

Agenda item:

Title of meeting: Employment Committee

Date of meeting: 15th September 2015

Subject: Changes to the designated independent person dismissal procedures

Report From: Director of HR, Legal & Procurement

Report by: Paddy May, Corporate Strategy Manager

Wards affected: N/A

Key decision: No

Full Council decision: Yes

1. Purpose of report

1.1. To inform members of a change to the procedures, recently agreed by Full Council that must be followed for the dismissal of designated statutory officer posts (Head of Paid Service, Monitoring Officer or Chief Finance Officer). These new changed procedures were set by central Government. To ensure that the new procedures are in line with employment law this report also seeks that the committee approve an appeals process, to be followed in the event of such a dismissal, which will then be placed before full council.

2. Recommendations

2.1. It is recommended that Employment Committee:

2.1.1. notes the new process for dismissal of designated statutory officer posts (set out in paragraphs 4.1-4.4) and also the new Officers' Employment Procedure Rules in Part 3D of the constitution that have been approved by Council (see Appendix 1) in line with Government requirements and which have been subsequently modified to take account of the contents of this report

2.2. agrees that in order to meet the new requirements, and also employment law, that the specific process to be followed, set out in section 5, is proposed to Full Council for adoption (via Governance and Audit and Standards Committee) with the proposed new Officers Employment Procedure Rules shown as Appendix 1.

3. Background

3.1. The Heads of Paid Service, the Monitoring Officers and the Chief Finance Officers (S151 officer) all have statutory responsibilities to discharge to their councils. As they work with, and report to elected members, they discharge these responsibilities in a political environment. Previously any allegation of misconduct

against any of these officers had to be undertaken by a Designated Independent Person (DIP) and no disciplinary action could be taken other than that which had been recommended in a report by the DIP. The purpose of these requirements was to ensure that these officers could discharge their duties without any fear of being influenced by elected members or of being dismissed without good reason.

3.2. In response to a policy position that the process of appointing a DIP and undertaking an investigation was bureaucratic, complex, time consuming and expensive, new regulations (the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 ("the regulations")) have been issued which have the effect of directing councils to change their standing orders.

4. The new arrangements

4.1 The stated intention of the new regulations was to "simplify and localise the disciplinary process for the most senior officers". The new regulations apply to dismissals for the same reasons as apply to the current DIP process i.e. for reasons other than redundancy, permanent ill health or infirmity of mind and body (and failure to renew a contract of employment for a fixed term unless the authority has undertaken to renew such a contract). The requirement to appoint a DIP was removed and instead a decision has to be taken by Full Council who must consider:

- any advice, views or recommendations from an independent panel
- the conclusions of any investigation into the proposed dismissal
- any representations from the officer concerned.

4.2 Councils had to agree the new approach at the first ordinary Council meeting after the election and modify their standing orders (or equivalent) with the text given in the regulations. In Portsmouth this meant that changes had to be made to the "Officers' Employment Procedure Rules in Part 3D of the Constitution" and this was agreed at the Council meeting on the 7th July. A copy of the revised employment procedure rules, with additional elements to reflect the content of this report, is attached as Appendix 1.

4.3 As part of the new process if a council wishes to undertake a disciplinary process against the Head of Paid Service, the Monitoring Officer or the Chief Finance Officer it must invite independent persons, appointed under the provisions set out by section 28(7) of the Localism Act 2011 (which also govern the members' conduct regime) to form an independent panel. A panel will be formed if two or more independent persons accept the invitations. Councils should issue invitations in accordance with the following priority order:

- an independent person who has been appointed by the council and who is a local elector
- any other independent person who has been appointed by the council
- an independent person who has been appointed by another council or councils

4.4 The regulations limit the remuneration that should be paid to the independent persons on the panel to the level that they would receive as an independent person in the conduct regime. It is suggested that this will significantly reduce the costs of any process. In terms of the need to set up any such panel Council

agreed that this responsibility should rest with the Director of HR, Legal and Procurement. There are a number of concerns that have been raised about these new requirements and one of these is about the lack of clarity about an appeal process. This issue was also raised at Governance & Audit & Standards Committee when they discussed the changes to our constitution. Section 5 below suggests a process that should be followed to overcome these concerns.

5. A proposed process to follow

- 5.1 It is worth stressing that the new regulations do not "trump" employment law. A process that is entirely consistent with the new regulations could be against Employment Law and therefore leave the Council open to legal challenge through an employment tribunal. It is therefore important that we design a process that is both consistent with the new regulations and with employment law. It should be noted that nationally it has been very rare for such dismissals to take place.
- 5.2 The Local Government Association have published an Advisory Bulletin which suggested a new process that could be followed that would be consistent with the new regulations and employment law. In this advisory bulletin they state *"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"*. A modified version of the LGA approach is the suggested approach for Portsmouth City Council.
- 5.3 It is proposed that in the event of a potential disciplinary process against one of the designated statutory officer posts that the Council should secure by way of the Director of HR, Legal and Procurement (or in the event that the factual circumstances suggest that a conflict of interests may arise in respect of that Director another Director) the establishment of an Investigation and Disciplinary Committee (I&DC) of three members and a standing I&DC Appeals Committee of three members, along with a Panel to independently advise on the decision. Each of the I&DC and the I&DC Appeals Committee would be made up of councillors in political proportionality to the number of seats each party has on the council and each of whom shall not take participate in any decisions of the council relating to the same matter. The I&DC should:
- Screen potential disciplinary / dismissal issues to consider whether they require investigation and whether the relevant "protected" officer should be suspended
 - To organise the investigation
 - To review the results of the investigation to consider what disciplinary action, if any, is appropriate after hearing the views of the relevant officer and then report its recommendations
 - If the recommendation is for a dismissal then the I&DC would refer the matter to the new Panel set up in line with the new regulations, to be convened by the Director of HR, Legal and Procurement (or other Director in the event of a conflict of interests), as described in the draft *Officers' Employment Procedure Rules*, at Appendix 1. The I&DC would then,

subject to the right of appeal referred to below, send any report from the Panel, alongside its own report to Council for a formal decision.

- If the Council approves the dismissal the City Solicitor or Deputy City Solicitor (in the event that the City Solicitor was the relevant "protected" officer) shall notify all members of the Cabinet of the name, and matters relevant to the dismissal.
- Following receipt of the notification above, the Leader may within 7 days, give notice of objection to the dismissal, accompanied by reasons for the objection.
- The City Solicitor or Deputy City Solicitor (in the event that the City Solicitor was the relevant "protected" officer) may request that the I&DC action the dismissal provided that:
 - No objection is received from the Leader; or,
 - Upon receiving an objection, a meeting of the Council is convened, the objection considered, and the Council resolves that the objection is not material or is not well-founded.
- In the event that the relevant "protected" officer elects to appeal the recommendation, the I&DC Appeals Committee shall convene to hear the appeal of the relevant "protected" officer, who shall review the decision of the I&DC, referring any new matters to the Panel, before submitting a report to Council for formal decision.

5.4 The advice from the LGA is that if a process is set up without an I&DC, or equivalent, and the process results in a dismissal it would not be possible to have an appeal because no one would have the authority to overturn the Council's decision.

5.5 Undertaking the process as described would also satisfy the Executive Objections procedure. The Executive Objection Procedure, set out in Schedule 3 to the 2001 Regulations, remains in force. So, where the Panel resolves to recommend to Council that a statutory officer be dismissed, notice will still have to be given to all members of the Executive, and the Leader then has a prescribed period to submit any objections or representations, which must be considered by Council when it considers the recommendation of the Panel. If the "decision" has been delegated to an I&DC, or equivalent, this means that the objections procedure could take place once the committee has made its dismissal recommendation and prior to the Council meeting.

5.6 Finally it is worth noting that whilst we have met the requirements to amend our standing orders, or equivalent, this has no effect on the contracts of employment of the designated officers or on the National Terms and Conditions. The current national Joint Negotiating Committee (JNC) terms and conditions for Chief Officers are based on the old DIP process. The statement of particulars for the three Portsmouth City Council designated statutory officer posts state that "Any disciplinary situation will be handled in accordance with the principles of the Joint Negotiating Committee for Chief Officers of Local Authorities" This means that until these change the Council would be following the old DIP process. The LGA are currently in discussion with CLG and the unions about updating the national terms and conditions although it is not clear when this will be complete.

6. Reasons for recommendations

6.1 The City Council has agreed the modified Officers' Employment Procedure Rules in Part 3D of the constitution relating to taking disciplinary action against the Head of Paid Service, the Monitoring Officer or the Chief Finance Officer. The recommendations in this report are to create a process consistent with the regulations and employment law and then to further modify the constitution. It is worth noting that negotiations are still being undertaken nationally about how the new regulations will be implemented.

7. Equality impact assessment (EIA)

7.1 A preliminary EIA was completed at the time of taking the report to Council and this concluded that there was no requirement for a full EIA at this stage.

8. Legal Implications

8.1 All legal comments are contained within the body of the report.

9. Director of Finance's comments

9.1 No specific budget provision exists for such an event and should this situation arise, costs would represent a call on contingency.

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Signed by: Jon Bell, Director of HR, Legal & Procurement

Appendices:

Appendix 1 - Proposed New Officers' Employment Procedure Rules from Part 3D of the Constitution

Background list of documents: Section 100D of the Local Government Act 1972

The following documents disclose facts or matters, which have been relied upon to a material extent by the author in preparing this report:

Title of document	Location

The recommendation(s) set out above were approved/ approved as amended/ deferred/ rejected by on

.....
Signed by: Name and Title

Proposed Officers' Employment Procedure Rules in Part 3D of the Constitution**Part 3D - Officers' Employment Procedure Rules ¹**

These rules determine procedures to be followed in the recruitment of senior officers of the council and in any disciplinary action which may become necessary and the involvement of Members in such matters. Further details of the disciplinary process for senior officers are contained in relevant policies agreed by the Employment Committee.

1. Recruitment and appointment
 - (a) Declarations
 - i) The council will draw up a statement requiring any candidate for appointment as an officer to state in writing whether they are related to, or in a relationship with, any existing councillor or employee of the council; or of the partner of such persons.
 - ii) No candidate so related to a councillor or an officer will be appointed without the authority of the relevant chief officer or an officer nominated by him/her.
 - (b) Seeking support for appointment.
 - i) Subject to paragraph (iii), the council will disqualify any applicant who directly or indirectly seeks the support of any councillor for any appointment with the council. The content of this paragraph will be included in any recruitment information.
 - ii) Subject to paragraph (iii), no councillor will seek support for any person for any appointment with the council.
 - iii) Nothing in paragraphs (i) and (ii) above will preclude a councillor from giving a written reference for a candidate for submission with an application for appointment.
2. Recruitment of head of paid service and chief officers

Where the council proposes to appoint a chief officer and it is not proposed that the appointment be made exclusively from among their existing officers, the council will:

 - (a) draw up a statement specifying:
 - i) the duties of the officer concerned; and
 - ii) any qualifications or qualities to be sought in the person to be appointed;
 - (b) make arrangements for the post to be advertised in such a way as is likely to bring it to the attention of persons who are qualified to apply for it;
 - (c) make arrangements for a copy of the statement mentioned in paragraph (1) to be sent to any person on request;
3. Where a post has been advertised as provided in paragraph 2(b), the council shall -
 - (a) interview all qualified applicants for the post, or
 - (b) select a short list of such qualified applicants and interview those included on the short list.
4. Where no qualified person has applied the council shall make further arrangements for advertisement in accordance with paragraph 2(b),
5. The council may authorise a chief officer to carry out any or all of the steps in paragraphs 2, 3 and 4 above and unless the council otherwise directs, the chief executive is authorised to carry out those steps in respect of any chief officer post.

¹ Last updated on [to be added]

6. **Appointment of head of paid service**

- (a) The arrangements for the appointment of the head of paid service (the chief executive) are reserved to the council².
- (b) Where the Employment Committee or an appointments sub committee is acting on behalf of the authority, the full council must approve the appointment before an offer of appointment is made.³
- (c) The council may only make or approve the appointment of the head of paid service where no well-founded objection has been made by any member of the Cabinet.

7. **Appointment of chief officers**

- (a) The arrangements for and appointment of all chief officers and staff on the Joint National Council for Chief Officers conditions of service is delegated to the Employment Committee who are authorised to delegate any such process and appointment (including the terms of any contract for such appointment) to an 'appointments sub committee', which shall comprise such members as the Employment Committee thinks fit, but must include at least one member of the Cabinet.
- (b) An offer of employment under (a) above must not be made by the Employment Committee or the appointments sub committee until —
 - (i) the chief executive has been notified of the names of the shortlisted candidates together with any particulars considered relevant to the proposed appointment;
 - (ii) the chief executive has notified every member of the Cabinet of —
 - the names of the shortlisted candidates;
 - any particulars relevant to the proposed appointment of any of the shortlisted candidates;
 - the period within which any objection to the making of any offer is to be made by the Leader of the Council on behalf of the Cabinet; and
 - (iii) either —
 - The Leader has, within the period specified, notified the committee that the Cabinet has no objection to the making of any offer;
 - the chief executive has notified the committee that no objection was received from the Leader within the period specified; or
 - the committee is satisfied that any objection received from the Leader of the Council within the period specified is not material or is not well-founded.

8. **Other appointments**

- (a) Officers other than head of paid service and chief officers
Appointment of officers on any other scheme of condition of service is the responsibility of the relevant chief officer or his/her nominee, and may not be made by councillors.

² The head of paid service (usually referred to as the Chief Executive) is a statutory appointment pursuant to section 4 of the Local Government and Housing Act 1989.

³ Paragraph 4 of Part 2 of Schedule 1 of the Local Authorities (Standing Orders) (England) Regulations 2001(as amended).

9. **Disciplinary action of Relevant Officers**

- (a) **Suspension.** The head of paid service, monitoring officer and chief finance officer may be suspended whilst an investigation takes place into alleged misconduct. That suspension will be on full pay and last no longer than two months.
- (b) councillors will not be involved in disciplinary action against any officer other than those employed on the Joint National Council for Chief Officers conditions of service.

10. **Dismissal of the Head of Paid Service, Monitoring Officer or Chief Finance Officer**

- (a) In this paragraph 10:
- "the 2011 Act" means the Localism Act 2011;
 - "independent person" means a person appointed under section 28(7) of the 2011 Act;
 - "local government elector" means a person registered as a local government elector in the council's area;
 - "The Panel" means a committee appointed by the council for the purposes of advising the council on matters relating to the dismissal of the head of paid service, the monitoring officer or the chief financial officer;
 - "relevant meeting" means a meeting of the full council to consider whether or not to approve a proposal to dismiss the head of paid service, the monitoring officer or the chief financial officer;
 - "relevant officer" means the chief officer, head of paid service, or monitor officer, as the case may be.
- (b) Where the Employment Committee or a committee acting on its behalf is discharging on behalf of the council the function of dismissal of a relevant officer, the full council must approve that dismissal before notice of dismissal is given to that person.

The relevant officer may not be dismissed unless the procedure set out in the following paragraphs 10(b) (i) to (xi) is complied with:

- (i) The Director of HR, Legal, and Procurement (or in the event that the factual circumstances suggest that a conflict of interests may arise in respect of that Director another Director) shall appoint:
- a. In consultation with the leaders of each political group, a committee of three members (the Investigation and Disciplinary Committee (I&DC)) shall be established, made up of councillors in political proportionality to the number of seats each party has on the council and each of whom shall not take part in any decisions of the council relating to the same matter;
 - b. In consultation with the leaders of each political group, a committee of three members (the I&DC Appeals Committee) not being members of the I&DC shall be established made up of councillors in political proportionality to the

- number of seats each party has on the council and each of whom shall not take participate in any decisions of the council relating to the same matter;
- c. A Panel of at least two independent persons appointed in accordance with the procedure set out below at (ii) to (v) for the purpose of providing advice, views, and recommendations.
- (ii) The Panel referred to at (i) (c) shall comprise "relevant independent persons" (meaning any independent person who has been appointed by the council), or where there are fewer than two such persons, such independent persons as have been appointed by another authority or authorities as the council considers appropriate.
- (iii) Subject to paragraph (iv), the council must appoint to the Panel such relevant independent persons who have accepted an invitation issued in accordance with paragraph (iii) in accordance with the following priority order-
- (1) a relevant independent person who has been appointed by the council and is a local government elector;
 - (2) any other relevant independent person who has been appointed by the council;
 - (3) a relevant independent person who has been appointed by another authority or authorities.
- (iv) No more than two relevant independent persons need be appointed but may do so.
- (v) The Panel must be appointed at least 20 working days before the relevant meeting.
- (vi) A meeting of the Investigation and Disciplinary Committee (the I&DC) shall:
- a. Screen potential disciplinary / dismissal issues to consider whether they require investigation and whether the relevant officer should be suspended;
 - b. Organise an investigation;
 - c. Review the results of the investigation to consider what disciplinary action, if any, is appropriate after hearing the views of the relevant officer and then report its recommendations;
 - d. If the recommendation is for a dismissal, refer the matter to the Panel who shall review the decision and report of the I&DC, and provide their advice, views, and recommendations;
 - e. The I&DC shall, subject to ix) below, provide the report of the Panel alongside its own report to Council for a formal decision.
- (vii) In the event that the relevant officer elects to appeal the decision of the I&DC to recommend dismissal the I&DC Appeals Committee shall convene to hear the appeal of the relevant officer, and shall review:
- a. the decision and report of the I&DC
 - b. any report of the Panel on the matter
 - c. any representations made by the relevant officer,

- d. any additional commentary provided by the Panel (in relation to any new matters raised)

Following which, the I&DC Appeals Committee shall where it resolves to recommend dismissal, submit its report together with any report of the Panel to Council for formal decision

- (viii) Before the taking of the vote at the relevant meeting on whether or not to approve such a dismissal, the full council must take into account, in particular-
- any advice, views or recommendations of the Panel;
 - the conclusions of any investigation into the proposed dismissal; and
 - any representations of the officer whose dismissal is being considered at the meeting
- (ix) If the Council approves the dismissal the City Solicitor or Deputy City Solicitor (in the event that the City Solicitor was the relevant officer) shall notify all members of the Cabinet of the name, and matters relevant to the dismissal.
- (x) Following receipt of the notification above, the Leader may within 7 days, give notice of objection to the dismissal, accompanied by reasons for the objection.
- (xi) The City Solicitor or Deputy City Solicitor (in the event that the City Solicitor was the relevant officer) may request that the I&DC action the dismissal provided that:
- a. No objection is received from the Leader; or,
 - b. Upon receiving an objection, a meeting of the Council is convened, the objection considered, and the Council resolves that the objection is not material or is not well-founded.

Any remuneration, allowances or fees paid by the council to an independent person appointed to the Panel must not exceed the level of remuneration, allowances or fees payable to that independent person in respect of that person's role as independent person under the 2011 Act.

11. **Dismissal of other Senior Officers**

- (a) councillors will not be involved in the dismissal of any officer other than those who are employed on the Joint National Council for Chief Officers conditions of service.
- (b) Where the Employment Committee or a committee acting on its behalf is discharging the function of dismissal of an officer on the Joint National Council for Chief Officers Conditions of Service, at least one member of the Cabinet must be a member of that committee.
- (c) Notice of the dismissal of an officer on the Joint National Council for Chief Officers Conditions of Service must not be given by the council, the Employment Committee, a sub-committee or officer until —

- (i) the chief executive has been notified of the name of the person whom it is proposed to dismiss and any particulars which are considered relevant to the dismissal;
- (ii) the chief executive has notified every member of the Cabinet of —
 - the name of the person whom it is proposed to dismiss;
 - any particulars relevant to the proposed dismissal;
 - the period within which any objection to the proposed dismissal is to be made by the Leader of the Council on behalf of the Cabinet; and
- (iii) either —
 - The Leader has, within the period specified, notified the committee or officer taking the decision that the Cabinet has no objection to the dismissal;
 - the chief executive has notified the committee or officer taking the decision that no objection was received from the Leader within the period specified; or
 - the committee or officer is satisfied that any objection received from the Leader of the Council within the period specified is not material or is not well-founded.

(These Rules incorporate where required within paragraphs 6, 7, 8, 9, 10 and 11, the provisions of the Local Authorities (Standing Orders) (England) Regulations 2001)(as amended).

NOTE:

The term chief officer includes Directors.