

## **DISCIPLINARY POLICY and PROCEDURES**

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## 1. Policy Statement

Manx Care requires high standards of conduct from all members of staff. We are committed to giving staff the opportunity to improve and learn from mistakes, developing and maintaining the high standards of conduct all colleagues within Manx Care and the Isle of Man community deserve.

Manx Care recognise the potential impact that disciplinary procedures can have on the wellbeing of staff and ensure that support is available for those involved at an early stage.

Managers will attempt to resolve minor matters of concern through informal resolution. If an informal approach fails to bring about improvement in conduct or behaviour, or if the misconduct is more serious, the formal stages of the disciplinary procedure will apply.

## 2. Introduction

The Disciplinary Procedure is designed to encourage employees to achieve and maintain the standards of conduct and behaviours expected, in a manner which is consistent and fair.

## 3. Scope

The Disciplinary Policy and Procedure applies to all employees of Manx Care including temporary/bank/casual/relief.

The Policy and Procedure will apply to Dentists and Medical Doctors only where the allegation against them is non-clinical in nature. Where provisions exist within their professional regulatory council to deal with clinical issues they are also excluded.

**The Disciplinary Policy & Procedure does not cover PSC (Civil Service/Manual & Craft) whose terms and conditions are determined by the Public Services Commission. Neither does it cover agency staff.**

The Office of Human Resources (OHR) and the Department, Board or Office Privacy Notices describe how personal information about an employee is collected and used during and after their working relationship within the Isle of Man Government and what legal basis there is for gathering and retaining that information in accordance with the Data Protection Act 2018 including the General Data Protection Regulation. For further details about the information collected and retention periods, please refer to the Office of Human Resources and relevant Department, Board or Office Privacy Notices

Information generated and collated during the application of these procedures may be disclosed (appropriately redacted) as part of a Subject Access Request.

Police, Courts, Tribunals or Regulatory bodies may order disclosure of documents, irrespective of whether or not they are confidential. These will be redacted and released where advised by the Data Protection Officer (DPO) for Manx Care.

In order to comply with GDPR legislation, employees who wish their personal data to be shared by OHR or Manx Care with their union representative are required to provide written consent to OHR.

This procedure will be reviewed every two years.

#### 4. Purpose

The purpose of the Disciplinary Policy and Procedure is to:

- Let employees know what is expected of them by Manx Care in terms of standards of conducts and behaviours, and the possible outcomes if these standards of conduct and behaviours are not consistently met
- Provide managers with a framework and guidance to support improvement to conduct and/or behaviours
- Support the employee to achieve the expected standards of conduct and/or behaviours.

#### 5. Key Principles

The following principles will apply to the application of this procedure:

**Informal Resolution** – Managers are responsible for addressing conduct and behaviour issues as early as possible and for taking appropriate action. Where appropriate, steps will be taken to resolve issues on an informal basis without recourse to the formal procedure. If informal action does not bring about an improvement, or the misconduct is considered too serious to be classed as minor, the formal procedure should be followed.

**Investigation** – It is important to carry out necessary investigations of potential disciplinary matters before any formal disciplinary action is taken. Where an investigation is undertaken under another procedure (e.g. Fairness at Work) the contents of the investigation report may be used as part of this process. Where this is the case, the employee will be supplied with all documents forming part of the investigation. Any such documents may also be redacted as advised by the DPO for Manx Care.

**Nature of allegations** – The employee against whom an allegation(s) has been made shall be advised in writing of the nature of the allegation(s) made against them and the disciplinary offence this constitutes including, where possible reference to specific rule or code of conduct. They'll be given the opportunity to respond as part of any investigation before any decision is made as to whether or not to progress the disciplinary procedure. If the allegation is deemed to be potentially one of Gross Misconduct, this should be stated at this stage.

**First breach of discipline** – Dismissal will not usually be a sanction for a first breach of discipline except in the case of gross misconduct.

**Confidentiality** – All parties involved in these procedures must ensure that they maintain, as appropriate, the confidentiality of the process within and outside Government.

Unauthorised disclosure of information relating to the investigation to any party not entitled to receive it, may constitute a disciplinary offence.

**Involvement of Human Resources** – The Office of Human Resources (OHR) is available to provide advice and support and will advise on precautionary suspension, investigation and the formal procedure. The OHR may also be invited to attend meetings to advise on procedural matters and employment legislation. Managers and employees may seek advice from the OHR at any stage in the procedure.

**Timescales** – Whilst every endeavour will be made to comply with timescales, due to the complexity and/or specific circumstances of cases, timescales may be extended in order to accommodate availability of those involved. In such circumstances, the reasons for the delay will be discussed with the commissioning manager who will ensure all parties are kept informed. If the designated manager determines that delays are unreasonable, they will discuss the way forward with OHR.

## **6. Right to be accompanied**

At each stage of the formal process, including the investigation interview, the employee should be advised of their right to be accompanied by a work colleague or trade union/staff association/professional body representative when invited to any meetings or hearings.

There is no right to be accompanied by a legal representative other than in cases where the allegation is such that in addition to the risk of dismissal, the employee would be at risk of being prohibited from working within their profession or with young or vulnerable people.

It is the employee's responsibility to arrange for a work colleague or trade union/staff association/professional body representative to attend meetings/hearings with them to ensure that the person they choose to accompany them is available to attend such meetings.

Reasonable adjustments may be needed for an employee with a disability (and possibly for their companion if they are disabled). For example the provision of a support employee with knowledge of the disability and its effects.

## **7. The procedure**

### **7.1 Informal Procedure**

Line managers and supervisors should develop and foster trusting relationships with their employees to enable them to discuss freely any issues that arise.

As soon as it is identified that an employee's conduct or behaviour(s) may be falling below the required standards, the issue should be addressed and discussed as soon as possible by informal one-to-one discussions between the employee and their line manager without using the formal procedure. The employee should also be given an opportunity to give any reasons for the alleged issue/shortfall. An informal verbal reminder of the standards expected will be issued at this stage and confirmation of this provided to the employee.

If informal discussions are not successful in bring the employee's conduct/behaviour up to the required standard, or if the allegation is of a more serious nature, then formal Disciplinary Procedures should commence. Alleged Gross Misconduct must be dealt with via the formal disciplinary procedures.

### **7.2 Formal Procedure**

It may be appropriate to use the Manx Care Fast Track Disciplinary Procedure (MCFTDP). The Fast Track Procedure applies to all employees with the exception of those on Medical and Dental Terms and Conditions of Service. The MCFTDP can be found [here](#). The Fast Track Procedure in relation to PSC staff can be found [here](#).

Where a formal allegation of gross misconduct is made (and informal or MCFTDP is not appropriate), an investigation will be commissioned to establish all relevant facts and whether there are grounds for the matter to proceed to a disciplinary hearing. The investigation should also identify any possible mitigating or aggravating circumstances which should be taken into consideration.

The employee must be informed in writing of the specific nature of the allegation, the relevant policy/procedure/code/legislation that applies.

Any suspected financial irregularities should be reported to the Director of Advisory Audit by the line manager. The employee will be advised, at the earliest opportunity, the name of the investigating officer appointed. If the employee feels that there is a conflict of interest, perceived conflict or another compelling reason why the investigating officer is not appropriate, they can state their case for this to

the commissioning manager. It will be for the commissioning manager to make a determination on the merit of the objection following discussion with OHR and the union representative.

The format of an investigation will depend upon the nature of the allegation(s). A template for an Investigation Report can be found in the Investigating Officer guide section at [OHR/Forms](#)

The Investigating Officer conducting the investigation will have no previous direct involvement in the matter, although they may have been aware of its existence.

Where the investigation report concludes that there is insufficient evidence to support the allegation(s) made, the commissioning manager will advise the employee in writing that no further action will be taken under the Disciplinary Procedure in respect of the alleged offence(s).

Where the investigation report concludes that there is sufficient evidence to support the allegation, the commissioning manager should determine the appropriate next steps. These could include progression to Disciplinary Hearing. The manager should record their decision and the reasons for this and provide a copy of this to the employee.

Where the manager determines that a disciplinary hearing should be convened, the individual should receive a copy of the investigation report and all appendices.

### **7.3 Precautionary Suspension**

Precautionary Suspension is a neutral act and should not be seen as an indication of the outcome of an investigation, hearing or appeal.

Any employee either, permanent or limited term, will receive full pay during the period of precautionary suspension. For the purposes of this procedure, full pay is defined as full basic pay and allowances that are a permanent feature of basic pay.

Casual, bank or relief staff will receive payment for any shifts or sessions previously agreed or scheduled and will be entitled to no further pay during any period of precautionary suspension.

Suspension should never be an automatic approach for a manager when dealing with a potential disciplinary matter.

Most disciplinary procedures will not require suspension. An employee will usually be able to continue doing their normal role while the matter is being investigated. Although temporary redeployment/relocation or other duties may be considered as an alternative to suspension.

Precautionary suspension should only be considered if there is an allegation of gross misconduct and:

- The employee is at risk by other employees, or customers
- Working relationships have severely broken down
- The employee could tamper with evidence, influence witnesses and/or sway the investigation into allegation
- There is a risk to other employees, property or customers
- The employees is the subject of criminal proceedings which may affect whether they can do their job.

The decision to precautionary suspend will be taken by a Senior Manager/Care Group Manager after consultation with OHR. Any precautionary suspension must be followed up in writing to the employee after they are notified of the reasons for the suspension.

Precautionary suspension is likely to have a significant impact of the employee, and where it is considered that there is no alternative to the suspension consideration must be given to what measures should be put in place to ensure the wellbeing of the employee. This will include agreeing contact measures and methods, and ensuring the employee is aware how to access additional support.

Precautionary suspension should not continue for any longer than necessary and should be reviewed on a regular basis to ensure it remains an appropriate course of action.

A precautionary suspension may not take place initially due to the risk assessment at the time but can be enacted later during the disciplinary process.

During any suspension period there must be regular monitoring of the progress of their investigation and contact with the employee will be maintained by their line manager/or agreed person.

The employee must be provided with a point of contact during their period of precautionary suspension. Every effort should be made for contact to be made by the point of contact on a weekly basis.

Precautionary suspension should be kept under regular review and may be extended where it is impractical to conclude a full investigation and/or arrange a disciplinary hearing within this period of time.

Precautionary suspension can be lifted at any time and disciplinary action at a lower stage can still take place. Should a suspension be lifted this must be confirmed in writing to the individual.

Managers need to ensure that employees are fully aware of the services of Staff Welfare.

#### **7.4 Criminal Offences**

If an employee is arrested, charged with, or found guilty of any criminal offence they must report the matter to their line manager without delay. An exception is a traffic offence for which the penalty did not include imprisonment or the suspension of his driving licence.

In any case, where preliminary enquiries give grounds for believing that a criminal offence may have been committed, or if there is any doubt about whether a possible criminal offence has been committed, the advice of the Attorney General and OHR must be sought immediately. The Manx Care Board should be informed by the line manager and if public funds are involved, the Director of Audit Advisory Division should also be notified.

Any other allegations should be investigated and dealt with using the disciplinary procedures providing no evidence is forthcoming during the investigation that a criminal offence may have been committed. If it appears that a criminal offence may have been committed in addition to the alleged disciplinary offence which is being considered then, after consultation with the Attorney General, the disciplinary offence may be dealt with and the employee informed that the question of prosecution will be considered independently. Conversely it may be necessary to suspend disciplinary proceedings until such time as criminal investigations/proceedings are completed.

#### **7.5 Disciplinary Hearing**

It is the commissioning manager's decision to proceed to a hearing based on the findings of the investigation report.

The purpose of the hearing is to consider if the allegation(s) are proven/upheld and what disciplinary sanction, if any, is appropriate when all of the evidence of the case has been heard/mitigation considered.

For all hearings which may lead to dismissal, the hearing will be heard by a panel of three managers who



are at least Senior Manager/Care Group Manager. The Chair must have authority to dismiss and be more senior to the person appearing before the hearing.

Hearings which will not result in dismissal may be heard by a Hearing Officer alone or a panel of three managers. The Hearing Officer (or Panel Chair) must be more senior to the person appearing before the hearing.

When inviting an employee to attend a hearing regarding an allegation of gross misconduct the employee must be made aware that an outcome could be summary dismissal without notice or pay in lieu of notice.

The employee must be notified of the date, location and time of the hearing at 10 working days in advance, and provided with all documentation relating to the allegation and the investigation and offered the opportunity to provide further information relevant to the hearing.

The employee should be advised that they can call witnesses, however the Hearing Officer/panel should be made aware of any witnesses called prior to the hearing.

During the hearing the employee will be given the opportunity to give an explanation, answer questions and offer details of any mitigating circumstances.

If any new facts emerge during the hearing, the hearing may be adjourned for further investigation and then reconvened. Once all the evidence has been presented, the hearing should be adjourned whilst the Panel make a decision.

It is a matter for the Hearing Officer, or Panel Chair to determine how to conduct the hearing. It is the Hearing Officer who will decide who they wish to hear from in evidence and in similar vein who or should not be present when that evidence is taken. In a situation of a vulnerable witness it will be the Hearing Officer/Panel Chair who will decide (acting reasonably, and taking into account the views of the Respondent or union representative/ staff association representative/professional body representative) what protection to afford the vulnerable witness. The Hearing Officer/Panel Chair must be mindful of finding a fair balance between protecting a vulnerable witness and allowing for a fair hearing for the employee.

Circumstances under which a hearing may be held in employee's absence:

The Hearing Officer/Panel Chair should reschedule the hearing on the first occasion of non-attendance and the employee given the opportunity to attend the rescheduled hearing, attend remotely via electronic meeting facility, or make a written submission to the hearing as alternatives if they do not wish, or are unable to attend in person.

If an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause, the Hearing Officer, or panel chair, after seeking the advice of OHR, may make a decision based on the evidence available.

### **Witnesses**

Wherever possible, and particularly in cases are of a sensitive nature, arrangements should be put in place for separate rooms to be available for witnesses.

### **Hearing venues**

Where cases are of a sensitive nature, Hearing Officers should ensure that any hearing venue provides sufficient space between both parties and any witnesses. Hearing Officers, where they believe it is appropriate, may put additional measures in place to ensure the wellbeing of all parties.

### **Remote Hearings**

Where it is not possible to hold a face-to-face meeting/hearing, disciplinary meetings/hearings may be held remotely. Management must ensure that employees have access to the necessary technology for participating in the process. Such hearings will not affect the rights of the employee, and management must ensure that the procedure remains fair and reasonable.

### **Recording of Hearings**

Employees and any person acting on their behalf, are not permitted to record electronically any meetings/hearings held as part of the disciplinary process, unless explicit permission has been given by all parties. [This is to encourage openness and full participation by all parties during meetings/hearings]. Any breach of this provision may lead to disciplinary action.

However, in certain limited circumstances, management may permit meetings/hearings to be recorded electronically (for example where it is a reasonable adjustment for an employee with a disability). Where management permit the meeting/hearing to be recorded electronically, management will take responsibility for making and transcribing of the recording which will then be held in line with the OHR Records Management and Document Retention Policy.

### **7.6 Decision and Penalties/Sanctions**

Each disciplinary case must be considered on its merits. The sanction, if any, should be reasonable in all the circumstances.

#### **Allegation Unsupported/No case to answer**

If it is found at the hearing that there is no case to answer, then the allegation is discharged. This should be conveyed to the individual in writing within 5 working days of the hearing.

#### **Allegation Upheld**

If it is found at the hearing that there is a case to answer, any mitigating circumstances will be considered and the employee will be issued with an appropriate sanction, which may be one of the following:

- **Oral Warning**  
In the case of minor misconduct an oral warning may be appropriate.
- **Written Warning**  
Where an oral warning is 'live' or has been ineffective previously, or where the alleged misconduct is more serious, it may be appropriate to give a written warning.
- **Final Written Warning**  
Where there is a 'live' lower warning, or previous warnings have been ineffective and misconduct continues, or the nature of the offence is of a serious nature a final written warning may be given or other action short of dismissal may be taken, as set out below. Warnings need not be sequential, i.e. a written warning does not need to be given before a final written warning can be considered.

#### **Other sanctions short of dismissal**

Demotion to a lower banded post, including removal from a post may be used as an alternative disciplinary sanction or in conjunction with another sanction. This penalty may only be considered where such a post exists and following discussion with OHR.

## **Time Limits on Warnings**

The formal disciplinary sanction period must be confirmed in the letter to the employee within 5 working days of the hearing, and will usually remain 'live' from the date of the hearing as follows

- Oral Warning 6 months
- Written Warning 12 months
- Final Written Warning 12 months

These periods may be extended if considered appropriate by the Hearing Officer/Panel. In which case, specific rationale for this will be provided.

There may be times where an employee's conduct is satisfactory throughout the period the warning is in force, only to lapse very soon afterwards. Where a pattern emerges, an employee's disciplinary record should be borne in mind when deciding how long any current warning will remain live

The employee should be advised that a record of the disciplinary action and sanction will 'remain live' on their personal file throughout the period that the warning is in force.

The employee should also be advised that record will still be maintained once the warning is no longer 'live'.

## **Dismissal**

If the employee's conduct still fails to improve despite support and penalties imposed, or if the allegation is of gross misconduct, it may be necessary to consider dismissal.

The employee will be given a verbal determination at the conclusion of the hearing.

The employee should be informed, in writing within 5 working days of the disciplinary hearing, of the reason for dismissal, the date on which their contract of employment will be terminated, the appropriate period of notice, where applicable and their right to appeal.

An employee who is dismissed for gross misconduct (examples can be found at Appendix One) may be dismissed without notice (summary dismissal) or payment in lieu of notice with effect from the date of the decision being communicated.

## **7.7 Appeals**

Employees who have had any disciplinary action taken against them have the right of appeal.

The following are examples of grounds for appeal:

- The original hearing was in some way procedurally unfair;
- The penalty imposed was excessive in relation to the conduct issue;
- New information of a material nature has come to light after the original hearing.

When lodging an appeal, the employee should state:

The grounds of appeal; and

Whether they are appealing against the finding that they committed the act/s of misconduct, or against the level of disciplinary panel imposed.

Appeals, stating the grounds upon which they are based, must be submitted by the employee in writing within 10 working days of the date of the written confirmation of the warning, dismissal or other penalty.

The purpose of the appeal hearing is to review the decision of the Hearing Officer/Panel, where the employee has grounds for requesting this.

An appeal for a disciplinary sanction short of dismissal will be heard either by a senior manager/care group manager or panel (a Chair and not more than two appropriate managers) the Chair of which should be more senior in authority than those who took the original decision. One of the panel may be a member of the Professional Body (where relevant) with no previous knowledge of or involvement with the case.

Appeals against dismissal shall be notified to the CEO of Manx Care who will arrange for it to be heard by a panel of three persons, the Chair of which should have authority to dismiss and be more senior to the Chair of the disciplinary hearing panel.

The Appeal Panel will, in all cases, be advised by a representative from OHR.

The Appellant shall be given notice in writing at least 10 working days in advance of the time and place of the hearing and shall be allowed to be accompanied by a work colleague or recognised trade union/staff association/professional body representative and shall be entitled to call witnesses and produce documents relevant to their appeal at the hearing.

Management should not rely on an appeal to correct earlier failings in the disciplinary process, although a fair appeal may help managers avoid findings of unfair dismissal against them.

Every point of appeal must be addressed and comprehensively responded to in the decision letter.

A model procedure for use at the hearing of disciplinary appeals can be found at Appendix Two,

## **8. Disciplinary Action Taken Against Members of Recognised Trade Unions/Professional Bodies/Staff Associations**

The required standards regarding conduct, attendance and performance apply equally to officials of trade unions/staff association/professional body representatives. However, no disciplinary action beyond a formal oral warning should be taken against such an official until the circumstances of the case have been discussed in general terms by a senior manager/Care Group Manager with a senior trade union/staff association/professional body representative or full time official of the recognised trade union/staff association/professional body.

In respect of the recognised Trade Unions for Public Services Commission (PSC) employees, the Secretary of the PSC should also be informed.

## **9. Relationship of Disciplinary Procedure with Other Procedures**

The Disciplinary Procedure deals with an employee's conduct and should not be confused with the Capability Procedure which relates to the skills, aptitudes, mental and physical health or attendance at work of an employee. A clear distinction must be drawn between lack of skill or ability and misconduct. The disciplinary procedure is appropriate in matters of misconduct. In some circumstances, both these processes can run concurrently. Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance.

Where the grievance and disciplinary cases are related, it may be appropriate to deal with both issues concurrently.

Sometimes an employee may raise a grievance, or complaint, connected to the case during the course of a disciplinary procedure. In these circumstances the case should continue in parallel and any issues should be raised through either the Grievance or Fairness at Work procedures. If the Grievance or Fairness at Work complaint is upheld then the disciplinary process may take this into consideration. In some cases the grievance process may recommend that the disciplinary process is not progressed and where the procedures are running concurrently, any dismissal should not occur before any outstanding grievance or complaint connected to the disciplinary is concluded. This should only be relevant if there is a direct link between the disciplinary and the grievance/complaint.

#### **10. Retention of Documentation**

Confidential records of any Disciplinary Procedures and the outcomes will be kept by the Office of Human Resources in accordance with its document retention procedure.

## **Appendix One – Acts which constitute gross misconduct**

### **Acts which constitute gross misconduct**

Employees may be summarily dismissed without notice or payment in lieu of notice in cases constituting gross misconduct. The following list, which is not exhaustive, contains examples of actions which may be regarded as gross misconduct. This list is not intended to be fully comprehensive, or inclusive of all matters which might lead to dismissal or disciplinary action under the terms of the Disciplinary Procedure:-

- Stealing from the organisation, members of staff or the public and other offences of dishonesty;
- Fraud (including fraudulent clocking offences, falsification of records, accounts, expense claims, self-certification forms, and qualifications that are a stated requirement of the employee's employment or results in financial gain to the employee);
- Sexual misconduct at work;
- Obscene behaviour;
- Fighting with or physical assault, or threats of the same, on members of staff or the public;
- Bullying, harassment /victimisation and or inappropriate behaviour
- Wilful damage to, misuse of, or negligence in respect to the organisation's property, facilities or equipment, or unauthorised use of the same;
- Intoxication induced by alcohol, illicit drugs or misused prescribed / over-the-counter medicines while on duty or liable to be called for duty;
- Criminal conviction arising from an offence committed within or outside of normal working hours and where the offence is of a nature so as to render the employee unsuitable for the type of work employed
- An offence of unlawfully possessing controlled or illegal drugs will be deemed in all cases to be an offense as described in h) above;
- Serious breach of the organisation's rules, including, but not restricted to, health and safety rules, rules on computer use, Data Protection rules, Breach of Financial Regulations;
- Discrimination or harassment of a fellow employee on the grounds of gender, sexual orientation, race, disability, age, religion or belief;
- Deliberately ignoring health and safety at work rules and thereby endangering own or another's physical well-being, or risking unacceptable loss or damage;
- Conduct by word or deed detrimental to the public service;
- Wilful disobedience of reasonable instructions;
- Deliberate unauthorised disclosure of confidential information obtained by virtue of employment; e.g. tenders, medical records, staff references etc. except where these are 'protected disclosures' including whistleblowing in accordance with the relevant policy;
- Where proven harassment, discrimination or bullying amounts to gross misconduct.

## **Appendix Two – Model procedure for use at the hearing of disciplinary appeal panels**

The person or body ("the appellate body") considering an appeal against a disciplinary penalty shall use the following model procedure which may only be modified if there are good reasons for doing so:-

The appellate body shall have power to determine the appeal. Where a Panel is appointed it will comprise not more than 3 persons none of whom have been involved in handling the case previously.

The officer ("the appellant") shall be given notice in writing at least 10 working days in advance of the time and place of the hearing and shall be allowed, if they wish, to be accompanied by a "friend" of their choice (who may be either a work colleague, trade union representative, staff association representative or professional body representative) and shall be enabled to call witnesses and produce documents relevant to their defence in advance of or at the hearing. The appellant may also be advised in advance of the hearing of the procedure to be used at the hearing.

The manager against whose decision the appeal has been lodged ("the manager") shall be given at least 10 working days' notice in writing of the time and place of the hearing and may be advised of the procedure to be used at the hearing.

At the hearing, the manager shall put the case in the presence of the appellant (and their friend) and may call witnesses.

The appellant (assisted by their friend) should be given the opportunity to ask questions of the manager on the evidence given by them or any witnesses who they may call.

The appellate body may ask questions of the manager and any witness (is).

The appellant (assisted by their friend) should put their case in the presence of the manager and should be allowed to call such witnesses as they wish.

The manager should have the opportunity to ask questions of the appellant and their witness (is).

The appellate body may ask questions of the appellant and their witness (is).

The manager and the appellant (assisted by his friend) should have the opportunity to sum up their case if they so wish. The manager and/or the appellant may ask for a short adjournment before summing up, if either wish.

The manager and the appellant (and any friend) and any witness (is) should be asked to withdraw.

The appellate body with the person appointed to act as Chair to the hearing should deliberate in private, only recalling the manager and the appellant to clear any points of uncertainty on evidence already given. (If recall is necessary both parties should return notwithstanding only one is concerned with the point giving rise to doubt).

The appellate body should announce the decision to the parties personally wherever possible and should confirm in writing. The decision of the appellate body will be final.

## Appendix Three – Guidance for Managers

### A. DIFFERENCE BETWEEN CAPABILITY AND DISCIPLINE

The Capability procedure is usually implemented when an employee is not able to get to the standards required after standards have been advised and support has been given and is due to a variety of reasons. These reasons can include a lack of aptitude, skill or experience, lack of training, lack of understanding of what is required, changes in workload, changes in the nature and allocation of workload, personal problems or health problems. Disciplinary is usually implemented when an employee is not willing to get to the standards required or whose conduct is unacceptable.

### B. PRECAUTIONARY SUSPENSION

#### Alternatives to a suspension

A manager considering suspending an employee should think carefully and consider all options.

Even when there are reasons to consider suspension, in most situations a temporary adjustment to the employee's working arrangements can remove the need to suspend.

For example, if an employee has an allegation of operating unsafely, then a temporary transfer into a role where they can be supervised closely may be appropriate or if tensions between two employees are high then a temporary transfer to a different team can stop them having to work together while an investigation is carried out.

Alternatives to suspension could include the employee temporarily:

- Being moved to a different area of the workplace
- Working from home
- Changing their working hours
- Being placed on restricted duties
- Working under supervision
- Being transferred to a different role within the organisation (the role should be of a similar status to their normal role, and with the same terms and conditions of employment.)

Only if all other options are not practical, may suspension become necessary.

#### Additional considerations for precautionary suspension

There must be no assumption of guilt associated with a suspension and suspension must not be used as a disciplinary sanction. However, a suspension can still have a damaging effect on the employee and their reputation.

Therefore, if a suspension is necessary, the suspension and the reason for it should be kept confidential, where possible. If it is necessary to explain the employee's absence, a manager should discuss with the employee how they would like it to be explained to colleagues and/or customers.



Other considerations could include whether it is necessary to:

- Escort the employee from the workplace (whilst ensuring that the individual gets home safely).
- Remove the employee's workplace pass and/or IT access.
- Ask the employee not to contact other employees during the investigation<sup>1</sup>

### **How should an employee be suspended?**

If suspension is necessary, an employee should be provided with a suspension letter that includes:

- The reasons for the suspension and how long it is expected to last.
- Their rights and obligations during the suspension. For example, that they should be contacting during normal working hours.
- A point of contact (such as a manager or HR) and their contact details for the employee during their suspension.
- That the purpose of suspension is to investigate and is not an assumption of guilt.
- Some individuals may find it extremely distressing to be told that they are being suspended. This may be the case even if the person does not show any obvious signs of distress. Management should bear this in mind in deciding when and how to communicate a decision about suspension. It is good practice to encourage a suspended employee to access some immediate support and to offer help to do this.
- [Discipline and Grievances at work \(acas.org.uk\)](#) Page 18.

### **How long should a suspension last?**

A period of suspension should be kept as brief as possible and regularly reviewed to ensure it is still necessary. A suspended employee will usually still be expected to be contactable during normal working hours and available to attend any meetings and/or interviews that are necessary concerning the investigation.

Sick leave provisions according to relevant terms and conditions will continue to apply during any period of suspension.

If the employee wants to go on holiday during their suspension, they must still make a request to take annual leave.

During suspension, permitted annual leave carryovers cannot be exceeded unless there are extenuating circumstances and on these occasions advice should be sought from OHR.

Flexi Leave may also be granted during periods of suspension.

### **Communication during a suspension?**

An employee should be kept regularly updated about their suspension, the ongoing reasons for it, and how much longer it is likely to last.

Regular contact should be maintained between the employee and their manager and/or point of contact during their suspension. The employee should be advised of who the designated person is, prior to suspension. It is important that the employee is supported during this time and is able to contact someone at the workplace to discuss any concerns they may have.

As part of a disciplinary procedure, an employee may be asked not to communicate with other staff while they were suspended. Management should highlight that the employee still has a right to be accompanied by a trade union/staff association/professional body representative or work colleague at any disciplinary hearings.

### **Ending a suspension**

Once a suspension comes to an end, the employee should return to work immediately, the lifting of the suspension should be confirmed in writing to the employee.

An employee may sometimes feel aggrieved about the suspension and/or worried about returning to work. Therefore a line manager should arrange a return-to-work meeting on the employee's first day back, or as early as possible. These meetings can provide an opportunity to discuss and resolve any concerns.

The meeting could be arranged away from the workplace or somewhere at work in private.

### **C. RIGHT TO BE ACCOMPANIED**

Employees have a statutory right to be accompanied where they are required or invited by their employer to attend certain disciplinary meetings. The chosen companion may be a fellow employee, trade union/staff association/professional body representative or an official employed by a trade union/staff association or professional body.

#### **What is a reasonable request?**

Whether a request for a companion is reasonable will depend on the circumstances of the individual case, and ultimately, it is a matter for the courts and tribunals to decide if disputed. However, an employee should provide enough time for the employer to deal with the companion's attendance at the meeting.

Employees should also consider how they make their request so that it is clearly understood, for instance by letting the employer know in advance the name of the companion where possible and whether they are a fellow employee, staff association/professional body or trade union official or representative.

#### **Applying the right to be accompanied**

The employer should allow a companion to have a say about the date and time of a hearing. If the companion cannot attend on a proposed date, the law on the right of accompaniment provides that the employee has a right to suggest an alternative time and date so long as it is a reasonable and it is not more than five working days after the original date.

Employers may, however, wish to allow more time than this for a re-arranged meeting, particularly in cases that might result in dismissal. An employer must also act fairly in order to avoid a finding of unfair dismissal. Where there is a request to postpone a hearing for more than five days because a trade union/staff association/professional body representative or other companion is not available, it may be fair to allow the postponement if it does not cause unreasonable delay. The employer should consider the facts and decide what is fair and reasonable in the circumstances.

Whilst there is no obligation on Manx Care to cover the duties of the colleague/companion accompanying the employee, Departments should be mindful of the fact that the right to be accompanied is a legal right.

## **Role of the Companion**

The companion must be allowed to address the hearing in order to:

- Put the employee's case.
- Sum up the employee's case.
- Respond on the employee's behalf to any view expressed at the hearing.

The companion must be allowed to confer with the employee during the hearing. It is good practice to allow the companion to participate as fully as possible in the hearing, including asking witnesses questions. The employer is however, not legally required to permit the companion to answer questions on the employee's behalf, or to address the hearing if the employee does not wish it, or to prevent the employer from explaining their case.

## **D. WELLBEING OF STAFF DURING DISCIPLINARY PROCESS**

A disciplinary process can be stressful for everyone involved. Sometimes a process may cause extreme distress or even impact on a person's mental health. Where there are signs of that happening to anyone involved in the process, employers should consider whether the process can be adjusted in some way, such as allowing the individual to be accompanied at a disciplinary investigation meeting even where there is no formal right to be accompanied.

In some cases, it might be appropriate for an employer, with the agreement and involvement of the individual, to seek professional medical help or guidance as to how the disciplinary process can proceed fairly. If there are clear and repeated signs of distress, the manager should consider signposting the individual to staff welfare or consider suggesting that the individual seeks advice from a GP. It is important to address this issue early to avoid it escalating.

If someone has an existing mental health condition which they have previously disclosed as a disability, the employer must make reasonable adjustments to the process.

## **E. GRIEVANCE RAISED DURING A DISCIPLINARY MEETING**

When an employee raises a grievance during the meeting it may sometimes be appropriate to consider stopping the meeting and suspending the disciplinary procedure – for example when:

- The grievance relates to a conflict of interest that the manager holding the disciplinary meeting is alleged to have.
- Bias is alleged in the conduct of the disciplinary meeting.
- Management have been selective in the evidence they have supplied to the manager holding the meeting.
- There is possible discrimination.

It would not be appropriate to suspend the meeting where the employee makes an invalid point. For example if they mistakenly claim that they have the right to be legally represented or that a collectively agreed and applicable procedure does not apply to them because they are not a union member.

It is possible that the disciplinary meeting may not proceed smoothly – people may be upset or angry. If the employee becomes upset or distressed allow time for them to regain composure before continuing. If the distress is too great to continue then adjourn and reconvene at a later date – however, the issues should not be avoided. Clearly during the meeting there may be some 'letting off steam', and this can be

helpful in finding out what has actually happened. However, abusive language or conduct should not be tolerated.

#### **F. WITNESSES**

There should be areas for witnesses to wait, preferably keeping any witnesses called by management separate from any witnesses called by the employee to give evidence.

Where 'cases' are of a sensitive matter, (not necessarily of a sexual nature), arrangements should be put in place such as separate rooms being made available (to the extreme of being at other ends of a building or different floors). Parties can be asked to attend at different times.

Disciplinary hearings are not a court of law and if the respondent/their representative is asked whether they wish to be in the room whilst the claimant is asked questions, then those wishes have to be considered by the Hearing Officer.

If witnesses do attend, then both parties must be allowed to verify and question them about the information they have provided.

Where outcomes maybe career ending, Departments should ensure relevant witnesses attend hearings where requested by either party.

#### **G. BANK, CASUAL AND RELIEF STAFF: APPLICATION OF DISCIPLINARY POLICY**

Bank staff liable to dismissal should be removed from the bank, rather than kept on the bank and not offered hours (maybe perceived as informal black balling of staff).

The disciplinary process can apply to casual and relief staff but Departments would have to show a clear and proper linkage between any external offence and the employee's employment.

For example, a drink driving conviction for someone who is employed to undertake ticket collections on the horse trams would not be sufficient on its own to commence disciplinary proceedings.

#### **H. EXPIRED WARNINGS**

An employer is not strictly required to remove an expired warning from an employee's file, unless its disciplinary policy contains clear guidance to the contrary. Warnings (expired or otherwise) should not generally be taken into account when deciding whether an employee is guilty or innocent of misconduct. But they may occasionally be relevant. For example, it would be reasonable to suppose an employee accused of harassment should have realised their behaviour was inappropriate, if they had been previously warned for the same offence.

An employer can take into account prior misconduct for which a disciplinary warning has expired when deciding whether to dismiss for similar misconduct, if that misconduct itself warrants dismissal. In contrast, if the misconduct is insufficient on its own to justify dismissal, dismissal based partly on the spent warning will be unfair (as held in [Diosynth v Thomson](#)).

Case law *Airbus UK Limited v Webb* [2008] EWCA Civ 49; [2008] IRLR 309

Expired warnings maybe used as part of a redundancy matrix as well.

## I. INVESTIGATIONS

### INVESTIGATION – GATHERING THE FACTS

A guide for both Internal and External Investigating Officers can be found [here](#).

Template forms for both Internal and External Investigating officers can be found [here](#).

## J. HEARINGS

There should be no reasonable perception of bias in respect of the constitution of hearing panels.

The presence of a person on a disciplinary panel who is perceived to be bias could amount to fundamental breach of contract and could give rise to a constructive unfair dismissal.

Panels should take all reasonable steps to avoid or mitigate any actual or perceived conflicts of interest.

Where cases are of a sensitive nature, Hearing Officers should ensure that the hearing venue provides sufficient space between both parties and any witnesses.

### Recording disciplinary meetings and Hearings

An employee or their representative does not have the right to record a meeting. However, an employee who is not able to take their own notes of a meeting due to a physical or mental impairment that prevents them from doing so may ask for an audio recording of the meeting/hearing as an alternative.

If a disabled employee asks to record the meeting/hearing management should consider:

- Whether or not recording the meeting/hearing would remove any disadvantage that employee has; and
- Whether there are any alternative options which could remove the disadvantage; for example, would the employee be happy to rely on notes taken on his or her behalf by a companion accompanying him or her to the meeting?

If recording the meeting would not remove any disadvantage or there is a reasonable alternative way of preventing the disadvantage, the meeting need not be recorded.

## K. CRIMINAL OFFENCES WITHIN OR OUTSIDE OF EMPLOYMENT

- In all such cases, managers should read the notes contained below within these procedures, **Criminal Proceedings'**. You may also wish to seek advice from an HR Adviser in The Office of Human Resources.
- These should not be treated as automatic reasons for dismissal regardless of whether the offence has any relevance to the duties and responsibilities of the employee. The main considerations should be whether the offence is one that makes the individual unsuitable for their type of work (e.g. unable to carry out duties of role), unacceptable to other employees, or their continued employment would be damaging to the reputation of the area in which they work.
- An employee should not be dismissed solely because a criminal charge against them is pending

or because they are absent from work through having been remanded in custody.

- However, where a criminal charge has been preferred, the Senior Manager/Care Group Manager is not obliged to await the outcome of the prosecution before taking **action which is fair and reasonable** in all the circumstances and provided a proper investigation can be carried out, it is usually better to deal with the disciplinary matter rather than await the outcome of criminal proceedings which may be protracted.
- Where a serious case against an employee is being heard in a criminal court, the Senior Manager/Care Group Manager should arrange, wherever practicable, for an appropriate staff member to be present in court as an observer so that they can produce a report for use in any subsequent disciplinary proceedings.
- When an employee is acquitted of a criminal charge or when, a prosecution is abandoned, subsequent disciplinary proceedings should not seek to prosecute the same offence.

## **CRIMINAL PROCEEDINGS**

### **MANX CARE'S APPROACH TO DISCIPLINE PROCEDURES WHERE CRIMINAL PROCEEDINGS ARE ALSO INVOLVED**

#### **INTRODUCTION**

To ensure that Government adopts a consistent approach when dealing with disciplinary matters which may lead to, or arise from, criminal proceedings, the following guidance is issued to its employee authorities.

In issuing this guidance it is acknowledged that the approach to be adopted differs from that which would be adopted by other employers. However, paying regard to Government's responsibilities concerning law and order it is felt that there should be a degree of co-operation between Government's agencies but this should not detract from an employer's responsibility for dealing with matters of discipline promptly in accordance with agreed procedures and good employee relations practice.

Thus there is nothing in this guidance which departs from the principles of fairness, consistency of approach or natural justice. However, it must be stated that discipline matters involving criminal proceedings may be complex and each case will need to be considered on its merits. Where there is a doubt about the appropriate course of action to take, managers should be advised to seek specialist advice from The Office of Human Resources to ensure employment law and/or good practice are not breached.

#### **GUIDANCE**

As soon as the employer becomes aware that an employee's actions might need to be considered a disciplinary matter, an investigation should be instigated because the employer is concerned with the impact such action has on the employment contract.

To render any subsequent dismissal as fair in law, the investigation must be timely and sufficiently thorough to justify dismissal. It should be conducted independently of any policy or internal audit investigation but in certain cases where there is insufficient evidence to enable an allegation of misconduct to be resolved satisfactorily, the investigation may need to be suspended pending the outcome of criminal proceedings.

In all cases where criminal proceedings are pending, either in connection with employment or outside of employment, consideration should be given to suspension pending investigation.

In order to give proper consideration to the need to suspend the employer must instigate the investigation and see the employee under caution and make a contemporaneous note of the meeting.

The purpose of seeing the employee should be not only to seek an explanation from the employee if he is prepared to volunteer<sup>1</sup> an explanation but also to discuss the action which the employer proposes to take, including the question of suspension. Employees should not be pressurised into make a statement and may choose to remain silent.

It may well be that the matter of discipline is not the alleged criminal offence but a serious breach of conduct. Therefore, the employer must be clear as to what the allegation of misconduct is. Also, care

must be exercised not to pre-judge the likely outcome of any criminal proceedings. Clarity of what is of concern to the employer, i.e. a criminal conviction or the serious breach of conduct will inform the decision as to whether to suspend the employee. This is the key to what action should be taken and it is this aspect that commonly causes confusion in the mind of the employer. For example, an employee who punched a colleague at work may well have committed a criminal offence, i.e. assault. However, the violent behaviour of the employee would represent a serious breach of conduct and would be the primary concern of the employer.

Where there is sufficient evidence to enable the allegation of misconduct to be satisfactorily determined one way or the other, the disciplinary process should normally be proceeded with rather than awaiting the outcome or any criminal proceedings. On this matter, the advice of the Attorney General's Chambers via The Office of Human Resources should be sought.

The explanation sought from the employee during a disciplinary hearing should be given under caution and a contemporaneous note should be made.

The use of cautions and making of contemporaneous notes should ensure that any criminal proceedings are not prejudiced by the employer's actions.

It is incumbent on employers to follow the discipline procedure in regard to suspension either with pay or without pay.

The advice of the Attorney General's Chambers should be sought via The Office of Human Resources where it is felt that there could be other legal implications.

The Office of Human Resources should be kept informed of discipline cases involving criminal proceedings so that the consistency of approach can be monitored.

## **CIVIL PROCEEDINGS**

In relation to civil proceedings instituted or contemplated against an employee, the advice of the Attorney General's Chambers should be sought at an early juncture, since such proceedings may have an impact on any prosecution or disciplinary action. Although it is natural to focus on police and disciplinary action, it should not be forgotten that even in cases where a prosecution has been unsuccessful or where no prosecution is taken, there is the possibility of civil action, for example to recover monies allegedly misappropriated by the employee. Again, the advice of Attorney General Chamber's should be sought and The Office of Human Resources should be kept informed of the advice received.

## **GUIDANCE FOR MANAGERS ON DISCIPLINE PROCEDURES WHERE CRIMINAL PROCEEDINGS ARE ALSO INVOLVED**

The impact of criminal proceedings on the discipline process can be complex. And, as with any discipline matter, the actions which managers take will depend on the circumstances of each particular case. However, there are a number of issues relating to such cases which merit the issue of further guidance to public service managers so that the principles of the procedures are not breached. Also, in the event of dismissal, the actions of managers should render that dismissal fair in accordance with employment law.

### **What are the issues?**

Where there is sufficient evidence of theft of an employer's property or fraudulent practice this will normally amount to a fair reason for dismissal provided that the employer honestly believes on reasonable grounds that the employee is guilty and provided that the employer acts reasonably in dismissing for that reason. However, far more difficult to handle are cases of suspected dishonesty. The



critical factors in either of these situations are the thoroughness and timeliness of the investigation.

Criminal proceedings and police involvement in the case can have an important bearing on the timing of dismissal and the kind of investigation which can be properly carried out. On the one hand employers must make their own enquiries into alleged criminal acts. On the other, the fact that criminal charges have been brought may limit what can be done.

Where an employee admits dishonesty or is caught red-handed, little investigation is likely to be necessary. Also, in such cases the police will normally liaise with the employer concerning admittance of guilt but paying regard to any legal constraints regarding evidence or disclosure. But, where the probability of guilt is less apparent the safer course would be to consider the appropriateness of suspension pending the outcome of any criminal proceedings. Whether a criminal conviction in itself justifies dismissal will depend on the nature of the crime and the impact of such on the employment contract.

The fact that employees have been charged with a criminal offence should not prevent the employer communicating with them (or their representatives) to discuss the matter. What needs to be discussed is not only the alleged offence but the action which the employer proposes to take. Also, the involvement in an alleged criminal offence quite often involves a serious breach of duty or discipline.

In the context of employment law and more particularly unfair dismissal, it is relevant to consider acts of such a nature, whether in the course of employment or outside of employment, which reflect in some way on the employee/employer relationship. Thus, managers need to be clear on whether it is the criminal conviction or a breach of conduct which is of primary concern to the employer and what act of gross misconduct is suspected. Also, there should be no pre-judgement of the likely outcome of criminal proceedings. And that is why careful consideration needs to be given to the suspension of an employee and the reasons for it. It should be remembered that in circumstances where the employer has decided an investigation cannot be completed until after the criminal charge has been disposed of and the outcome is that there has been an acquittal or prosecution has been abandoned, subsequent disciplinary proceedings cannot be for the same offence, i.e. a criminal act.

For example, if the criminal charge related to fraud or theft the disciplinary offence could not be the criminal act but there might well be evidence of a serious breach of duty or trust which could justify disciplinary action including dismissal.

### **What should managers do?**

Having become aware of a situation where an employee is likely to be involved in criminal proceedings an investigation should commence. Before seeing the employee consideration should be given to obtaining information from other sources to gain a clearer understanding of some of the issues which might need to be taken into account. This could involve speaking to the police, internal audit, other employees or the Office of Human Resources. Due regard needs to be given to the formal discipline procedure and any code of conduct applicable.

Reference should be made to a senior manager to secure a view on the offence and its impact on the organisation. The main consideration here is whether the offence is one that makes the individual unsuitable for the type of work or unacceptable to other employees.

All the foregoing information is essential if a sound judgement is to be made on the need to suspend an employee whether with pay or without pay.

Suspension may be to allow a fuller investigation prior to forming a belief as to whether there has been a breach of conduct. But, it may also be appropriate to suspend as a safeguard of the employment

relationship and hence a protection for the employer and employee, e.g. where a criminal charge arises outside of employment, **say, for example, shop lifting or indecent assault.**

The overriding principle of employment law is the fairness and reasonableness of the employer's actions which may lead to a dismissal being deemed to be 'fair'. However, in strictly legal terms there are rules about disclosure of information. Anything that might be said to the employer during the disciplinary process could be used in court. Therefore, when seeing an employee either during the course of the investigation or at the disciplinary hearing, a suitably worded caution must be used advising the employee of the position. Also, a contemporaneous note must be made of what the employee says. However, the use of such caution does not prevent the employee from choosing to remain silent and the employee must not be pressurised into making a statement.

The following checklist should ensure that Government's managers act fairly when dealing with cases.

### **CHECKLIST**

Where it is suspected that there may be an act of gross misconduct on the part of an employee, managers who have the authority to suspend should take the following action:

- Conduct an investigation immediately.
- Seek an explanation from the employee under caution and retain a contemporaneous note (see model cautions attached).
- Establish what is of concern to the employer, i.e. the outcome of any criminal proceedings or a breach of conduct as a consequence of the employee's actions.
- Consider what impact the action might have on:-  
The employer/employee, and the employer/employee relationship.  
E.g. the nature of services provided, the role of the employee, the risk to the employer/employee and discipline procedures.
- Consider the need to suspend pending fuller investigation of the incident or as a protection for the employer and employee.
- Consider the basis of suspension, i.e. paid.
- Consider is there sufficient evidence to believe on reasonable grounds that there has been a breach of contract.
- Where there is sufficient evidence conduct a disciplinary hearing in advance of criminal proceedings under caution and retain a contemporaneous note of the employee's explanation.
- Consider whether there may be other legal implications and seek advice via the Office of Human Resources, if appropriate.
- Advise the Office of Human Resources of the discipline case and proposed actions.

## MODEL FORMS OF WORDING FOR CAUTIONS FOR USE WITH DISCIPLINE PROCEDURES

### Model 1

I am conducting an investigation into certain apparent irregularities concerning .... (STATE MATTER BEING INVESTIGATED) .... to ascertain whether there are any issues of discipline or capability arising from the audit report which .... (NAME OF EMPLOYER) ... should address.

As there is a possibility that criminal proceedings might be brought against some of the parties involved, I should caution you that you need not answer any questions which you feel might incriminate you. A contemporaneous record will be kept of our discussion and will be read to you at its conclusion before I ask you to sign it.

### Model 2

I am aware that criminal proceedings have been brought against you in relation to the matters about which I wish to question you, namely ..... I should caution you that you need not answer any questions which you feel might incriminate you. A contemporaneous record will be kept of our discussion and will be read to you at its conclusion before I ask you to sign it. If you are in any doubt about your position you should seek legal advice.

### Model 3

This is a disciplinary hearing regarding an alleged breach of conduct which, if proven, would constitute..... (GROSS MISCONDUCT) ... for which you could be dismissed from your employment with .... (EMPLOYER) ... We are not concerned today with any criminal proceedings which might be brought against you but only with the relationship between the .... (DEPARTMENT/SERVICE AREA/CARE GROUP) ... and you as a member of staff. Nonetheless, I should caution you that you need not answer any questions which you feel might incriminate you. A contemporaneous record will be kept of this hearing and will be read to you at its conclusion before I ask you to sign it.

### Model 4

I understand that you may have been charged with a criminal offence and criminal proceedings are being proceeded with. I wish to question you about these matters as section 6.4.1 of the Manx Care Disciplinary Procedures states:

If an employee is arrested, charged with, or found guilty of any criminal offence they must report the matter to the Manx Care Board without delay. An exception is a traffic offence for which the penalty did not include imprisonment or the suspension of his driving licence.

If the case appears serious enough to warrant it, advice should be sought from the Office of Human Resources as soon as practicable and consideration should be given as to whether the Disciplinary Procedures need to be used.

Also, I should say that a criminal conviction may constitute gross misconduct under the Manx Care Disciplinary Procedures. Depending on what your response is I may need to consider whether you should be suspended from duty pending further investigation.

I should caution you that you need not answer any questions which you feel might incriminate you. A contemporaneous record will be kept of our discussion and will be read to you at its conclusion before I ask you to sign it. If you are in any doubt about your position you should seek legal advice.

## Appendix Four – Role of the Investigation Officer and Model Investigation Report

### Disciplinary Procedures

#### Purpose of the Investigation

The purpose of the investigation is to obtain all the relevant facts about an alleged breach of discipline to:

- a) Allow the public servant who would conduct the disciplinary hearing to decide whether a disciplinary hearing should be convened; and if a hearing is arranged.
- b) Provide sufficient evidence to allow the hearing to proceed.

#### Selection of the Investigating Officer

The investigating officer is normally:

- a) The line manager – generally for straightforward cases where the line manager may also conduct the hearing; or
- b) Another manager from within the organisation – usually for more complex and serious cases; or where the line manager is too close to the alleged offence (e.g. falsification of records which the manager has signed; or the manager is a key witness in the alleged misconduct where there is a conflict of views on events). Typically the investigating officer would be a middle manager/senior manager.

#### Conduct of the Investigation

An outline of the format of the investigation report can be found at **Annex A**. The key issues for the investigating officer are:

1. To establish the rule that is alleged to have been breached
2. To obtain evidence relevant to this allegation. This includes documentary evidence (job descriptions, time sheets, written standards of conduct, professional codes of conduct, written instructions on procedures, written complaints, records of previous disciplinary incidents etc.) and witness statements. It is recommended that signed witness statements are obtained, which may either be written by the witness or the investigating officer's notes on the interview which have been certified as accurate by the witness.
3. To obtain the employee's version of events. This will include the reason for the breach of discipline if the facts of the case are not disputed. At this point the employee should be made fully aware of the complaint against them but is not entitled to any witness statements or other evidence obtained during the investigation, this will be provided by means of a copy of the investigation report if it is decided to proceed to hearing. From a practical point of view it can be useful to obtain all the supplementary evidence before meeting the employee to provide the investigating officer with background information which may be of assistance in conducting the interview.

**NOTE:** Under most current disciplinary procedures the public servant does not have the right of representation during the investigation. However it is good practice to allow representation

during the investigation. Therefore the staff member **should be advised prior to the interview** that he/she can be accompanied by a “friend” (who may be his/her or trade union/staff association/professional body representative) at the investigation interview.

4. To determine, on the basis of evidence obtained:

- Whether there is evidence of a breach discipline; and if so
- The nature of the alleged offence(s).

The investigation may reveal additional offences or result in a change from the offence in the initial allegation. This is acceptable as the objective of the investigation is to obtain the full facts and draw conclusions from these facts.

#### **NOTES:**

- The investigation should focus on the alleged offence and should be as concise as possible. However, it is important that it does not omit any relevant evidence, in particular any issues raised by the employee to justify the action or their version of the events should be followed up.
- Evidence of previous misconduct may be relevant in establishing whether the employee knew the standards of conduct required; or in establishing whether their version of events is consistent with previous behaviour (the disciplinary process is based on what a “reasonable person would believe” and not absolute proof as required in a court of law). However, previous acts of misconduct which have been dealt with on a formal or informal basis must be included as an offence for the purposes of the current investigation.
- Limit the contents of the report to the alleged disciplinary offence:
- If the investigation raises other issues (e.g. procedural changes which would be beneficial) these may be raised separately with management.
- The employees reason’s for his/her actions should be requested during the interview with the employee and should be included in the report, normally in the employee’s statement or notes of the interview attached as supporting evidence. The report should also identify any relevant facts which have been gathered relating to the incident being investigated. However, the report will not normally comment on the impact that any mitigating circumstances may have on any penalty that may be applied. Mitigation is a matter to be considered at the hearing (if the case progresses to hearing) after it has been determined whether an offence has been committed and, if it has, before deciding on an appropriate penalty.
- The conclusions should be limited to identification of the offence (if any) and identifying that this is potentially gross misconduct if appropriate. It should not draw any direct conclusions on whether the public servant actually committed the offence or on an appropriate penalty as this is for the hearing to determine.

## **Appendix Five - Avoiding discrimination when handling disciplinary issues**

This section provides guidance for managers to avoid discriminating unlawfully when handling disciplinary issues in the workplace, either formally or informally.

### **A. Disciplinary Procedures and Criteria**

The procedures must be applied fairly, in accordance with employment law, and avoid unlawfully discriminating directly or indirectly against people with protected characteristics.

As a reminder, the nine protected characteristics under Equality legislation are:

- disability
- pregnancy and maternity
- age
- religion or belief
- race
- marriage and civil partnership
- gender reassignment
- sex
- sexual orientation.

### **B. Disciplinary Procedures and Disability**

Under the Equality Act 2017 a person has a ‘disability’ if they have a physical or mental impairment that has a substantial and long-term adverse impact on her or his ability to carry out normal day-to-day activities.

A disabled person is discriminated against if s/he is treated unfavourably because of something arising in consequence of their ability, and the person discriminating cannot show that the treatment is a proportionate means of achieving a legitimate aim. There is also protection for direct and indirect disability discrimination.

The Equality Act 2017 requires the employer to make ‘reasonable adjustments’ where:

- an employer’s provision, criteria or practices put a disabled person at a ‘substantial disadvantage’ compared with a person who is not disabled;
- an employer’s premises have physical features which puts a disabled person at a substantial disadvantage;
- a disabled employee will be put at a substantial disadvantage if they are not provided with an auxiliary aid.

This also means that if there is something arising in consequence of a disability, the employer must take this into account. For example, taking disciplinary action for someone losing their temper, if that arose as a result of a disability, such as severe pain caused by cancer, may be discriminatory. Discrimination can occur if the employer knows, *or ought to have reasonably known*, about the disability.

Any hearings or meetings connected with this procedure should be conducted in such a way as

not to disadvantage an individual with a protected characteristic, such as disability. For example, allowing someone with a learning disability to be accompanied by a friend who does not work with them, allowing someone with a stammer sufficient time to express themselves.

An employee who is not able to take their own notes of a meeting due to a physical or mental impairment that prevents them from doing so may ask for an audio recording of the meeting as an alternative, however, managers should refer to the guidance notes at Appendix Three.

### **C. Disciplinary Procedures and Maternity**

There is nothing to prevent an employer taking disciplinary action against an employee during pregnancy or maternity leave provided that care is taken to avoid discrimination and that the disciplinary action is appropriate in all circumstances. The action must not be taken for a reason related to pregnancy, childbirth or absence on maternity leave and an employee absent on maternity leave must not be disadvantaged.

If an employee's performance at work during pregnancy is affected by pregnancy-related sickness or tiredness during pregnancy, it would be discriminatory to take disciplinary action against her. Any pregnancy-related sickness absence should be recorded separately on an employee's sickness record and should not be taken into account for disciplinary purposes.

If a disciplinary hearing is held, due consideration should be given to any difficulties the employee may have in attending the hearing, particularly if she is on maternity leave, and if the individual is unwell, it would be necessary to wait.

Any action which disadvantages a breast-feeding employee outside of the maternity period could be classed as sex discrimination, so the employer must make reasonable adjustments in such instances.

### **D. Disciplinary Procedures and Other Protected Characteristics**

In applying disciplinary procedures, managers should take care to ensure that they are not discriminating against people with other protected characteristics. Examples include:

- Ensuring employees who have a poor command of English, have access to an interpreter if necessary.
- Applying the procedures equally to people of all ages and not making assumptions about conduct and/or behaviour dependent on age.

If in doubt, advice should always be sought from The Office of Human Resources.

### **E. Disciplinary Procedures and Pregnancy and Maternity**

Action under the capability procedures should only be taken against a pregnant employee or employee on maternity leave if the action is about a matter that has nothing to do with her pregnancy or maternity. Action must not be taken if this relates to the employee's performance which has been poor because of pregnancy related illness or another reason related to her pregnancy or maternity.

If the performance is unrelated to the pregnancy or maternity, managers should ensure that the employee is well enough to attend meetings, and if not, timescales may need to be

extended to accommodate specific circumstances e.g. maternity leave.

The employee may assume that you are taking action because she is pregnant or on maternity leave. You must show that this is not the case, and give clear examples of the reasons that are not connected to the pregnancy or leave.

## **Annex A** **Report Format**

Format should be simple and factual.

- **Nature of complaint**

Outlines, details of complaint(s)/allegations with reference to dates, times, specific incidents etc. where possible

- **Background**

Brief paragraph to set scene i.e. individuals involved, working arrangements etc.

- **Outline process**

Describe actions taken to investigate.

- **Employee(s) Response**

Give details of the employee's response/explanation for each incident/allegation

- **Supplementary Evidence**

Brief details of any witness statement(s) or corroborate evidence (if available).

- **Findings and Evaluation**

Identify whether the investigation has revealed evidence of misconduct. If so, identify the alleged misconduct (i.e. what rules or standards relating to his/her employment is the employee alleged to have broken?). The investigation officer should not come to a conclusion about whether or not the employee has actually committed the alleged offence. This is for the hearing officer to determine (if it is decided the case should progress to hearing) after a full hearing of all the evidence, including the employee's response to the allegations.

- **Appendices**

Include all information relevant to the investigation (i.e. witness statements and copies of any relevant documentation).