



## **ASSOCIATION OF LOCAL AUTHORITY CHIEF EXECUTIVES AND SENIOR MANAGERS**

### **REVISED CONDITIONS OF SERVICE – OCTOBER 2016: EXPLANATORY NOTE FOR ALACE MEMBERS**

#### **Introduction**

The Joint Negotiating Committee for Local Authority Chief Executives ('the JNC') (comprising the LGA for the Employers and ALACE forming the staff side) has issued a revised Conditions of Service Handbook, to replace the September 2009 edition. The new Handbook takes account particularly of new disciplinary procedures required following the coming into force of the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 ('the new regulations') in May 2015. The new regulations apply only in England, so the 2009 procedures relating to Wales remain unchanged.

(The Handbook does not apply in Scotland and Northern Ireland. Also, the Handbook only applies to officers within the purview of this JNC, although the new regulations apply to Monitoring Officers and S151 Officers – Chief Finance Officers – as well as Heads of the Paid Service; it is anticipated that the Joint Negotiating Committee for Local Authority Chief Officers will adopt similar disciplinary procedures for MOs and CFOs to those now relating to chief executives. ALACE will notify members when an agreement for chief officers is concluded.)

The opportunity has been taken to revise the Handbook as a whole, in particular to bring up to date the section relating to the fixing of salaries and to revise the Grievance Procedure in the light of experience gained under the 2009 agreement.

**Salaries** – As the Handbook makes clear, a chief executive's salary is a matter for the employing authority, and the JNC no longer prescribes a scale or range within which salaries are fixed. Instead, the new Handbook sets out approaches to the fixing of salaries in the light of statutory provision and guidance introduced via the Localism Act 2011. Nevertheless, the JNC sets periodic (usually annual) percentage salary changes after negotiation, and these changes are commonly adopted by councils, unless in an individual case their application is expressly excluded.

**Grievance procedure** – Experience of the use of the former procedure showed that it needed to be fleshed out and tightened up, and also needed to be much clearer about who deals with what and when, and how any appeal process should be managed. As before, the procedure should be used to manage both grievances brought against the chief executive and grievances brought by the chief executive in his/her capacity as an employee.

### **Statutory protection/disciplinary procedures**

The current basis of statutory protection of chief executives in respect of disciplinary action lies in the Local Government and Housing Act 1989. Earlier regulations ('the previous regulations') required a designated independent person ('DIP') to conduct an investigation into disciplinary complaints and to recommend the sanction, if any, which should be imposed. The new regulations 'replace' this with a requirement for an Independent Panel to consider and advise on a recommendation for dismissal before the recommendation is considered by the Council. (The word 'replace' is in quotation marks above because the previous and the new regulations operate at different points in the disciplinary process.)

The JNC procedures are therefore based on and include statutory requirements, but comprise a complete disciplinary process, incorporating many practical points not referred to in the regulations. As is noted below, they also incorporate a resolution of potential areas of dispute in the application of the statutory requirements. They clearly state **'the model procedure should apply unless alternative arrangements have been agreed by both parties locally'**, so it is not open to a council to vary the procedures except with the chief executive's agreement.

Attention is drawn to the inclusion in the Handbook of flow-charts which help to guide users through what is inevitably a complex set of provisions.

This section is divided into three parts:

- . A summary of the procedure set out in the Handbook;
- . Reference to a number of issues affecting the understanding and application of the new regulations; and
- . Some practical points members may wish to have in mind in the operation of the new regulations and Handbook provisions

### **Summary of procedure**

The new regulations, like the previous regulations, apply to most forms of disciplinary action other than dismissal on grounds of redundancy, ill-health or failure to renew a fixed-term contract.

The effect of the new regulations may be summarised as follows:

- . The removal of the requirement for a DIP to investigate disciplinary complaints and to recommend what sanction, if any, should be imposed;
- . The removal of the constraint that a suspension may not continue in force for more than two months without the agreement of the DIP;
- . The removal of the provision that the only disciplinary sanction that may be imposed is one that is in accordance with a recommendation of the DIP; and
- . The imposition of a new requirement that, in the case of a proposal for dismissal of a chief executive, the Council should consider a report from an Independent Panel on the proposal.

### Role of the Investigating and Disciplinary Committee ('IDC')

This is the committee of the council responsible for undertaking the disciplinary action. Their responsibilities include:

- . Initial consideration of the allegations as to whether a disciplinary investigation should be conducted;
- . If so agreed, appointing an independent investigator and determining the scope of the investigation
- . Receiving the report and recommendations of the investigator;
- . Determining the sanction (if any) to be imposed – or, if dismissal is proposed, to recommend the council accordingly (in which case, the Independent Panel required by the new regulations should consider that proposal). Under the previous regulations, the council was obliged to follow the recommendation of the DIP as to disciplinary sanction; under the new regulations, there is no such requirement.

### Suspension

Under the previous regulations, suspension could not exceed two months without the agreement of the DIP.

This provision no longer applies, but the Handbook includes a provision whereby the continuance of a suspension should be reviewed by the IDC after it has been in place for two months.

The important provisions about possible alternatives to suspension have been retained.

### Disciplinary investigation

Under the previous regulations, this was the responsibility of the DIP.

Under the new regulations, there is no prescription in relation to the investigation, although the ACAS Code of Practice requires that there should be one. The Handbook provides that this shall be carried out by an independent investigator. The Joint Secretaries of the JNC will maintain a list of suitable independent investigators, and appointments will be made from this list. The usual procedure will involve the

Joint Secretaries providing three names from the list, working through the list in order; the Council will offer the names to the chief executive and s/he will choose one.

The investigation may take the form of a document review and a series of interviews with persons having knowledge of the issues in the case; or it may take the form of a hearing (as many DIP investigations did) – the decision on the process to be used being a matter for the investigator.

### The Independent Panel

Under the previous regulations, there was no such body.

The Panel is made up of (at least two) persons who are appointed by a council (not necessarily the employing council) for the purpose of considering allegations against elected members, under the provisions of the Localism Act 2011.

The role of the Panel is to offer to the council any advice, views or recommendations it may have on the proposal for dismissal. The Panel will have before it:

- . the IDC proposal and the reasons in support of the proposal;
- . the report of the Independent Investigator; and
- . any oral and/or written representations from the chief executive.

### The role of the Council

Under the previous regulations, the Council's role was to give effect to a recommendation for dismissal if such was put forward by the DIP.

Separate regulations require that a chief executive can only be dismissed by the council itself; this power may not be delegated to anyone else. These regulations continue in force.

Under the new regulations, the Council, in considering a proposal for dismissal of the chief executive, has to take into account:

- . any advice, views or recommendations of the Independent Panel;
- . the conclusions of the investigations into the proposed dismissal; and
- . any representations from the chief executive.

Furthermore, in practice, and under the conditions of service, the council meeting also fulfils the requirement for an appeal against dismissal (since the council cannot reasonably be expected to offer a separate appeal against a decision it itself has taken).

### **Issues arising in agreeing the new procedures**

In this section we provide some background to the new procedures, and outline some of the factors and considerations which have influenced the Handbook provisions as finally agreed.

### The new regulations

There are several issues arising from the wording of the new regulations, and the LGA and ALACE share most of the misgivings which they prompt:

- . They purport to replace one procedure (DIP) with another (Independent Panel), whereas in fact they add an extra stage into the disciplinary process overall, which of itself will be a source of delay and expense;
- . Consequently, the sense that chief executives get a favourable procedure compared with other employees is enhanced rather than diminished by the change;
- . There are uncertainties arising in the interpretation of the regulations which may well be a source of unnecessary argument when a council seeks to use the procedure. We have generally resolved these in the negotiations by what will be new contractual provisions, but that does not mean that there will not be unhelpful arguments about procedure in particular cases. For example, the wording of the new regulations is open to two interpretations in respect of the membership of the independent panel: either that the panel should be made up only of independent persons or that it should include members of the council (which would have to be appointed in accordance with the political proportionality rules, meaning a larger panel on which councillors would have a majority – not very independent!). The ambiguity arises from the fact that, under the Local Government and Housing Act 1989, all committees appointed under the Local Government Act 1972 s104 (which this panel is specifically stated to be) have to conform with the political proportionality rules thereby possibly negating the power under the 1972 Act to appoint a committee made up only of non-councillors. We have argued strongly that the new procedure should give effect to the obvious intention for the Panel to comprise independent persons only, and this has been agreed, so the position is secured contractually.
- . There appears also to be an unintended consequence in the regulations in that an independent person who becomes a member of a Panel in the council by whom s/he was appointed an independent person in the first place will thereby become disqualified for reappointment as an independent person for the members' complaints regime at the end of their term of office in that role. As the Panel is a committee of the council, it is the understanding that the independent persons' status is that of a co-opted member of that committee, and so of the authority. By Section 28(7) and (8) of the Localism Act, a person cannot be an independent person if the person is a co-opted member of the authority, and may not be appointed if at any time during the 5 years ending with the appointment, the person was a co-opted member of the authority. This means that if an independent person is appointed to a Panel

in their own council, they would be disqualified for reappointment as an independent person under the Localism Act for five years, and obviously this will need to be made clear when appointments are being made. So although under the regulations, priority has to be given in appointing a Panel to independent persons of that council, anyone accepting such an appointment would cease to be eligible for reappointment as a Localism Act independent person when their term of office expired. There is a possibility, therefore, that Panels will tend to comprise members appointed as Localism Act independent persons by other councils.

- . The new independent component in the procedure is individuals who have been appointed by councils for a completely different role (considering complaints against councillors) and therefore by no means to be expected to have the skills and understanding needed for possibly challenging cases involving local authority chief executives and their working environment.
- . The absence of consultation on the specific proposals and their failure to reflect the improvements to the previous procedures on which the LGA and ALACE had agreed during previous consultations.

### Disciplinary investigation

Under the ACAS Code of Practice, there is a requirement for 'necessary investigations...to establish the facts of the case...Where practicable, different people should carry out the investigation and the disciplinary hearing'. Under the previous regulations, this was carried out by the DIP, but with no DIP the question arose as to who should carry out the investigation.

In the case of a CE, we argued that it would not be appropriate for the investigation to be carried out by an officer of the Council, given that the officer would be under the management control of the CE and/or subject to influence by elected members. This view has been accepted, and the investigation will be carried out by an independent person.

The Employers had some concerns about this, mainly related to the perception that identifying a DIP and getting the investigation going was seen as one of the delaying and costly factors under the old procedure. The maintenance by the Joint Secretaries of a list of Independent Investigators, who will generally be selected on a 'cab rank' basis, is an important part of the new agreement.

### Independent Panel

This is the new element introduced by the new regulations – an independent panel having the status of a committee of the council and required to report to a council meeting that is to consider a proposal for the dismissal of a statutory officer. One issue here arises from the fact that this is an additional procedure – it does not,

because it cannot, replace the DIP procedure because as noted above there must be an investigation. Neither the LGA nor ALACE was looking for an extra component of what can already be a lengthy and expensive procedure – this is entirely a DCLG initiative (and one that was not the subject of consultation with either side). So another stage has had to be added into the standard three-stage process of investigation, decision and appeal. The Employers wished to explore limiting the scale of this additional element, but we have argued that this is now the only statutory protection available and ALACE members will expect to be able to have unfettered access to the independent element, and this has been agreed.

Members of the independent panel are to be drawn from independent persons appointed for the purpose of considering allegations against elected members, under the provisions of the Localism Act 2011. Such persons will not have been appointed with the responsibilities imposed by these new regulations in mind, and therefore not on the basis of any familiarity with HR or legal issues, challenges involved in performing the roles of statutory officers of local authorities, the nature of working relationships at senior levels in large politically-led organisations, possibly arbitrary or inappropriate political considerations affecting decision-making etc. We have agreed with the Employers that suitable training needs to be provided for panel members.

### **And some practical points**

If the possibility of the use of the new disciplinary procedures should arise in your case, it is in your interests to have ensured that **those colleagues likely to be involved in supporting members in their use** (probably the Monitoring Officer and/or the Head of Human Resources) **are aware of the existence of the Handbook** and its nature and scope. We have been aware of many colleagues over the years whose difficulties have been compounded by their Council's failure to follow the agreed procedures from the start.

The recruitment and training of independent investigators will be undertaken by the Joint Secretaries. **We would welcome suggestions from members as to possible suitable independent investigators** (in most cases, likely to be former chief executives).

ALACE members need to be aware that **independent persons appointed to deal with complaints against elected members may be required to fulfil the additional responsibility of advising a council on the recommended dismissal of a chief executive**, and ensure that this is taken into account in appointing such persons in the first place.

Finally, we have become aware of some colleagues **whose conditions of service have been changed from those laid down by the Chief Executives' JNC** to the

Green Book or to Chief Officers' conditions. This change cannot be made without the chief executive's agreement, but colleagues have not always felt it appropriate or desirable to resist such a change. But this Handbook contains the only set of conditions of service which is designed particularly for the distinctive role and context in which chief executives operate. **ALACE advises its members not to agree to Chief Executives' conditions being disapplied in their case, and will support any member wishing to resist such a change.** (Statutory protection itself applies whether Chief Executives' conditions apply or not, but most of the other provisions in the Handbook would not necessarily apply.)

**Association of Local Authority Chief Executives and Senior Managers  
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