

EPHING FOREST DISTRICT COUNCIL

Committee: Staff Appeals Panel **Date:** 22 August 2017
Place: Committee Room 2, Civic Offices, High Street, Epping **Time:** 1.30 - 4.30 pm
Members Present: Councillors B Sandler (Chairman), B Rolfe (Vice-Chairman), G Chambers, L Mead and L Hughes
Officers Present: P Maginnis (Assistant Director (Human Resources)), S Tautz (Democratic Services Manager)

1. RESERVE MEMBERS

The Director of Governance reported that Councillor L. Hughes was attending the meeting in the capacity of a 'reserve' member of the Panel, from amongst those councillors appointed as reserves for the current municipal year.

2. DECLARATIONS OF INTEREST

No declarations of interest were made by members of the Panel, pursuant to the Council's Code of Conduct.

3. STAFF APPEALS PANEL - PROCEDURE

Members noted the procedure to be followed by the Staff Appeals Panel in the determination of staff appeals.

4. EXCLUSION OF PUBLIC & PRESS

RESOLVED:

That, in accordance with Section 100(A)(4) of the Local Government Act 1972, the public and press be excluded from the meeting for the item of business set out below as it would involve the likely disclosure of exempt information as defined in the paragraphs of Part 1 of Schedule 12(A) of the Act indicated and the exemption is considered to outweigh the potential public interest in disclosing the information:

<u>Agenda Item No</u>	<u>Subject</u>	<u>Exempt Information Paragraph Number</u>
1	Staff Appeal No 01 – 2017/18	1

5. STAFF APPEAL NO. 1 2017/18

The Panel considered an appeal by an employee of the Council, against a decision of the Director of Neighbourhoods that they be dismissed from the service of the authority with payment in lieu of notice. The Panel was advised that such decision represented the outcome of a medical health/incapacity hearing held by the Director

of Neighbourhoods on 8 June 2017, in accordance with the Councils Disciplinary/Capability and Managing Absence Policies.

The appellant was in attendance at the meeting, accompanied by a representative of the GMB trade union. Ms P Maginnis (Assistant Director (Human Resources)) attended the meeting to advise the Panel as required on details of employment law and the policies of the Council relevant to the appeal. Mr. S. Tautz (Democratic Services Manager) was also in attendance, as secretary to the Panel.

The Chairman welcomed the appellant and their union representative to the meeting and introduced the members of the Panel and the officers present. The Chairman outlined the procedure to be followed in its consideration of the appeal and reported that the Council's case would be presented by Ms. C. O'Boyle (Director of Governance). Ms. O'Boyle set out the background to the appeal and advised the Panel that she would call Mr. D. Macnab (Director of Neighbourhoods) to give evidence in connection with his decision that the appellant be dismissed from the service of the Council.

Appellant's Case

The appellant and his union representative were invited by the Chairman of the Panel to make an opening statement in regard to the appeal and to present the evidence of their case. During the presentation of the appellant's case, members of the Panel asked questions of clarification from time to time. Ms. O'Boyle was also afforded the opportunity to ask questions of the appellant and his union representative, on the appellant's case.

The appellant advised the Panel that he considered that he had been unfairly dismissed by the Council and that he had been discriminated against as a result of an on-going health condition related to a back problem, that had been diagnosed as sciatica and a trapped nerve. The appellant also indicated that he felt that the Council had failed to make all reasonable adjustments to his working arrangement, that would have helped to facilitate his return to work. Although he had been redeployed into an office-based role, this had not proved successful, partly as he had suffered a number of fainting episodes whilst at work. The appellant also considered that the Council could have offered additional training and support to ensure the success of the redeployment arrangement, including time for him to undertake on-the-job learning and general 'upskilling'. In response to questions from the Panel, the appellant confirmed that he had received appropriate ICT training during his period of redeployment, but that concerns around other training requirements had not been addressed by his line-manager.

The appellant advised the Panel that his back condition had originally arisen in 1996, but had been exacerbated during 2013 as a result of his job as a gardener that required him to use 'ride-on' grounds maintenance equipment with no suspension, for approximately 60% of each working day. The Panel was advised that the appellant's level of sickness absence related to the cumulative effect of the use of such equipment, rather than a specific instance of such use. The Panel questioned the appellant on whether his concerns with regard to the use of the 'ride-on' equipment had been addressed with his line-manager through the identification of appropriate use and handling methods. The appellant's representative indicated that the appellant had not suffered from any form of back complaint prior to starting work with the Council in 1996, but that stress and anxiety arising from his back condition had contributed to the appellant's level of sickness absence, which could be regarded as a disability. Ms. O'Boyle highlighted that no documentary evidence of the appellant's medical condition having arisen as a result of his substantive role, specifically

through the use of 'ride-on' equipment, had been submitted to the Panel for consideration as part of the appeal.

The appellant indicated that he felt that the Council should have made additional adjustments to his working arrangement, including the provision of 'anti-vibration' grounds maintenance equipment, the use of such equipment for limited working periods and the rotation of work involving the 'ride-on' equipment around other grounds maintenance operatives. Ms. O'Boyle suggested that there was no evidence to suggest that the Council had not taken these matters into account when undertaking risk assessments for grounds maintenance roles. The appellant's union representative highlighted that the appellant had not been party to the carrying out of such risk assessment and again suggested that the Council had made insufficient adjustments to the appellant's substantive role to allow him to recommence his duties.

The appellant indicated that he had received physiotherapy treatment for his back condition and that he was currently awaiting an operation on his back. Although an earlier appointment for the operation had been cancelled, the appellant had received only limited support from his doctor in relation to his condition and the re-scheduling of the back operation was currently awaiting referral by the doctor. The Panel questioned the appellant with regard to the efforts that he was currently making to progress this matter with his doctor. The appellant advised the Panel that he had not sought any additional medical opinion on the cause or treatment for his back condition, but that he had recently been subject of a 'tilt test' at hospital. The Panel was advised that such test reproduced the symptoms of dizziness or fainting under monitored conditions to help diagnosis of fainting episodes and was not directly related to the applicant's back condition. The appellant advised the Panel that the causes of his previous fainting episodes appeared to have now been resolved.

After a short break to allow the appellant to confer with his union representative, he advised the Panel that he was currently sufficiently fit and able to perform his substantive role as a gardener, as his doctor was actively seeking to re-schedule his outstanding back operation and had confirmed his state of health as being suitable for a full return to work. Ms. O'Boyle asked that appellant to confirm whether he had obtained written evidence of his fitness for work from his doctor, that he could submit as evidence to the Panel and whether such 'fitness' might be related to his absence from the stresses of the grounds maintenance role. The appellant indicated that the doctor had recorded his fitness for work in his medical notes about two weeks previously, but had been unwilling to print-out the notes or provide a letter or certificate of confirmation of his fitness to work.

The appellant's union representative suggested that the appellant might be suitable for 'light duties' within the grounds maintenance team, that did not involve the use of 'ride-on' equipment. The appellant indicated that duties such as driving, gardening and strimming were the types of activity that his doctor considered him fit enough for, but that this approach had not been considered properly by the appellant's line-manager, who appeared to lack empathy for the appellant's position. Ms. O'Boyle again raised concern that evidence of the appellant's possible fitness for work, covering both his back condition and fainting episodes, had not been submitted to the Panel for consideration.

After a short break, the Panel commenced consideration of the Council's case in regard to the appeal.

Council's Case

Ms. O'Boyle was invited by the Chairman of the Panel to make an opening statement in regard to the appeal and to present evidence of the Council's case. During the presentation of the Council's case, members of the Panel asked questions of clarification from time to time and the appellant and his representative were also afforded the opportunity to ask questions of Ms. O'Boyle and Mr. Macnab on the Council's case.

The Panel was advised that the medical evidence presented by the appellant did not suggest that it was currently appropriate for him to return to his substantive role, as no diagnosis or confirmation of the successful treatment of his back condition had been presented. Ms. O'Boyle indicated that the requirements of the Equality Act 2010 did not require the Council to 'create' a job role for the appellant to reflect his current limitations and that the authority was not able to offer him an opportunity to undertake his substantive role on the basis of 'light duties', as a result of the impact on the requirements of the grounds maintenance service. Ms. O'Boyle suggested that the decision of the Director of Neighbourhoods that the appellant be dismissed from the service of the Council, was therefore reasonable when considered against all of the evidence available, as the Council could not wait any longer for a resolution to the appellant's health issues, given that there appeared to be no imminent prospect of his return to his substantive role. Ms. O'Boyle drew attention to the case of *Spencer v Paragon Wallpapers Ltd (1976)* that supported the Council's approach in this regard.

Mr. Macnab assured the Panel that his decision that the appellant be dismissed from the service of the authority had not been taken lightly. Mr. Macnab emphasised that, in reaching his decision, he had taken full regard of advice received from the Council's consultant occupational health service (Harlow Occupational Health Service (HOHS)) in relation to the appellants prospects for a full return to work and the availability of alternative employment positions or redeployment opportunities within the authority. Mr. Macnab advised the Panel that he considered that HOHS had provided timely and appropriate advice to the Council in connection with the appellant's health and that the appellant had been fully supported by his line-manager and officers of the Human Resources Section, throughout the period of his sickness absence and redeployment. In response to questions of the Panel, Mr. Macnab reported that no appropriate redeployment opportunities were currently available that could be offered to the appellant.

The Panel was advised that the redeployment role previously undertaken by the appellant had concluded as a result of the completion of the specific job activity and that the appellant had been made aware when commencing the redeployment role, that such arrangement would only be for a temporary period of time. Mr. Macnab conceded that the unfamiliar nature of the appellant's redeployment role might have contributed to his stress and anxiety, but advised the Panel that a high-level of appropriate support had been put in place to secure the success of the temporary redeployment arrangement.

In response to questioning by the appellant's trade union representative, Mr. Macnab advised the Panel that he could not be certain that the appellant's back condition had been caused or exacerbated by his use of the 'ride-on' grounds maintenance equipment, as no medical evidence had been submitted at the time of his dismissal to support this. Mr. Macnab also advised the Panel that, at the time of the medical health/incapacity hearing in June 2017, the level of the appellant's sickness absence was considerably in excess of the triggers set out in the Council's Managing Absence Policy and that adjustments to his working arrangements were implemented when there was a reasonable prospect of his return to his substantive role. In response to

further questioning by the appellant's representative, Mr. Macnab advised the Panel that there was little opportunity for the use of suitable 'aids' to support the activities of grounds maintenance operatives and that it was necessary to consider the impact of the appellant's continued absence from duty, on the requirements of the grounds maintenance service.

Summing-Up

Ms O'Boyle and the appellant and his representative made final statements to the Panel in support of their respective cases.

The Panel considered all of the evidence that had been submitted and presented in regard to the appeal, by the appellant and the Council respectively.

Decision

The Chairman indicated that the Panel would consider its decision on the appeal in the absence of each of the parties and that the appellant would be notified of the decision in writing within five days. The appellant, his representative, Ms O'Boyle and Mr. Macnab all then left the meeting.

RESOLVED:

- (1) That it is the unanimous decision of the Panel that, on the basis of the evidence presented by and on behalf of the appellant and on behalf of the Council in writing and orally, the appellant's appeal against dismissal from service with payment in lieu of notice, not be upheld for the following reasons:
 - (a) the appellant's substantive role as a gardener involved a significant degree of lifting, driving, bending and standing and the Council was not able to offer him an opportunity to undertake such role on the basis of 'light duties', as a result of the impact on the requirements of the grounds maintenance service;
 - (b) the appellant could not currently return to his substantive role, as no evidence of the successful treatment of his ongoing back condition or the issue of a 'fit for work' certificate by his doctor, had been presented;
 - (c) the appellant was not suitable for further redeployment into an office-based role as a result of previous fainting episodes and instances of stress and anxiety, for which no diagnosis or evidence of successful treatment had been presented. Additionally, no appropriate redeployment opportunities were currently available;
 - (d) the Council could not wait any longer for a resolution to the appellant's health issues, as there appeared to be no imminent prospect of his return to his substantive role, and the authority had done all that it could over a four-year period to secure his return to work; and
- (2) That the sympathy of the Panel for the appellant's current situation and its disappointment that the redeployment opportunities and placements previously provided within other service areas of the Council had not proved to be successful, be conveyed to the appellant alongside members' best wishes for his future.

CHAIRMAN