Teachers	7.7	7.8	6.8
	Other LG employees	11.9	10.1	9.0
<b>Dumfries and Galloway</b>	Teachers	7.6	9.0	9.3
	Other LG employees	14.3	11.2	10.3
<b>Dundee</b>	Teachers	9.4	9.7	6.6
	Other LG employees	12.1	13.7	11.0
<b>East Ayrshire</b>	Teachers	5.8	5.7	5.6
	Other LG employees	12.0	12.0	10.9
<b>East Dunbartonshire</b>	Teachers	6.1	6.5	4.8
	Other LG employees	10.0	10.3	11.9
<b>East Lothian</b>	Teachers	6.6	5.9	4.5
	Other LG employees	12.3	12.2	11.3
<b>East Renfrewshire</b>	Teachers	6.6	5.9	4.5
	Other LG employees	13.7	13.0	10.8
<b>Edinburgh</b>	Teachers	7.8	7.4	6.3
	Other LG employees	13.7	12.0	10.9
<b>Falkirk</b>	Teachers	4.4	5.1	4.7
	Other LG employees	12.2	12.4	10.7
<b>Glasgow</b>	Teachers	9.0	8.1	6.7
	Other LG employees	13.3	11.6	9.3
<b>Highland</b>	Teachers	6.2	7.3	6.4
	Other LG employees	10.6	11.6	10.5

<b>Inverclyde</b>	Teachers	8.3	7.1	8.1
	Other LG employees	10.9	10.1	10.9
<b>Midlothian</b>	Teachers	4.7	6.1	4.9
	Other LG employees	9.9	11.2	9.6
<b>Moray</b>	Teachers	7.4	9.4	9.2
	Other LG employees	10.1	10.8	9.9
<b>North Ayrshire</b>	Teachers	9.1	9.5	5.5
	Other LG employees	13.8	12.2	8.0
<b>North Lanarkshire</b>	Teachers	7.8	8.7	8.7
	Other LG employees	12.6	11.0	11.2
<b>Orkney</b>	Teachers	5.9	8.8	7.9
	Other LG employees	12.9	9.8	9.6
<b>Perth and Kinross</b>	Teachers	7.9	8.8	7.9
	Other LG employees	10.8	10.0	10.3
<b>Renfrewshire</b>	Teachers	6.6	8.7	7.4
	Other LG employees	10.8	10.0	10.3
<b>Scottish Borders</b>	Teachers	5.6	5.7	5.8
	Other LG employees	13.3	12.5	11.9
<b>Shetland</b>	Teachers	5.3	6.9	6.2
	Other LG employees	13.3	12.2	12.2
<b>South Ayrshire</b>	Teachers	7.7	7.0	6.2
	Other LG employees	12.1	11.6	11.7
<b>South Lanarkshire</b>	Teachers	9.2	8.6	7.4
	Other LG employees	12.8	10.4	9.9
<b>Stirling</b>	Teachers	5.8	6.4	4.7
	Other LG employees	14.5	11.2	10.5
<b>West Dunbartonshire</b>	Teachers	7.0	7.4	7.7
	Other LG employees	13.6	13.3	11.3
<b>Western Isles</b>	Teachers	10.0	8.6	8.7
	Other LG employees	10.5	9.5	13.0
<b>West Lothian</b>	Teachers	6.4	6.9	5.1
	Other LG employees	13.2	13.3	10.6
<b>Average Totals 2010/11</b>	Teachers			<b>6.1</b>
	Other LG employees			<b>10.4</b>

**(EIS 2010)**

**Fitness to Work Statements**

**Background**

- 1.1. From 6 April 2010 fitness to work statements are to be introduced to replace sick notes.
- 1.2 This change is set out in the Social Security (Medical Evidence) and the Statutory Sick Pay (Medical Evidence) (Amendment) Regulations 2010.
- 1.3 The certificate requires a doctor to determine that the patient is not fit for work or, where it is appropriate, that the patient may be fit for work.
- 1.4 During the first six months of a medical condition the maximum duration for which medical certificates can be issued will be reduced from six to three months.
- 1.5 The statement sets out four options (a phased return to work; amended duties; altered hours; workplace adaptations) which may assist a return to work. It is for the employer, in consultation with the employee, to make the decision about whether changes can be made to facilitate a return to work. If the employer cannot facilitate a return to work GPs will not be required to issue additional statements.
- 1.6 There will be a period of monitoring and evaluation of the new medical statement.

**Issues for Local Association Secretaries and Branch Secretaries**

- 2.1 The purpose of the GP's issuing of the new certificate is to make a recommendation based on the GP's assessment of the condition. It is not expected that the GP will have a detailed knowledge of specific job duties.
- 2.2 It will be for the employer to consider how best to support a return to work. This may require specific input from occupational health services.
- 2.3 The EIS does not normally provide accompaniment for any member who is required to attend an Occupational Health interview. This interview is a medical interview and is covered by patient confidentiality.
- 2.4 However, it is likely that, where a member is seeking to return to some work based on the options set out in the fitness to work

statement, EIS support will be sought for a meeting with the employer. The member will require a copy of any OH reports which the employer has requisitioned.

- 2.5 The introduction of fitness to work statements will place demands on EIS branch officials and local association secretaries in supporting members who may be fit to work with adjustments.

## **OCCUPATIONAL HEALTH SERVICE PROCEDURES: ADVICE**

### **1. Background**

- 1.1 The following resolution was approved by the 2004 Annual General Meeting:

“This AGM instructs Council to investigate the procedures adopted by Local Authorities for referring teaching staff to the Occupational Health Service with a view to issuing advice to Local Associations based on best practice and the contractual and legal rights of members.”

- 1.2 Advice was sought from Local Association Secretaries in relation to referral procedures, including self-referral, access to Occupational Health reports and concerns relating to Occupational Health Services. Responses were received from 13 Local Association Secretaries.
- 1.3 The findings from the Teachers Health and Wellbeing Project, produced by the Healthy Working Lives Group, Glasgow University and commissioned by Teacher Support Scotland *et al*, also informed this advice.
- 1.4 Further advice was sought from EIS advising solicitors, to clarify the legal position on Occupational Health Service procedures.

### **2. Occupational Health**

- 2.1 Occupational Health schemes provide independent medical advice to employers.
- 2.2 Occupational health practitioners are subject to the Faculty of Occupational Medicine’s “Guidance on Ethics for Occupational Physicians” and the British Medical Association’s “Confidentiality and Disclosure of Health Information”.
- 2.3 Occupational Health Practitioners operate under strict codes of professional ethics and, like General Practitioners, carry the duty of medical confidentiality to their patients.
- 2.4 The exchange of information from an Occupational Health Practitioner to an employer must be with the consent of the employee and must be limited to the information necessary for the exercise of the management function.
- 2.5 An Occupational Health Practitioner can override an employee’s consent in very limited circumstances including the following: where disclosure is clearly in the patient’s interests but it is not possible or desirable to seek consent; where disclosure is required by law; where disclosure is

unequivocally in the public interest; and where disclosure will prevent a serious risk to public health.

- 2.6 An occupational health practitioner who breaches confidentiality is liable to be subject to civil action for damages as well as professional misconduct proceedings through a professional body, such as the General Medical Council.

### 3. **Referral Procedures**

- 3.1 Referral to Occupational Health may arise from either the length of a specific absence or the nature of absence or a combination of both.
- 3.2 In relation to length of absence there may be specific explicit triggers, for example, a long term illness extending beyond 6 weeks or a series of short term illnesses triggering a number of calendar day absences or a number of absences, regardless of duration, within a stated period of time.
- 3.3 Occupational Health referrals are normally located within the context of Managing Absence/Maximising Attendance policies, which results in Occupational Health being seen as punitive rather than supportive. The genesis of such policies often lie in corporate management approaches which do not take sufficient account of the provision of the Scheme of Salaries and Conditions of Service for Teachers. Referral to Occupational Health is sometimes construed as the first stage of a capability dismissal procedure. Local Authorities should comply with the Health and Safety Executive's 'Guidance on Managing Sickness Absence and Return to Work' which sets out good practice for managing sickness absence and return to work in partnership with trade unions. This has been copied to Local Association Secretaries.
- 3.4 A key issue for the EIS is whether referral by the employer to Occupational Health is a result of stated policy or a matter requiring a management judgement. Where referral is considered according to the particular nature of illness most employers will have a degree of scope. For example, an illness arising from an accident would be unlikely to lead to an automatic referral by the authority whereas persistent absence would typically be referred by the authority. However, some employers would appear to have automatic referral triggers.
- 3.5 It is clear that most councils are aware that workplace stress should be managed carefully and that absences related to workplace stress are referred to Occupational Health. However, many councils do not have effective strategies to deal with workplace stress.
- 3.6 Few Councils operate self-referral procedures or, even when this is possible, self-referral is neither advertised nor understood by teachers. This can have an impact in relation to the role of Occupational Health reports in Illness Related Retirement applications, in light of SPPA advice on the advisability of engaging with occupational health when teachers consider ill health retirement.

- 3.7 A concern for some Local Association Secretaries has been the practice that teachers are advised by a council after referral has been made. This practice is at odds with paragraph 13.4.1(e) of the Scheme of Salaries and Conditions of Service (see paragraph 5.1).
- 3.8 Another concern arises from referrals being made directly by Headteachers. This is unacceptable to the EIS and can result in inconsistency of practice which leads to suspicion by teachers. It is the EIS view that referral to Occupational Health requires to be managed centrally by suitably trained staff who are in a position to reach independent judgement in cases.
- 3.9 The EIS notes that the Scottish Public Pensions Agency has been encouraging occupational health reports to support applications for illness related retirement. The EIS has argued that this route will not be sustainable until there is better provision of occupational health services. For example, in one employing authority occupational health support is provided by a nurse which is not sufficient for SPPA purposes. Elsewhere, there are major concerns over the time to process referrals.
- 3.10 The EIS recommends that Local Associations should seek to agree Local Authority guidelines on Occupational Health such procedures should contain the following minimum provisions:-
- (a) Consent should be sought in writing for the referral and the Authority should supply the employee with a copy of the referral pro-forma.
  - (b) The employee should receive a copy of the Authority's Occupational Health guidelines.
  - (c) The employee should have the right to a copy of the Occupational Health report to be submitted to the employer.

#### 4. **Access to Reports**

- 4.1 The majority of responses indicated that teachers are automatically provided with Occupational Health reports. Elsewhere, teachers receive the report upon request or the report is retained by the employer but discussed at a meeting with the employee. The legal obligation on Occupational Health Specialists is quite explicit, that the consent of the employee is required in all but a number of limited circumstances. Therefore, the EIS argues that teachers should be provided with Occupational Health reports and should sign an agreement to receive a copy of the report when they agree to engage with Occupational Health.
- 4.2 Teachers are not always invited to meet with Authority representatives to discuss the outcome of Occupational Health reports. There should be the opportunity for a meeting at authority level and for the person to be accompanied at that meeting. It is advised that Local Association Secretaries should not accompany members to Occupational Health meetings. This may only lead to confusion for members that Occupational

Health doctors are agents of the employer or create a point of unnecessary conflict between Occupational Health specialists, employers and the EIS. This may also create consequent case management difficulties.

- 4.3 Local Association Secretaries are concerned by reports being sent *simpliciter* to Headteachers. There are three reasons behind this. Firstly, as noted above, head teachers are not trained personnel managers and do not have either the resources or locus to act on Occupational Health reports. Secondly, there are concerns relating to confidentiality in a school setting. Thirdly, where cases relate to bullying and harassment or work related stress in which the Headteacher is implicated the teacher is reluctant to divulge to the Occupational Health Specialist when the report goes automatically to the Headteacher.

## 5. **The Legal Position**

- 5.1 Paragraph 13.4.1(e) of the Scheme of Salaries and Conditions of Service sets out the following provisions.

13.4.1(e) Where a teacher has been absent for more than 7 days, the teacher may be required by the Director of Education to produce additional evidence of continued incapacity or submit to a medical examination by a medical officer appointed by the Authority.

- 5.2 While Paragraph 13.4.1(e) allows a teacher to decide whether to agree to attend an Occupational Health interview or to provide additional evidence through his/her own General Practitioner members require to be aware of the wider legal context which may apply. In particular, under the terms of the Employment Relations Act 1996 (ERA) Section 98 incapacity may lead to dismissal.

- 5.3 The Access to Medical Reports Act 1988 created a right for employees to see Occupational Health reports prepared in relation to them. Before an employee can apply to a doctor for a report the employee must be notified that a report is being sought. The employee must provide consent and the employee has the right to (a) withhold consent; (b) see the report before it is submitted to the employer, and (c) seek amendment if the employee considers the report to be misleading or incorrect. It should be noted that there are a number of circumstances under which a doctor is not obliged to show the report to the employee. It should also be noted that a doctor is not obliged to alter a report. These circumstances require to be notified to the employee. Any dispute related to the Act is under the jurisdiction of the Sheriff Court. It must be noted that an employee's consent should be explicit and freely given.

- 5.4 Most employers are "public authority" in terms of the Human Rights Act which means they will be bound by Article 8 to protect the privacy of their employees.

- 5.5 In addition, Data Protection legislation is relevant. The Information Commissioner has produced the “Employment Practices Data Protection Code, part 4 of which deals with information about workers’ health.
- 5.6 The Code lays an onus on employers to inform employees of how information about their health will be used and who will have access to it.
- 5.7 The Code also requires employers to identify who can authorise or who can carry out the collection of information about workers’ health. One of the core principles of the Code states that:
- “Decisions on a worker’s suitability for particular work are properly management decisions but the interpretation of medical information should be left to a suitably qualified health professional.”
- 5.8 A particular concern for the EIS relates to the handling of Occupational Health reports. The Code makes it clear that employees who handle information about workers’ health, or who authorise the collections of such information, should be briefed on the Data Protection Act and the Code. In particular, the Code stresses there are non-compliance risks if health information matters are dealt with by those who have neither the authority nor training to do so.
- 5.9 As noted above an employee’s consent requires to be explicit and freely given. However, refusing to agree may create potential difficulties for employees. In the absence of detailed medical information employers will take decisions based on limited information and this may lead to capability dismissal. While an employer has to make a reasonable effort to gather as much information as possible before taking a decision regarding dismissal if an employee does not agree to provide access to a GP’s records or attend an Occupational Health examination the employer may dismiss and an Employment Tribunal may find such a dismissal to be fair under the ERA referred to above.
- 5.10 In addition, where members pursue personal injury claims arising from work related stress an employer would have scope to argue that any injury was not foreseeable. An Occupational Health report at the time of injury is good evidence for personal injury and discrimination cases.
- 5.11 It is also possible that an employer could argue that reasonable adjustment under the Disability Discrimination Act (DDA) cannot be applied if the employee refuses to attend an Occupational Health examination.
- 5.12 It is legitimate that personal health information should be kept private and that the onus lies with the employer who wishes to collect and hold any health information to be clear about the purpose this information is being sought. In particular, an employer may request medical information to assist in management decisions regarding capability. This does not entitle all employers to seek general information about an employee’s health.

## 6. **Conclusion**

- 6.1 Procedures for referring teaching staff to Occupational Health are too often only contained within Managing Absence Policies. Such policies should be freestanding, be agreed locally with the EIS and should be aimed at providing support for ill and injured teachers.
- 6.2 Managing Absence Policies should conform to best practice and should be appropriately resourced and managed. Headteachers should not be responsible for key decisions on referral to Occupational Health nor should reports from Occupational Health be issued direct to Headteachers.
- 6.3 Self-referral to Occupational Health Services is essential for dealing with workplace stress and promoting the health and wellbeing of teachers.
- 6.4 Occupational Health procedures should not be instigated without the explicit written consent of the teacher for the procedures including a copy of the referral pro-forma to be followed and the rights to automatic access to the report submitted to the employer by Occupational Health.
- 6.5 Local Association Secretaries should encourage members to seek referral to Occupational Health Services where necessary and, in particular, when suffering workplace stress.
- 6.6 Members should be advised of both the benefits of obtaining Occupational Health involvement and their rights in relation to the process.
- 6.7 The EIS will not provide accompaniment to members to Occupational Health consultations but will commence support when the report reverts to the employer.

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