

Appendix 3

How to exercise discretion

Although it may seem daunting, completing a discretions policy is not as challenging as you may think. In essence, a discretion is a choice and the key to exercising discretion properly is maintaining your freedom to choose.

With this in mind, we recommend that you complete your discretions policy by choosing one of three stock phrases -

If you would like to do something you can employ: **“The employing authority may award (discretion) but each case will be considered on its merits.”**

If you do not want to do something you can say: **“The employing authority will only award (discretion) in exceptional circumstances.”**

If you are not sure about whether you will or will not do something you can deploy: **“The employing authority will not generally award (discretion) but each case will be considered on its merits.”**

The point of these phrases is that they indicate intent without restricting the employer’s freedom to choose. An employer may be inclined to do something, but they might not want to do it for an employee who has defrauded them. Equally, they might not want to do something but find themselves confronted by a particularly sensitive case. Moreover, discretion can only be exercised lawfully if the employer maintains their freedom to choose and, if they say they will always do this or never do that, they have restricted their freedom to choose and are said to have “fettered their discretion”.

You should also be mindful of the Equalities Act 2010, which requires you treat all staff equally, regardless of age, unless any divergence can be objectively justified.

One last point to consider is that it is always a good idea to record the decision-making process, particularly when it is a contentious case. This is necessary to resist challenges from disappointed active, deferred and pensioner members who may try to identify a comparator whose case has been approved. That is why you should always set out your reasons when considering a case that justifies making an exception to your published policy.

The keys to exercising discretion properly are;

- Acting in good faith and for a proper purpose
- Complying with legislative procedures
- Considering only relevant considerations and ignoring irrelevant ones
- Acting reasonably and on reasonable grounds
- Making decisions based on supporting evidence

- Giving adequate weight to a matter of great importance but not giving excessive weight to a matter of no great importance
- Giving proper consideration to the merits of the case
- Ensuring that the person affected by the decision is dealt with in a way that provides procedural fairness and
- Exercising the discretion independently and not under the dictation of a third person or body.

In short, you should aim for a decision that a reasonable person acting reasonably would make having regard for the principles set out above.

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