

## The Report of the Assistant Chief Executive (Legal and Democratic Services)

### Constitution Review 2015 - Proposals to Change the Current Process for Disciplinary/Capability Dismissal Appeals

At the 20 May 2015 meeting of County Council this report was deferred for clarification as the proposals were not exactly as those originally put to and considered by members of the current Appeals Committee and the Members Workforce Planning Group, during February and March 2015. The proposals set out below are now in accord with those original proposals.

**Remit of the Employment Appeals Committee:** the Constitution states that the terms of reference for the Employment Appeals Committee are as follows:

- “1. To hear and determine appeals against decisions of officers of the Council, where provision exists for appeals to a member level body, or of relevant decisions of the Governing Bodies of voluntary aided schools where the Governing Body so requests in respect of:-  
All dismissals, except
  - appeals against dismissals on the ground of redundancy and against selection for redundancy, which shall be determined by a Chief Officer or Senior Manager s/he has authorised to act in his/her place in consultation with an HR adviser, and
  - appeals against dismissals under the Council’s Attendance Management Policy shall be determined, in consultation with a Member to be drawn from the Appeals Committee and an HR Adviser, by a senior manager who has not previously been involved in the matter, and who is duly authorised to determine the appeal in accordance with paragraph 3.7 of the Officers’ Delegation Scheme.Group grievances or collective disputes.
2. To exercise all functions (including, but not limited to, hearing and determination) in relation to appeals by the Chief Executive Officer against decisions of the Chief Officers Appointments and Disciplinary Committee to take disciplinary action against him/her short of dismissal.
3. To exercise all functions (including, but not limited to, hearing and determination) in relation to appeals by the Chief Executive Officer against decisions of the Leader and/or the Chief Officers Appointments and Disciplinary Committee, on appraisal of the Chief Executive Officer, not to award an increment.”

Hearings by the Appeals Committee do not under normal circumstances require a full re-hearing of the case or full consideration of the original evidence. The remit of the Appeals Committee is to satisfy itself that the decision taken to dismiss was reasonable in the circumstances and that due process was followed. In doing so the Appeals Committee must be satisfied that:-

- The rules of Natural Justice have been applied
- There was a thorough and fair investigation
- The Disciplinary Procedures have been followed or there are justifiable reasons if this was not possible
- The sanction imposed was reasonable in the circumstances

Members Appeals can only decide whether or not to uphold the Appeal being heard, and has no authority to apply any different sanctions to the case. Therefore if an Appeal is upheld, the employee is entitled to return to work with no sanction on their record. The current practice is resource-heavy in terms of admin support from Democratic Services to arrange panels, copy/send out the Bundles and clerk the Appeal Hearings.

**How other appeals are heard in NYCC:** All other Appeals are either Officer only or Officer with a Member sitting on the Panel as follows:

- Attendance dismissal Appeals are heard by at least one Officer of appropriate seniority (who is Chair) and one Member not previously involved in the case.
- Probationary dismissal Appeals are heard by at least one Officer of appropriate seniority.
- Redundancy Dismissal Appeals are heard by a Chief Officer (or Senior Manager authorised to act in his/her place) not previously involved.

All Managers who Chair or sit on Panels attend a full days training course on hearings, and complete training on the relevant Policies, which includes both online learning as well as a class room based briefing. This ensures all Officers making decisions in employment relations cases have been appropriately trained and are aware of the relevant NYCC Policies, as well as ACAS and legislative requirements/principles relevant to the decision being taken.

Currently, due to the Panel being constituted of Members who understandably have many other commitments, the time-frame for Appeals taking place is often well past the employee's final day of employment. Usually by the time the Appeal is held, the employee has found alternative work and the Service has filled the resulting vacancy, meaning that when an Appeal is upheld, reinstatement on a practical level is very difficult. In recent cases this resulted in settlement via compromise agreements being necessary. Even in cases where the service does not recruit, or recruits on a temporary basis there is pressure on staff to cover, cost can be incurred on the service due to temporary staff arrangements and service delivery may be inconsistent and/or at a reduced level. An approach is needed where the Appeal is held swiftly following the original decision to dismiss so any outcomes of the disciplinary appeal process can be effectively managed, including reinstatement, without adverse impact on the individual, their colleagues or the service.

Councillors currently on the Committee have found it a challenge to get sufficient time away from their primary function as a Councillor to attend required training. Attendance at training is looked for by Employment Tribunal (ET) Judges when cases progress to court and is seen as an important requirement in case law and practice around disciplinary and appeals. To date training has been arranged 3 times over recent years but each time has been cancelled due to Members of the Appeal Panel being unable to attend.

The current Appeals Panel has two possible outcomes either uphold or over-turn the appeal. There is no option to up-hold the appeal whilst applying an alternative sanction. This means there is a polarised outcome for each appeal, with the employee either still losing their job or being re-instated without any blemish on their record. This has been an issue in past cases, resulting in inconsistency. In one case a number of staff had committed the same misconduct to differing degrees, resulting in some staff receiving final written warnings and one being dismissed. The dismissed employee appealed which was upheld, resulting in them being reinstated without any warning on their record. It has also resulted in service concerns whereby staff have been reinstated with no sanction having previously being dismissed for what the service consider to be safeguarding issues and the service then having to put them back into a post where they have access to the same client group. In such situations the service has felt the need to put in place alternative working and supervision arrangements sometimes at additional costs to mitigate what it considered to be a risk which the member of staff has not wanted to be subject to. This again resulted in a settlement via a compromise agreement.

The current Appeal Panel is a council Committee and is by default a very formal process. Both staff and managers find this formality difficult on occasion and it brings with it an adversarial atmosphere which can get in the way of a full and open consideration of the issues. Whilst all Hearings in NYCC are formal and decision-making is taken seriously, the Appeal Committee can be over-facing to employees especially those without representation. An Officer/Member Panel will still ensure objectivity of decision making, whilst potentially being more 'approachable' to those making their case and in a format which mirrors the original dismissal hearing so is at least a known process.

The current Committee considers very few dismissal appeals because, for the size of the workforce, there are relatively few conduct and capability dismissals with the majority of dismissals for sickness/ill health (appeals heard by officer/member panel of 2) and redundancy (appeals heard by officer only panel of 2).

To illustrate in 2013/14 there were (excluding schools):

- 167 sickness/ill health cases resulting in 32 dismissals and 1 appeal
- 38 redundancy dismissals with 1 appeal.
- 11 capability cases resulting in 2 dismissals and no appeals
- 177 disciplinary cases resulting in 51 sanctions (including 19 final written warning/dismissals) resulting in 2 appeals
- 14 probation cases resulting in 8 dismissals and 1 appeal.

Any dismissal appeal process should review the decision to dismissal and consider whether the investigation has been sufficiently thorough, whether the allegations were found on the balance of probability and be convinced that the decision to dismiss was reasonable in the circumstances. It is not to re-hear the case but is to check the manager's decision and the process undertaken. If there were procedural errors efforts should be made by the appeal process to rectify these. By checking the manager's decision to dismiss, the appeal process in effect holds them to account for their management approach and action. This arguably has more impact if it takes place within the management hierarchy by a more senior manager in this case a member of Management Board. Whilst managers currently attending appeals to present their decision may be interested in how members view them this has no direct impact on them, whereas feedback from a member of Management Board to them and their director/senior manager will have a more direct consequence.

An important part of a manager's role is managing staff and arguably holding managers to account for this is a function of senior management not politicians. In NYCC, the Chief Executive has delegated authority for staff management as Head of Paid service and dismissals and any appeals can be seen as part of this delegated management function as it is for other dismissals.

**Arrangements in Other Authorities:** The current arrangements are not without difficulties as detailed and experience from other authorities suggests there may be better alternative processes (see appendix 1). Benchmarking of other Shire Councils as well as Councils in the area shows that 14 Councils in the benchmarking exercise have Member Panels for dismissal appeals, 12 have moved to Officer Appeal Panels for dismissals, 2 have hybrid arrangements whereby the employee can choose between a Member Appeal Panel and an Officer Appeal Panel, and one has a mixed Panel of 2 Members and a Senior Manager who chairs the Appeal Panel.

**Proposal - Panel Composition:** 2 Person Panel of 1 Officer and 1 Councillor:

It is proposed that appeals for conduct/capability dismissals move to the same process as for sickness/ill health dismissal appeals, which have worked well for many years. This arrangement is also in line with the standard (non-dismissal) Disciplinary Appeal arrangement of a 2 Officer panel with HR advice. This means a Panel of 1 Officer of appropriate seniority (a member of Management Board) and 1 Councillor, chaired by the officer with a Head of HR/Principal HR Adviser advising the Panel and the Panel members having no prior involvement in the service area or the case.

Under this proposal:

- The Appeal will be held as quickly as possible after the decision to dismiss, ideally within/shortly after the notice period. This will enable better management of any decision to uphold the appeal, and have less impact on service delivery / team.
- Where cases progress to Employment Tribunal (ET) an Officer will attend. Currently because the Chair is a Councillor the ET and preparation for be problematic as it requires days out of their schedule.
- All members of appeal panels will attend appropriate training and be available for appeals, allocating a full day for the panel itself as well as preparation time
- Officers who chair Panels will have had sufficient training and experience, with training being recorded and available as evidence at ET as required. Steps are in place to ensure all Officers get experience on panels prior to Chairing.
- There will be a small pool of councillors able to sit on appeal panels and attend training to ensure the Council is not reliant on one or two councillors for all Appeals and that the process does not create delays. This approach will allow flexibility for Appeal dates to ensure Appeal panels are held in a timely manner as soon as possible after the decision to dismiss.
- The panel will have alternative sanctions available to it and can reinstate with a lower sanction as appropriate including redeployment as an alternative to dismissal.
- Democratic Services resource will not be required to administrate the process or clerk the Hearing. This will substantially reduce costs of photocopying, diary management, and clerking.

The proposal carries benefits compared to the current arrangements, notably because the Panel includes only one Member it should be easier to set up and not suffer from delay following the original decision to dismiss. Also because the Panel mirrors the current Disciplinary Panel arrangements, employees who have had their case considered at a Disciplinary Hearing will be familiar with the arrangement, and not be put off by an unduly formal setting. A new case review stage (see below) provides a further check on management action prior to formal appeal and the ability to take pre-emptive action if needed.

**Consultation on the proposal:** UNISON have been fully involved and are supportive of the proposal on the basis that it is a pilot for two years to provide sufficient number of cases to go through the changed arrangements with a formal review undertaken jointly with them. They have asked for additional changes to the disciplinary and capability procedures including the appeal stage in order to better support their members. These are:

- Documentation to be exchanged 15 days before the Panel for both disciplinary/capability hearings and appeal panels.
- Wording strengthened in the disciplinary policy on the length of time taken to investigate cases particularly where staff are suspended, so it is clear that cases should not be allowed to drift. Both UNISON and HR understand that in cases where the employee is off sick or the police are involved lengthy delays can arise.
- UNISON to review with Assistant Chief Executive (Business Support) the list of suspensions on a quarterly basis. Whilst these are not usually large in number it is important staff are not suspended for long periods of time unless there is an unavoidable reason such as police involvement and pending criminal proceedings.
- A case review stage be built into the disciplinary/capability process to take place prior to any appeal to allow senior HR and UNISON officers to look at individual cases and be clear these have been managed appropriately and that anything needing to take place prior to an appeal can be actioned.

With these changes UNISON are comfortable that the proposed alternative Panel will hold managers to account in dismissal decisions and ensure that such decisions have been conducted fairly and are reasonable in the circumstances. The proposal was considered by the Members Workforce Planning Group on 4 March 2015. There was robust discussion and a variety of views both for and against the proposal. In addition the views of all existing members of the current committee (not substitutes) have been sought and 2 are supportive of the changes and 2 not. Of the 2 with concerns about the proposals, 1 has personal reservations but given the support of UNISON, is not opposed to the pilot.

**Policy implications:** The Disciplinary/Capability Policies require no change to accommodate this proposal, as these states that all employees are entitled to Appeal against the decision made by the Disciplinary/Capability Panel but do not give any detail as to the constitution of the Appeal Panel itself. The Panels and Appeals Procedure will need amending to state that: *Disciplinary/capability appeals against dismissal will be heard by a Director/Assistant Chief Executive (who will act as Chair), and one Member who have not been previously involved in the case, advised by a Head of HR / Principal Adviser.*

**The Council's Constitution:** includes reference to the Employment Appeals Committee for hearing Appeals against Dismissal (excluding redundancy and ill health/absence) and will need amending to enable the pilot panel to be tested by adding the following exemption for a two year period:

*Appeals against dismissals under the Council's Capability or Disciplinary Policies shall be determined, in consultation with a Member to be drawn from the Appeals Committee, by a Corporate Director / Assistant Chief Executive who has not been previously involved in the matter and who is duly authorised to determine the appeal in accordance with Officers delegation scheme. The appeal panel will be advised by a Head of HR / Principal HR Adviser who has had no previous involvement in the case, and who will not take part in decision-making.*

It is proposed that the one councillor for the new panel is drawn from the membership of the Employment Appeals Committee on a rota basis, working down the rota for cases to be heard. The Employment Appeal Committee will still exist for the pilot period as it retains the remit to hear collective disputes and be the dismissal appeal body for the post of Chief Executive. The consequential changes to the Constitution are shown as tracked changes in appendix 2.

**RECOMMENDATION:**

That the proposed changes to the current process for Disciplinary/Capability Dismissal Appeals are approved

## Appendix 1 - Shire Council Benchmarking

Surrey: Only appeals for collective disputes go to members. Dismissal appeals go to officer panel which has operated successfully for a number of years.

Somerset, Worcestershire, Nottinghamshire: Members hear some types of dismissal appeals

Devon: employees have option of Members or Chief Officer appeal, as Member availability is very limited so process takes longer. Chief Officers are far more likely to be able to hear an appeal quickly. This has reduced the number of Member appeals.

Dorset: moved from member appeals about a year ago to hybrid panel of three, a director and two members. The director is decision maker, in consultation with the two members. Work really well so far.

Norfolk: Members involved in dismissal hearings and jointly with unions for final stage grievances.

Gloucestershire: moved 3 years ago to Officer appeal hearings.

Sussex: trialed using Officers for dismissal appeals and final stage grievances.

Warwickshire: trialed using Officers for dismissal appeals and final stage grievances

Kent: Officer appeal panels- seen as a better use of officers time with officers trained and experienced in assessing and managing these. A panel of 2 senior officers is easier/quicker to organise and officers take the role of attending any subsequent ET etc. All activity is reported to the relevant Committee 6 monthly (since moved to annual). Trade Unions were not keen on the move but have since been satisfied that the process is at the least as rigorous if not more so.

Vale of Glamorgan: A small panel (Head of HR, Managing Director and Leader) works well and has improved speed and informality of the process

Buckinghamshire: Changed approach 2 years ago to panel of a Strategic Director (direct report to CEO) and a Service Director (reporting to a Strategic Director) with HR providing support.

Derbyshire: moved to Strategic Directors hearing all appeals subject to a 12 month review. The trade unions were unconvinced, but metrics show little difference in the outcomes

Hertfordshire: Moved to officer panel in 2010 which is working well. Members only hear appeals for Chief Officers and Assistant Directors.

Wiltshire: changed about 5 years ago to officer only via a separate appeals policy which applies to majority of staff policies. This went through the committee process to be ratified and there was no desire from members to be involved. This was because that there were very small numbers per year, a lot of training for members

who may never be involved, and a lot of time required for the appeal panels and so members agreed not to be involved in the future.

Cornwall: Corporate Directors are responsible for such matters better fitted to their delegated operational responsibilities.



## Appendix 2

### EMPLOYMENT APPEALS COMMITTEE

#### TERMS OF REFERENCE OF THE EMPLOYMENT APPEALS COMMITTEE

1. To hear and determine appeals against decisions of officers of the Council, where provision exists for appeals to a member level body, or of relevant decisions of the Governing Bodies of voluntary aided schools where the Governing Body so requests in respect of:-

- Group grievances and Collective Disputes

**Comment [SS1]:** This moved up in the document.

Exceptions:-

- a) appeals against dismissals on the ground of redundancy and against selection for redundancy, which shall be determined by a Chief Officer or Senior Manager s/he has authorised to act in his/her place in consultation with an HR adviser, and
- b) appeals against dismissals under the Council's Attendance Management Policy shall be determined, in consultation with a Member to be drawn from the Appeals Committee , by a senior manager who has not previously been involved in the matter, and who is duly authorised to determine the appeal in accordance with paragraph 3.7 of the Officers' Delegation Scheme. The appeal will be advised by an HR adviser who has had no previous involvement in the case and who will have no role in decision-making and
- c) Appeals against dismissals under the Council's Capability of Disciplinary Policies shall be determined, in consultation with a Member to be drawn from the Appeals Committee, by a Corporate Director / Assistant Chief Executive who has not been previously involved in the matter and who is duly authorised to determine the appeal in accordance with the Officers delegation scheme to ensure this is the same. The appeal panel will be advised by a Head of HR / Principal Adviser who has had no previous involvement in the case, and who will not take part in decision-making.

**Comment [SS2]:** Changed wording here to make it clear HR only advising

**Comment [SS3]:** This is new wording

2. To exercise all functions (including, but not limited to, hearing and determination) in relation to appeals by the Chief Executive Officer against decisions of the Chief Officers Appointments and Disciplinary Committee to take disciplinary action against him/her short of dismissal.

3. To exercise all functions (including, but not limited to, hearing and determination) in relation to appeals by the Chief Executive Officer against decisions of the Leader and/or the Chief Officers Appointments and Disciplinary Committee, on appraisal of the Chief Executive Officer, not to award an increment.

Notes:

1. No member of the Chief Officers Appointments and Disciplinary Committee shall sit on the Employment Appeals Committee when the Employment Appeals Committee is hearing appeals by the Chief Executive Officer against decisions of the Chief Officers Appointments and Disciplinary Committee to take disciplinary action against him/her short of dismissal.