

NOTE ON THE NEW REGULATIONS RELATING TO DISMISSAL OF SENIOR OFFICERS

Background

1. The Government issued new regulations on 25 March 2015 to come into force on 11 May. The Regulations introduce new arrangements for dealing with disciplinary cases involving a council's three statutory officers - the Head of Paid Service, Monitoring Officer and Chief Finance Officer. The new Regulations contain requirements for councils to amend their Standing Orders.
2. Because these three roles are statutory positions with specific roles and personal responsibility to ensure a council acts lawfully and has effective governance in place, they have had specific protection from dismissal under legislation in order to avoid them being scapegoated or victimised by local politicians were they to blow the whistle on impropriety within the authority. This is because the proper discharge of these personal responsibilities can bring the statutory officer into conflict with members of their authority, as their report may conflict with the political objectives of the authority, or indicate misconduct by a particular member.
3. Traditionally, before one of these officers could be dismissed, the council had to appoint a designated independent person (DIP) to carry out an investigation into the circumstances. The DIP was appointed on agreement between the council and the officer concerned, although if no agreement could be reached on the individual the Secretary of State had reserve powers to impose a DIP. The council could then only take disciplinary action in accordance with the DIP's report and recommendation.
4. The Secretary of State regarded this as a cumbersome and expensive process and wished to make it easier and cheaper for such officers to be dismissed where the council believed there had been significant misconduct or poor performance. He had therefore been consulting on draft regulations to streamline the arrangements and in particular remove the need for the DIP.
5. Concerns had been expressed by local government, however, that it was important to continue to provide some form of protection so that chief officers could not be dismissed purely because of political differences or for speaking uncomfortable truth unto power.
6. The new Regulations therefore seek to introduce a new streamlined procedure while attempting to retain some sort of independent check within the system. This is broadly done by giving the 'independent person' (IP) appointed to support the members' conduct framework a role in the disciplinary process for chief officers.
7. However, the regulations do raise a number of issues, both about the role of the IP and the way the process would work more generally, which remain to be clarified. This paper therefore summarises our initial understanding of the new process and some of the issues councils will need to consider. These Regulations do not stand alone but need to be considered in conjunction with wider provisions relating to local authority governance and any local process will have to have regard to general principles of employment law as well as any contractual employment agreements, so we should stress that these views below are only preliminary views and may be amended after further analysis.

The new process – in brief

8. The Regulations introduce new mandatory standing orders which all councils will have to put into their constitution to replace arrangements relating to the previous framework.

9. In brief, from now on, only the full council can dismiss one of the three statutory officers. Previously the decision could have been delegated to a committee or to the Head of Paid Service.
10. Before considering such action, the council must set up a panel whose role will be to give views, advise and make recommendations to the full council. The council must invite independent persons to sit on this panel. The panel must be appointed at least 20 working days before the relevant meeting of full council.

Issues – the independent person on the panel

11. There is no statutory minimum or maximum number of IPs that the council must appoint with regard to member misconduct issues. Some councils only have one, others have more than one.
12. Under the officer disciplinary process, the panel must invite at least two IPs to be on the panel, but can invite more. It is worth noting that the Regulations say the IP must be invited, but there is no obligation on any IP to take up the invitation, nor is there anything which would prevent the panel sitting if the IPs did not attend.
13. IPs are to be invited in a particular order. First priority is to be given to an IP appointed by the council who is also an elector in that council's area. If that proves insufficient numbers or the invite is refused, the council should invite any other IP it has appointed. And finally, it can then approach IPs from other authorities.

Issues – composition of the panel

14. The covering letter from DCLG accompanying the Regulations describes the panel as an 'independent panel'. In fact the Regulations state that it is to be a panel drawn from the council in accordance with the Local Government Act 1972 which means that it has to comply with certain legal requirements.
15. As by law it is an advisory panel under s102(4) of that Act, this can indeed be a panel consisting solely of independent (non-elected) members appointed for that purpose, which would meet the Government's stated aim of an 'independent panel'. However, there is nothing to say this has to be the case. It could also include elected members – and indeed if no IP takes up the invitation it would have to be made up of elected members.
16. If the Panel includes elected members then the political proportionality rules will apply to any elected members on the Panel, unless the Council votes to waive the proportionality requirements. In considering the composition of any Panel the principles of natural justice and employment law considerations would need to be borne in mind.
17. By virtue of s13 (3) and (4) of the Local Government and Housing Act 1989 IPs who are appointed to an advisory panel have the right, alongside any elected members to vote on matters at that panel. This differs from the IP's role in relation to member conduct issues, where they are there simply to give views rather than to make decisions and have no voting rights.
18. Incidentally, that would mean that any IP appointed to such an advisory panel would be considered a co-opted member with voting rights, and hence would become subject to the code of conduct under the Localism Act, including the requirements to register and declare DPs.
19. There is no upper limit placed on the membership of the panel, although by convention a panel should always consist of a minimum of three members. Although there is no obligation to invite more than two IPs, if the panel consists of wholly independent appointees, three IPs would have to attend. Otherwise, there must be at least one elected member alongside two IPs.

Issues – how would the panel carry out its considerations?

20. Inevitably the business of the panel relates to employment law and contractual matters. So, while there is no requirement for HR expertise on the panel, they would clearly need to have access to proper legal and HR advice to help their deliberations.
21. There is also no requirement specified as to what they are to consider. However, it is likely if they are to consider whether a dismissal can be justified, they would have to consider the outcome of an investigation or at the very least hold a hearing on the matter in hand. This is not least because employment law and existing contractual terms and conditions would still apply to the operation of the panel.
22. Regardless of the contractual provisions for a DIP in the JNC Chief Officer conditions of service, employment lawyers will be very familiar with the tests of employer reasonableness set out in sections 98(4) of the Employment Rights Act 1996. Whether the council's dismissal of a statutory officer will be regarded as fair or unfair by the Employment Tribunal will be determined by the circumstances (including the size and administrative resources of the council) and whether it acted reasonably. *Iceland Frozen Foods v Jones* [1982] IRLR 439 remains the leading case on the test to be applied. It is likely to be unfair to dismiss unless a reasonable and sufficient investigation into the alleged misconduct has been carried out, including the provision of an opportunity to explain.
23. Previously, the investigation was done by the DIP. The Government implies the guarantee of independence provided by the DIP has been replaced by the independence of the IP. Yet it seems unlikely that the expectation is that the IP would carry out any investigation, as that is not their role, so there will still need to be some sort of investigator appointed to provide evidence for the panel to consider.
24. It must be remembered that the panel is not the ultimate decision-making body – it is merely there in turn to advise the full council – so its procedures will need to reflect this.
25. That said, unless and until JNC terms and conditions are amended any procedure would need to comply with these contractual obligations. In particular, the JNC terms refer to the need for there to be an investigation committee to consider the findings of an independent investigation, and for there also to be an appeals committee. We would consider the advisory panel to meet the requirements for an investigating committee even though it is merely making recommendations rather than a final decision, but councils will need to consider how the need for any appeals committee would be met.
26. When the matter is referred to full council, it must have regard to any views, advice or recommendations made by the panel as well as the findings of any investigation and any representations made by the officer concerned.

What the council needs to do

27. These changes to standing orders come into force on 11 May. Councils must therefore adopt these changes at their first ordinary council meeting after that date. At the risk of sounding trite an ordinary meeting would be any meeting which is not 'extraordinary' under schedule 12 para 3 of the 1972 Act. Hence the annual meeting would be classed as an ordinary meeting.
28. Councils will need to decide whether they wish to create a standing panel or not. In any case, they should agree what the composition of any panel they might need to set up in future should be and agree procedural rules for the panel in case it needed to be convened in the future, to avoid future arguments about arrangements at a time when sensitivities would be likely to be high.
29. The Regulations also allow an allowance to be paid to any IPs appointed to the panel. Councils should consider now what those allowances might be and how they are incorporated into any existing

allowances IPs might currently be getting. The Regulations say this allowance cannot be more than the allowance paid to the IP for their 'member conduct' role. While this is not entirely clear, the implication does seem to be they can receive two separate allowances – one for this role and one for the member conduct role, provided the allowance for this role does not exceed that paid for the member conduct role.

Implications and considerations for IPs

30. IPs will need to be aware of the implications of these Regulations for their role. Chief officer dismissals can arise in a number of circumstances – where serious misconduct has been found, where there has been serious performance issues or occasionally where there has been a breakdown in relations between the officer and politicians. This last scenario will always prove the most contentious as officers can only be dismissed where there are clear grounds to do so under employment law.
31. In particular therefore IPs will need to think how they would carry out their role where the issue arises from a breakdown in relationships. They will need clear guidance on relevant and irrelevant factors they will need to consider.
32. While the Regulations say that IPs have to be invited to participate, it does not appear that they have to accept the invitation. If IPs decline the invitation, it seems clear that the council will have discharged its duty by inviting them so can proceed in their absence. IPs will therefore need to consider the grounds on which they would/would not accept the invitation.
33. As with their role in dealing with member conduct issues, the IP role here appears to be above all that of a guarantor of independence and due process. Even though they are part of the panel, unlike with member conduct issues where they merely give views to the relevant panel, it is not the panel which is the final decision-making body. IPs will therefore need to consider how they would fulfil their role on the panel and, in particular, how they would make representations if they disagree with conclusions reached by the councillors on the panel, particularly where they think the conclusions have been influenced by political rather than employment considerations, or if they do not believe that full council has properly taken the panel's views into consideration.
34. As their role is similar to their role in terms of member conduct, albeit they would have voting rights, we see no need to consider recruiting IPs with different mindsets or skillsets. They will not need to be employment law experts but merely able to reach an independent view based on evidence presented.
35. An IP would become bound by the code of conduct and related statutory obligations were they to become members of the panel and will therefore need to be reminded of their obligations when they do so.

A final reminder

35. Such cases are of course, thankfully, very rare. The most important role for an IP will remain in relation to member misconduct and that should be the main emphasis when recruiting and training IPs. This will simply be an additional duty which they will need to be aware of, but may never be called upon to exercise.

Note prepared by

PAUL HOEY AND NATALIE AINSCOUGH, HOEY AINSCOUGH ASSOCIATES LTD and JONATHAN GOOLDEN, WILKIN CHAPMAN LLP

2 APRIL 2015