

HAMPSHIRE COUNTY COUNCIL

Decision Report

Decision Maker:	Employment in Hampshire County Council Committee
Date:	22 March 2012
Title:	Managing Misconduct and Incapability – Proposed Changes to the Current Arrangements
Reference:	3763
Report From:	Director of Human Resources

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1. Executive Summary

1.1 The purpose of this report is to:

- i) Outline a number of proposed changes to the way in which the County Council deals with misconduct appeals.
- ii) Seek agreement from the Committee to the recommendations set out in section 10.
- iii) Inform the Committee that a full review of the Disciplinary and Capability Procedures is underway and that this will take account of potential changes to employment legislation.

2. Contextual Information

2.1 The County Council's current arrangements for dealing with misconduct appeals have been in existence for a number of years and in the context of potential changes to employment legislation in this area it is timely to consider the modernisation of existing practices.

2.2 Appeals against misconduct dismissals are heard by elected members. All other forms of dismissal appeal; capability, redundancy, ill-health etc. are heard by officers.

2.3 In recent months the County Council's approach to misconduct appeal hearings has proved problematic in that:

- The process followed at appeal hearings has been unnecessarily complex and time consuming (a six day appeal hearing in the most recent case which was stressful for the individual concerned, time consuming for elected members, and costly in terms of officer time).
- The Chair of the original dismissal panel has not been permitted to attend the appeal hearing to explain the reason/s for the decision to dismiss.
- It has been difficult to identify elected members to sit on appeals panels, and elected members have received insufficient training in hearing misconduct appeals.
- Elected members have not been afforded access to sufficient levels of professional and technical advice on, for example, child protection, safeguarding or public safety matters, to enable them to make a properly informed decision.
- There have been difficulties in drawing a distinction between misconduct (disciplinary) issues and capability (performance) issues.

3. Issues Related to the Appeal Process

3.1 These recent difficulties have resulted in a review of the misconduct appeals process (contained within the Disciplinary Procedure) and the following issues have been identified:

i) Content of the Appeal Hearing

Historically, member appeal panels have re-heard the original dismissal case, rather than hearing the points of appeal. Whilst the current procedure allows for either a full re-hearing, a re-hearing of the issues in dispute, or a hearing concentrating specifically on the grounds for appeal, in practice appeals have been re-hearings. This is because only a re-hearing will guarantee that any defects at an earlier stage are corrected. However, a re-hearing is not a strict legal requirement and a failure to have a re-hearing will not in itself make a dismissal unfair.

ii) Grounds for Appeal

Currently, although appellants are required to state their grounds for appeal, they are failing to adequately do so, leading to the necessity for a re-hearing.

iii) Conduct of the Appeal Hearing and Submission of Papers

Currently the running order for the appeal hearing is the same as that for hearing the original case i.e. management present their case and the employee responds. A more appropriate process for an appeal hearing, which isn't a re-hearing, would be for the appellant to present their grounds for appeal to which management would respond.

Similarly, with regard to submission of papers, an employee would normally submit their grounds for appeal and supporting paperwork, and

the management paperwork would respond to the points of appeal. This is not the case in the current Procedure.

iv) Attendance of the Chair of the Dismissal Panel at Appeal Hearings

Although the current policy is silent on this issue, the legal advice is that if the appeal is a re-hearing then the Chair of the dismissal panel is not required, and that to call them to explain their rationale would undermine the appeal being a genuine re-hearing. Chairs of dismissal panels have not, therefore, been permitted to either present the management response to the appeal, or to be called as a management witness to explain the dismissal decision.

v) Definition of Gross Misconduct

The legal advice is that the current definition of Gross Misconduct is flawed and requires amendment.

4. Changes to the Procedure

4.1 In light of the issues identified, the following changes have been made to the procedure, attached as an appendix to this report:

- i) Revised wording moves the appeal hearing away from being a re-hearing of the original case and states "*The conduct of the appeal meeting will depend upon the grounds of the appeal submitted*". (Section 6.4). This does, however, still allow for the appeal to be a re-hearing, in exceptional cases, if the grounds for appeal necessitate this. The presumption will, however, be that that appeal hearings should not be re-hearings, unless there sound reasons for which a re-hearing is required. Moving away from re-hearings, in the majority of cases, introduces a small risk of successful unfair dismissal claims but the benefits of this approach are considered to outweigh the risks.
- ii) The wording requiring appellants to be clear about their grounds for appeal has been strengthened. It now reads "*The employee must state the specific grounds for their appeal in full*" (Section 6.1).
- iii) The running order has been amended so that the appellant will present their grounds for appeal, and management will respond, rather than a full re-hearing of the case (Section 6.4).

"*The management papers will detail the management response*" has been added to emphasise that management are responding to the written grounds of appeal, and not submitting papers for a full re-hearing (Section 6.3.2).
- iv) As the majority of appeal hearings will no longer be re-hearings, the Chair of the dismissal panel will now have the opportunity to

either present the management response to the appeal, or to be called as a management witness to explain the dismissal decision. The Procedure remains silent on this point to avoid any potential challenge if this weren't to happen, but this will be HCC's normal practice. Similarly, it will also be possible for an officer/s, such as a head of profession, to attend as an "expert witness," if required, as the appeal hearing will no longer be a re-hearing of the original case.

- v) In line with legal advice, the definition of Gross misconduct has been amended to "*Gross misconduct is an act of misconduct or indiscipline which is so serious in nature, that it will fundamentally damage the employment relationship and thus, will justify dismissal without notice*" (Annex 2 to the Appendix, page 15).

5. Selection and Training of Elected Members to Sit on Appeals Panels

- 5.1 Appeal panel members are drawn from Regulatory Committee B, which comprises 20 members.
- 5.2 Given the low numbers of members to draw from, it has been difficult to ensure that appeal panels are constituted on a proportionate basis. Members are selected subject to diary availability and there is often some difficulty in getting sufficient member "volunteers". Anecdotal feedback from the members concerned indicates that membership of misconduct appeal panels is not a favoured activity.
- 5.3 The Monitoring Officer and Head of Governance has advised that because the Proportionality Rules apply to Committees and Sub-Committees of the Council equally, the current practice could leave the Council open to challenge from a disgruntled appellant that a Sub-Committee upholding a dismissal was not properly formed, meaning that if the challenge was successful the appeal would need to be heard again. The advice is that the County Council cannot necessarily rely on the caveat in the proportionality rules "so far as reasonably practicable" if the reason why we struggle to get a Proportional Sub-Committee is because members simply don't want to hear appeals.
- 5.4 It is therefore proposed that the pool of elected members who can hear misconduct appeals is widened by increasing on a proportional basis the number of members appointed to Regulatory Committee B. Further work will be required to determine how this can be achieved.
- 5.5 Members of Regulatory Committee B currently receive a limited amount of training on misconduct appeals, alongside training on other issues which form part of their wider remit.
- 5.6 To remedy this situation, a training programme focussing specifically on conduct appeals is under development, and will run on an annual

refresher basis for all elected members who sit on misconduct appeals panels.

6. Professional and Technical Advice to Misconduct Appeals Panels

- 6.1 Appeal hearings frequently involve consideration of highly complex professional and technical matters such as those relating to child protection, safeguarding, or public safety.
- 6.2 The revised approach, in which the appeal hearing will not be a re-hearing of the original case, will mean that the management side can call on an expert witness, such as a relevant head of profession, in presenting the management response to the appeal. Both the manager presenting the appeal, and the appellant and/or their representative, will thereby be afforded the opportunity to ask questions of the expert witness.
- 6.3 Currently misconduct appeal panels are advised on legal and procedural issues by an employment lawyer, but do not have access to expert professional and technical advice on matters such as child protection, safeguarding or public safety.
- 6.4 It is therefore proposed that, in relevant cases, where it is considered the panel would benefit from expert advice, an appropriate senior officer who has had no previous involvement in the case will act as an expert advisor to the panel, alongside the employment lawyer.
- 6.5 Given the facility for the management side to call an expert witness it is envisaged that the number of cases in which an additional officer will be asked to provide expert advice to the panel will be limited. It is important that the odds are not perceived to be stacked against the appellant by the introduction of an expert adviser to the panel. Therefore calling an expert witness as part of the management response is the preferred approach. Nevertheless, expert advice to the panel may be necessary in some cases and the procedure has therefore been amended to allow for this, as necessary (Section 6.2).
- 6.6 The Constitution, as it is currently written, means there is no reason why a officer with knowledge of the professional issues may not sit alongside members of an appeal panel but only in advisory capacity. The appeal decision itself can only be made by elected members.

7. Future Changes to the Disciplinary and Capability Procedures

Streamlining Procedures

- 7.1 Managers often find it difficult to know whether concerns should be dealt with as misconduct (disciplinary) issues, or capability (performance) issues, and in practice cases sometimes involve a mix of both. In the most recent case, members overturned parts of the management

decision because they formed the view that some issues should have been dealt with as incapability rather than misconduct.

- 7.2 An on-line e-learning tool, to teach managers to carry out misconduct investigations, and an on-line e-tool to walk managers through the investigation process, have already been developed and are proving to be of assistance.
- 7.3 To further streamline the process by ensuring clarity in respect of the procedure to be used, and that the issues can be addressed swiftly, a fundamental review of both the Disciplinary Procedure and the Capability Procedure will be undertaken in the next three months.

Gross Incapability

- 7.4 Following a capability process normally involves specifying the required level of improvement, allowing time for improvement, and providing training or development, as necessary. However, in some cases, the incapability is so serious, and presents such serious risk, that it is considered to be gross incapability and the employee can be summarily dismissed without notice. Alternatively, where an employee demonstrates that they are incapable of, or unwilling to change, then it may be reasonable to move straight to the dismissal stage without first giving a warning and opportunity to improve.
- 7.5 The current Capability Procedure allows for suspension, and for dismissal on the grounds of gross incapability in such cases, although is rarely used.
- 7.6 The review of the Capability Procedure will emphasise the facility to dismiss on the grounds of gross incapability, or to move straight to the dismissal stage, in appropriate cases, and will ensure that managers are aware of this facility. It should, however, be noted that cases in which it is reasonable to dismiss for gross incapability are rare. Such cases will carry a higher risk at Employment Tribunal as any such dismissals could be open to challenge that the employee has not been given the opportunity to improve prior to dismissal.

8. The Qualifying Period for Unfair Dismissal Claims

- 8.1 A change in the law, with effect from 1 April 2012, will extend the qualifying period for the right to claim unfair dismissal from one to two years. This will mean that employees can be dismissed in the first two years of employment without the risk of an unfair dismissal claim, and will be included in the review of the Disciplinary and Capability Procedures. (Equality Act claims are not subject to a qualifying period and will therefore still be able to be made in the first two years of employment).

8.2 Additionally, the government are consulting on a number of proposed changes to dismissal legislation and any further changes to the legislation in this area will be taken account of in the review of the Disciplinary and Capability Procedures.

9. Next Steps

9.1 The trade unions were consulted on the immediate changes to the Disciplinary Procedure at the corporate JCG on 8 December 2011, and these changes are now recommended for ratification by the EHCC Committee.

9.2 A full review of the Disciplinary and Capability Procedures is currently underway.

10. Recommendations

10.1 It is recommended that the EHCC Committee agree the following recommendations:

- i) That the immediate proposed changes to the misconduct Appeals Process/Disciplinary Procedure (including the facility to provide an expert adviser to the panel) should be implemented following approval by EHCC.
- ii) That a review is undertaken to both determine how the pool of elected members who can sit on misconduct appeal panels can be widened and that this is then actioned accordingly.
- iii) To note that a full review of the Disciplinary and Capability Procedures is underway and will take account of any relevant changes in employment legislation.
- iv) To note that a training programme is under development for elected members who hear misconduct appeals.

CORPORATE OR LEGAL INFORMATION:

Links to the Corporate Strategy

<i>Hampshire safer and more secure for all:</i>	no
Corporate Improvement plan link number (if appropriate):	
<i>Maximising well-being:</i>	no
Corporate Improvement plan link number (if appropriate):	
<i>Enhancing our quality of place:</i>	no
Corporate Improvement plan link number (if appropriate):	

Section 100 D - Local Government Act 1972 - background documents

The following documents discuss facts or matters on which this report, or an important part of it, is based and have been relied upon to a material extent in the preparation of this report. (NB: the list excludes published works and any documents which disclose exempt or confidential information as defined in the Act.)

Document

Location

None

IMPACT ASSESSMENTS:

1. Equalities Impact Assessment:

1.1. The proposed changes to the Council’s appeals procedure for staff who have been dismissed on the grounds of misconduct will apply to all HCC non teaching staff irrespective of gender, race, disability or religion

2. Impact on Crime and Disorder: N/A

3. Climate Change:

- a) How does what is being proposed impact on our carbon footprint / energy consumption? N/A
- b) How does what is being proposed consider the need to adapt to climate change, and be resilient to its longer term impacts? N/A