

APPEALS PANEL 3

TUESDAY 1 DECEMBER 2015 AT 2.00PM

PRESENT: Councillors Collier, Bell, and Boaden (Chairman)

OFFICERS: The Green Spaces and Bereavement Services Manager
HR Advisor
HR Advisory Services Team Leader

ALSO

PRESENT: Appellant.
Appellant's representative.

1. APPOINTMENT OF CHAIRMAN

RESOLVED – That Councillor Boaden be elected Chairman for the meeting.

2. APOLOGIES FOR ABSENCE

An apology for absence was submitted on behalf of Councillor Stothard.

3. DECLARATIONS OF INTEREST

There were no declarations of interest in respect of the complaint.

4. PUBLIC AND PRESS

RESOLVED - That in accordance with Section 100A(4) of the Local Government Act 1972, the Public and Press were excluded from the meeting during consideration of the following item of business on the grounds that it involved the likely disclosure of exempt information, as defined in Paragraph Number 1 of Part 1 of Schedule 12A of the 1972 Local Government Act.

5. APPEAL AGAINST DISMISSAL

The Chairman welcomed the appellant and his representative and introduced the Officers and the Panel.

The Chairman asked the appellant to summarise his appeal as clearly as possible and what outcome he hoped to achieve from the hearing.

The Appellant explained that he was appealing the decision to terminate his employment with the Council on the grounds of his capability. The appellant stated that during the hearings undertaken previously, regarding his employment, he had not been given the opportunity to state his case, as on each occasion he had been told that the information was not contained in his file and therefore could not be considered. The appellant referred to the management report produced prior to his case review and

asserted that the only option it contained was dismissal from his post, consequently, the appellant felt that a decision regarding his employment had been come to prior to his hearing, and that the hearing was prejudiced. The appellant felt that the letter inviting him to the Formal Case Review Meeting, August 2015 was not in line with ACAS procedures. The appellant explained that he had requested his case considered by the Appeals Panel in order for him to out his case and to receive a fair hearing.

The Chairman asked the appellant's representative if he wished to add anything further to the appellant's verbal submission.

The appellant's representative stated he wished to clarify the appellant's role had been changed, following a traffic accident outwith the workplace, following which the appellant had taken sick leave. The Council had agreed and implemented a phased return to work for the appellant that covered a four week period, the appellant's representative felt that this had been a reasonable response from the Council and the four weeks would have provided enough time for the appellant to be assessed in his new role. The appellant's representative stated that the appellant had undergone three workplace assessments within a five day period, during which the appellant's supervisor had deemed the appellant unfit to perform the role. The appellant's representative asked if that action was expected from a reasonable employer.

The Chairman asked The Green Spaces and Bereavement Services Manager to put the management case to the Panel.

The Green Spaces and Bereavement Services Manager stated that the decision to dismiss the appellant had not been taken lightly, in chairing the appellant's case review he had taken care to try and understand the issues relating to the case, as he was not the appellant's line manager. The Green Spaces and Bereavement Services Manager explained the initial incident occurred when the appellant had been involved in an accident whilst driving his own vehicle, following which the Council had taken action to investigate the appellant's fitness to drive a work vehicle. The Green Spaces and Bereavement Services Manager noted that this action had been taken by the appellant's line manager, but he felt it had been the correct action to take as the appellant was at that time responsible for driving a Council vehicle. The Green Spaces and Bereavement Services Manager stated that the outcome of the assessment undertaken by the Occupational Health Nurse was that the appellant was not fit to drive a Council vehicle.

The Green Spaces and Bereavement Services Manager explained that following advice that the appellant was not fit to drive a Council vehicle, it had been agreed that the appellant would have the driver duties removed from his post. Following his return from sickness absence the appellant undertook a four week phased return, during which time his suitability for the different role was assessed.

The Green Spaces and Bereavement Services Manager stated that the results of the independent assessment of the appellant performing the new role, along with concerns expressed by the appellant's colleagues, indicated that the appellant was not capable of performing the role to the required standard. The Green Spaces and Bereavement Services Manager felt that the testimony of the appellant's colleagues was striking as they had reported concerns that the appellant was at risk of physical harm from carrying out the duties, and was struggling to perform tasks even with mechanical assistance. The Green Spaces and Bereavement Services Manager added that it was not known how long it would take or, if it would be possible for the appellant to build up the physical stamina required to perform the role, and that the independent assessor's report had not covered this. The results of the independent assessment, along with the testimony of his colleagues had persuaded The Green Spaces and Bereavement Services Manager that the appellant was not capable of performing the new role, and that doing so may cause the appellant harm.

The Green Spaces and Bereavement Services Manager advised the Panel that the appellant was subsequently placed on the Redeployment Register where the appellant's competencies and capability were assessed for suitability for roles of a similar grade; however, no posts were available. The Green Spaces and Bereavement Services Manager explained that the basis of the final decision regarding the appellant's employment had been the evidence that indicated he was not capable of performing the either his former or his new role, that no other suitable positions were available; therefore, regrettably, dismissal of the appellant had been the only option available to the Council.

The Green Spaces and Bereavement Services Manager advised that the letter to the appellant of 31 July 2015 noted that dismissal was an option in his case, and as this was a possible outcome of the hearing procedure, the appellant had to be made aware of it prior to attending the hearing. The reference to dismissal in the letter did not indicate that the hearing was prejudiced; it merely served to explain to the appellant that it was an option for the hearing to consider. The Green Spaces and Bereavement Services Manager noted that he had become involved in the appellant's case at a late stage and therefore had not predetermined his decision regarding the appellant, he concluded by stating that having considered all the possibilities with respect to the appellant's employment, he could not have come to any other decision

A Member asked for clarification on ACAS guidelines for letters inviting employees to attend hearings. HR Advisory Services Team Leader explained that if an employer considered dismissal of an employee as a potential outcome of a hearing, it had a duty to advise an employee of this when inviting them to the hearing; this was to ensure that the employee was aware of the seriousness of the case.

A Member noted that the timeline provided with the report indicated that while on restricted duties following a case review meeting in February 2015, the appellant had

incurred two further accidents, the Member asked for further information regarding the accidents.

The Green Spaces and Bereavement Services Manager responded that he understood that the appellant had returned to work on restricted duties following an accident where the appellant had crashed a Council vehicle into residential property.

The Chairman invited the appellant to give an account of the two accidents referred to in the timeline.

The appellant gave an outline of the two accidents and stated that as a result of the second accident he had been suspended from work.

In response to a Member's question regarding the length of time the restricted duties had lasted, the appellant stated that he was not able to remember the exact amount of time.

A Member noted that the appellant's four week phased return to work and trial in the new role had been curtailed and asked if this was the result of statements made by the appellant's colleagues? The Green Spaces and Bereavement Services Manager replied that the comments had been a factor which had caused significant concern and appeared to be caused by genuine concern for the appellant's health.

The appellant questioned the judgement that he did not meet the standard required to complete the new role, and asked what the judgement had been based on.

The Green Spaces and Bereavement Services Manager replied that he had not been involved with the appellant's case at this stage; however, the judgement had been taken on the basis of the feedback from assessments taken over a three week period, along with the concerns raised by colleagues, whilst the appellant was trialling the new role.

The Chairman invited the appellant's representative to put questions to the Management representative. The appellant's representative noted that the appellant's four week trial in the new role had been reduced to five days, during which the appellant had undergone three assessments, he asked the Green Spaces and Bereavement Services Manager's opinion of this.

The Green Spaces and Bereavement Services Manager responded that as the trial period had been structured, the appellant had not attended work on a daily basis; the appellant had been given the details of how the trial would operate on 6th July 2015. The Green Spaces and Bereavement Services Manager explained that the appellant had received training in advance of the trial, and had been included as an extra person in the team as a fair way to introduce the trial period.

The Green Spaces and Bereavement Services Manager explained that the first assessment of the appellant had taken place in the initial hours of the trial and had indicated that the appellant was coping with the work, however, later that day it was noted that the appellant had struggled with the tasks and had to rest. He added that the trial had been a fair opportunity for the appellant.

The appellant stated that his training had comprised one day's observation of others performing the role. The appellant outlined his working pattern during his trial in the new role; he added that he had only worked for five days but had been assessed three times. The appellant asked why he had been assessed three times in five days?

The Green Spaces and Bereavement Services Manager responded that the appellant's recollection of the working pattern of the trial was slightly incorrect and advised the Panel of the agreed working pattern details. The Green Spaces and Bereavement Services Manager explained that the Council need to assess employees undergoing a trial from day one, and that assessment had been an agreed aspect of the trial; he added that the three days had been spread over a period of weeks and had not all taken place in the first week.

The appellant's representative referred to pages 72 – 78 of the report which contained comments made by colleagues and assessors, he stated that they had all clearly taken place in the appellant's first week of his trial. The appellant's representative felt that the Council should have allowed the appellant to conduct a full four week trial to ascertain if the appellant could have worked up to the required level of fitness to perform the job; he added that it was a physical job and required time to work up to the level required.

HR Advisory Services Team Leader explained that the appellant knew that the new role was a physically demanding job; and asked the appellant if he had undertaken any activity to prepare for his return to work. The appellant responded that he had taken daily walks in an effort to prepare himself for the role.

HR Advisory Services Team Leader asked the appellant how long he had been absent from work. The appellant replied that following the road accident in his own vehicle he had telephoned his supervisor, who had advised him to take time off as he was shocked and suffering stiffness. The appellant stated he subsequently received a letter from the Driver and Vehicle Licensing Agency (DVLA) which had stated he was fit to drive, and a further letter from his doctor confirmed this. The appellant said that despite the two letters the Council had required him to attend Occupational Health.

HR Advisory Services Team Leader explained that following an accident the Council investigated Officer's capability for the functions of their role to ensure that they were capable of performing the required tasks. The Occupational Health report had raised concerns regarding the appellant's capability and it had been right for the Council to address this.

HR Advisory Services Team Leader asked the appellant if he had been assessed twice in one day, whilst undertaking his trial in the new role. The appellant stated that he had been independently assessed on his first day in the trial, and assessments had taken place on different days. HR Advisor noted that the appellant had been assessed twice in one day in the role and the outcomes were contained on pages 76 and 77 of the report, and added that two colleagues had also reported concerns regarding the impact of the job on the appellant's health that day.

HR Advisory Services Team Leader asked the appellant if he had felt concerned about his health while performing the trial. The appellant replied that he had not felt concerned about his health.

A Member noted that in the feedback from the two assessments conducted on one day, a marked difference had been reported regarding the appellant's capability in the afternoon compared to the assessment conducted in the morning, and concern was expressed about the impact on the appellant's health. The Member asked if options such as AM only working had been considered for the appellant. The Green Spaces and Bereavement Services Manager explained that a balance need to be struck between the requirements of service delivery and the appellant's needs, the Council had offered the appellant as much flexibility as it had been able, but the priority had been the delivery of the service. The Green Spaces and Bereavement Services Manager referred to page 71 of the report which contained feedback from an independent assessment of the appellant and noted the comment of the assessor that the appellant was "unable to safely complete the tasks". The Green Spaces and Bereavement Services Manager felt that the trial period had been sufficient to come to the conclusion that the appellant was not capable of conducting the new role.

The appellant's representative referred to the monitoring of the appellant during his trial and stated that the decision to dismiss the appellant had been taken after five days of the trial, he asked why the appellant had not been monitored further, and why his suspension had led to dismissal. The Green Spaces and Bereavement Services Manager explained that the Occupational Health report had advised that the appellant was "not fit to carry out the role at the moment", he added that he had also taken note of references in the appellant's file to the need for a vascular specialist to assess the appellant. The Green Spaces and Bereavement Services Manager reiterated that that decision to dismiss the appellant had not been taken lightly; the assessments of the appellant had indicated that he struggled to perform the tasks of the new role, and he had not felt that further time would have given the appellant the capability to perform the tasks, additionally there were no other duties available, therefore, dismissal had been the only feasible option.

The Chairman invited The Green Spaces and Bereavement Services Manager to make a final statement to the Panel.

The Green Spaces and Bereavement Services Manager stated that it had been clear the appellant had wished to continue in the new role, and he respected him for that, however, it was obvious that the appellant was not capable of completing the tasks required. The decision to dismiss the appellant had been guided by independent assessments and feedback from colleagues, and sought to protect the appellant from physical harm. The Green Spaces and Bereavement Services Manager explained that The appellant's representative had attended each of the hearings relating to the appellant's case and therefore it had not been reasonable to suggest that the appellant had not had the opportunity to express his opinions.

The Chairman invited the appellant to make a final statement to the Panel.

The appellant stated that he had been aware of colleagues who had been permitted to work half days, and that it had been unfair not to allow him to do so. The appellant reiterated his view that he had not been given the opportunity to give his opinion at the hearings relating to his case, or to ask questions; he had no further comment.

The appellant, the appellant's representative, the Green Spaces and Bereavement Services Manager and HR Advisor left the hearing at 2.59pm.

The Panel then gave detailed consideration to written and verbal evidence that had been presented to them, prior to and during the hearing. It was:

RESOLVED –That the Panel dismiss the appeal on the basis that:

- 1) The deliberations and decisions made in respect of the appellant's previous employment as a Driver were fair and appropriate.
- 2) The redeployment on a trial period was ceased early due to serious concerns being raised about the appellant's health and wellbeing, concerns that included and went beyond capability to undertake the functions of that role.

The appellant, the appellant's representative, the Green Spaces and Bereavement Services Manager and HR Advisor returned to the hearing at 3.20pm

The Chairman thanked the appellant for his input to the hearing and informed him of the Panel's decision relating to his appeal, he advised the appellant that he would receive written confirmation of the Panels' decision within 3 working days.

The Chairman thanked everyone for attending the hearing.

(the meeting ended at 3.25pm)