Advisory Bulletin

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Workforce: Employment Relations

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Welcome

This month's bulletin sets out the forthcoming changes to the statutory disciplinary and dismissal procedures applying to English local authorities' heads of paid service, monitoring officers and chief finance officers (the 'protected officers'), under which a new process will replace the current statutory Designated Independent Person (DIP) process. The key feature of the new process is that the requirement for a DIP is removed, and instead a protected officer will not, in most cases, be able to be dismissed unless the dismissal has been approved by full council by way of a vote. The legislation also makes provision for a Panel, on the face of it made up of independent persons, which can advise the authority on the proposed dismissal.

However, the legislation itself does not provide much, if any detail, of how the new process will work in practice. This bulletin, therefore, identifies some of the key issues with the changes, and suggests how authorities could manage the new process. The guidance though is in essence interim, pending clarification of the new requirements by DCLG and discussions within the JNC for Chief Executives of local authorities regarding amendments to the model disciplinary procedure incorporating a DIP process (see below).

In terms of managing the new process in practice, example matters that require consideration are the setting up of the Panel, and ensuring a fair investigation takes place prior to dismissal. In considering these, however, one of the issues we face is that the legislation in places is not clear, in particular in terms of the intended composition of the Panel, and whether that should only include the independent persons or also elected members. We have therefore recently asked DCLG to confirm the position for us, as although we had responded to two previous consultations on this issue, this particular form of the legislation was laid before Parliament without any notice to us and local authorities.

Another issue for local authorities is that in some cases DIP procedures will be incorporated into terms and conditions of employment, and the statutory changes do not of themselves remove that contractual entitlement. In terms of this, one of the points we would ask authorities to note is that within the next few months we envisage that changes to the Chief Executive Handbook model DIP procedures will be agreed by the JNC, to account for the new legislation. In the meantime, this bulletin suggests how those model procedures could run alongside the new process, and we would also draw authorities' attention to paragraph of 15.19 of the Handbook which indicates that the joint secretaries of the JNC are available to assist the parties with the model procedures.

Finally, the bulletin sets out the implementation timetable and, as authorities will see, it is our view that the standing orders required by the legislation have to be put in place at or before an authority's first ordinary meeting falling after this year's annual meeting.

Further information

Receiving the bulletin by e-mail	The Advisory Bulletin is available by e-mail to all local authorities and subscribers. If you have any queries about the bulletin please e-mail eru@local.gov.uk
The employment law advisers	Philip Bundy, Samantha Lawrence and Kelvin Scorer will be pleased to answer questions arising from this bulletin. Please contact us on 020 7664 3000 or by e-mail on eru@local.gov.uk
Address	The Workforce Team, Local Government Association, Local Government House, Smith Square, London SW1P 3HZ
Website	www.local.gov.uk/employment-relations
Obtaining legislation and other official publications	Copies of legislation can be found at www.legislation.gov.uk

Key data

SMP, SPP and SAP basic rates	£139.58 or 90 per cent of normal weekly earnings if lower (from 5 April 2015)
SSP	£88.45 (from 6 April 2015)
'A week's pay'	£475 – statutory limit for calculating a week's pay (from 6 April 2015) £490 in Northern Ireland

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CHANGES TO STATUTORY DISMISSAL PROCEDURES FOR HEADS OF PAID SERVICE, MONITORING OFFICERS AND S.151 FINANCE OFFICERS

This feature provides details of the changes to the statutory disciplinary and dismissal procedures applying to English local authorities' heads of paid service, monitoring officers and chief finance officers (the 'protected officers'), whereby a new process will replace the current statutory Designated Independent Person (DIP) process.

The DIP process

It is first worth summarising the Designated Independent Person (DIP) statutory procedures that will be replaced by the new process. These are set out in schedule 3 to the Local Authorities (Standing Orders) (England) Regulations 2001 (the 2001 Regulations). They require that no disciplinary action in respect of a protected officer can take place other than in accordance with a recommendation in a report made by a Designated Independent Person (DIP). Disciplinary action in this context has a wide definition of "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."

Other key features of the DIP process are:

- the appointed DIP must be a person agreed between the officer and the authority, or where such agreement cannot be reached, a person nominated by the Secretary of State;
- any suspension for the purposes of investigating the alleged misconduct must be on full pay, and be for no longer than two months, unless specifically extended following a recommendation from the DIP; and
- where an authority operates a Mayor and cabinet executive, leader and cabinet executive or committee system the dismissal of the head of paid service (but not the monitoring officer or chief finance officer) must be approved by the authority itself.

The new process

The new process is set out in the schedule to the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 (the Regulations) which amend the 2001 Regulations. As well as removing the statutory requirement for a DIP in order to take disciplinary action generally the regulations introduce new rules in respect of dismissal. The key elements of the new process are that the dismissal of a protected officer for the reasons set out above, must be approved by way of a vote at a meeting of the authority, who instead of only being able to take action in accordance with DIP recommendations, will be able to dismiss provided they take into account:

- any advice, views or recommendations of a panel (the Panel),
- the conclusions of any investigation into the proposed dismissal; and
- any representations from the protected officer concerned.

One other point to note is that the requirement under the DIP process set out above for the authority itself to approve dismissal has been extended to cover the chief finance officer and monitoring officer. Further details of the new process are set out below, along with suggestions on how the process could operate in authorities, in particular by using an Investigation and Disciplinary Committee system.

Joining the gaps: using an Investigation and Disciplinary Committee?

The Regulations provide little detail of how the new process will operate in practice. For this reason, authorities will need to consider how the new process could work in their authority and in particular how they will 'join the gaps' in the Regulations to ensure the effective running of a disciplinary/dismissal process, such as conducting an investigation. In this respect, authorities may consider that it would be appropriate to operate an Investigation and Disciplinary Committee (I&D Committee) type system, similar to that which they may already have in place under any contractual DIP procedures (see page 13). The role of that I&D Committee would then be as follows:

- To screen potential disciplinary/dismissal issues to consider whether they require investigation and whether the relevant protected officer

should be suspended.

- To organise the investigation, including appointing an investigator.

- To review the results of the investigation to consider what disciplinary action if any is appropriate, after hearing the views of the protected officer, and report its recommendations.

- Where dismissal is its recommendation, to refer the matter to the Panel for its views etc, which in turn the I&D Committee then refers to the authority alongside its own report for the authority to vote on whether it approves the proposal to dismiss.

- Where the authority approves dismissal, to action the dismissal by issuing notice of dismissal.

- Where the I&D Committee decides that action short of dismissal, or no disciplinary action at all is appropriate, to put that in place as appropriate, without any referral to the Panel or the authority.

Looking then at the I&D Committee system outlined above, a key benefit would be that the Panel need only be involved where the I&D Committee has decided to propose dismissal. If such a system was not in place then the Panel might need to be involved earlier on in proceedings, and the authority would need robust systems in place to take relevant decisions on allegations, suspension and investigation etc.

Application of the new process

The new process applies to dismissals for the same reasons as apply to the current DIP process. This means it applies to dismissals 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."

However, unlike the DIP process, the new process does not apply to disciplinary action short of dismissal, for whatever reason. That being said, at the outset of many disciplinary issues it will be apparent that dismissal will be a potential sanction, meaning the

authority must be prepared for it to apply at a later stage. However, if an authority chose to operate an I&D Committee system as set out above, then Panel involvement would only be required once the matter had been investigated and the I&D Committee had decided that dismissal was its recommendation.

The Panel: Constitution and formation

The Panel must include at least two independent persons, who are defined in the Regulations as a person appointed under section 28(7) of the Localism Act 2011. Section 28 deals with the member code of conduct regime, and authorities should have appointed persons under that section so most should already have independent persons in place. However, should an authority have appointed fewer than two independent persons, an independent person appointed by another authority can sit on the authority's Panel.

In terms of costs, an independent person's remuneration, fees or allowances must not exceed the level in respect of those payable to that person in their role under the Localism Act 2011. Usually independent persons receive an annual allowance and expenses, the level of which is set by the authority's Independent Remuneration Panel.

On the face of it the Regulations, as well as the accompanying explanatory memorandum, suggest that the Panel need only be made up of two independent persons. However, a wider consideration of the statutory governance framework suggests that this might not be the case. This is because the Panel falls into the category of a committee appointed by the authority under section 102(4) of the Local Government Act 1972. The normal proportionality rules apply to such committees, meaning that subject to any waiver, in addition to the two or more 'neutral' independent persons, the Panel would need to include at least five additional local authority elected members. Because of the inconsistency between the apparent intention of the Regulations and the section 102(4) requirements, we have asked DCLG to clarify whether it will be possible for the Panel to be made up of independent persons only. Once we receive their response we will let authorities know what the position is.

The Regulations provide for appointment to the Panel through an invitation and acceptance process. Under

that process it appears that the authority has to invite all of its independent persons to be on the Panel. If there are fewer than two it must invite such independent persons appointed by other authorities as it considers appropriate.

Having made the invitations it must appoint in the following order for those that accept the invitation:

- an independent person appointed by the authority and who is an elector in the authority's area;
- any other independent person who has been appointed by the authority; and
- finally, an independent person who has been appointed by another authority or authorities.

This means, therefore, that the independent persons on the Panel are most likely to live in the authority's locality.

The Regulations do not limit the number of independent persons who could be on the Panel. Therefore, the authority could, if it wanted to, appoint more than two independent persons to the Panel, should more than two accept the invitation, provided the authority continued to comply with the order of appointment requirements. The Regulations state though that the authority is not required to appoint more than two.

The authority must ensure the Panel is in place at least 20 working days before the meeting at which the authority decides whether or not to approve a proposal to dismiss (this is defined in the Regulations as a "relevant meeting"). As the invitation and acceptance process could take some time, an authority may want to set up a standing Panel, that would be ready to act in any relevant disciplinary matter that may arise.

The new process: Investigation issues

The Regulations say little about an investigation, and do not require the Panel or any other party to carry out an investigation. This is a key difference with the current statutory DIP requirements, which expressly require the appointment of a DIP to carry out an investigation. However, it remains the case under general employment law principles that an essential part of a fair dismissal is that a fair and objective

investigation is carried out. Further, the Regulations do refer to “any investigation”, in the sense that the authority must take into account the conclusions of any investigation before approving a proposal to dismiss, so it is implicit that an investigation will be carried out. Therefore, even though the Regulations do not require an investigation, in practice the new process will need to make provision for an investigation process that will then enable the Panel to advise full council etc. on the proposed dismissal in accordance with the Regulations’ requirements.

The question then arises of who will be responsible for that investigation and who will actually carry it out? Where an authority is operating an I&D Committee type system, the Committee would be best placed to be responsible for the investigation, and would appoint someone to carry out the investigation. If though an authority is not operating an I&D Committee system, then the Panel could be responsible for the investigation. However, it is not envisaged that the independent persons on that Panel would be able to carry out the investigation itself; instead it would need to appoint someone independent to carry out that role. This is because in many cases the independent persons will not have the necessary expertise to carry out the investigation, as well as the necessary time, especially considering the limit on the fees that can be paid to them. There may also be general issues of fairness around the independent persons carrying out the investigation and then making a recommendation as part of the Panel on dismissal, for authority approval.

So who might then be appointed to investigate the matter? Where the investigation concerns the monitoring officer and chief finance officer, the head of paid service as someone more senior may, subject to resourcing issues, be able to carry out the investigation, provided they have had no prior involvement in the matter and so have the necessary independence. However, where the person under investigation is the head of paid service, then to ensure an independent investigation the I&D Committee or Panel, as appropriate, would in many cases need to appoint an external person to carry out the investigation. In practice then what you may find is that even though the statutory requirement for a DIP appointment has been removed, a ‘DIP-like’ investigation process still takes place, and in this

respect it is worth noting that the current DIP processes are incorporated into many senior officers' term and conditions. Changing the statutory procedures does not of itself remove the contractual commitment to follow the DIP process, and further information on this issue is in the 'fit with contractual procedures' section below.

Outcome and recommendations: I&D Committee system

If the I&D Committee type system was being followed, then following the investigation the Committee would consider the appropriate action, if any, taking into account the contents of the investigation and any recommendations (if any) made by the investigator.

The best way of doing this would be for the Committee to hold a meeting at which it would consider the evidence and decide what action was appropriate. The protected officer would attend that meeting, so they could put forward their views, and it would be treated as one at which the officer has the statutory right to be accompanied by a fellow worker or a trade union official. In many ways then, although the decision to dismiss would not formally be taken at that meeting, the meeting would follow the format of a standard disciplinary hearing, at which the question of dismissal was in issue. That then helps to deal with appeal issues, an appeal being an important part of a fair dismissal procedure (see below).

If the Committee recommended action short of dismissal, rather than dismissal, then it would take the relevant action itself, without referring the matter to the Panel or the authority.

However, if the Committee recommended dismissal, the Committee would refer the matter to the Panel, so in turn it could advise etc. the authority on the dismissal proposal.

Outcome and recommendations: No I&D Committee System

If there was no I&D Committee system in place, then in practice the Panel would need to consider the appropriate action. In doing so it is recommended that a meeting with the protected officer be held in the same format as set out above. If the Panel were to take such a role though the authority operating that system might consider it appropriate to ensure that elected members were on the Panel. This though is subject to what DCLG say about whether the Panel should be made up of independent persons only (see page 8).

If the Panel recommended dismissal, then it would provide the authority with its advice etc.

However, if it considered no action or action short of dismissal should take place, then on the face of it there is no requirement under the Regulations to put the matter forward for an authority vote to determine whether dismissal is instead appropriate. This means the action short of dismissal could proceed in accordance with the authority's standard procedures and subject to any relevant contractual requirements.

Authority meeting

In the event that the Panel advice, and/or where relevant the I&D Committee recommendation, was that dismissal was appropriate, the matter would go forward to the authority who would vote at a meeting on whether to approve the proposal to dismiss, having taken into account the advice of the Panel etc, the conclusions of any investigation into the proposed dismissal and any representations from the protected officer concerned. The Regulations do not specifically give the protected officer the right to make representations at the meeting. However, because of the importance of the meeting the officer should be provided with the appropriate paperwork in advance of the meeting and be allowed to attend the meeting to make their representations. The statutory right to be accompanied should also be applied. It would also be sensible to invite the officer to make written representations in advance of the meeting, so members will have some time to consider them in advance of the meeting.

When scheduling the authority meeting, authorities will need to ensure that enough time is given to allow 20 working days between the appointment of the Panel and the meeting, as is required by the Regulations.

If the authority approves the proposal to dismiss, then it will either action the dismissal itself, or where the power has been delegated to a committee, I&D or otherwise, then that committee can action the dismissal by issuing notice. In the case of authorities operating a Mayor and cabinet executive or leader and cabinet executive system, at least one member of the authority's executive would have to be on that committee (see paragraphs 4(2) of Part I and Part 2 of Schedule 1 to the 2001 Regulations).

Appeal issues

As the authority has approved the dismissal, there is no one in the authority who has the power to overturn the dismissal decision, which raises appeal issues. For that reason, as we suggested above, many councils may want to treat the outcome and recommendations stage meeting as one at which the decision to dismiss was taken, meaning the authority meeting process can then in effect become the appeal stage, removing the need for any further appeal. Strictly speaking that is not in line with standard employment law practices, but bearing in mind the Regulations' requirements, many tribunals may find that such an approach is fair given that the officer will have had the opportunity to state their case before any proposal to dismiss is made and then to address the authority before any decision to approve the dismissal is made.

The executive objections procedure

The new procedure does not remove the requirement on authorities that operate a Mayor and cabinet executive or a leader and cabinet executive to follow the executive objections procedure set out in schedule 1, part I, paragraph 6 and part II, paragraph 6 of the 2001 Regulations. In summary, under those procedures the notice of dismissal must not be issued until the dismissor "discharging the function of dismissal" has notified the "proper officer" (as defined by the authority) of the name of the person the dismissor wishes to dismiss, along with relevant particulars. Members of the executive then have a chance to object through the elected mayor/executive leader. If there are no objections or the dismissor is satisfied that any objection is not material or well founded, then the dismissal can proceed.

Where the authority delegates the action of dismissal to an I&D Committee or similar committee, then that committee can be treated as discharging the function of dismissal. This means the objections procedure could take place once the committee has made its dismissal recommendation and prior to the authority meeting. If though the authority itself actions dismissal and there is no delegation, then the procedure would have to be followed after the authority meeting. However, given the process that would have been followed prior to that meeting, it is unlikely to result in objections that the authority overall would find material and well founded.

Fit with contractual DIP procedures

As referred to before, in some cases DIP-like procedures may be incorporated into protected

officers' contracts of employment, and authorities will need to determine this. This is because where DIP procedures are contractual, the Regulations do not of themselves remove that contractual obligation, meaning the authority will need to apply them, save to the extent that if applied it would result in not following the new requirements of the Regulations. It is anticipated that such cases will be rare, the requirements of the Regulations not being extensive.

When assessing whether DIP procedures are contractual, it may be the case that the DIP model procedures set out in the Joint Negotiating Committee Conditions of Service Handbook for Chief Executives have been incorporated into a Chief Executive's or other protected officer's contract. Authorities will need to check whether that is the case, noting in particular for chief executives that paragraph 15.16 of the Handbook states "where informal resolution is not possible the model procedures should apply unless alternative arrangements have been agreed locally".

On the face of it one option where DIP procedures are contractual is to change the contract to remove or amend those procedures. This could be through agreement or, in theory, dismissal and re-engagement. However, it is important to note that the new process would apply to any such dismissal, as well might the contractual DIP procedure. Therefore, authorities are advised to note that we are seeking to amend the JNC model procedures through collective agreement, thereby potentially removing any need to make changes at a local level.

If the model DIP procedures apply, the issue arises of how they could fit alongside the new process, and in many ways that could be along the lines outlined above where an authority chooses to operate an I&D Committee system. In addressing the potential fit it is worth setting out first the core steps in the model procedures (noting that the expectation is that the guidance with the model procedure is discretionary). Those core steps are summarised below:

1. Where an allegation is made against the chief executive relating to conduct or capability or some other substantial issue that requires investigation, the matter will be considered by the I&D Committee, which is one appointed by the authority.

2. The I&D Committee will consider and action suspension, where appropriate. Any suspension must not last longer than two months, unless extended by the DIP.

3. The I&D Committee will inform the chief executive of the allegations, and allow him/her to respond in writing and in person. The I&D Committee will then decide whether no further action is required or that the issue should be referred to a DIP.

4. If referred, the DIP must be agreed between the parties, and if agreement cannot be reached the Secretary of State will be asked to nominate the DIP.

5. The DIP will investigate and prepare a report, which will include recommendations for disciplinary action (if any is appropriate) along with relevant evidence.

6. The I&D Committee will consider the report and give the Chief Executive an opportunity to state his/her case. It may then:

    - Take no further action
    - Recommend informal resolution or other appropriate procedures
    - Refer the matter back to the DIP for further investigation and report
    - Take disciplinary action short of dismissal, up to the maximum recommended by the DIP
    - Recommend dismissal to the authority (if in accordance with the DIP's report).

7. Where the I&D Committee propose dismissal, the authority will consider the I&D Committee's proposal, and the chief executive will be given the chance to put their case to the authority before they decide whether to dismiss. Where the executive objections procedures apply, they are followed before the authority considers the proposal.

8. Where the I&D Committee proposes dismissal, the authority hearing/decision process at (7) above is treated as the appeal. Where the I&D Committee proposes action short of dismissal, then any appeal is dealt with by the Appeals Committee.

Looking at the model DIP procedure then, authorities may consider that the least problematic way of running them with the new process would be for steps 1-6 to apply prior to any substantive Panel involvement (in cases where the I&D Committee recommends dismissal). At this stage the Panel could then consider the I&D Committee and DIP recommendations, so it can advise the authority. The recommendations and any report etc of the I&D Committee and the Panel would then go the authority, in line with step 7.

One question that arises with such an approach is that it involves some duplication in the later stages. However, it does have the potential benefit of the I&D Committee's role filling many of the gaps in the new statutory process, and provides a way of managing disciplinary issues from the start to the finish. It also provides a clear mechanism for dealing with action short of dismissal.

Another key difference between the new process and the model DIP procedure is not only the involvement of the DIP, but the fact that the DIP has to be agreed between the parties, and where the DIP cannot be agreed the Secretary of State is asked to decide who will perform the role. In respect of this, it is hoped in most cases the DIP could be agreed, but where agreement cannot be reached, the new Regulations have removed the statutory role of the Secretary of State to decide on the DIP. That would not stop the authority asking the Secretary of State to make a nomination, but if no such nomination was made then the Joint Secretaries could be asked to make a nomination.

Implementation

The Regulations require authorities to put in place the necessary standing orders in respect of the new process "no later than the first ordinary meeting of the authority falling after 11th May 2015". We have been asked whether an authority's annual meeting is an "ordinary meeting" for these purposes, and it is the LGA's view that it is not. The reason for this is that

schedule 12 to the Local Government Act 1972 makes provisions for three types of authority meeting. These are:

1. "an annual meeting"

2. "in addition to the annual meeting, such other meetings as they [the council] may determine"; and

3. "an extraordinary meeting".

Specific provisions are therefore made for the annual meeting, which reflects the fact that it is a particular meeting of the authority which usually sets up the meetings timetable for the year and deals with appointments to each of the committees, sub-committees and outside bodies. Therefore, in our view it should not be classified as ordinary. This is in line with guidance from the time of the Local Government Act 2000 when new constitutions were implemented, which clearly sets out the three types of meetings i.e. annual, ordinary and extraordinary (see 4.03 of guidance).

On this basis it is the LGA's view that authorities do not have to put in place the relevant standing orders until the first ordinary meeting falling after the annual meeting.

Transitional provisions in the Regulations provide that where anything is being done before 11th May 2015 in respect of an allegation, the statutory DIP procedures shall continue to apply to that allegation. Where anything is being done in respect of an allegation after 11th May 2015, but before the authority puts in place the new Panel procedures, the authority may continue to use its current procedures.

EMPLOYMENT LAW TIMETABLE

We set out some of the key employment law developments to look out for over the coming months.

During 2015

The DWP Fit for Work Service (previously known as Health and Work Service) is to be rolled out across GB. Currently GPs in Sheffield and Betsi Cadwaladr can refer eligible patients to an occupational health assessment. This will be expanded in Spring 2015 – see the roll out map for details.

For more information visit www.fitforwork.org or

	www.fitforworkscotland.scot.
From April 2015	Right to time off to attend adoption appointments for those adopting. Parental leave extended to parents of a child under 18 years. Introduction of shared parental leave (see Advisory Bulletin 617 and Advisory Bulletin 618). 26 week qualifying period for adoption leave removed. Statutory adoption pay increased so that adopters receive 90% of earnings for first 6 weeks, in line with statutory maternity pay. Surrogate parents eligible for adoption leave and pay.
Other Government proposals	Proposal to increase national minimum wage for apprentices to the same rate as 16/17 year old. Employment law review to help clarify employment status of workers. Implementation of a proposal to recover exit payments made to high earners who leave the public sector if they return to the same part of the public sector within 12 months.