

## **EMPLOYMENT MATTERS COMMITTEE**

**29 JUNE 2011**

### **DISCIPLINARY PROCEDURE**

Report from: Tricia Palmer, Assistant Director, Organisational Services

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#### **Summary**

This report details the Council's proposals to implement a new Disciplinary Procedure.

#### **1. Budget and Policy Framework**

- 1.1 The procedure lies within the Council's policy and budget framework and the Committee's terms of reference. Therefore, this is a matter for the Employment Matters Committee.

#### **2. Background**

- 2.1 The current Disciplinary Procedure was agreed by the Employment Matters Committee on 12 November 2008 (minute no. 442/11/2008 refers). This was produced in accordance with the ACAS Code of Practice on Disciplinary and Grievance Procedures. Application of the procedure ensures the Council meets its legal obligations to follow the Procedure contained in the ACAS Code of Practice brought into force by the Employment Act 2008.
- 2.2 The proposed revised Disciplinary Procedure remains within the legal framework and introduces suspension without pay in exceptional circumstances, provides examples of potential dismissal for some other substantial reason (SOSR) and clarifies roles and responsibilities. The proposed procedure is attached at Appendix A.
- 2.3 The proposed procedure will help the Council to promote orderly employment relations as well as fairness and consistency in the treatment of individuals. It clearly states what behaviour the Council expects from employees in terms of their conduct and the likely course of action that will be taken if these rules are broken. The procedure also makes it clear the expectations placed on managers to deal with issues of conduct at an early and informal stage.

2.4 There will be other circumstances where employees do not meet the Council's expectations in the way they do their job, for example unsatisfactory performance or capability. These issues are dealt with separately under the Capability Procedure.

### 3. Options

3.1 The options available are either to implement the new procedure or retain the current Disciplinary Procedure.

### 4. Advice and analysis

4.1 Whilst the current Disciplinary Procedure still achieves its aims, a number of recent cases have identified the need for these changes.

4.2 HR Services will communicate the policy changes to the workforce and ensure that managers are appropriately briefed and trained in the revised arrangements.

### 5. Consultation

5.1 This procedure has been consulted upon via the following stakeholder groups:

- Trade unions
- Assistant Directors and Service managers (those who have volunteered to be consulted on policy development)
- Disabled Workers Forum
- Black Workers Forum
- LGBT Forum
- Medway Council legal services.

5.2 A number of suggested amendments were made by these groups and wherever possible, the suggestions were taken on board.

5.3 The comments from the trade unions were seriously considered and the comments received and the responses from HR Services are set out below.

- **UNISON comment:** 6.1. A conviction of a serious criminal offence is, in the words of ACAS "not normally in itself reason for disciplinary action". Consideration needs to be given to what effect the charge or conviction has on the employee's suitability to do the job, and their relationship with the employer, customers etc. The wording at 11.1 is more appropriate.
- **Response from HR:** This is covered in 11.1
- **UNISON comment:** 6.13. It is not appropriate to deal with a grievance as part of the disciplinary hearing, but the grievance process can run concurrently.

- **Response from HR:** Not agreed – there is no proposed change here from existing procedure.
- **UNISON comment:** 8.8 What is an ‘informal reprimand’ and what is its status? How long on file? We would request that the employee has a right of appeal against an informal reprimand as it is held on the persons file.
- **Response from HR:** It is part of the informal stage and remains on record. There is no right of appeal under the existing procedure.
- **UNISON comment:** 10.3 says “In most cases, a meeting will take place with the employee, who may be accompanied by a trade union representative or workplace colleague. A meeting should not be delayed due to the unavailability of a trade union representative or workplace colleague.” This is hardly acceptable given the present debacle regarding facilities budget? More flexibility will be expected from management to take on board the specific issues budget cuts are making in obstructing our members right to representation.
- **Response from HR:** Suspensions only happen in particularly serious situations and cannot be delayed just because a TU representative is not available but we will of course make every effort to ensure representation.
- **UNISON comment:** 10.5 states “The following support should be offered to the employee during the period of suspension:
  - The name of a responsible person to act as a point of contact, to provide information as to the progress of the investigation
  - If appropriate, counselling may be offered through Care First
  - Reasonable access to information which will help them prepare their case for a formal disciplinary hearing”

Unison requested that “reasonable” should be removed as the manager and investigations officer are not restricted therefore employee should not be.

- **Response from HR:** Agreed – the word “reasonable has been removed.
- **UNISON comment:** 10.7 states “Suspension is not a punitive measure and is usually on full pay. In exceptional circumstances consideration will be given to suspension without pay. This is only likely to be appropriate where an employee is in prison custody, has been convicted (or is highly likely to be) of a serious criminal offence or has admitted to an offence under Police or formal caution whereby the effect of the charge or conviction has considerable impact on the employees suitability to do the job or is a conviction for crimes against the Council.” Unison submitted that assumptions should not be made about someone’s guilt, before a criminal trial. Suspension without pay is not a sanction in itself and as in the comments above; a conviction is

not automatically a reason for disciplinary action. Therefore, no sanction should be imposed until a disciplinary hearing has taken place.

- **HR Response:** Not agreed – the proposed procedure states “in exceptional circumstances”. The council has had 2 cases recently of serious fraud and theft against the Council – amounting to thousands of pounds. It is believed that in such cases suspension without pay is appropriate and that no further public funds should be paid in such cases. Please be assured that this will only apply in severe cases.
  
- **UNISON comment:** 14.2 states “The employee should be provided with the management case at least 10 days in advance” UNISON submitted that otherwise it will be difficult to provide HR with any counter documents and witnesses within 5 working days. UNISON also submitted that the format of these documents has been not consistent in the past and they need more in here about the format, the signature panels and annotated that the employee has to sign and return the documents if they agree with them and what to do if they don't.
- **HR Response:** It is agreed that 10 working days notice should be given. It is not appropriate to detail in the policy what the format will be – this will be covered in Managers guidance/ briefings.
  
- **UNISON comment:** Regarding 15.3: Why if there is part of a case to answer but not fully cannot a reprimand be given? A case once heard do not always fit 1, 2 or 3 or no case to answer and panels sometime find it difficult for no case and end up giving a First Written.
- **HR Response:** As the investigation has determined there is a case to answer in accordance with the formal procedure even if only part of the allegation is upheld it is appropriate to issue the lowest level of formal sanction, i.e. first written warning.
  
- **UNISON comment:** 15.3 Other Sanctions states:  
In exceptional circumstances and / or as an alternative to dismissal, it may be appropriate to consider one of the following:
  - (i) Withholding of incremental progression
  - (ii) Demotion / Transfer without salary protectionUNISON suggested this should be removed and may be more appropriate under the capability procedure.
- **HR Response:** This is standard in disciplinary procedures and there is no change from existing procedure.

5.4 A Diversity Impact Assessment (DIA) has been undertaken on the proposals and it has been found that it is not necessary to carry out a full impact assessment. The screening form is attached at appendix B to the report.

## **6. Financial, legal and risk management implications**

- 6.1 There are no direct financial implications. However the maximum compensatory award payable for unfair dismissal cases at Employment Tribunal is £68,400. There is no statutory cap on compensation payable under the equalities legislation or in cases of protected disclosure (Whistle Blowing).
- 6.2 This procedure enables the Council to comply with the requirements of the ACAS code of practice on disciplinary procedures. A failure to comply with the requirements of the Code places the Council at risk of a possible uplift of an award against it of up to 25%.
- 6.3 The leading Statutory Authority lies with
- Employment Rights Act 1996
  - Employment Relations Act 1999
  - ACAS Code of Practice on Disciplinary and Grievance Procedures
  - Employment Act 2008
  - Equality Act 2010.

## **7. Recommendations**

- 7.1 That the Employment Matters Committee agrees to the implementation of the revised Disciplinary Procedure, as set out on Appendix A to the report.
- 7.2 That officers review the Disciplinary Procedure bi-annually and report to Members when necessary with any changes

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### **Background papers**

ACAS Code of Practice on Disciplinary and Grievance Procedures  
[www.acas.org.uk](http://www.acas.org.uk)





# **Medway Council**

## **DISCIPLINARY PROCEDURE**

*June 2011*



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## **1.0 Introduction**

- 1.1 All employees of Medway Council are expected to maintain high standards of conduct.
- 1.2 Medway Council recognises the shared responsibility between managers and employees for maintaining acceptable standards of behaviour, conduct and performance at work. Whilst most day-to-day issues will be picked up through regular communication and supervision between managers and their staff, there are occasions when an individual's conduct may need more serious attention.
- 1.3 This procedure is designed to help and encourage employees to achieve and maintain standards of conduct and aims to ensure fairness, equity and consistency in the management of employees in accordance with working for Medway: 'Guidelines for staff'.
- 1.4 The principles of the procedure are based on employment law rather than criminal law and decisions are made on the balance of probabilities, i.e. where the evidence considered is more likely to be true than not true.
- 1.5 This policy should be used in cases where conduct is allegedly unsatisfactory. It does not apply where there are matters of:
  - Minor misconduct that can be dealt with informally by means of guidance, training or informal reprimand in order to improve conduct
  - Grievance which is dealt with under a separate procedure
  - Competency or capability which is dealt with under a separate procedure, unless it is clear that the employee is capable of reaching the required standard and has not done so or where there is evidence to suggest that an employee has been willfully negligent in carrying out their duties and responsibilities
  - Ill health for which there is a separate procedure unless there is evidence of abuse of the sickness absence procedure
  - Bullying, harassment, discrimination and / or victimisation which are dealt with in the first instance under the Dignity at Work Procedure

## **2.0 Equalities Statement**

- 2.1 Medway Council is committed to providing equal opportunities and access to all. This policy statement embraces the spirit of managing a diverse workforce and those managing and dealing with the process of the Disciplinary Procedure must ensure that no employee is discriminated against either directly or indirectly or victimised on the grounds of their race, disability, sex, sexual orientation, religion or belief, age, marital or civil partnership status or any stage of gender reassignment.

### **3.0 Core Values and council objectives**

3.1 This policy supports the Council's Core Values. The council believes that a consistent approach to employee management and well being is fundamental to the delivery of quality services to the public.

### **4.0 Scope**

4.1 This procedure applies to permanent and temporary employees of Medway Council, subject to 4.2 below.

4.2 This procedure does not apply to the following employees:

(1) The Chief Executive, the Section 151 Officer or the Monitoring Officer who are subject to statutory regulations

(2) School based staff and centrally employed teachers who are covered by a separate procedure

### **5.0 Roles and responsibilities**

#### **5.1 Employee responsibilities:**

- Making themselves fully aware of the conduct expected of them and ensuring they observe this at all times
- Asking questions of his/her line manager or HR if he/she is unsure about any aspect of the disciplinary procedure
- Responding positively to informal attempts to resolve disciplinary issues by the line manager
- Co-operating fully during all stages of the procedure
- Willingly engage in training or development to correct or improve behaviour or conduct
- Arrange their own representation at meetings/hearings

#### **5.2 Line Managers responsibilities:**

- Monitoring the conduct of their staff, making clear the standard of conduct that Medway Council expects of them and for giving them help and encouragement to reach required standards
- Taking timely but considered action in all cases, supported by HR Advice, where an employee's conduct gives cause for concern
- Ensuring standards of fairness, objectivity and consistency in treatment of staff, in all cases.

### 5.3 HR Services responsibilities:

- Providing advice to managers and investigating officers on disciplinary matters, on request
- Advising the Chair and forming part of the disciplinary panel at hearings and appeals
- Advising managers / investigating officers on the content of letters
- Collating all relevant documentation from all relevant parties involved in disciplinary cases, distributing and filing it appropriately
- Monitoring the outcome and impact of the disciplinary procedure on protected groups of staff as per the Council's equal opportunities obligations.

### 5.4 Trade Union Representative / Work place colleague responsibilities:

- Attend formal disciplinary meetings, in the role of representative
- Address meetings at the outset (to put forward a case)
- Address meetings at the end (to sum up a case)
- Respond to any views expressed at meetings
- Confer with the member of staff during meetings.

The Trade union representative / work place colleague does not have the right to:

- Answer questions on behalf of the member of staff (i.e. if a question is directed at the member of staff)
- Address meetings if the member of staff does not wish it
- Prevent any party from explaining their case.

## 6.0 Principles

- 6.1 Managers will try to resolve issues of minor misconduct informally. However where this approach has been tried and has not worked, or where the misconduct is more serious, formal disciplinary action will be considered.
- 6.2 Allegations of misconduct will normally be investigated before any disciplinary action is taken. Exceptionally, the circumstances may be such that an investigation is not required, for example where the employee admits to the misconduct, or where the facts of the case are already explicitly clear (e.g. conviction of a serious criminal offence, etc.). In these circumstances the case will proceed directly to a disciplinary hearing.
- 6.3 The employee will be advised in writing of the nature of the complaint against him/her; given the opportunity to state his/her case and present relevant evidence to a

disciplinary hearing before any decision is made. The employee will have the right of appeal against any formal disciplinary action under this procedure.

- 6.4 At all stages of the formal process the employee will have the right to be accompanied by a trade union representative or work place colleague. No other representatives are acceptable, apart from cases where a consequence of a hearing or appeal could be the addition of the employee's name to a register of individuals deemed unsuitable to work with children or vulnerable adults and of the deregistration from their professional body. In such cases, legal representation may be permitted at the hearing and appeal stages only.
- 6.5 Employees will not generally be dismissed for a first incident of misconduct except in the case of gross misconduct.
- 6.6 Information relating to formal proceedings will be kept confidential.
- 6.7 The timescales within this procedure may be varied by agreement. However any disciplinary issues will be handled promptly and in a fair and consistent manner.
- 6.8 The procedure can be started at any stage. The first stage will depend on the nature of the alleged misconduct.
- 6.9 An employee or trade union representative / workplace colleague who cannot attend a hearing because of illness or other unforeseen circumstances should notify Human Resources at the earliest opportunity and give full reasons. The hearing will usually be rearranged. However, if no reason is received or the employee or trade union representative / workplace colleague fails to attend a second time then the hearing will proceed in their absence. The reason for non-attendance will be recorded.
- 6.10 In all instances of alleged misconduct, however serious, the employee will normally be given the opportunity and reasonable notice i.e. (no less than ten working days unless by agreement) to attend a disciplinary hearing to explain their action.
- 6.11 Throughout the procedure, managers will demonstrate their commitment to equal opportunities and carry out fair investigations and hearings taking account of Medway's equal opportunities policy.
- 6.12 As an employee faced with possible disciplinary action is likely to find the situation stressful, the employee should be made aware of the confidential counselling service available as follows: -
  - Care first – Tel: 0800 174 319 [www.care-first.co.uk](http://www.care-first.co.uk)
- 6.13 Disciplinary and dismissal proceedings shall not be affected or interrupted by the employee who is subject to the procedure invoking the grievance procedure. Any grievance raised during the course of these proceedings, that relates to disciplinary action or dismissal, will be dealt with as part of the disciplinary hearing, statutory dismissal meeting or appeal hearing / meeting as appropriate. Where an employee is on sickness absence leave at the time of a disciplinary process, Occupational Health advice will be sought, if deemed appropriate.

- 6.14 All steps of the formal procedure should be completed as speedily as possible in the interests of both management and staff, and particularly in respect of cases of alleged gross misconduct. However this shall not be to the detriment of a fair investigation or the principles of natural justice.

## **7.0 ACTION AGAINST A TRADE UNION REPRESENTATIVE**

- 7.1 No formal action will be taken against a trade union representative until the circumstances of the case have been discussed with a regional officer of the trade union concerned. In cases of alleged gross misconduct against a trade union representative and where a regional officer cannot quickly be contacted, the trade union representative may be suspended on full pay until the regional officer has been contacted and further action discussed.

## **8.0 INFORMAL STAGE**

- 8.1 Where possible, matters relating to conduct and discipline should be resolved informally. This may be achieved by the manager giving the employee informal advice, coaching and counselling and, if appropriate an informal reprimand. This informal process does not constitute formal disciplinary action under this procedure.
- 8.2 The manager will talk to the employee in private. This will be a two-way discussion aimed at pointing out their shortcomings in conduct and encouraging improvement.
- 8.3 The manager will listen to whatever the employee has to say about the issues.
- 8.4 Where improvement is required the manager will ensure that the employee understands what needs to be done, how their conduct will be reviewed and over what period. The employee will be told that if there is no improvement then the next stage will be to invoke the formal disciplinary procedure.
- 8.5 Written notes will be kept of the meeting and it is recommended that these be shared with both parties. Any disagreement by the employee as to the accuracy of the notes should be formally recorded and added to the note. The written note will be kept on the employee's personnel file.
- 8.6 The action agreed will be in writing.
- 8.7 If during discussions it becomes obvious that the matter may warrant formal investigation the meeting should be stopped and the employee told that the matter will be continued under the formal procedure.
- 8.8 Informal reprimand – if following informal discussion the manager considers it appropriate to issue an informal reprimand, this must be given at the meeting and be made clear to the employee.

## **9.0 FORMAL STAGE**

### **Informing the employee of the allegations**

- 9.1 In cases of alleged misconduct the employee will be informed of the nature of the allegations and that an investigation will be conducted. Where the employee admits to the misconduct or the facts are explicitly clear, the circumstances may be such that an investigation is not required and the case proceeds directly to a disciplinary hearing.

### **Investigation**

- 9.2 The aim of the investigation is to establish the facts of the case as promptly and thoroughly as practicable.
- 9.3 The employee must be informed in writing:
- That an investigation is taking place and that they will be given the opportunity to respond to the allegation(s)
  - Of general details of the complaint / allegation(s)
  - Who the investigating officer will be
  - That they are entitled to be accompanied by a workplace colleague or trade union representative to any meetings
- 9.4 The investigating officer (who will be nominated by the appropriate Director or Assistant Director) will promptly establish what has happened, obtain written statements from witnesses and record all the facts. A member of Human Resources will be available to provide procedural guidance to the investigating officer, but will not normally form part of the investigation itself.
- 9.5 Any witnesses to alleged offences should be asked to make written statements and to sign and date their statements. Any witnesses must be informed that they may be asked to attend a disciplinary hearing to act as a witness.
- 9.6 Sometimes it may be appropriate for an external investigating officer to be appointed, for example where particular expertise is required. The appropriate Director or Assistant Director in conjunction with Human Resources will nominate the external investigating officer. A member of Human Resources will provide procedural guidance to the investigating officer.
- 9.7 It may be necessary to suspend an employee prior to an investigation being undertaken. Alternatives to suspension may also be appropriate. (Please see section 10.0 below).
- 9.8 As part of the investigation the investigating officer will interview the employee and any other relevant witnesses. The investigating officer will obtain written statements, and collect all relevant documentation relating to the investigation. The employee should be clear that the interview is part of the investigation, not part of a disciplinary hearing.

On conclusion of the investigation, the investigating officer will decide, in consultation with a Human Resources representative, whether to proceed to a formal disciplinary hearing. If it is clear that there is an adequate explanation and there is no case to answer, no further action will be taken and all details referring to the investigation shall be removed from the employees file, except in cases of child protection or adult abuse.

9.9 The employee under investigation will be kept informed at all stages by the investigating officer. Every effort will be made to conclude the investigation as quickly as possible.

## **10.0 SUSPENSION**

10.1 Suspension should only be applied where the circumstances of the case make it unacceptable for the employee to remain in work while the facts are ascertained. Such circumstances are where there is an allegation, or potential allegation of gross misconduct, i.e. behaviour that may result in dismissal. Suspension may also be appropriate where:

- Children / adults are at risk
- The employee needs protection themselves
- Where the presence of the employee at work may impede the investigation.

10.2 Any decision to suspend will be made by the Chief Executive, a Director or Assistant Director following consultation with a Human Resources representative. The Assistant Director, Organisational Services (or nominated representative) and Chief Executive/ Director/Assistant Director should sign a suspension form.

10.3 In most cases, a meeting will take place with the employee, who may be accompanied by a trade union representative or workplace colleague. A meeting should not be delayed due to the unavailability of a trade union representative or workplace colleague.

10.4 At the meeting the employee will be told of the allegations and asked for their response to the allegations. If the employee's explanation is not accepted they will immediately be suspended. The employee should also be told:

- That they will continue to receive their normal pay (unless in exceptional circumstances as set out in 10.7)
- The reason for suspension
- The period anticipated for the suspension. The suspension will normally last until the investigation has been concluded or any resulting disciplinary hearing has been held
- Other rules (e.g. that they must not return to the workplace, contact particular members of staff)

- That they should be available to attend any investigatory meeting or hearing during the period of suspension during their normal working hours
  - That they should notify management of any authorised annual leave
  - That they can request annual leave during the period of suspension
  - That they should return upon request any particular items such as keys, laptop computer etc.
- 10.5 The following support should be offered to the employee during the period of suspension:
- The name of a responsible person to act as a point of contact, to provide information as to the progress of the investigation
  - If appropriate, counselling may be offered through Care First
  - Access to information which will help them prepare their case for a formal disciplinary hearing
- 10.6 The above should be confirmed in writing to the employee within two working days.
- 10.7 Suspension is not a punitive measure and is usually on full pay. In exceptional circumstances consideration will be given to suspension without pay. This is only likely to be appropriate where an employee is in prison custody, has been convicted (or is highly likely to be) of a serious criminal offence or has admitted to an offence under Police or formal caution whereby the effect of the charge or conviction has considerable impact on the employees suitability to do the job or is a conviction for crimes against the Council.
- 10.8 An employee can be suspended at any stage during the disciplinary process where it is considered appropriate e.g. when further information comes to light
- 10.9 In some circumstances, as an alternative to suspension, it may be appropriate to redeploy the employee to a temporary alternative location whilst the initial investigation is undertaken at no detriment to them. Alternatively, it may be necessary to place an employee on a period of additional leave to allow for an initial investigation of the facts to be undertaken. Such leave is determined by management and is a neutral position. During this period the employee will continue to receive full pay as if they were at work.

## **11.0 CRIMINAL OFFENCES**

- 11.1 Medway Council will treat seriously any employee who is charged with a criminal offence, although being charged with, or convicted of a criminal offence does not automatically lead to dismissal. It would depend on the offence, its seriousness and the effect on the employee's ability to continue to do the job he or she was employed to do, or how it might affect the Council's credibility with the public. Employment law is based on different principles to criminal law, which means that the Council can take disciplinary action before the outcome of a criminal case. An employee found not guilty of a criminal offence will not necessarily be immune from disciplinary action.
- 11.2 Medway Council will request a copy of the crime report, witness statements, suspect PACE interview or a summary report from the police or fraud investigation team to inform the internal disciplinary investigation.
- 11.3 Where this evidence supports the allegation of gross misconduct, the employee has admitted the offence under Police or formal caution and the charge or conviction is such as to affect (or likely to affect) the suitability of the employee for the position they are employed, then the case will proceed directly to a disciplinary hearing (section 16.0), where the employee will be allowed to account for their conduct and put forward any mitigating factors.

## **12.0 ALLEGATIONS OF CHILD / ADULT ABUSE**

- 12.1 Allegations of child / adult abuse should be referred to the designated officers(s) before any investigation is commenced to ascertain whether statutory processes should commence involving the police and relevant agencies.

## **13.0 FINANCIAL MISCONDUCT**

- 13.1 Where the alleged misconduct has arisen as a result of an Audit investigation, Human Resources must be informed of the matter as soon as possible. A disciplinary investigation will be conducted as soon as possible, and wherever possible, Audit will provide information to inform the investigation. In some cases the Audit investigation may cover all that is required for a disciplinary investigation.

## **14.0 THE DISCIPLINARY HEARING**

### **Notification**

- 14.1 Following the investigation, a disciplinary hearing may be convened. The disciplinary hearing will decide what, if any, action should be taken in respect of the alleged misconduct.
- 14.2 The employee will normally be given no less than 10 working days notice in writing of the disciplinary hearing, unless all parties are in agreement to hold the hearing at an earlier date. Human Resources will write to the employee to confirm the allegations against him/her and inform him/her of the date, time and venue for the disciplinary hearing. This notification will remind the employee of his/her right to be accompanied

by a trade union representative or workplace colleague (or legal representation if the provisions of clause 6.4 apply) and include copies of documents that will be used to support management's case along with the names of witnesses to be called.

- 14.3 The employee will be informed if the outcome of the hearing could be dismissal (normally where the allegations are for gross misconduct or where the employee is subject to a final written warning that had not expired at the time of the alleged misconduct or where the potential dismissal is for some other substantial reason – see **Appendix 1**). This should happen at the earliest appropriate point and at the conclusion of the investigation at the latest.
- 14.4 The employee will be required to provide Human Resources with all documents he/she intends to rely upon at the hearing along with the names of any witnesses they intend to call, at least 5 working days before the hearing. The panel can decide not to accept late documentation or witnesses, which have not been notified in advance. Any alternative timescale will be by agreement between the parties.
- 14.5 Failure to attend a hearing is covered in 6.9 above.

### **Procedure at hearing**

- 14.6 At the hearing each side will be entitled to present their case and call witnesses. Each party will be able to ask questions and comment on the case presented by the other side. A procedure to be followed at disciplinary hearings can be found at **Appendix 2**.
- 14.7 Notes of the hearing will be taken by an experienced note-taker provided by the Director of the Directorate where the employee subject to disciplinary action works. A copy of the notes will be supplied to the employee and or representative.
- 14.8 A Human Resources representative will form part of the disciplinary panel.

## **15.0 DISCIPLINARY ACTION**

- 15.1 Following the hearing a finding will be made on the balance of probability as to whether the allegation(s) are proven or not, setting out the evidence supporting the decision on each allegation, then a decision will be taken on the appropriate disciplinary action. Wherever possible the decision will be notified to the employee verbally on the same day. If this is not possible it shall be confirmed in writing within 5 working days.
- 15.2 It is the responsibility of the panel to communicate their decision and any recommendations to the employee's management. This responsibility extends to monitoring the implementation of any actions associated with the recommendations and reporting to the relevant AD where these have not been implemented

15.3 Where an employee is found to have committed misconduct the following actions may be taken:

**(1) First written warning**

The warning will:

- Set out the nature of the misconduct and the evidence supporting the decision
- State that failure to improve, or any repetition within the specified timescale could lead to more serious formal action being taken, including dismissal, and
- Refer to the right to raise an appeal within 5 working days of written notification of the outcome of the hearing and the name of the person and address where the appeal must be sent.

A record of the first written warning will be kept on the personal file. The warning will be disregarded for disciplinary purposes after 12 months unless the Council is required not to do so by statute or regulation or has good reason.

**(2) Final written warning**

Where there is a failure to improve or change behaviour in the timescale set at the first formal stage, or where the offence is very serious (but does not warrant dismissal) the employee should normally be issued with a final written warning. A final written warning may be issued even though no previous disciplinary action has been taken where it is warranted by circumstances and there is a degree of serious misconduct by the employee. The final written warning will:

- Set out the nature of the misconduct and the evidence supporting the decision and refer to any previous warning where appropriate;
- State that failure to improve or any repetition within the specified timescale may lead to dismissal
- Refer to the right to raise an appeal within 5 working days of written notification of the outcome of the hearing and the name of the person and address where the appeal must be sent.

A record of this final written warning will be kept on the personal file. The warning will be disregarded for disciplinary purposes after 2 years unless the Council is required not to do so by statute or regulation or has good reason.

**(3) Dismissal with Notice**

Where an employee has previously received a final written warning and is guilty of further misconduct serious enough to warrant disciplinary action, then the employee will normally be dismissed in accordance with the terms of their contract of employment.

The person chairing the hearing will write to the employee within 5 working days of the decision giving reasons for dismissal, the date on which employment is terminated and to advise the employee of their right to appeal.

#### **(4) Other Sanctions**

In exceptional circumstances and / or as an alternative to dismissal, it may be appropriate to consider one of the following:

- (i) Withholding of incremental progression
- (ii) Demotion / Transfer without salary protection

#### **(5) Gross Misconduct**

If the employee is guilty of gross misconduct they will be summarily dismissed i.e. without notice or pay in lieu of notice. Exceptionally dismissal with notice may be appropriate.

The person chairing the hearing will write to the employee within 5 working days of the decision giving reasons for the dismissal, the date on which employment is terminated and to advise the employee of their right to appeal.

#### **NOTE:**

If dismissing a member of staff working in the provision of social care services to children or vulnerable adults, and where dismissal has occurred on grounds of misconduct which harmed, or placed at risk of harm, a child or vulnerable adult there is a statutory requirement for the council to apply the provisions of the Independent Safeguarding Authority.

### **16.0 DISREGARDED WARNINGS AND INDEFINITE WARNINGS**

- 16.1 A warning will normally be disregarded after 12 months in the case of a first written warning, and two years in the case of a final written warning. However where statutory regulations apply (for example where the employee works with children and / or vulnerable adults) warnings will stay live indefinitely, or as required by the regulations. If further misconduct is found to have occurred after a warning has expired, it is permissible to take this into account at a future disciplinary hearing when considering the overall employment of that employee.

### **17.0 DISCIPLINARY APPEALS**

- 17.1 An employee is entitled to appeal against the formal decision taken at the disciplinary hearing.
- 17.2 The appeal must be made in writing, addressed to the Assistant Director (Organisational Services), stating the grounds for the appeal, within 5 working days of being advised in writing of the decision of the disciplinary hearing.
- 17.3 The letter of appeal from the employee must clearly state the reasons for appealing e.g.:

- It is alleged that the disciplinary procedure has not been properly applied or an appropriate investigation conducted
  - New evidence has come to light which was not available at the disciplinary hearing and which may make a difference to the original decision
  - The disciplinary sanction was too severe.
- 17.4 The disciplinary appeal will be heard as soon as possible taking into account the availability of all those involved and unless agreed otherwise not normally later than 20 working days following the date of receipt of the appeal.
- 17.5 The employee will normally be given no less than 10 working days notice, in writing, of the date of the disciplinary appeal hearing. This notification will give the name of the person chairing the hearing (if it is an appeal against dismissal, the Chair of the Members' Panel is elected at the beginning of the appeal hearing), the names of panel members, and the name of the representative of Human Resources who will advise the panel. It will remind the employee of his / her right to be accompanied at the hearing by a trade union representative or workplace colleague.
- 17.6 No less than 7 working days before the date of the appeal, unless otherwise agreed, both sides will exchange with each other and supply Human Resources with copies of documents they intend to rely upon at the appeal and a list of witnesses. The panel may decide not to accept late submission of documents and / or witnesses unless the evidence was not available at the time of exchange.
- 17.7 The manager who dealt with the disciplinary hearing will attend the appeal hearing and present the management case. They will normally be accompanied by the Human Resources adviser who advised them at the disciplinary hearing. The employee will attend the appeal and has the right to be accompanied by a trade union representative or workplace colleague.
- 17.8 The employee or their representative will present their case referring to evidence and calling witnesses as necessary, the manager who dealt with the disciplinary case will present the management case. Both parties will have the opportunity to question the other and any witnesses called as will the appeal panel.
- 17.9 The appeal panel will review the decision of the disciplinary hearing in the light of the evidence presented at the appeal hearing and taking into account the grounds of appeal will decide whether or not to confirm the disciplinary decision, overturn the disciplinary decision or impose a lesser penalty.
- 17.10 The employee will be informed of the decision of the appeal panel in writing; the panel will set out the reasons for its decision within 5 working days.
- 17.11 The procedure to be followed at appeal hearings can be found at **Appendix 3**.

## **18.0 Guidance for line managers**

- 18.1 Managers, at all levels, who may be involved in disciplinary action shall be fully briefed in the operation of this procedure.
- 18.2 To ensure consistency of approach across the Authority, Human Resources will provide advice to managers and investigating officers in all disciplinary investigations and will form part of the disciplinary panel at hearings and appeals.

## **19.0 Monitoring and review**

- 19.1 A Diversity Impact Assessment will be undertaken at each review of this policy.
- 19.2 HR Services will monitor the outcome and impact of the disciplinary procedure on protected groups of staff as per the Council's equal opportunities obligations.
- 19.3 The disciplinary procedure will be reviewed periodically in line with developments in good practice

## **20. Relevant legislation**

- 20.1 This procedure follows the advice contained in both the ACAS Code of Practice 'Disciplinary Practice and Procedures in Employment' and the Advisory Handbook 'Discipline at Work'.
- 20.2 This disciplinary procedure may be used in conjunction with other Medway Council procedures, such as the Child Protection Procedure, Adult Abuse or Dignity at Work Procedure. The inter-relationship with Codes of Practice of relevant professional bodies must be recognised. The Council may report action taken under this disciplinary procedure to the relevant professional body and may take action under this procedure if an employee is removed from the relevant professional bodies register for professional misconduct
- 20.3 Employment Rights Act 1996  
Employment Relations Act 1999  
Employment Act 2008  
Employment Act 2008 (Commencement No. 1 Transitional Provisions and Savings) Order 2008  
Equality Act 2010  
Equality Act 2010 (Consequential Amendments, Saving and Supplementary Provisions) Order 2010

## 21 Table

<b>Subject/Title</b>	
Date agreed by Employment Matters Committee:	<b>29 June 2011 (TBC)</b>
Team responsible for policy	<b>Employee Relations</b>
Date of Review:	<b>June 2013</b>
Toolkit updated by:	<b>HR Services</b>

# Appendix 1

## EXAMPLES OF MISCONDUCT, GROSS MISCONDUCT AND DISMISSAL FOR SOME OTHER SUBSTANTIAL REASON

### Examples of misconduct:

Ordinary misconduct is conduct of such a kind as to warrant disciplinary action rather than dismissal for a first offence on the part of the employee, and the warning procedure will normally be followed.

- Unauthorised or casual absence from work, including repeated late attendance or persistent absenteeism
- Failure to comply with the Council's code of conduct for employees
- Persistent failure to comply with sickness absence reporting procedures
- Failure to comply with the provisions of the Data Protection legislation
- Failure to comply with the Council's Rules of Procedure including financial Procedure Rules
- Using threatening or abusive language/behaviour towards colleagues, Council members or members of the public. This can be regarded as gross misconduct depending upon the circumstances.
- Failure to observe corporate and/or directorate safety rules and regulations
- Failure to comply with a reasonable instruction, or provide information that is needed by a manager
- Wilful inefficiency or neglect of duties and responsibilities
- Failure to observe the Council's Equal Opportunity policy and acts of discrimination against or harassment of employees, council members, clients or members of the public on any grounds
- Failure to comply with general office rules
- Unauthorised additional employment
- Inappropriate use of Council time, property and telephone e.g. misuse of e-mail and internet facilities for inappropriate personal use.

### Examples of Gross Misconduct:

Gross misconduct is of such a kind that in the light of the employee's action, the council cannot allow the employee to continue work and sees no alternative to dismissal on the grounds of gross misconduct or suspension pending an investigation.

- Persistent and wilful refusal to carry out a reasonable management instruction
- Serious or deliberate failure to comply with the Council's Code of Conduct for employees; Financial regulations and standing orders and corporate or directorate health and safety policies and practices
- Improper disclosure of confidential information
- Physical violence or assault of, or towards a member of the public, Council members or staff
- Theft or attempted theft of cash or property belonging to the Council or an employee of the Council
- Cash shortage by reason of negligence in relation to money within your responsibility

- Serious or persistent acts of discrimination or harassment.
- Conduct of a fraudulent nature, including falsification of time sheets, sickness absence forms, time sheets and fraudulently recording arrival on behalf of other employees, or inappropriate application of the Council's services
- Wilful and irresponsible actions or omissions which would endanger people or property
- Acts of professional negligence or grossly inadequate standards of work due to neglect or wilful failure to perform
- Conduct liable to cause serious loss of confidence in the Council or considered contrary to the interests of the Council. In addition to those mentioned in the Code of Conduct, this includes criminal offences outside of work, which may affect the continued performance of your contract of employment
- Interference with or misuse of Council computer systems, hardware, software or data, in such a way as to threaten the continued operation, integrity or security of the Council's systems
- E-mail and internet abuse such as accessing pornographic or offensive material
- Unauthorised removal and use of Council property
- Sexual offences/misconduct at work
- Improper use of an official position for private gain, including seeking and accepting bribes
- Unauthorised use and/or disclosure of information relating to the Council's business, its members, staff or clients (contrary to the Code of Conduct)
- Serious failure to discharge obligations in accordance with statute or contract of employment
- Sleeping on duty unless expressly permitted
- Incapability through the result of the influence of alcohol or other drug misuse
- Causes of child protection or adult abuse
- Failure to report an incident of child protection or adult abuse which has come to your attention.

***The above lists are for illustrative purposes only and are not exhaustive. Each disciplinary case will be viewed on its own merits as to whether it constitutes gross or minor misconduct.***

#### **Dismissal for some other substantial reason:**

Some dismissals do not fall into the specific categories of misconduct or gross misconduct and are termed under the Employment Rights Act 1996 as for "some other substantial reason" (SOSR) dismissals.

An employer is required to show that the substantial reason is a potentially fair one. Any employment tribunal must then decide whether the employer acted reasonably in dismissing for that reason. As in all unfair dismissal claims, an employment tribunal will take into account whether the employee was consulted, given a hearing and appeal rights, and whether dismissal was a reasonable response in the circumstances.

A potentially fair dismissal under SOSR can be made for a variety of reasons, for example

- Where an employee has confirmed that they are not prepared to accept a change in working practises/contractual terms following a reorganisation
- Where there is a serious breakdown in relationship which causes a breach of trust and confidence between the employee and the council
- Where an employee has a sentence of imprisonment imposed upon them which falls outside the normal disciplinary procedure

This list of reasons is not intended in any way to be exhaustive or prescriptive. Each instance must be assessed on an individual basis within the context of the nature of the job and any other relevant circumstances.

A potential dismissal under SOSR will follow the disciplinary process and if there is a dismissal it would be with appropriate notice of termination of services

## Appendix 2

### DISCIPLINARY HEARING PROCEDURE

The hearing will be conducted by an authorised officer who will be accompanied by a Human Resources representative.

The Authorised Officer will explain the procedure to be followed, outline the allegation(s) made and ask the employee whether he/she admits or denies the allegation(s).

- a) The investigating officer will detail the allegations and will present the evidence against the employee and call any witnesses in support of their case.
- b) The employee and/or his/her representative may cross-question the investigating officer and any witnesses and examine any documentary evidence submitted.
- c) The employee and/or his/her representative may present their evidence and call witnesses in support of their case.
- d) The investigating officer may cross-question the employee, his/her representative and any witnesses.
- e) The Authorised Officer and the Human Resources representative may question the investigating officer, the employee, his/her representative and any witnesses.
- f) Witnesses will remain in attendance whilst they are questioned and will withdraw thereafter.
- g) The investigating officer and the employee or his/her representative will have the opportunity to sum up their cases if they so wish.
- h) When the Authorised Officer and the Human Resources representative are satisfied that all the relevant facts have been obtained, they will, in private, consider this evidence, any mitigating circumstances and any previous relevant disciplinary record prior to deciding what action is appropriate.
- i) An adjournment may be approved by the Authorised Officer, if necessary, to obtain further information.
- j) Wherever possible the decision will be notified to the employee and their representative verbally on the day of the hearing and confirmed in writing within 5 working days.
- k) Where disciplinary action is taken, the employee will be informed of his/her right of appeal against the decision.

### DISCIPLINARY APPEALS PROCEDURE

The Chair of the Appeals Panel will conduct the appeal hearing and will explain the purpose of the hearing, outline the procedure to be followed and the powers vested in the Appeals Panel.

- a) The appellant has the right to be represented by his/her Trade Union representative or workplace colleague and may call witnesses and refer to documents.
- b) The appellant (or representative) will put the appellant's case in the presence of the management representative(s) and may call such witnesses as required.
- c) The management representative(s) will have the opportunity to ask questions of the appellant and witnesses who have been called on the evidence.
- d) The members of the Appeals Panel will have the opportunity to ask questions of the appellant and witnesses and call such witnesses as required.
- e) The management representative(s) will put the case in the presence of the appellant and representative and may call witnesses as required.
- f) The appellant or representative will have the opportunity to ask questions of the management representative(s) and any witnesses who have been called on the evidence.
- g) The members of the Appeals Panel will have the opportunity to ask questions of the management representative(s) and call such witnesses as required.
- h) Witnesses will remain in attendance whilst they are questioned and will withdraw thereafter.
- i) The appellant (or representative) and the management representative(s) will have the opportunity to sum up their cases if they so wish.
- j) The management representative(s) and the appellant (and representative) will then withdraw.
- k) The Appeals Panel will deliberate in private.
- l) Wherever possible the decision will be notified to the employee and their representative verbally on the day of the hearing and confirmed in writing within 5 working days.

<b>Directorate</b> Business Support Department	<b>Name of Function or Policy or Major Service Change</b>  <b>Disciplinary Procedure</b>	
Officer responsible for assessment  Paula Charker, Employee Relations Manager	Date of assessment  6 June 2011	New or existing?  Existing
<b>Defining what is being assessed</b>		
<b>1. Briefly describe the purpose and objectives</b>	<p>Ensures fair treatment of individuals involved in disciplinary action, and maintains good employee relations.</p> <p>Establishes a fair procedure in accordance with statutory requirements and ACAS guidance.</p> <p>Resolves disciplinary issues more speedily and at an informal level whenever possible.</p>	
<b>2. Who is intended to benefit, and in what way?</b>	<p>Staff are intended to benefit by being aware of the standards of conduct expected of them as a Medway Council employee. Medway managers are intended to benefit by becoming competent and confident in applying the procedures fairly and consistently. The result will be that Medway customers will benefit by being served by a well motivated workforce.</p>	
<b>3. What outcomes are wanted?</b>	<p>The procedure is fairly and consistently applied leading to resolution of issues at an early and informal stage with a resultant fall in formal disciplinary action which could lead to unfair dismissal claims before an Employment Tribunal.</p>	
<b>4. What factors/forces could contribute/detract from the outcomes?</b>	<p>Contribute</p> <p>Comprehensive training for managers</p> <p>Good staff induction</p> <p>Managers dealing with issues informally and at an early stage</p> <p>Consistent application of the procedure</p> <p>Monitoring of the staff subject to disciplinary action</p>	<p>Detract</p> <p>Managers failing to implement the procedure consistently and speedily</p> <p>Employees refusing to co-operate with informal management guidance</p> <p>Line management confidence and competence to manage effectively</p> <p>Appropriate resourcing (management and HR) of investigations</p> <p>Trades union resistance</p>
<b>5. Who are the main stakeholders?</b>	Managers and employees	
<b>6. Who implements this and who is responsible?</b>	HR Services and managers implement the procedure .HR Services is responsible for the procedure.	

<b>Assessing impact</b>		
<b>7. Are there concerns that there <u>could</u> be a differential impact due to <i>ethnicity/ racial groups</i>?</b>		Currently we report and monitor disciplinary investigations or formal action in relation to ethnicity.
	NO	
<b>What evidence exists for this?</b>	The procedure has been shared with the BWF/ DWF and trades unions. The main concerns were not about the procedure itself but about consistency of application. A managers' toolkit is being developed along with a training programme to address this concern. It should also be borne in mind that an external race equality review on discipline and grievance procedures has been conducted in Medway and concluded that there did not appear to be any evidence of racial discrimination in the application of these procedures.	
<b>8. Are there concerns that there <u>could</u> be a differential impact due to <i>disability</i>?</b>		Currently we monitor and report disciplinary investigations or formal action in relation to disability.
	NO	
<b>What evidence exists for this?</b>	The procedure has been shared with the BWF/DWF and trades unions. The main concern was about consistency of application, which can be addressed through the development of a management toolkit and training programme.	
<b>9. Are there concerns that there <u>could</u> be a differential impact due to <i>gender</i>?</b>		Currently we monitor and report disciplinary investigations or formal action in relation to gender.
	NO	
<b>What evidence exists for this?</b>	The procedure has been shared with the BWF/DWF and trades unions. The main concern was about consistency of application, which can be addressed through the development of a management toolkit and training programme.	
<b>10. Are there concerns there <u>could</u> be a differential impact due to <i>sexual orientation</i>?</b>	YES	Monitoring of sexual orientation has been identified as an issue requiring a corporate approach and has been referred to the Equal Opportunities and Access Core Value Working Group.
<b>What evidence exists for this?</b>		
<b>11. Are there concerns there <u>could</u> be a have a differential impact due to <i>religion or belief</i>?</b>		No evidence to support a differential impact on grounds of religion or belief.
	NO	
<b>What evidence exists for this?</b>		
<b>12. Are there concerns there <u>could</u> be a differential impact due to <i>age</i>?</b>		No evidence to support a differential impact on grounds of age.
	NO	
<b>What evidence exists for this?</b>		

<b>13. Are there concerns that there <u>could</u> be a differential impact due to <i>being transgendered or transsexual</i>?</b>	YES	Monitoring of gender identity has been identified as an issue requiring a corporate approach and has been referred to the Equal Opportunities and Access Core Value Working Group.
<b>What evidence exists for this?</b>		
<b>14. Are there any other groups that would find it difficult to access/make use of services, or who might experience unfavourable treatment, as a result of the function/ policy/ service change (eg people with caring responsibilities or dependants, those with an offending past, or people living in rural areas)?</b>	NO	If yes, which group(s)?
<b>What evidence exists for this?</b>		
<b>15. Are there concerns there <u>could</u> be a differential impact due to <i>multiple discriminations</i> (eg disability and age)?]</b>	YES	Monitoring of cases could highlight some differential impact.
<b>What evidence exists for this?</b>		The BWF/DWF and trades unions have been consulted and expressed concerns about consistent application of the procedure.

<b>Conclusions &amp; recommendation</b>		
<b>16. Could the differential impacts identified in questions 7-15 amount to there being the potential for adverse impact?</b>	YES	Monitoring of cases could highlight some differential impact.
<b>17. Can the adverse impact be justified on the grounds of promoting equality of opportunity for one group? Or another reason?</b>	NO	The procedure should be applied consistently to all staff in line with the Medway Council Equal Opportunity Policy.

<b>Recommendation to proceed to a full impact assessment?</b>		
<b>NO</b>	<b>This function/ policy/ service change complies with the requirements of the legislation and there is evidence to show this is the case.</b>	
	<b>What is required to ensure this complies with the requirements of the legislation?</b> (see DIA Guidance Notes)	None

	<b>Give details of key person responsible and target date for carrying out full impact assessment</b> (see DIA Guidance Notes)	
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<b>Action plan to make minor modifications</b>		
Outcome	Actions (with date of completion)	Officer responsible

<b>Planning ahead: Reminders for the next review</b>		
<b>Date of next review</b>	3 years time.	
<b>Areas to check at next review (eg new census information, new legislation due)</b>	Check whether any particular groups have experienced: i. difficulties in accessing or making use of the function/policy/service; ii. the application of the function/policy/service has been fair and consistent across the council.	
<b>Is there <i>another group</i> (eg new communities) that is relevant and ought to be considered next time?</b>	Check that the function/policy/service continues to be accessible and fairly applied to members of the Council's workforce, including any additional demographic groups, including any additional demographic groups.	
<b>Signed (completing officer/service manager)</b>	<b>Date</b> 6/6/2011	
<b>Signed (service manager/Assistant Director)</b>	<b>Date</b>	