



EMPLOYMENT MATTERS COMMITTEE

5 SEPTEMBER 2018

STATUTORY OFFICERS DISMISSAL PROCEDURES

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Summary

This report proposes new arrangements for dealing with disciplinary action against the Council's Statutory Officers in order to comply with statutory requirements.

1. Budget and Policy Framework

- 1.1 The Council's Employment Rules stipulate that the Council's Statutory Officers (i.e. The Head of Paid Service, Monitoring Officer and Chief Finance Officer) may not be dismissed by the Council unless in accordance with the requirements of the Local Authorities (Standing Orders) England (Amendment) Regulations 2015.
- 1.2 Decisions on the arrangements needed to comply with these Regulations are a matter for Council.

2. Background

- 2.1 The Local Government Act 1972, the Local Government Finance Act 1988 and the Local Government and Housing Act 1989 require local authorities To designate officers as the "head of paid service", the "monitoring officer" and the officer "responsible for the administration of the authority's financial affairs" (called the "chief finance officer" or "section 151 officer"), each of whom has a personal statutory duty to report to Cabinet or Full Council in certain circumstances. Their duties are, in very broad terms, to prevent or highlight organisational, legal or financial problems. This Council has designated the Chief Executive, the Chief Legal Officer and the Chief Finance Officer to these respective roles.
- 2.2 As a result of the personal duties upon them, the post holders have a degree of statutory protection from dismissal or other disciplinary action. Before the 2015 Regulations referred to above, there was a requirement to appoint a Designated Independent Person (DIP) to undertake an investigation where disciplinary proceedings were contemplated against a Statutory Officer.

The Council or a relevant Committee was obliged to consider that report before making a decision involving disciplinary sanction or dismissal of a Statutory Officer. Under the previous rules, only Full Council could dismiss the Head of Paid Service. The Monitoring Officer and Chief Finance Officer could be dismissed by a Committee. The DIP procedures dated back to 1993 but the concept of statutory protection is a much older one.

- 2.3 In March 2015, the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 came into force. The Regulations changed the procedure which local authorities must follow before dismissing a Head of Paid Service, a Monitoring Officer or a Chief Finance Officer (the Statutory Officers). The Regulations required the Council to include in its Constitution, Standing Orders which deal with the appointment and dismissal of staff.
- 2.4 In August 2015 the Council agreed new Standing Orders to comply with the Regulations and agreed that a further report be submitted to a future meeting on arrangements to meet the requirement to establish an Advisory Panel (see paras 5.7-5.14 below) to advise the Council before any decision is taken to dismiss one of the Statutory Officers.
- 2.5 The Department for Communities and Local Government (DCLG) had cited issues of complexity and expense associated with the previous regime as the reasons for bringing forward this legislative change. The 2015 Regulations sought to introduce a new streamlined procedure while attempting to retain an independent check within the system by giving the 'Independent Persons' (IPs) appointed to support the Members' conduct framework a role in the disciplinary and dismissal process for these three officers.
- 2.6 The Council's Employment Rules were also revised in 2015 and are compliant with the 2015 Regulations. However, the Rules do not yet specify the specific procedures which the Council will adopt if disciplinary action is to be taken against one of the Statutory Officers. Nor does the Constitution currently contain the "machinery" required to operate the new procedures. This is because there has been uncertainty as to how the legislation ought to be applied in practice.
- 2.7 The 2015 Regulations, as drafted, raised some fundamental questions about their scope, an apparent conflict with the Localism Act (see paras 5.11-5.12 below) and how, if at all, an appeal against a decision to dismiss could be incorporated into the new arrangements. Additional uncertainty was caused by the fact that the previous DIP process was embedded within the terms and conditions for Chief Executives as set out in the JNC for Local Authority Chief Executives handbook. The latter has contractual effect where an authority has agreed to be bound by JNC terms and conditions. Until October 2016, when the JNC issued a new handbook, there was a scenario where the contractual obligations owed under JNC terms required different steps to be taken to those set out in the new Regulations. Although the Council is not bound by JNC terms and conditions, officers were monitoring what was happening and the procedures proposed in this paper are largely modelled on what is contained in the new JNC handbook.

2.8 To try and resolve these issues discussions have taken place with other Monitoring Officers through the Kent Secretaries Group who have sought clarification from the Government as well as instructing Counsel on several key issues. The Group has now reached a Kent wide view on the most appropriate way to implement the new arrangements.

3. The New Process for Dismissal

3.1 The 2015 Regulations replaced the previous Designated Independent Person (DIP) arrangements with a new system. There is now no requirement to appoint a DIP where disciplinary action against a Statutory Officer is being considered and instead full Council must approve the dismissal of any of the Statutory Officers (previously this had only applied to the Head of Paid Service).

3.2 The Regulations stipulate that the following procedure must be followed before a Statutory Officer can be dismissed:

- The Council must invite a number of independent persons (“IPs”) to be appointed to a Panel. (These are the same independent persons who have been appointed to advise the Council on member conduct complaints under the Localism Act 2011.)
- The Council must appoint independent persons who have accepted such an invitation to a Panel at least 20 days before the Council takes a decision to approve the dismissal of a Statutory Officer.
- Full Council must then meet and, before a vote is taken on whether or not to approve the proposed dismissal, it must take into account any advice, views or recommendations of the Panel as well as the conclusions of any investigation and any representations made by the officer concerned.

3.3 DCLG were asked if the new arrangements were limited to dismissal on conduct grounds or whether they also applied in cases of dismissal due to ill-health or redundancy etc. DCLG have clarified that the procedures set out in para 3.2 only apply to dismissal on disciplinary grounds. However, if one of the Statutory Officers was to request that these procedures be invoked where dismissal was proposed on grounds other than conduct then it is considered such a request should be agreed to.

3.4 Regulations define disciplinary action as follows: *“any action occasioned by alleged misconduct which, if proved, would, according to the usual practice of the authority, be recorded on the member of staff's personal file, and includes any proposal for dismissal of a member of staff for any reason other than redundancy, permanent ill-health or infirmity of mind or body, but does not include failure to renew a contract of employment for a fixed term unless the authority has undertaken to renew such a contract.”*

4. The JNC for Local Authority Chief Executives Model Disciplinary Procedure

4.1 The JNC October 2016 handbook contains a model disciplinary procedure. Whilst this procedure only applies to Heads of Paid Service subject to JNC terms and conditions, which Medway are not party to, it is recommended that

these procedures should be followed (with some minor deviations) and also applied to the other Statutory Officers too (i.e. to the Monitoring Officer and Section 151 officer).

- 4.2 The main features of the JNC model procedure are:
- a) That there should be a standing Investigation and Disciplinary Committee which oversees any disciplinary process and determines the outcome. (In Medway this could be carried out by the Employment Matters Committee)
 - b) That any disciplinary investigation should be carried out by an Independent Investigator.
 - c) That there should be a Disciplinary Appeals Committee to consider any appeal against a decision of the Investigation and Disciplinary Committee to take any disciplinary action short of dismissal.
- 4.3 The model procedure suggests that any decision to suspend the Head of Paid Service should be made by a Committee, but that the power to make such a decision in urgent circumstances should be delegated to the Chairman of the Committee. However, this cannot lawfully be delegated to a single Member and as such is not recommended in this paper.
- 4.4 At present the Chief Executive and Directors have the power to discipline, suspend and dismiss employees *“in accordance with the Council’s disciplinary procedure and capability procedures”*. However, in keeping with the principle of a consistent application of the protections to all of the Statutory Officers, it is proposed that the Employment Matters Committee be responsible for deciding whether or not to suspend a Statutory Officer. For the reasons set out above, it is also considered that there is no compelling case to delegate a power to suspend in urgent circumstances. A small amendment to this delegation is therefore suggested (**Appendix 3**) to make it clear that this power to discipline, suspend and dismiss employees must also be exercised in accordance with the Employment Rules.
- 4.5 The model procedure suggests that any suspension of the Head of Paid Service (and so, by extension, the Monitoring Officer and S151 officer) is reviewed after a period of two months by a Committee. In doing so it should consult with the Independent Investigator and consider any representations from the officer concerned.
- 4.6 The model procedure makes provision for the Investigation and Disciplinary Committee and the Disciplinary Appeals Committee to include a Cabinet Member. Although this is an option for the Council it is not recommended as these procedures are likely to be invoked rarely and adding a Cabinet Member to the Employment Matters Committee on a permanent basis would increase what is already a heavy workload for Members of the Cabinet. However, it would be possible for the Group Leader to use their power under the Local Government and Housing Act 1989 to allocate a seat on the Employment Matters Committee to a Cabinet Member in place of an existing Member of the same political group in the event that the Committee has to deal with an allegation regarding a disciplinary matter involving a Statutory Officer.

- 4.7 It is proposed that amendments are made to the Employment Rules to reflect the model procedure. The proposed amended Rules are attached as **Appendix 2**.

5. Proposals for Change

a) Employment Matters Committee

- 5.1 It is proposed that the terms of reference of the Employment Matters Committee be extended to include the power to decide whether any of the Statutory Officers should be suspended and to also determine whether any allegation against any of the Statutory Officers warrants investigation. It is recommended that when the Committee is exercising this power that, for consistency, unless a Member is unavoidably indisposed or conflicted, the same Members shall comprise the Committee until the matter has been dealt with fully. It is recommended that the same approach be applied to the Disciplinary Appeals Committee (see paragraphs 5.5-5.6 below).
- 5.2 The Committee may, if it considers it appropriate, appoint an Independent Investigator. The Committee will consider any report of the Independent Investigator and, if appropriate conduct a hearing. The Committee may determine that no action should be taken, that some action short of dismissal should be taken, or propose that the officer should be dismissed.
- 5.3 If the action taken is short of dismissal the officer should have the right to appeal that decision.
- 5.4 If the Employment Matters Committees recommends that the officer should be dismissed it will forward its proposal and the necessary information to the Independent Persons Panel. The Panel will consider the proposal and the necessary particulars and decide what advice, views or recommendations to make to full Council. Full Council will decide whether or not to dismiss the officer, having regard to any advice, views or recommendations of the Panel, the conclusions of any investigation, and any representations from the officer.

b) Disciplinary Appeals Committee

- 5.5 It is proposed to set up a new appeals committee comprising three Members to determine any appeals by one of the statutory officers against a decision by the Employment Matters Committee to take disciplinary action short of dismissal.
- 5.6 A new committee is needed to hear any such appeals given that the Employment Matters Appeals Panel, as a sub-committee of the Employment Matters Committee, will comprise Members of the Committee who took the decision being appealed against.

c) The Independent Persons Panel

- 5.7 It is recommended that a standing Independent Persons Panel should be established, comprising three Independent Persons (IPs) and a substitute IP, appointed in priority order in accordance with the Regulations. The Panel will be an advisory committee of the Council. The substitute would take the place

of any IP who was unable to participate because he or she was not available at the time, or had a personal conflict of interest. The Council currently has two IPs. In line with the priority order set out in the 2015 Regulations the Council's two IPs would be invited to serve on the Panel first and then an invitation would be extended to an IP from another authority in Kent. It is recommended that the Head of Democratic Services is authorised to make these invitations.

- 5.8 If a Council has fewer than two IPs, it must extend the invitation to one or more IPs from another authority. If more accept the invitation than are needed, then appointments must be made in the following priority order:
- An IP appointed by the Council who is on the electoral register in Medway
 - Any other IP appointed by the Council
 - An IP who has been appointed by another authority
- 5.9 At least two of the IPs who have accepted the invitation must be appointed, but there is no upper limit. They can be paid an allowance or expenses, but no more than they would receive for their Localism Act work. The appointment must be made at least 20 days before Council takes a decision to approve the dismissal of a Statutory Officer. At the full Council meeting, the authority must take into account any advice, views or recommendations of the Panel as well as the conclusions of any investigation and any representations made by the officer concerned.
- 5.10 The JNC for Local Authority Chief Executives (the JNC) has sought clarification from DCLG on whether the Panel referred to above should be comprised solely of independent persons or whether it can, or should, also include elected members. DCLG has indicated that the intention is that this Panel should consist solely of IPs "*so that independent scrutiny can be attained before a full council takes the final decision on a dismissal motion*". The proposal is therefore to follow that approach as this emphasises the independence of the Panel while still ensuring Member involvement at every other stage of the process.
- 5.11 One of the difficulties in implementing the 2015 Regulations has been its apparent incompatibility with the Localism Act in relation to the appointment of independent persons. S. 28 (8) of the Localism Act provides that any independent person appointed to provide a view on councillor conduct issues is ineligible to be appointed to this position if they are a voting co-opted member of a committee of the council (and/or hold such a position at any time during the 5 years ending with the appointment). However, an independent person appointed to an Independent Persons Panel under the 2015 Regulations will become a voting co-opted member of a committee of the council. The Council could decide not to give them a vote but that is not recommended as it is difficult to see how the Panel can come to a view on a matter if Panel Members do not have voting rights.
- 5.12 Counsel's advice is that, ultimately, the two pieces of legislation are not in irreconcilable conflict "*because appointment to an IP (i.e. the Independent Persons Panel) cannot itself be regarded as disqualifying an Independent Person (IP) from being such on the basis that the very appointment makes them a co-opted member*". An IP appointed under the Localism Act is not

excluded from continuing in this role by virtue of being appointed as a voting member of the Independent Persons Panel as on that logic they would be prevented from serving on the Panel as they would no longer be an independent person.

- 5.13 The Kent Secretaries Group have agreed in principle reciprocal arrangements whereby each Council is able to invite the IP of another council in Kent to serve on the Independent Persons Panel. This proposal is being explored with the Independent Persons and contact is being made with the Chair of their Forum to seek their agreement to this reciprocal arrangement. Therefore it would be possible for the Independent Persons Panel to comprise one or more IPs from other authorities.
- 5.14 The proposed revised Terms of Reference for the Employment Matters Committee, and the terms of reference for the Independent Persons Panel and the Disciplinary Appeals Committee are attached at **Appendix 1**.

6. Options

- 6.1 The Council could establish a new standing Committee to carry out the additional functions proposed for the Employment Matters Committee.
- 6.2 The Council could include one or more elected members as part of the membership of the Independent Persons Panel, although this is not recommended (paragraph 5.10).

7. Advice and analysis

- 7.1 The model procedure adopts a balanced approach to the need to set up a new disciplinary process, which will ensure that the Council has a fair process which is unlikely to be susceptible to successful challenge. It has taken over a year for the JNC to reach agreement on this process. Any attempt to seek local agreement to a different process is likely to cause further delay and it may be difficult to reach agreement. Any alternative process would have to be fair and comply with employment law, so it would be unlikely to be radically different from the model procedure.
- 7.2 The protection rules which apply to the Statutory Officers are an important means of ensuring good governance and maintaining high standards of legal, ethical and financial conduct and probity. The proposals in this report have been formulated in such a way that implements the 2015 Regulations, maintains those protections and governance safeguards while also minimising the costs and risks to the Council.
- 7.3 A flowchart detailing the processes for dealing with allegations in relation to disciplinary matters relating to the Council's Statutory Officers is attached at **Appendix 4**.

8. Risk management

Risk	Description	Action to avoid or mitigate risk	Risk rating
Reputational damage to the Council/financial loss/Employment Tribunal claim.	The new procedures are challenged as being unlawful or unfair. Decisions taken found to be unlawful.	<p>The proposed procedures have been agreed with Kent Monitoring Officers taking into account detailed advice from Counsel on key issues.</p> <p>These procedures are relatively new and untested. Issues may emerge in the context of national debate or as individual cases come forward. It will be possible for Council to make changes at a future date if necessary.</p>	D2
Council is unable to dismiss a Statutory Officer due to difficulties in establishing an Independent Persons Panel	<p>Inability to appoint sufficient members to the Independent Persons Panel.</p> <p>One of the Council's Independent Persons is unwilling or unable to be re-appointed due to their involvement with the Independent Persons Panel.</p>	Reciprocal arrangements to appoint an IP from another authority have been agreed in principle.	D1
Difficulties in appointing or re-appointing an Independent Person to advise on councillor conduct issues.	A prospective Independent Person is unwilling to be appointed to advise on councillor conduct issues because of the additional responsibility of being called on to advise on an officer disciplinary matter.	Counsel's advice has been received. Reciprocal arrangements to appoint the IP from another authority in Kent have been agreed in principle.	D3
Failure to agree procedures which comply with the Regulations	The Council is vulnerable to claims if its processes do not fully comply with the legislation and its contractual obligations.	The proposals have been agreed with Kent Monitoring Officers following advice from Counsel on key issues.	E2

		The procedures are in line with the JNC for Local Authority Chief Executives model procedures.	
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9. Consultation

- 9.1 Consultation on the revised procedures has taken place with the Council's Statutory Officers. Due to the nature of the issue and the limited external impact of the Regulations it was not considered necessary to consult with the public.

10. Financial implications

- 10.1 The proposals will result in costs being incurred in relation to the appointment of an Independent Investigator and also if either the Disciplinary Appeals Committee or the Independent Persons Panel decides to commission external legal and professional advice. In addition, the Members of the Independent Persons Panel are entitled to receive a fee, which must not exceed the rate payable to that person in respect of their role in advising the Council on Councillor Conduct issues. Any costs will be met from within existing budgets.

11. Legal implications

- 11.1 The Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 require local authorities to make or modify standing orders to include certain provisions relating to staff and other matters. The Council amended the Employment Rules in August 2015 to comply with that requirement and the proposals in this paper are compliant with the 2015 Regulations.
- 11.2 The Independent Persons Panel is an advisory committee of the Council appointed under S.102(4) of the Local Government Act 1972.

12. Recommendations

- 12.1 The Committee is asked to recommend the following to Council:
- a) to extend the terms of reference of the Employment Matters Committee, as set out in Appendix 1;
 - b) to appoint a Disciplinary Appeals Committee and agree its terms of reference, as set out in Appendix 1, and agree the Committee should comprise three Members of the Council appointed on a politically proportionate basis (Cons 2: Lab 1);
 - c) to appoint an Independent Persons Panel, agree its terms of reference, as set out in Appendix 1, and agree that it should comprise three Independent Persons;

- d) to agree to pay a fee to Independent Persons appointed to the Independent Persons Panel equal to the agreed rate paid in respect of their role in advising a Council on Councillor Conduct issues;
- e) to amend the Employment Rules, as set out in Appendix 2;
- f) to amend the Employee Delegation Scheme as set out in Appendix 3, including agreeing to delegate to the Head of Democratic Services authority to invite and appoint members to serve on the Independent Persons Panel as set out in paragraphs 5.7-5.9 of the report, and;
- g) to agree that where the Employment Matters Committee is considering allegations regarding disciplinary matters relating to the Designated Statutory Officers that, for consistency, unless a Member is unavoidably indisposed or conflicted, the same Members shall comprise the Committee until the matter has been dealt with fully and that the same principle shall apply to the Disciplinary Appeals Committee.

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Appendices

Appendix 1 - Revised Chapter 3 (Part 2 – Responsibility for Council Functions) of the Constitution

Appendix 2 - Revised Chapter 4 (Part 8 – Employment Rules) of the Constitution

Appendix 3 - Revised Chapter 3 (Part 4 – Employee Delegation Scheme) of the Constitution

Appendix 4 - Disciplinary Procedure Flowchart

Background papers

None