

## Disciplinary Procedure - Management Guidance

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## **1 GOOD PRACTICE FOR DEALING WITH MINOR PROBLEMS**

1.1 In many cases the right word, at the right time and in the right way may be all that is needed and will often be a more satisfactory way of dealing with a relatively minor problem rather than setting up a disciplinary hearing. What is “minor” is difficult to define, but roughly it is an action or inaction by the employee that falls below the standards expected and can be easily addressed by pointing out where they went wrong and what they need to do correctly. This should be done by having a meeting with the employee.

- The discussion should be out of the hearing of other employees. It should be a two-way discussion, aimed at pointing out any shortcomings in conduct or performance and finding ways for the manager to offer support and to encourage improvement. Criticism should be constructive and emphasis should be on finding ways in which the employee can remedy any shortcomings.
- Where an improvement is required, making sure that the employee understands what needs to be done, how they can achieve the improvement, how conduct will be reviewed and over what period. The employee should be told that if there is no improvement the next stage will be the formal disciplinary procedure. Managers must make it clear that these meetings are not part of the disciplinary process.
- Listen to any explanation put forward by the employee. If it becomes evident that there is no case to answer this should be made clear to the employee.
- Take care that the interview does not turn into a formal disciplinary hearing as this may unintentionally deny the employee certain rights, such as the right to be accompanied. If during the meeting it becomes obvious that the matter is more serious, the discussion must be adjourned. It should be made clear that the matter will be pursued under the formal disciplinary procedure.
- Keeping a brief note of this meeting for reference purposes.

## **2. OVERLAP WITH OTHER POLICIES**

### **2.1 Equalities issues**

Where handling a disciplinary issue, there may be specific issues to consider such as the needs of staff with disabilities, including those with mental health problems, staff where English is a second language or where serious problems relating to sexual/racial harassment have been raised. Support can be arranged in handling sensitive equalities issues by contacting HR.

### **2.2 Grievances**

If a grievance discloses a breach of the Code of Conduct then it should be dealt with as a disciplinary matter. The grievance may be suspended pending the outcome of the disciplinary hearing.

In exceptional circumstances, i.e: where allegations of bullying or harassment have been made, the disciplinary process may be temporarily suspended pending a prompt investigation.

### **2.3 Complaints from Members of the Public**

Complaints from the public should be dealt with by following the Complaints Procedure. If it becomes apparent that there is a case of misconduct to be answered then the investigation officer should deal with the matter as a disciplinary issue, following the disciplinary procedure. Both parties must be informed about the way the complaint is to be handled. The Complaints Procedure may be suspended pending the outcome of the disciplinary hearing.

### **2.4 Alcohol or substance misuse**

The Council has a clear policy and guidance on the question of alcohol and substance misuse by employees. A copy of the policy can be found on Harinet.

If it becomes apparent that alcohol or substance misuse was a major contributory factor to misconduct this should not prevent a manager from disciplining an employee. The sanction that is applied may, however, be tempered by the circumstances around the case. A manager can apply a disciplinary sanction and at the same time offer help to deal with the problem. The two approaches are not incompatible.

### **2.5 Dealing with sensitive cases**

In certain sensitive cases e.g. those involving allegations of abuse involving a child or vulnerable adult, other outside agencies, such as the police and/or adult or children's services, may need to be involved in the investigation.

In any case involving alleged fraud or other illegal activity it is essential to involve the Council's internal audit at an early stage.

### **2.6 Criminal offences**

In most cases a criminal offence committed outside the employment shall not be treated as an automatic reason for dismissal or other disciplinary decision. Disciplinary/dismissal may not necessarily be appropriate; depending on the circumstances it may be appropriate to redeploy the employee to another job if, for example, a cumulative speeding points driving ban has been imposed and it affects the employee's job for a limited time. The main consideration is whether the offence is relevant to the duties of the employee and makes the employee unsuitable for employment in that type of work. An employee shall not be disciplined solely because a charge is pending.

As instances where Council employees are involved in criminal activities/held in custody, are likely to be rare. It is advisable that when a manager is faced with such an event, he or she should seek appropriate HR/legal advice.

## **3. ALLEGED FRAUD**

3.1 An employee who allegedly makes fraudulent claims against the Council will be disciplined for gross misconduct. Equally, where employees have allegedly made fraudulent claims against other local authorities or public bodies or have been convicted of this type of offence in the Courts, this too would be dealt with under the disciplinary process. Where an employee has been convicted for any type of fraudulent activity then the Council will normally discipline that employee. This will

apply whether the fraud was against the Council or another public body. Such fraudulent activity will be deemed to demonstrate that the employee can no longer be trusted and the usual sanction will be dismissal.

3.2 When either the Audit or Benefit Fraud Team decide that they have sufficient documentary evidence, they will arrange to question the employee under the Council's guidelines for Audit interviews. The Council has a right to tape the investigative interview. Following this interview, a report will be made to the appropriate manager with recommended action for that manager to consider.

3.3 If, on consideration the manager decides that disciplinary action is warranted, he or she can then call the employee to a suspension meeting. At this meeting the employee must be advised that he or she is suspended and of the reason for the suspension. This suspension must be confirmed in writing. If the employee refuses to co-operate in the fraud investigation, the period of suspension may be without pay. Any such decision to suspend without pay must be made with agreement of Head of HR.

NB. It is important that the Council maintains a consistent approach to all such cases. Generally the weight of evidence presented to the manager will be such that disciplinary action will usually result.

3.4 Once the employee is suspended it is the manager's responsibility to ensure that the suspected disciplinary offence is fully investigated and that the outcome of the investigation is fully documented. As the evidence will have already been gathered by Audit or the Benefit Fraud Team, it may be that the period between suspending the employee and advising him or her of a disciplinary hearing will be governed by the need to pull together the documented Audit or the Benefit Fraud Team evidence to be used. Such documented evidence must be provided to the employee at the time he or she is advised about the disciplinary hearing. As with any evidence, it is essential that this is documented in a clear, logical manner (and subsequently presented in the same way).

3.5 Notes taken by audit during-investigative interviews will be disclosed unless it is a confidential breach and anonymity is an issue e.g. if the case relates to safeguarding and data protection is a consideration; if the case is also subject to an ongoing police investigation or if it relates a whistle blowing issue (see the Whistleblowing policy for additional details). All pertinent elements of the audit report will be used.

3.6 If an employee is convicted, the case against him or her should be relatively straightforward. If, however, a prosecution is pending, the ability to proceed to a disciplinary hearing may be affected by the police specifically requesting the Council not to discipline in advance of such a prosecution.

3.7 If there is sufficient evidence available the Council can proceed with disciplinary action. You need to be aware that the burden of proof does not extend to the criminal requirement of being beyond all reasonable doubt. If there is a genuine belief that the offence (s) had occurred and there are reasonable grounds for having reached this, then the decision will be considered to be fair. Advice should be sought

from HR if you feel it is necessary to continue with the disciplinary case before the Police complete their court proceedings.

3.8 It is possible that an employee could be disciplined and dismissed even though the employee is not convicted in court of fraud. Equally, there may also be good reasons for not prosecuting an employee for alleged fraud. In order to successfully discipline an employee the evidence needs to be such that a decision can be reached on the balance of probability. This differs from the court's requirement that the evidence is beyond all reasonable doubt.

3.9 Decisions to involve the police at any stage of a fraud investigation must rest with the Audit Manager or, the Benefit Fraud Team Manager.

### **3.10 Disciplinary Sanction/Mitigation**

If, at the disciplinary hearing, a fraud case is found proven, the usual disciplinary sanction will be dismissal. This sanction may be varied in extenuating mitigating circumstances.

### **3.11 Haringey employee Allegedly Defrauding another Local Authority**

Alleged fraudulent activity against another local authority will not come to light automatically. There is an Audit/Benefit fraud Team information network and it may be that such activity will come to light via this network.

3.12 As previously indicated, if an employee is convicted and this is known, then the employee will normally be disciplined. If it is alleged that the employee has acted fraudulently but has not been prosecuted or that a prosecution is pending, the Council must **ensure that the evidence is sufficient to enable disciplinary action to take place**. It will not be sufficient to rely on suspicion of a fraudulent activity via, for example, the Audit/Benefit Fraud Team information network.

3.13 Instead, the evidence will need to be clearly and logically documented and the relevant Audit or Benefit Fraud officer from the local authority that has allegedly been defrauded will need to attend the disciplinary hearing. He or she will be the key witness presenting the evidence and being cross-examined etc.

3.14 The sequence of events leading up to suspension and arranging a disciplinary hearing should be the same as any other investigation and suspension. The manager will need to arrange for the other authority's Audit or Benefit Fraud officer to attend the disciplinary hearing.

## **4 CONDUCTING AN INVESTIGATION**

4.1 Managers should conduct a brief preliminary investigation where it is felt that there may be a case of misconduct to answer which cannot be addressed by pointing out where they went wrong as specified in Section 1. This initial assessment should be very brief, as there will be no right to representation at this stage of the procedure.

### **4.2 Who Carries Out The Investigation?**

Any investigation must be carried out by an appropriate level of manager. The manager who investigates the case should not be the same manager who

subsequently may hear the case. However, in cases where the simplified procedure is used this would be acceptable

#### **4.3 Timing Of Investigations**

Key to any investigation is a clear action plan with a correspondingly clear timescale in order to complete the investigation as speedily as possible to avoid additional costs incurred with employees remaining at home for long periods and avoid any undue stress placed upon employees. Employees will be provided with sufficient substance and context of the allegation to enable them to provide a full response at their investigatory interviews.

4.4 In most cases, the aim should be to complete the investigation in two to three weeks. If the investigation is likely to take longer, the Director should be assured that all practicable steps were taken to progress the matter up to that time. In any event, the Director should ensure that the investigation is concluded as soon as practicable. If the investigation is to last much longer than two to three weeks, the employee under suspension should be advised and given an indication of its progress. An appropriate manager must carry out any investigation.

- 4.5 Investigations need to be carried out as quickly as possible to ensure that
- The witnesses' memory of the event is accurate. Memories fade and facts become distorted over time
  - The momentum is maintained
  - The cost involved is kept to a minimum, especially when the employee has been suspended on full pay.
  - The stress to the employee and to witnesses is minimised

4.6 In cases, which involve the possible abuse of children or vulnerable adults, the disciplinary investigation may need to be postponed pending the outcome of, or advice from, proceedings taken in accordance with the Child Protection Regulations or the Joint Agencies Adult Protection Policy. HR will be able to advise in such situations.

4.7 Investigative interviews can be taped with the employee's approval. Please refer to the guidelines on the tape recording of investigative interviews and hearings in accordance with Council Procedures.

#### **4.8 Carrying out the investigation**

The main task is to establish the facts around the issue under investigation. Depending on the type of misconduct, this may be by obtaining statements from those who were involved in the alleged misconduct or were present when it happened or by assembling documentary evidence, together with statements.

4.9 It is important that statements are taken from all who can make a contribution to building up the evidence. These may be direct witnesses or those who can help to place the misconduct in perspective. In the case of harassment, this includes any witnesses to an employee's resultant distress, etc. The witness statements should be a very straightforward statement of the facts as understood by each witness. The means of obtaining these is simply by getting each witness to produce a statement.

4.10 In order to complete the investigation the investigating manager will need to ensure that the following facts are clear:

- What happened?
- How did it happen?
- Where did it happen?
- When did it happen?
- Who was there when it happened?
- What documentary evidence, if any, is available?

4.11 Once all the statements have been taken, the investigating manager needs to come to a conclusion as to whether or not there is a case to be answered. S/he should then meet with the manager who commissioned the investigation and make a clear recommendation about whether or not there is a disciplinary case to be answered.

4.12 If it is decided that there is a case to answer, then the statements, together with any appropriate documentary evidence, will form the basis for questioning the witnesses who are called to give evidence at the disciplinary hearing. The statement needs to be the witness's account of the alleged misconduct and written as if the witness was telling the investigating manager what happened, i.e. in the first person tense. The witness can be helped in this process.

#### **HOW TO OBTAIN WITNESS STATEMENTS**

4.14 The investigating manager can assist the witnesses in making their statements by prompting them with a number of questions which will help to put the statement into a logical order and make the reading of them that much clearer.

4.15 It may be that the witness is able to write down a statement following the prompting that the manager provides. This may not always be possible and therefore the witness should answer these questions and the investigating manager should write down the answers. These must be written in the first tense, i.e. I saw this, I did that etc.,

4.16 The final result should be a complete statement, written in the first tense. This statement should be signed and dated by the witness and signed and dated by the investigating manager. This hand-written statement should be typed up as soon as possible and then signed and dated by both the witness and the investigating officer. Only the typed statement needs to be submitted at any subsequent disciplinary hearing.

*There is no need for any other managers, or employees, to be present when the witnesses are making their statements.*

The exception to this is when the employee, who is under investigation, is required to make a statement. S/he can be accompanied, usually by a trade union representative, if s/he wishes.

#### **4.17 The "Prompt" Questions To Assist In Obtaining A Statement**

These questions will enable the statement to be made within a logical framework. A number of statements made within this overall framework, will be easier to go through

at a disciplinary hearing. Examples of how the answers would be started are given in italics.

Start by asking the witness to state who s/he is. *"My name is ....."*

What job does s/he do? *"I'm an administrative assistant....."*

Where does s/he work? *"I work in the Civic Centre, in the Committee Division....."*

Where were you at the time of the incident? *"I was in room 105 ....."*

When were you there? (day, date, time) *"I was there on Monday 14 January 1998 at 1130am....."*

What happened?/How did it happen? *"I saw X push Y ....."*

Where did it happen? If different to where the witness was. *"It happened in the rear car park....."*

What were you doing at the time of the incident?

*"I was meeting with....."*

Who else was present, or who else witnessed the incident? *"I think that P,Q,R and S also saw what happened, but I'm not certain....."*

What else would you want to say about the incident? *"The whole thing was over in a flash ....."*

#### 4.18 Some Key Points To Remember About Statements

The statements should be obtained at the same time that the investigating manager is questioning each witness to gain a better knowledge of the matter under investigation.

4.19 Whilst it is important that the investigating manager carries out this task as comprehensively as possible, it is not necessary to make a formal record of the questions asked or the answers given. Managers should note the questions asked and the answers given, as these will form the basis for the questions at the disciplinary hearing, however, there is no need to submit these, or, "notes of the investigative hearing" as part of the documents for the disciplinary hearing.

#### 4.20 INVESTIGATIONS - CHECKLIST

1. Decide which manager will carry out the investigation.
  2. Ensure that the investigation is planned into the workload of the investigating manager.
  3. Set a timescale in which the investigating manager should complete the investigation.
- The investigating manager should:
4. Seek HR advice and support.
  5. Ensure that records are taken or statements are obtained from management witnesses.
  6. Ensure that the employee who is under investigation provides a statement.
  7. Ensure that there is a record of the investigatory interview with the employee, or as a minimum a signed statement from the employee.
  7. Keep the process and the paperwork simple.
  8. Use the "prompt" questions during investigation interviews.
  9. Save detailed questions for the disciplinary hearing (if there is one).



#### 4.21 Audit Investigations

Financial Regulations require that any case of suspected financial irregularity must be reported immediately to the Head of Audit.

4.22 Usually, the employee will be suspended if an audit investigation is required. Management must try to ensure that the employee does not take or destroy documents etc, that could be used in evidence against him/her. If the employee is suspended they may also be required, depending on the circumstances to return any property/equipment that belongs to the Council, e.g. mobile phone, computer, etc.

4.23 There should be close liaison between the Directorate and Audit to ensure that the investigation is progressed as quickly as practicable. The employee under suspension should be advised by management, as soon as possible on progress, after two or three weeks, and on a regular basis after this, if the investigation is prolonged.

4.24 If there are any queries about the Audit report these should be discussed with its author. Once a decision on action is taken, Audit should be informed and given an opportunity to comment. If, after discussion, it is intended to take action that is at variance to that recommended in the Audit Report, the reasons for this decision must be confirmed in writing to Audit as this will eventually be reported to the Audit Panel. Particular attention needs to be given to the wording of any allegation(s) to ensure that they are clear and specific and that they are agreed with Audit.

4.25 Officers from Audit may be required to attend any subsequent disciplinary hearing to answer questions about their report in order to bring out the evidence that it contains.

4.26 Managers need to be certain that they have all the facts relating to the allegation(s) clear. It would be advisable for managers to meet with the employee and his/her representative to hear any comments s/he may have about the allegations, or, any other comments that the employee would want to make before the manager proceeds with arranging a disciplinary hearing.

### 5. SUSPENDING AN EMPLOYEE

"Gross misconduct is generally seen as misconduct serious enough to destroy the employment contract between the employer and the employee which makes any further working relationship and trust impossible". (ACAS).

5.1 Therefore, gross misconduct is misconduct of such a nature that the authority is justified in no longer tolerating the continued presence at work of the employee. A suspension may also be justified for misconduct depending on the circumstances, for example, when the presence of the employee compromises the investigation process.

5.2 Whilst it may seem attractive to keep an employee at work even though there is good reason to believe that an act of gross misconduct has occurred both HR and the Legal Service do not recommend keeping an employee at work in these

circumstances. If the employee was dismissed and complained to an Employment Tribunal, then the decision not to suspend could seriously weaken the Council's defence of the decision to dismiss.

5.3 Gross misconduct destroys the employment contract and makes the continued presence of an employee at work intolerable. What could be argued, at an Employment Tribunal, is that if the misconduct was such as to eventually warrant dismissal, then the Council, by not suspending, did not consider the misconduct to be that serious.

5.4 Suspension of the employee can be applied either immediately a disciplinary concern comes to light, at any stage during the investigation or on completion of the investigating officers report .

5.4 There is no right to representation at the suspension meeting, regardless of whether an employee is suspended pending a fuller investigation or whether it is pending a hearing. Any notes made at the suspension meeting cannot be used in disciplinary hearings unless it is referred to formally as part of the investigative meeting where the employee is given the opportunity to be represented.

5.5 Before suspending a trade union official, the Branch Secretary or district officer should be advised. NB: a trade union official is a recognised union official as notified to the Council.

5.6 Employees should be told clearly that they are suspended that it will be for as short a period as possible and that they may be called back for interviewing as part of the investigation. They should be available to be called in at anytime and not book leave without the prior authorisation of the manager. This decision to suspend must be confirmed in writing.

5.7 Suspensions will be on normal contractual pay and other terms and conditions will continue to apply. Any dispute about what constitutes normal contractual pay will be referred to the Head of HR. However, where the actions or inaction of an employee on suspension continually frustrates the disciplinary process or the allegation concerns serious fraud or theft the suspension may be without pay. Any decision to suspend without pay must be discussed and agreed by the Head of HR and must be reviewed on a regular basis to ensure that the period of no pay is kept to a minimum before the hearing takes place.

5.8 The HR Support team must be advised that the employee has been suspended in order that any necessary adjustments to pay or allowances can be made. While the employee is suspended they may also be required depending on circumstances to return any property/equipment that belongs to the Council eg. parking permit, computer, mobile phone, name/security badge etc.

5.9 A suspended employee shall not undertake any additional employment during periods when the employee would normally be at work for the Council. Failure to comply with this obligation may result in dismissal for gross misconduct.

## **6. PRESENTING A CASE**

It is a very rare occurrence for a manager to have to present a disciplinary case. Most managers will not be required to do so at any time in their managerial career.

### **6.1 Training**

Directors must ensure that managers and supervisors have a thorough knowledge of the Code of Conduct and Disciplinary Procedure and that they know how to prepare for and conduct a disciplinary hearing. If managers are in any doubt as to what they should do in any situation necessitating disciplinary action then they should seek appropriate HR advice.

Newly appointed managers, especially, need to be familiar with the disciplinary procedure and code of conduct.

### **6.2 Obtaining advice from HR**

When investigating a case of misconduct or gross misconduct, managers should seek support and guidance from HR. It follows that the HR practitioners should continue to be involved in preparing for and presenting the case at a service level disciplinary hearing or at a Member appeal hearing.

### **6.3 Planning and Preparing for the Disciplinary Hearing**

It is essential that managers prepare thoroughly for presenting a disciplinary case. Failure to plan and prepare for such a presentation will, at best, make the task of presenting the case more difficult and at worse lead to the evidence being unclear

### **6.4 Documentation &-Questions**

Managers are advised to prepare in advance any questions that they may ask at the hearing.

6.5 It is important that all the documents used at a disciplinary hearing are relevant. All documents that are tabled must have a purpose. It must not be assumed that documents will be read; in the time that a disciplinary hearing takes place, the majority of the evidence will be heard, not read. It follows that any incidental letters around administrative issues, etc., should not be tabled. However, it is important to understand that the chair has the right to ask for documentation that might not seem immediately relevant.

6.6 At the initial disciplinary hearing the paperwork must include the letter that was sent to the employee setting out the allegation. In the case of a Member appeal this must be replaced by the dismissal letter. The witness statements that will form the basis for questioning the witnesses should be included along with any relevant papers.

6.7 Where there has been an audit investigation, the audit documentation must be distributed. When it comes to the presentation however, only those parts of the audit documentation that are particularly relevant should be specifically referred to. The auditor should usually attend the disciplinary hearing as a witness and it should be made clear, when starting to question the auditor that the questions will aim to bring out the key facts from the documentation.

6.8 All the documents that will be used in presenting the case need to be assembled in a clear, logical order. The witness statements should be provided in the order in which the witnesses will be called and thought needs to be given to this order.

6.9 The documents must be clearly sectioned and/or numbered for ease of identification and it is useful to have a summary index of them.

6.10 It is advisable that the manager who presents the case has all the questions written down, for his/her own benefit, with any other notes that will assist in the presentation. It is also very useful to have an outline summing up of the case written down in advance of the hearing. This can then be varied as required during the course of the hearing.

6.11 The statements produced by each witness should form the basis for framing questions to the witnesses. The questions need to be specific ie who? what? where? why? when? how? and should clearly relate to the evidence. Thought needs to be given to the order in which the questions will be asked.

6.12 Questions will also be asked by the other party's representative. Witnesses should be told to only answer the questions asked of them and not to attempt to add to the answer unless specifically requested to do so.

6.13 If there are a number of allegations, it is important that the evidence relating to each allegation is kept separate and is not confused with evidence relating to the other allegation(s). Before questioning the witness it is useful to very briefly explain what s/he will be answering questions on. Once questions relating to one allegation have finished, this should be stated before moving on to the other allegation(s).

6.14 If there is a need to re-examine a witness, it should only be to clarify a point, or points, made in answering the other party's questions.

#### **6.15 Witnesses**

All those who made a statement during the investigation should, usually, be called as witnesses. (There are exceptions and these are covered below).

6.16 Consideration needs to be given to the order in which the witnesses will be called. Some of the witnesses will have a major contribution to make whilst others may have less of a contribution to make. In considering this order it is useful to imagine that the witnesses are describing a picture, i.e. the main details are brought out first, with additional details then added to complete the picture.

**6.17 Witnesses who are not prepared to attend Disciplinary Hearings/Appeals**  
Generally, Council employees are expected to attend hearings/appeals when called to do so as witnesses. However, there are circumstances when management may accept that it is not reasonable for witnesses to attend a hearing such as:

- When the allegations are concerned with forms of harassment and the victim cannot face the prospect of contact with the alleged harasser.

- Where the witness is clearly vulnerable e.g a child or vulnerable adult
- Where the witness is a member of the public.

Failure to attend as a witness should not itself be considered as a disciplinary issue.

6.18 In the event of someone (employee or member of the public) not being prepared to attend a hearing or an appeal, it may be appropriate to accept a signed statement as evidence and to accept evidence both from individuals who witnessed the complainant's state of distress immediately after the event and from management representatives who took the statement. However, such evidence will inevitably have less weight than had the complainant given evidence in person and been available for cross-examination. As in any disciplinary hearing/appeal it is the responsibility of the Director or his/her representative to make a decision as to the balance of probability taking into account all of the evidence presented and the circumstances surrounding the presentation of the evidence. Where there are a large number of witnesses who are providing character statements and are to attend it will be acceptable to have a limited number attend and accept statements from the rest. Alternatively, where a statement is factual and accepted at face value by both sides, the witnesses need not attend.

6.19 Provision can also be made (where issues of intimidation are concerned) for a witness only to be present with the employee's representative and not with the employee. Time would need to be arranged for the representative to consult with the employee to put the responses of the witness to him/her and to give them the opportunity to give their response.

6.20 It may also be appropriate for the hearing to be adjourned for certain questions arising from the hearing to be put to the complainant and reported back to the re-convened hearing.

#### **6.21 Hostile Witnesses**

In preparing for a hearing, managers need to beware of coercing a witness to attend a hearing. Such a witness may give evidence that does not support management's case.

## **7. CHAIRING & ARRANGING A HEARING**

7.1 Employees have the right to be fully represented at the formal stages of the procedure and are therefore entitled to be accompanied either by a trade union or work colleague. In genuinely exceptional circumstances, an employee may choose to have legal representation if there is a potentially serious consequence of a disciplinary decision in respect of their future employment or career. All requests for legal representation will be considered by the Head of HR. Additionally, employees may not be represented, by a person who may prejudice the fairness of the process or who may have a conflict of interest, for instance, a representative who is related to the Chairperson or a member of an appeal panel. In such circumstances it would be for the Head of HR to use hi/her discretion in deciding how this will be dealt with. There is an expectation that employees and their representatives declare any potential prejudice as to the fairness of the process or conflict of interest.

7.2 Similarly, where a conflict may arise from the management side presenting the case this must also be declared and the Head of HR will use his/her discretion in deciding how this is dealt with.

7.3 The timescales for advising an employee of a disciplinary hearing are minimum notice periods. These are:

- 5 working days in the case of misconduct
- 10 working days in the case of gross misconduct

It is essential that at the time the hearing is arranged and all the facts relating to the case are available. Where large bundles of information need to be considered it would be appropriate for a longer notice period to be given.

7.4 The timescales are set for two very good reasons:

1. To enable the employee to arrange representation (usually either a trade union official or work place colleague). Where possible, the employee's representative should be given the opportunity to have a say in the date and time of a hearing. If the employee or the representative is unable to attend on the date notified, an alternative date can be suggested so long as it is reasonable and is ideally not more than 10 working days after the original date. (nb it is acknowledged that on occasions because of diary commitments, 10 working days is not practicable but as a general principle this target should be achievable on most occasions.
2. To give the employee time to prepare his or her case in response to the allegation(s).

7.5 Copies of any documents and details of the witnesses to be used by the management side should be sent to the employee with the letter notifying him or her of the disciplinary hearing, a written copy of the procedure to be followed at the hearing must also be sent. Managers hearing the case should be given the case bundles in advance of the case. Bundles should be provided to the manager hearing the case a minimum of 1 day before hand. However this notice period should be longer if there is a large amount of information to consider.

7.6 The documents and details of witnesses to be used in the case by the employee side will need to provide no later than 2 working days in advance of the hearing.

7.7 Preparing for disciplinary hearings on gross misconduct may involve lengthy investigations/considerable documentation. The employee, therefore, may also need more time to arrange representation and to prepare his or her case in response to the allegation(s).

7.8 The letter notifying the employee of the disciplinary hearing must state very clearly what the allegation(s) is/are. If the allegation(s) is/are of gross misconduct, then the employee must be advised that if the allegation(s) is/are found proven then he or she will be liable to be dismissed. It must advise the employee that he or she can be represented at the hearing usually by a trade union official or workplace colleague. It must advise the employee on what day and at what time the hearing is arranged. In addition it needs to advise him or her where the hearing will take place.

7.9 The employee should be requested to acknowledge receipt of the letter calling him or her to the disciplinary hearing. The employee should also confirm that he or she can attend on the day and at the time stated.

7.10 If the employee requests additional time to prepare his or her case, then this request should not unreasonably be refused. However, management need to be firm and fair on this and not allow the employee to unduly extend the timing.

7.11 If the employee fails to attend the disciplinary hearing then management needs to establish the reason for this. If there is good reason then the hearing should be re-arranged. If there is not a good reason the employee should be advised that the hearing will be re-arranged and that if he or she does not attend the re-scheduled hearing it will proceed in his or her absence. If the hearing was to consider a case of misconduct/capability, the failure to attend could give rise to further disciplinary proceedings (in the instance that there was not a good reason).

7.12 In preparing for the case the employee's representative has the right to talk to relevant staff about the allegation(s). Any witnesses that the employee wishes to call should be allowed reasonable time off to attend the hearing. The employee must inform management of whom he or she will be calling as witnesses to allow time off to be arranged. In some cases it may be necessary for management to schedule the attendance of witnesses to avoid undue disruption to their work.

7.13 Witnesses that the employee calls must not be subjected to harassment because they have attended as witnesses for the employee being disciplined.

7.14 In cases involving children under the age of 16 or vulnerable clients, where it may have been more appropriate to use a third party such, as a teacher or social worker, to conduct the interview, parental consent would be required before the child could be called to a disciplinary hearing, to give evidence. Where consent is not given, the manager concerned would have to present a statement instead.

#### **7.15 Sickness absence**

If an employee fails to attend the hearing due to sickness then he/she must provide, prior to the hearing, a medical certificate from his/her doctor specifically stating that he/she cannot attend the hearing due to sickness. A general medical certificate covering the day in question is not sufficient. In these circumstances the manager hearing the case will make a decision either to proceed with the hearing in his/her absence or to defer the hearing. Managers are advised to discuss this issue with HR.

7.16 It is not the intention to penalise employees whose illness genuinely precludes them from attending disciplinary hearings. However, the Council cannot afford to have employees who are suspended unavailable for disciplinary hearings for an unreasonable period on the grounds of ill health.

7.17 Each individual case will have to be evaluated on its own merits but the prime objective will be to eliminate or minimise any delay in the holding of disciplinary hearings.

### **7.18 Failure to attend a Hearing**

If an employee fails to attend a hearing for some other reason he/she is entitled to be represented in his/her absence. If this happens the Chair will:

- Try to find out why they have failed to attend, how reasonable the explanation is, and when the employee is likely to be available
- Take into account the effect on the Council of any delay to the procedure

Decide whether it is reasonable to delay the hearing or to go ahead.

7.19 A hearing will normally only be arranged on one further occasion and will then go ahead should the employee fail to attend. However it is unsatisfactory to leave a hearing adjourned for an unreasonably long period of time, especially if the employee is on suspension.

7.20 This also applied when neither the employee nor their representative attends the hearing.

### **7.21 Chairing the Hearing**

The manager who hears the case and makes the decision is regarded as the Chair and therefore needs to also control the hearing. It is important to understand the role of the chair.

7.22 The hearing is being convened to hear all relevant and appropriate evidence about the alleged misconduct issue and to give the employee an opportunity to justify their actions. As the decision maker, the chair needs to be clear that they have heard all the information to be able to reach a fair and balanced decision. The Chair may choose to have an adviser or advisers depending upon the exact nature of the disciplinary hearing.

7.23 Prior to the hearing, the chair should understand what is involved in an issue and what decisions have to be taken. S/he should make sure that all people at the meeting have access to all the relevant documents/bundles at the meeting, so it is important to exchange all relevant documents in advance.

7.24 A disciplinary hearing is not a Court of Law, it is a meeting to ascertain the facts about the alleged misconduct issue. Disciplinary decisions are made on the 'balance of probability' based on all the available information/evidence. This is a lesser test than the test in law courts which is 'beyond a reasonable doubt'.

7.24 At the hearing, the chair should do the following:

- Make sure the meeting room is of a suitable size and is laid out correctly
- Ensure there is a suitable holding area for witnesses from different sides
- Outline the procedure to be followed
- Establish the control parameters at the beginning e.g. time scheduled for hearing, order of evidence and witnesses
- Check and confirm with both parties the order of witnesses and their purpose. Ask if there are any procedural issues to be dealt with
- Check that both sides have all the relevant documents to be used
- Keep the discussion on the issues. If you feel you've heard sufficient information to understand/comprehend the point, move it on
- Make sure that only one person is speaking at a time



- If a number of witnesses for the employee are character referees the Chair can limit the number to hear. Written references may be accepted instead
- If one or both sides seem to be getting excited or going off track, the Chair needs to calm things down or pull them back on the pertinent issues. In preparing for a disciplinary hearing, managers should be mindful of the possibility of an appeal being made to Members.

Member appeals are a review of the case and the process to be followed is detailed in the Disciplinary procedure itself.

#### **7.25 Assistance to the Chair**

Usually, a HR practitioner or another manager will accompany the manager who will be presenting the case. S/he can assist in keeping the papers in order, make prompting notes, whilst s/he will not be allowed to address either the service level disciplinary hearing or the Member appeal panel. S/he will be allowed to ask questions of witnesses and employees at relevant stages.

#### **7.26 The Employee's Representative**

Managers who present a case, either at disciplinary hearing or at a Member appeal, can find that the employee is represented by any one of the following: A trade union representative or fellow employee. Very rarely will an employee choose to represent him/herself.

#### **7.27 Problems that may arise and how they should be handled**

- **Interruptions**

Chairs need to be prepared for interruptions/disruptions. If this is attempted, it is important to stay calm and not to react to the issues. If the interruptions are persistent, it would be appropriate to intervene to control the hearing.

- **Emotional Distress**

If an employee or witness becomes emotionally distressed during a disciplinary hearing, time should be allowed for him/her to become composed before proceeding. A brief adjournment may be appropriate. The issues, however, cannot be avoided. If the employee continues to be so distressed that the interview cannot continue, it should be adjourned and resumed at a later date. If this is the case then it should be made clear that the resumed hearing will proceed to be concluded at the later date, regardless of the employee's distress.

- **Controlling the Hearing**

It is important to maintain order during hearings. The purpose of the hearing is for the person/panel making decisions to obtain as much information as possible to hear the case. Sometimes delaying tactics or irrelevant issues are employed to frustrate proceedings. It is important to recognise this and move things on as appropriate.

- **Letting Off Steam**

During a disciplinary hearing it is important to recognise that the employee who is subject to disciplinary allegations is in a potentially stressful situation and that a certain amount of 'letting off steam' may be inevitable. This may be no bad thing and may be helpful in finding out and understanding precisely what happened. A brief adjournment may be appropriate to allow cooling off. However, if misconduct or gross misconduct - e.g. abusive language or

threatened physical violence - takes place during the hearing, then this should be treated as such. Usually, the hearing should be adjourned and reconvened at a later date when this offence can be considered as well.

## **8. RESIGNATION & REFERENCES**

### **8.28 Resignations**

In cases of alleged gross misconduct an employee may opt to resign rather than face the possibility of dismissal at the time of the disciplinary hearing. Management are not in a position to stop a resignation. However, if an employee is required to give a month's notice, it may be possible to conduct a disciplinary hearing before the end of that notice period. Much would depend on whether the evidence was available in time to arrange such a hearing. If it was possible to arrange a hearing and the employee failed to attend, under these circumstances it would be appropriate to conduct the disciplinary hearing in his or her absence.

There should be no pressure by management for an employee to resign. This approach can have potentially damaging implications, e.g. with regards to equalities considerations and constructive dismissal.

If the employee has allegedly committed a criminal offence, there is nothing that would prevent the Council from instituting criminal proceedings, whether or not he/she resigned prior to a disciplinary hearing.

If an employee is exonerated at the hearing and no action is to be taken then the employee may request to rescind their resignation.

### **8.29 References**

Managers who are requested to provide a reference should give a factual response. They should not, under any circumstances, promise an employee who resigns a "good" reference.

In the circumstances where an employee resigned rather than face disciplinary action, the reference should state the person resigned from the Council before an investigation into his or her alleged gross misconduct had been concluded.

## **9. CONSIDERING AN APPROPRIATE SANCTION**

9.1 In cases where the facts are in dispute, decisions on whether or not the case is proven will be reached on the balance of probability. The facts should have been established following as much investigation as possible. The burden of proof does not extend to the criminal requirement of being beyond all reasonable doubt. If there is a genuine belief that the offence(s) had occurred and there are grounds for having reached this, then the decision will be considered to be fair.

9.2 When deciding whether a disciplinary sanction is appropriate and what form it should take, consideration should be given to:

- Whether the case is one of gross misconduct, in which case dismissal will be the normal sanction
- The sanction imposed in similar cases in the past

- Any special circumstances which might make it appropriate to lessen the severity of the sanction
- The employee's disciplinary record, general record, position and length of service
- Whether the proposed penalty is reasonable in view of all the circumstances
- Whether there are any conditions attached to the sanction

9.3 Where a manager is in doubt about what would be the usual kind of sanction to apply in a case of misconduct, then he or she should seek appropriate HR advice and guidance.

9.4 Information regarding the type of sanctions which may be considered are outline in the Disciplinary Policy, Section 6.

9.5 Any conditions attached to a sanction should be relayed to the individual at the hearing. They should be aware that failure to agree to the condition may lead to a more severe sanction being given and details of what this sanction would be.

9.6 Similar cases will not always lead to the same disciplinary sanction being applied. Each case must be looked at on its merits and any relevant circumstances taken into account. These may include health or domestic problems, provocation, ignorance of the rule or standard involved or inconsistent treatment in the past.

#### **9.7 Where More Than One Employee Is Involved**

Where more than one employee is being disciplined over related breaches of the Code of Conduct and Disciplinary Rules, whether within the same Directorate or within more than one Directorate, it is especially important that all the relevant facts are considered.

9.8 It may be that more than one manager will be involved in deciding the disciplinary sanctions, especially if the employees are in different Directorates. Under these circumstances, it is essential that the managers concerned consult with each other before deciding what disciplinary sanctions to apply.

9.9 Whilst under these circumstances it may be possible to apply varying sanctions, it will be unacceptable for these sanctions to be applied without such consultation.

9.10 Managers need to bear in mind that if more than one employee is involved in a breach of the Code of Conduct and Disciplinary Rules, which constitutes gross misconduct and only one is dismissed, then the rationale for applying varying sanctions (or even no sanction) will need to be very clear.

9.11 Warnings that are issued as part of the Disciplinary Procedure will remain on file after they are spent. They will normally be disregarded for disciplinary purposes but can be taken into account in other circumstances, for example, appointment to another post. There may, however, be occasions where an employee's conduct is satisfactory throughout the period the warning is in force, only to lapse very soon thereafter. Where a pattern emerges and there is evidence of abuse, the employee's

disciplinary record should be borne in mind in deciding how long any current warning should last. It would be artificial to act as though an incident had never occurred and was erased from the memories of both parties. If an employee maintains that he or she was unaware of particular rule, for example, and it happened that he or she had been warned about this breach of rule in the past, this could be checked on the employee's file.

## **APPENDICES (to follow)**

- Appendix 1: Model Letters
- Appendix 2: Information for Suspended Employees (regarding sick/annual leave whilst on Suspension)
- Appendix 3: Investigating Cases of Misconduct or Gross Misconduct
- Appendix 4: Presenting the Case
- Appendix 5: Model Letters regarding Probation