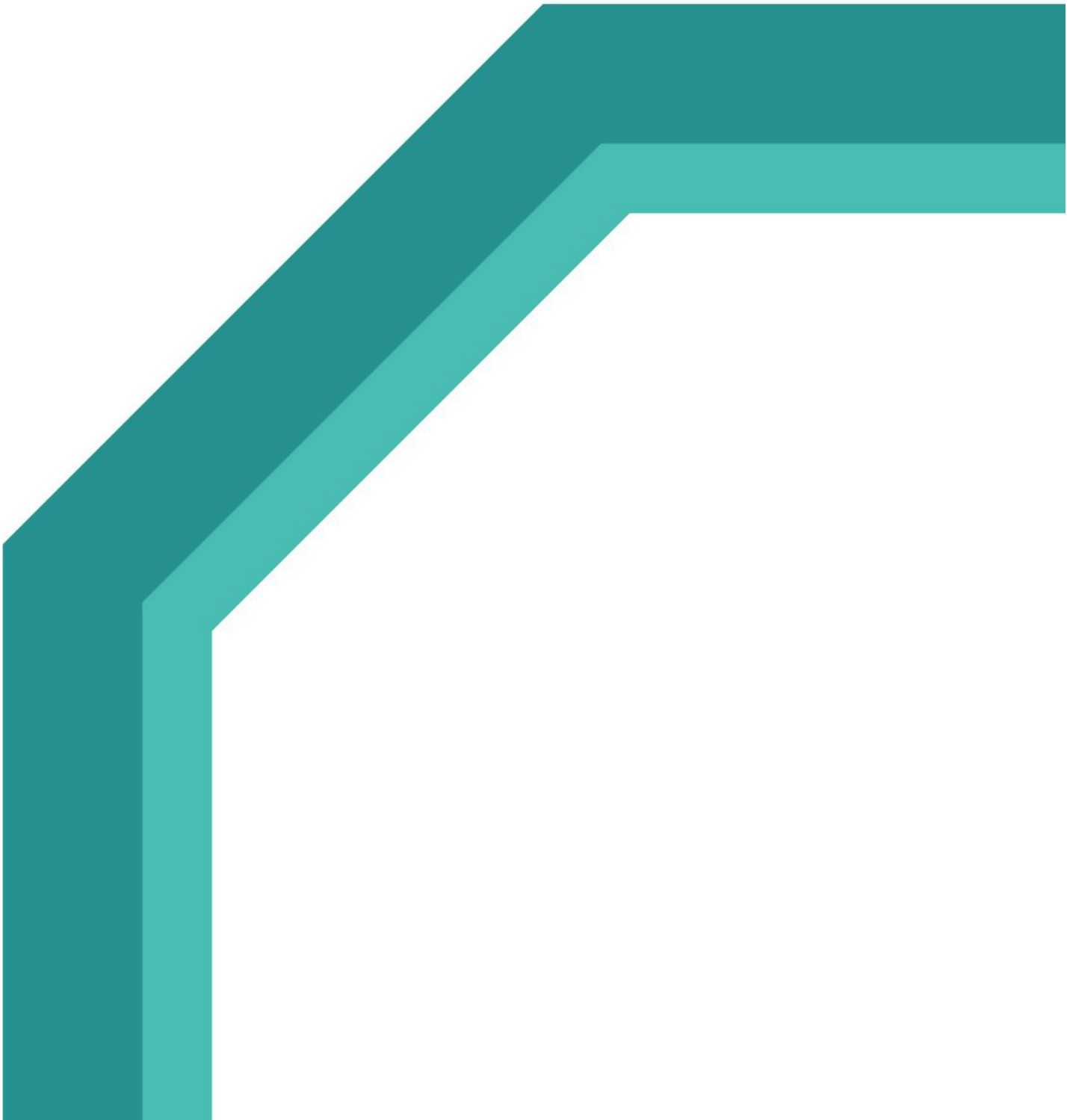
Guidance and Advice on Misconduct and Disciplinary Hearings



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1. Introduction

1.1. This EPM guidance applies to all types of School in England including Academies, Aided, Community, Controlled, Foundation, Free, Independent and Trust.

1.2. The Governing Body is required to adopt procedures to regulate the conduct and discipline of all employees which includes teachers, support staff and any other employee who is employed and paid from the Governing Body's budget. The Governing Body is also required to adopt procedures for dealing with employee capability. This EPM guidance is confined to misconduct but hearings and appeals for capability follow the same principles.

1.3. The following are outside the scope of the Governing Body's disciplinary procedures:

- Agency staff
- Staff employed by a private contractor.
- Staff whose contract of employment is with another body, e.g. local authority.

1.4. Definitions 1.4.

"Adopted disciplinary procedure" refers to the disciplinary procedure which is in force in relation to the employee subject to disciplinary procedures. In the vast majority of cases one procedure will apply to all employees. Where employees have transferred to the School under TUPE, the disciplinary procedure which transferred from the previous employer should be used. If in doubt about which procedure applies please seek guidance from an EPM Adviser.

"Headteacher" also refers to any other title used to identify the Headteacher where appropriate.

1.5. Sometimes it's difficult to distinguish between lack of capability and misconduct. Some guidance was given by the Employment Appeals Tribunal:

"Employers and Tribunals should clearly distinguish in their own minds whether the case in point is one of sheer incapability due to an inherent incapacity to function, or one of failure to exercise to the full such talent as is possessed. Cases where a person has not come up to standard through his own carelessness, negligence or idleness are much more appropriately dealt with as cases of misconduct rather than of incapability."

1.6. Another test is to ask, "Is it that the employee 'can't' or won't' do what is required?" If the answer is 'can't' this suggests lack of capability; if the answer is 'won't' then it's probably a misconduct issue.

1.7. Under employment law an employer is obliged to state the principal reason for dismissal. Where both misconduct and lack of capability are present, then both should be stated, but one must be made the principal reason depending on the evidence and the seriousness of the complaints against the employee.

2. Issues to Consider at the Start

2.1. This EPM guidance must be read alongside the adopted disciplinary procedure. Before starting any disciplinary investigation and/or hearing the following issues should be considered by the person who will be dealing with the misconduct allegations:

2.1.1. If there appears to be pupil safeguarding issues, the Designated Safeguarding Lead and the Designated Officer (DO) must be informed before an investigation is started. The Keeping Children Safe in Education mandatory guidance issued by the Department of Education should be taken into consideration.

2.1.2. In serious cases consider who has the power to suspend and who has the power to lift such suspension. Normally the Headteacher and Governors have the power to suspend but suspension may, normally, only be lifted by Governors.

2.1.3. The Investigating Officer must be chosen with care. Normally this will be a senior manager delegated to carry out the task by the Headteacher. If the allegation is against the Headteacher then The Chair of the Governing Body should appoint an investigating officer.

2.1.4. The adopted disciplinary procedure will set out who has power to dispense warnings and who has power to dismiss. Normally the Headteacher will deal with dismissal. If the Headteacher has prior involvement in the case (rather than just knowledge) then the matter should be referred to the Governors.

2.1.5. A disciplinary appeal committee of governors will normally be made up of three governors, although if the adopted disciplinary procedure allows, it could be a governor or governors. The same persons cannot be a member of both the disciplinary and appeal committee in the same case. Any prior involvement with the employee or information which may compromise the Headteacher or a governor or cause a conflict must be disclosed at the outset.

2.1.6. The employer must identify a potentially 'fair' reason for dismissal which must be one of the five prescribed reasons in the Employment Rights Act 1996 ('ERA').

2.1.7. The employer must act reasonably in accordance with section 98 of ERA when conducting a disciplinary investigation or hearing and when deciding whether dismissal for that reason is justified.

2.1.8. Equality issues must be taken into consideration such as special arrangements for an employee with a disability.

2.1.9. If the matter may result in dismissal then any Insurers must be informed in accordance with any details prescribed in the policy. Failure to do so will probably invalidate the insurance.

2.1.10. No formal disciplinary action (beyond an informal warning or management instruction) should be taken against a trade union representative until the professional officer of their trade union has been advised of the circumstances.

3. The Governing Body may need to Reserve its Position

3.1. When an employer learns of matters which may constitute misconduct, it should make a decision promptly about whether to take matters further and should communicate its intentions to the employee. A delay in communicating intentions may be necessary in circumstances where there is a need to seek advice from the DO, hold a child protection strategy meeting or secure evidence before making the employee aware. However, if an employer unnecessarily delays and does nothing to indicate to the employee that it is considering its position, it may be taken to have affirmed the contract and be precluded from arguing that any dismissal was lawful.

3.2. Therefore, while the employer has a duty towards an employee who is off sick with stress and will not want to exacerbate the situation with an employee who feels aggrieved in some way, it should not shy away from writing to the employee to advise of what action it intends to take with regard to potential disciplinary matters.

4. The ACAS Code of Practice on Discipline and Grievance

4.1. The ACAS Code of Practice on Discipline and Grievance provides statutory guidance to employers and employees on carrying out fair disciplinary procedures for misconduct or poor performance. Failure to follow any part of The ACAS Code of Practice on Discipline and Grievance does not in itself make a person or employer liable to proceedings. However, Employment Tribunals will take the ACAS Code into account, where relevant, when considering whether an employer has acted reasonably or not. If the employee wins an unfair dismissal (or other case) the Employment Tribunal can adjust the amount of compensation by up to 25% either way if one party has unreasonably failed to comply with the ACAS Code. Simply following the ACAS Code will not be sufficient to persuade an Employment Tribunal that an employer has dismissed fairly. The law of unfair dismissal is primarily concerned with whether the employer acted reasonably in all the circumstances, and so there is no one-size-fits-all answer to every case.

4.2. The ACAS Code is supplemented by Discipline and Grievances at Work: The ACAS Guide. This has no statutory effect but provides good practical guidance.

5. Should the Matter be Dealt with Informally?

5.1. The ACAS Code of Practice on Discipline and Grievance encourages informal resolution of disciplinary issues where appropriate. It is important to establish:

- What has happened to date?
- Has this been tackled informally?
- Was the employee aware that formal processes were likely if the problem persisted?

5.2. However, an employer must set standards of conduct and deal with issues of misconduct consistently and at an appropriate level. The informal steps will normally be set out in the adopted disciplinary procedure and include:

- Holding a confidential and private meeting with the employee to discuss the problem
- Clarifying why the problem has arisen, e.g. frequent absence may be due to personal problems, which are not the employer's responsibility, or problems at work, which the employer has a duty to address
- Deciding and, if possible, agreeing what action is needed. Verbally warning the employee that formal disciplinary action will follow if the misconduct continues
- Keeping a record of the discussion
- Sending a memorandum to the employee setting out what has been discussed (and agreed) and decided and recording that, although it is not a formal written warning, disciplinary action will follow if there is no change in their conduct

5.3. An informal oral warning

An informal oral warning as part of the above discussion about minor misconduct is not regarded in law as a formal disciplinary sanction. Therefore, the employee has no legal right to be accompanied or represented at a meeting. However, the Governing Body's adopted disciplinary procedure may stipulate different provisions which must be followed. In particular, if the manager is to be accompanied at such a meeting, or it is anticipated that this informal oral warning may not resolve the issue, then it may be helpful to let the employee bring a work colleague or representative of their trade union to the meeting.

6. Suspension in Cases of Serious Misconduct

6.1. The employer must be satisfied it has reasonable grounds for the suspension in order to avoid breaching the implied term of mutual trust and confidence. In instances of alleged serious misconduct it may be necessary to suspend the employee who is being investigated. For example, this may be appropriate in the following instances:

- Where there is a potential threat to pupils or other employees
- Where it is not possible to properly investigate the allegation if an employee remains at work (i.e. they may destroy evidence or attempt to influence witnesses)
- Where the evidence of misconduct is so slight that there is no more than suspicion, but further investigation at the place of work can only be carried out satisfactorily if the employee is absent from School, e.g. the IT Network Manager may need to be removed from the workplace and denied access to the computer systems whilst an investigation is carried out
- Where relationships at work have broken down
- Where there is a strong likelihood that if the allegations are substantiated then the matter will amount to gross misconduct. Gross misconduct can be defined as:
- "Misconduct so serious that it justifies dismissal without previous warning and without notice"
- A repudiation of the contract of employment by the employee, or of one of its essential conditions, which entitles the employer to dismiss

- Misconduct so serious that the employee's continued employment can no longer be tolerated

6.2. Non-exhaustive examples of gross misconduct are usually found in a disciplinary policy. It may be prejudicial to a complaint of gross misconduct if an employee is allowed to continue working normally after the Headteacher has become aware of the alleged gross misconduct. Therefore, in this instance, it is necessary to suspend the employee without delay pending the disciplinary hearing

6.3. In instances where the allegation/s relate to safeguarding, the mandatory statutory guidance **Keeping Children Safe in Education** must be adhered to. In accordance with this document, an individual should only be suspended if there is no reasonable alternative. If suspension is deemed appropriate, the reasons and justification should be recorded by the School and the individual notified of the reasons. The EPM document **Managing Allegations of Misconduct Linked to Safeguarding: Risk Assessment for Suspension**, can be used at child protection strategy meetings to assist the relevant parties both in making a decision regarding suspension, and keeping a record of that decision.

6.4. The period of suspension should be as **short as possible** and the **suspension decision should be kept under regular review**. Suspension is a serious step and thought needs to be given as to whether it can be avoided. Failure to consider whether it can be avoided may be a breach of trust and confidence by the employer. The Headteacher should make a note for the file to show that due consideration has been given to this. An employee may be able to claim damages for personal injury due to clinical depression arising from suspension in circumstances where the allegations were subsequently found to be completely unwarranted.

6.5. The power to suspend an employee in Maintained Schools rests only with the Headteacher and Governors. In different types of School others, such as the Chief Executive, may have power to suspend. Employees must be informed, normally in person, of the fact they have been suspended as soon as possible. The employee should be told of the reason for the suspension, that the allegation/s will be investigated, that they will be provided with full information about the allegation/s and will be interviewed as part of the investigation.

6.6. The employee is not entitled to advance warning of suspension, nor to representation when informed of the suspension, unless the adopted disciplinary procedure indicates the contrary. If the employee wants to say anything at this meeting then they should be told that they should seek advice, but a note should be taken of any comments made by the employee. The allegation/s should not be discussed at this meeting which should be short and is only for the purpose of informing the employee of the decision to suspend and an outline of the reason for that decision. The person carrying out the suspension should obtain any keys, passes, passwords or school property that the employee may have as appropriate, and it may be necessary to change passwords for accessing the school site and systems immediately following the suspension.

6.7. The verbal notification of suspension must be followed up in writing. The letter must make clear the following:

- That the employee is suspended and on full pay
- That their employment contract continues but they are not to report to work and must not contact colleagues or others in School
- How long it is anticipated that the employee will be suspended for or what the next steps are likely to be.
- That should the allegation/s be substantiated in full or in part, then this may amount to gross misconduct and result in their summary dismissal (dismissal without notice)
- That the suspension itself is not a disciplinary measure. The letter should also set out the employee's rights and obligations during the period of suspension, and the support available to them, including:
    - The name of the person who will keep their suspension under review and their contract details.
    - The terms of their suspension; normally that they are not to discuss the matter/s under investigation with members of the School community, or access their place of work without prior arrangement with the Headteacher.
    - Their right to representation by a trade union representative or work colleague, during the course of the investigation if the adopted disciplinary procedure allows for it, and at the hearing in all cases.
    - Any Occupational Health services that are available to support them during the period of suspension and how to access them.
- The employee should also be given a copy of the disciplinary procedure that the school will be following together with the suspension letter.

6.8. An employee must not be dismissed for gross misconduct without a disciplinary hearing to consider the case for and against the employee. Suspension is not a disciplinary measure; it is precautionary and protective of the employee's and the School's interests.

6.9. If the Headteacher believes that a criminal offence may have been committed, which has a bearing on their employment they must inform the Police. It is advised that the Headteacher takes advice from an EPM Adviser before deciding whether or not to inform the employee that they have reported, or intends to report, the matter to the Police, as the Police may wish to be the first to discuss the matter with the employee.

6.10. If the employee has been charged already with a criminal offence, the nature of which could make them unsuitable for continued employment, then they must be suspended. If an employee is in custody, having been charged, they should be notified in writing at their home address that they are suspended. It is not automatically "unfair" (in employment law) to dismiss an employee after a proper disciplinary hearing for gross misconduct, even though the employee may have been charged and may be awaiting trial. Much will depend on the nature of the evidence directly available to the employer. The criminal legal process operates quite independently. It is strongly advised that the decision whether to proceed with the disciplinary process is made after taking advice from an EPM Adviser.

6.11. If it's decided to bring a complaint of misconduct rather than of gross misconduct, the Headteacher should request that the Chair of Governors lifts the suspension. The Headteacher should then set up a disciplinary hearing in accordance with the procedure.

6.12. Thought should be given to confidentiality and whether and what colleagues and external third parties (such as parents) are told about an employee's suspension and the investigation behind it. Particular care should be taken that any statement made does not betray any assumption of guilt that may prejudice the fairness of a subsequent disciplinary hearing.

6.13. If it appears, following the investigation, that a disciplinary hearing is not appropriate, or that a disciplinary hearing is appropriate but the nature of the allegations and/or findings of the investigation means that the disciplinary sanction available will not include dismissal then, the suspension should be lifted in accordance with the adopted disciplinary procedure – normally by The Chair of Governors. The Headteacher has no power to lift suspension in a Maintained School. Normally the employee should be asked to return to work immediately.

7. The Disciplinary Investigation

7.1. The disciplinary investigation is the process where all pertinent facts are collected by the Investigating Officer. The role of the Investigating Officer is to establish the facts of the case by interviewing the relevant people and preparing a comprehensive report which contains all of the relevant factual information, copies of any statements received and any other relevant documentary evidence. Confidentiality is vital and the witnesses should be reminded not to discuss the investigation with other employees or third parties.

7.2. The report will be the key document at any disciplinary or dismissal hearing and, if the matter results in proceedings in the Employment Tribunal, then the thoroughness and probity of the Investigating Officer's report will be subject to very close scrutiny. The **EPM Guidance Notes for Investigating Officers - Conducting Disciplinary Investigations** provides detailed guidance on conducting investigations and includes outline templates for conducting an interview with a witness and a disciplinary investigation report.

7.3. There is a distinction between an investigation and any subsequent disciplinary proceedings. If an employee admits guilt during an investigatory interview this will not remove the need for a formal disciplinary hearing at which the employee has the opportunity to state their case and possibly bring evidence to explain any mitigating factors. This may be particularly important where the employee implicates others as further investigation will be necessary. The employee can be asked, but cannot be required, to confirm their admission in writing; if the employee refuses, an investigation should be carried out.

7.4. If the employee suggests that there is no need for a disciplinary hearing because they admit the misconduct, then the senior manager should still advise them to take advice before allowing an employee to accept a formal disciplinary sanction without a hearing. In the event that an employee waives the right to a hearing then a letter should be sent which confirms:

- The admission made by the employee
- That the employee has expressly waived the right to a hearing
- The nature and duration of the disciplinary sanction (normally a warning)
- The fact that there is no right of appeal because the warning has been voluntarily accepted

7.5. When misconduct is admitted, it is still necessary to assess its seriousness and consider anything the employee may say in mitigation before deciding on the disciplinary sanction. A disciplinary hearing should be arranged in the normal way unless the employee wishes to waive their right to a hearing (see above). If the employee suggests this, the Headteacher should advise them to consult a representative. If the employee confirms that they wish to waive their rights, the Headteacher is advised to take advice from an EPM Adviser.

7.6. In the event of misconduct occurring after a final warning has already been given, or of gross misconduct, where this is admitted by the employee, it can be appropriate to explain to an employee that they have the option of resigning (and that this may have both advantages and disadvantages for the employee). However, pressuring an employee to resign could easily result in a successful claim by the employee to an Employment Tribunal for "constructive" unfair dismissal, i.e. fundamental breach of contract by the employer and a claim that the employee has been discriminated against. Furthermore, a statement by an employer to an employee, "resign or be dismissed" is, in law, a "dismissal" which is likely to give rise to a claim in the Employment Tribunal. The Headteacher is advised to take advice from an EPM Adviser prior to entering into any such discussion. Such discussions will never be appropriate where there are safeguarding concerns.

7.7. If the misconduct is of a kind that would lead to dismissal and is reportable to the Disclosure and Barring Service (DBS) then the employee should be advised that resignation will still result in the matter being reported. Advice on this matter should be taken from an EPM Adviser. The School has a legal duty to refer information to the DBS about an employee you have dismissed because they harmed, or had you not dismissed them, may have harmed a child. A DBS referral must be made even if the employee resigns before the employer has the chance to formally dismiss them, and if the employer fails to make such a referral then the employer will be committing a criminal offence.

8. Preparing for a Disciplinary Hearing

8.1. Depending on the outcome of the investigation, the Senior Manager/Headteacher must consider whether formal disciplinary action is required. Subject to any requirements set out in the adopted disciplinary procedure, the following steps should be taken:

8.1.1. The senior manager/Headteacher should write to the employee to confirm the outcome of the investigation, set out sufficient information about the allegations and their possible consequences to enable the employee to prepare their case for a hearing. This information, together with a requirement to attend the disciplinary hearing, should be sent to the employee with a copy for the employee's representative. Consider whether the employee can be given the letter in person or whether registered mail and/or a private email address should be used. It is essential to ensure that the employer is in a position to demonstrate convincingly that the employee received the papers and reasonable notice of the hearing.

8.1.2. The disciplinary hearing should normally be conducted during normal working hours at a suitable location, normally the employer's premises. If governors are involved then it may be necessary to hear the case out of the employee's work time because of the governors' time constraints.

8.1.3. An employee should be given sufficient time to consider the allegations, and should be provided in advance of the hearing with copies of any documents or evidence on which the Investigating Officer intends to rely in presenting the case at the hearing. It should be made clear to the employee that the documents provided are confidential, and that they should not be disclosed to anyone other than their nominated representative. Disclosure of the documents may constitute a breach of confidentiality which may be managed in accordance with the adopted disciplinary procedure. The employee should also be notified of the names of any witnesses who will attend (The ACAS Code of Practice on Discipline and Grievance – para. 12). The employee should also be asked if there are any witnesses they wish to call to the hearing and any documents they wish to rely on that have not already been disclosed. Section 18 below sets out guidance on calling witnesses.

8.1.4. The employee must be sent a copy of the adopted disciplinary procedure and must be told of the right to be accompanied by a trade union representative or work colleague, and in very limited circumstances a legal representative **(see section 15 on Right to be Accompanied)**. The attendance of any other persons such as the note taker and EPM Adviser should be confirmed.

9. Disclosing the Evidence and Setting out the Case Against the Employee

9.1. An accused employee must be informed of the case against them. The precise nature of the allegation/s must be put to the employee. An employee must not be accused of one thing and then disciplined for another. The ACAS Code of Practice on Discipline and Grievance (para 9) requires the employee to be given written notification of "sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting".

9.2. The Investigating Officer's report should contain the steps taken in the investigation, the allegations, and the evidence available. A well-constructed and thorough report which includes all the witness statements as appendices greatly assists the conduct of the disciplinary hearing. Ideally all witness statements and other documents to be relied on should be made available to the employee before the hearing. However, there is no rule that a failure to disclose a witness statement will make a dismissal unfair, although The ACAS Code of Practice on Discipline and Grievance (para 9) states this is "normally appropriate". Provided an employee is fully aware of the case against them, an Employment Tribunal may find that the lack of disclosure of the actual witness statement does not make the dismissal unfair.

9.3. It is important to make sure that the employee appreciates the seriousness of the allegations and the possible consequences. In particular, an employee who is at risk of dismissal must be told in writing of this in advance of the hearing, otherwise any dismissal may be regarded as unfair.

10. What Information Should be Included in the Bundle of Documents for the Disciplinary Hearing?

10.1. The bundle should include:

- A copy of the investigation report which should include:
  - Minutes of the investigatory interviews held with all parties
  - Copies of all letters sent to the employee regarding the allegations
  - Adopted disciplinary procedure and any relevant code of conduct or other policies
  - A copy of the procedure to be followed at the hearing
  - Employee's contract of employment, and if available their job description and records of any relevant training undertaken

11. The Integrity of a Hearing or Appeal Process

11.1. Documents for a disciplinary or appeal hearing may be circulated a few days in advance to the person or panel hearing the case, or the documents can be made available on the day. Circulating documents in advance runs the risk that an accusation may be made that the person or panel has already made a decision prior to the hearing. However, circulating the material on the day where the case is complex or where there is a large volume of documentation may give rise to allegations that the disciplinary panel could not fully appreciate the issues or relevance of the documentation which could lead to adjournment. There should be no discussion of the circumstances of the case with any other governors, employees, the employee, other witnesses or any third parties, other than the EPM Adviser, before the hearing.

11.2. In internal disciplinary proceedings, whilst not encouraged practice, it may be that in some circumstances anonymity of witnesses can be protected. However, no guarantees of confidentiality can be given because if subsequent criminal or Employment Tribunal proceedings result then witness evidence will be disclosed. What is important is that the employee knows the case they have to answer. They need to know the allegations against them in order that they can respond. References which may identify the maker of the statement can in some circumstances be deleted and in the Employment Tribunal the tribunal may permit the employer to disclose redacted statements but this is not usual. As a general rule references to the identity of children contained in investigation documentation should be deleted or redacted, and the names of children replaced with 'Child A', 'Child B' and so on. Where a child's identity is material to the investigation, this may be clarified at any investigation meetings and at the hearing if and as appropriate.

11.3. Before the start of the hearing, when it is "in session" the following should be covered:

- Briefing by HR Adviser on procedure
- Confirmation that all documentation has been circulated
- Decision on who will chair if it is a panel hearing
- Consideration of any pre-hearing matters from either management or the employee
- Final check as to whether any reasonable adjustments need to be made if the employee is disabled or has other specific needs, such as an interpreter, although this should have been addressed at the time the hearing was arranged.

11.4. All hearings should be formally minuted by a competent minute taker. Employees can access the minutes under Data Protection legislation but there is no requirement to routinely provide minutes. It is neither necessary nor advisable for these minutes to be "agreed" by the employee. Hearings may be recorded or transcribed verbatim but it is not necessary to do so.

12. The Hearing: Non-attendance and Requests to Postpone

12.1. An employee may seek to postpone in order to have more time to consider their position, because of ill health or because of non-availability of their chosen companion. If an employee's representative cannot attend on the intended date, the onus is on the employee to suggest another reasonable time within 5 working days of the original date. This statutory 5 day time limit may be extended by mutual agreement. In most instances it is appropriate to agree an alternative date, rather than impose it, unless it becomes apparent that the employee or companion is stalling.

12.2. If the employee persistently seeks to postpone or fails to attend without good reason then a decision can, in some circumstances, be taken in the employee's absence, provided that the employee has been notified in writing that this may happen. There is always an element of risk in taking action in the employee's absence but the employee's position is somewhat weakened if their given right of appeal against a decision and still fails to attend. Nevertheless, this may not always be sufficient to ensure a fair dismissal, particularly if an Employment Tribunal considers that a hearing with the employee may have resulted in a different decision.

12.3. If a decision is taken to proceed in an employee's absence, it may be appropriate to offer them the opportunity to provide written submissions or to send a representative in their place.

13. Ill Health and Stress

13.1. Sometimes employees who are told to attend a disciplinary hearing go off sick, and cite stress as the cause. On the one hand there is a need to ensure that matters are dealt with speedily and on the other the employee may genuinely not be well enough to attend a hearing.

13.2. If the absence is likely to last more than two weeks then it may be appropriate to refer the employee to the Occupational Health provider (OHP).

The Occupational Health provider may be asked the following questions:

- Does the employee have the ability to understand the allegations made against them?
- Does the employee have the ability to distinguish right from wrong?
- Is the employee able to instruct a friend or representative to represent their interests?
- Does the employee have the ability to understand and follow the proceedings, if necessary with extra time and a written explanation?

If the answer to the any of above questions is "no" the employer should ask for an estimate of the timescale within which the employee is likely to be fit enough to attend the hearing.

13.3. Sometimes, in stress-related cases, the employee or their GP will assert that no return to work is possible while disciplinary proceedings are ongoing. A point may be reached where any further delay is not reasonable from the employer's point of view. In this case consideration can be given to other ways of conducting the disciplinary hearing, such as by telephone, at another location or inviting the employee to submit written submissions and holding a hearing in their absence. They would still have the right to appeal the decision and a full rehearing could be held at that stage, if requested and appropriate. The employer could also agree to the employee bringing a friend or family member, rather than restricting them to a workplace colleague or trade union representative.

14. Presentation of Late Documentation by the Employee

14.1. The letter inviting the employee to the hearing should set out very clearly the deadlines by which documents should be submitted for consideration at the hearing. The person/s conducting the disciplinary hearing will need to take a view on whether to allow the introduction of late documents by the employee or whether to reject them. This depends on the number and type of documents and whether the documents raise any additional issues. If in doubt, adjourn to consider the matter and take advice from the EPM Adviser.

15. Right to be Accompanied

15.1. Sections 10-15 of the Employment Relations Act 1999 give workers and employees a .statutory right to a "companion" at a disciplinary hearing who can be a trade union representative, an official employed by a trade union or a fellow worker. The ACAS Code of Practice on Discipline and Grievance states that employers must agree to a worker's request to be accompanied by any companion from one of these categories. Disciplinary hearings for these purposes are hearings that could result in:

- A formal warning being issued to a worker
- The taking of some other disciplinary action, e.g. demotion
- The confirmation of a warning or some other disciplinary action

15.2. Meetings to investigate allegations are therefore not "disciplinary hearings". However, if the adopted disciplinary procedure allows for the employee to be accompanied at an investigatory hearing then that must be allowed. To do otherwise would be a breach of the procedure and could be a breach of contract.

15.3. There is no general right to bring a lawyer to a hearing but there may be limited circumstances when this is appropriate and important as a result of the Human Rights Act 1998 (HRA) and Article 6 of the European Convention on Human Rights. In R (on the application of G) v The Governors of X Academy and another [2009] a teaching assistant was held to be entitled to legal representation at a disciplinary hearing because of the gravity of the allegations which, if upheld, would have led to his employer reporting him to the Secretary of State. This in turn could lead to the ISA (now DBS) placing him on the Children's Barred List as being unfit to work with children. However, the Supreme Court subsequently held that an employee was not automatically entitled to legal representation in disciplinary proceedings which could impact on his ability to practice his profession under safeguarding rules, where the disciplinary procedures would not have a substantial influence or effect on the later safeguarding procedures. It held that the ISA (now DBS) would exercise its judgment independently (as required by both statutory provisions and its own guidance) both in relation to fact finding and assessing the gravity and significance. However, where the misconduct alleged is serious and the consequences of disciplinary action could result in dismissal and have a serious detrimental effect on the person's career, legal representation may be advisable. Advice on whether or not legal representation should be allowed will be given by an EPM adviser.

15.4. Role of Representative

The representative is permitted to address the disciplinary hearing (including putting the employee's case, summing up, and responding on the employee's behalf to any view expressed at the hearing) and to confer with the employee during the hearing. There is no right to answer questions on behalf of the employee, address the hearing contrary to the employee's express wishes, or act in a way that prevents the employer explaining its case or prevents any other person making a contribution to it.

16. Procedure at the Hearing

16.1. The chair should lead the meeting and begin by introducing those present. The Chair should:

- Remind all present that the aim is to deal sensitively with the issues and that due respect for the privacy of individuals involved should be given
- Remind the employee (and anyone accompanying the employee) that they must not make electronic recordings of any meeting or hearing under the procedure
- Check that the employee has received a copy of the bundle of documents and is aware of the level of disciplinary sanction that could be an outcome of the meeting

16.2. The Chair should explain the purpose of the meeting and allegations that have been made against the employee. If the employee is unaccompanied the employee should be reminded of their right to be accompanied. The letter inviting the employee to the hearing is a useful document for the Chair to refer to when covering these points.

16.3. The Chair should explain the procedure that will be followed. The Governing Body's adopted disciplinary procedure may include a model procedure for the hearing in which case this should be used. If there is no model then the EPM Model Procedure for a Disciplinary Hearing can be used.

16.4. The Chair should ask if the employee is satisfied with the arrangements for the hearing, and has received, read and understood all the necessary documents, including the disciplinary procedure, any report of the investigation, and the witness statements. The employee should then be taken carefully through the allegations that have been made and all relevant evidence.

16.5. The case against the employee may be presented by the Investigating Officer or another person representing the employer. The employer may call witnesses to support the case. The employee (and their representative, if any) should be invited to ask questions of the witnesses.

16.6. Following this the employer and employee should have the opportunity to sum up before both parties withdraw and the decision maker/s deliberate and reach a decision. It is good practice to adjourn the meeting to consider the decision. This ensures that proper consideration is given to what has been discussed. Announcing the decision immediately after the employee has finished speaking would suggest a predetermined outcome. The employee should be given an indication of how long it is likely to be before the meeting is reconvened to communicate the decision.

16.7. Where a disciplinary sanction is appropriate, it is important for the decision maker/s to consider the full range of disciplinary sanctions available, even if a dismissal seems the obvious or only sanction. In dismissal cases it is particularly important to be able to show that lesser sanctions were considered (such as a final written warning) and why, in the particular case, this was not appropriate.

16.8. Where an EPM or other adviser is in attendance to advise the panel on law and procedure, the decision will be made by the panel and any advisers must not vote on the matter.

17. Adjournments

17.1. All parties at a disciplinary hearing or appeal should be mindful that they need to remain polite, attentive and calm throughout. The employee or witnesses may react in a way not anticipated and be angry, abusive or visibly distressed. The decision maker/s should be sensitive to this and make use of adjournments. If an adjournment is necessary then all parties must leave the room at the same time and re-enter together at the end of the adjournment.

17.2. Occasionally new issues are raised by either party that require further investigation and witnesses may need to be re-interviewed or the Chair or panel may not be satisfied that all of the evidence necessary has been presented. If witnesses are recalled then the questioning procedure as described above must be repeated so that each party has a fair opportunity in presenting evidence.

18. Witness Evidence at the Hearing (Adults and children)

18.1. If the employee has not asked for witnesses to be called then there is no need for all witnesses to be called to the hearing, and the matter can be dealt with by witness statements alone. However, the employee should usually be allowed to call relevant witnesses to the hearing if they wish. This is especially important if the matter may result in dismissal. The law does not generally require the Chair to allow court-room style cross-examination of witnesses. However, the employee (or representative) should be allowed to raise points in response to anything a witness has said and ask questions on points where evidence conflicts.

18.2. The ACAS Code of Practice on Discipline and Grievance states that the employee should be given a reasonable opportunity to call relevant witnesses and raise points about any information provided by witnesses and should give notice where they intend to call witnesses. As all disciplinary proceedings are subject to confidentiality, employees are precluded from discussing the matter/s under investigation with any members of the School community, other than their nominated representative. This means that if the employee under investigation wishes to call any members of the School community as witnesses, the Investigating Officer should offer to ask them to attend, as appropriate, on behalf of the employee. An employer cannot force a person to attend a hearing in the capacity of a witness called by an employee under investigation. As such, anyone who declines to attend should be asked to sign a file note to this effect, so that if necessary, it can be demonstrated to the employee that a person was asked but declined to attend.

18.3. The test to be considered regarding whether or not a witness should be called is one of reasonableness under section 98(4) of the Employment Rights Act 1996. The conduct of the investigation, of which the hearing is a part, must be within the "band of reasonable responses". There will be cases in which it would be impossible for the employer to be deemed to have acted fairly and reasonably unless cross-examination of a particular witness was permitted, i.e. where the decision to dismiss turns on a crucial issue of fact which is the subject of conflicting evidence.

18.4. However, in most cases it will be unlikely that a tribunal would criticise a failure to allow cross-examination, provided there have been sufficient safeguards to ensure that the employee has had a full opportunity to present their version of events, and the employer has carried out as much investigation as is reasonable, including adjourning the hearing to re-interview witnesses in the light of what the employee has said, and reconvening to allow the employee a further right to respond.

18.5. The guidance document on **Managing Children's Evidence in Staff Disciplinary Investigations** recommends that children are **not** present at the hearing in relation to allegations against employees and in other cases the attendance of pupils as witnesses should be avoided and if it cannot be avoided then parents' permission should be sought.

19. The Decision to Dismiss - A Two Stage Process

19.1. In order for an Employment Tribunal to determine if a dismissal is fair or not, there are two stages.

- First, the employer must establish the reason for the dismissal and demonstrate that it is a potentially fair reason as set out in section 98 of the Employment Rights Act 1996.
- Second, the employer must show that it acted reasonably in the circumstances.

19.2. The Employment Rights Act 1996 sets out five 'fair' reasons for dismissal:

- **Capability:** a reason related to capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do. This would include lack of capability on account of ill health
- **Conduct**
- **Redundancy**
- **Statutory Reason:** That the employee could not continue to work in the position which he held without contravention of a legal requirement, duty or restriction (by the employer or employee)
- **SOSR:** Some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held

19.3. The employer must adopt a fair procedure before taking the decision to dismiss. A fair procedure translates into a consistent use of the adopted disciplinary procedure, informing the employee of the case against them, an opportunity to present their side of the case (accompanied/represented), and a right of appeal against any formal sanction.

19.4. Reasonableness is undefined in law. However, tribunals will probably consider whether the employer:

- Genuinely believed that the reason for dismissal was a potentially fair one
- Had reasonable grounds for that belief
- Carried out proper and reasonable investigations where appropriate
- Followed procedures
- Told the employee why they were being considered for dismissal and listened to their views
- Allowed the employee to be accompanied/represented by a workplace colleague or a representative of their trade union at disciplinary/dismissal hearings
- Gave the employee the chance to appeal against the decision to dismiss
- Considered alternatives to dismissal
- Acted within the 'band of reasonable responses' available in the circumstances

19.5. Fairness in misconduct cases

- An employer must be able to establish that, at the time of the dismissal:
- It believed the employee to be guilty of misconduct
- It had reasonable grounds for believing that the employee was guilty of that misconduct
- At the time it held that belief, it had carried out as much investigation as was reasonable

20. The Disciplinary Decision

20.1. The power to dismiss an employee normally rests with the Headteacher, though there may be some circumstances where a dismissal case may be considered by governors. Where a senior manager hears the disciplinary case the options for the senior manager are:

- To find the allegations unfounded
- To find some or all of the allegations justified and
- Issue no warning (if appropriate and consistent)
- Issue a warning with consideration of withholding pay increments, or other potential sanctions short of dismissal such as demotion or transfer
- Decide that the employee's conduct warrants dismissal and refer the matter to the Headteacher to consider suspension and dismissal.

20.2. The test in the Employment Tribunal is not whether the employee was guilty of the misconduct, but whether at the time of the decision to dismiss, the employer has formed a reasonable belief of the employee's guilt, on reasonable grounds, and has carried out as much investigation as was reasonable in the circumstances. The Employment Tribunal will then ask whether the employer acted within the band of reasonable responses in treating the misconduct as a sufficient reason to dismiss.

20.3. Although the employer may well have conducted the disciplinary procedure fairly and reasonably, it must also ensure, when considering what sanction to impose, that its decision is fair and reasonable in all the circumstances. Consideration should be given to:

- Has there been as much investigation as is reasonable in the circumstances?
- Have the requirements of the adopted disciplinary procedure been properly complied with up to this point, including advance notice to the employee of the matter/s to be considered at the hearing?
- Has sufficient regard been paid to any explanations put forward by or on behalf of the employee?
- Is there genuine belief that the employee has committed the misconduct as alleged?
- Are there reasonable grounds on which to sustain that belief on the balance of probabilities, i.e. is it more likely than less likely, that the employee did what is alleged?
- Is the misconduct sufficiently serious to justify the disciplinary decision being contemplated?

- Do the adopted disciplinary rules indicate what the likely penalty will be as a result of the particular misconduct?
- Is the decision being contemplated reasonably consistent with decisions in previous cases, (if any) or is there justification in distinguishing one from the other?
- Is the decision being contemplated free of bias against the employee related to the employee's age, sex, sexual orientation, gender reassignment, marital status, race, disability, religion or belief, pregnancy and maternity or trade union activities?
- Has the employee's disciplinary record, general work record and position been taken into account?
- Has the employee or the representative been provided with an opportunity at the hearing to put forward any mitigating factors for the panel to consider? Has the senior management's representative had a chance to respond? Has the panel considered the mitigating factors?
- Are there any special circumstances which might make it appropriate to adjust the severity of the penalty?
- Is the proposed penalty reasonable in all the circumstances?
- Are training, additional support or adjustments to the work necessary?

20.4. Warnings

The ACAS Code of Practice on Discipline and Grievance recommends that employees should usually be given at least one chance to improve before a final written warning is given. Employers may be in breach of the implied term of mutual trust and confidence if warnings, especially final written warnings, are used oppressively or for relatively minor misconduct, if the punishment is out of proportion to the offence.

20.5. Live warnings

When deciding the appropriate penalty, employers should take into account any live warning on the employee's personnel file, but may normally only take into account any expired warning (and the underlying misconduct) where this is not the main/principal reason for any subsequent dismissal – in other words, where the circumstances would have justified dismissal anyway but see paragraph 20.6 below.

Live warnings can be taken into account even where they relate to a different type of conduct to the matter currently under consideration. However, care is required here as there are no rules to determine what should/should not be taken into account and it is a matter of balance and doing what is fair and just. Each case should be considered on its own facts. The date for assessing whether the final warning is still live is the date of the conduct leading to dismissal, not the date of the dismissal itself.

The Keeping Children Safe in Education document states under 'Record Keeping' (para 170):

"Details of allegations that are found to have been malicious should be removed from personnel records. However, for all other allegations, it is important that a clear and comprehensive summary of the allegation, details of how the allegation was followed up and resolved, and a note of any action taken and decisions reached, is kept on a person's confidential personnel file and a copy provided to the person concerned. The record should be retained for at least until the person has reached normal retirement age or for a period of 10 years from the date of the allegation if that is longer".

20.6. Expired warnings

Airbus Limited v Webb held that an expired warning may be taken into account when deciding whether to dismiss the employee. For example, if an employee is guilty of gross misconduct, the employer may be considering whether to dismiss the employee (as it would be entitled to do without a warning) or to impose a lesser sanction because of mitigating circumstances. It may take account of previous disciplinary records including expired warnings, in deciding that the circumstances do not merit a lesser penalty. The Employment Practices Code, issued by the Information Commissioner, states that where disciplinary procedures provide for warnings to "expire" it should be made clear whether the warning is removed entirely from the record or is simply disregarded in determining a future disciplinary penalty. If the former, a diary system or other suitable arrangements should be put in place to ensure that deletion actually takes place at the appropriate time.

20.7. Length of warnings

The ACAS Code of Practice on Discipline and Grievance does not specify the length of warnings but requires employers to state the period for which a warning will remain active. The non-statutory ACAS guide gives guidance on appropriate periods at page 33. It states that warnings should "normally" be live for a set period, and gives examples of periods of 6 months for a warning and 12 months for a final warning but does not rule out the possibility of longer or an unlimited warning in appropriate cases, particularly where an employee has a history of allowing their conduct deteriorate just after the expiry of warnings. In Child Protection cases it may be appropriate for the warning to be in place up until normal retirement age or 10 years from the date of the allegation if that is longer.

20.8. Conviction for a criminal offence outside employment should not be treated as an automatic reason for dismissal, regardless of whether the offence has any relevance to the duties of the individual as an employee. The Headteacher and those advising the Headteacher must consider primarily whether or not the offence is one that makes the individual unsuitable for his/her type of work or unacceptable to other employees. Employees must not be dismissed solely because a charge against them is pending or because they are absent through having been remanded in custody.

20.9. The employee must be informed, without unreasonable delay, of the employer's decision and the right of appeal. Although The ACAS Code of Practice on Discipline and Grievance requires this to be in writing, it is good practice, once the employer has reached a decision, to reconvene the meeting and explain the decision to the employee face to face. If the employee is being dismissed, they would also have the right to ask for a written statement of the reasons for dismissal in any case (section 92 Employment Rights Act 1996).

20.10. The letter confirming the decision should set out clearly the allegations against the employee, the findings in relation to each allegation and the factual basis and the reason for the decision. The employee should be in no doubt as to what action is being taken. If an employee is to be given a warning, the period that any warning is to remain in force should be clearly stated along with the possible consequences of any further misconduct. If there is a possibility that the "live" period of the warning may be extended if the employee's conduct does not improve sufficiently this must be made clear to the employee. The employee should also be advised as to how and where the warning will be stored, e.g. on their personnel file, and whether it will be removed from their personnel file once it has expired. Your EPM Adviser can provide template letters in relation to managing discipline, capability and dismissal, and will advise on the specific content to reflect the circumstances of the case.

20.11. Communicating the decision if the employee has been summarily dismissed in their absence.

Where an employee is summarily dismissed (without notice) by letter, the effective date of termination (EDT) is the date on which they actually read the letter or have a reasonable opportunity of discovering its contents. This means that an employer who summarily dismisses an employee by letter cannot be certain of the EDT when the letter is sent. To achieve greater certainty in these circumstances, summary dismissal should be communicated in person wherever possible. (Gisda Cyf v Barratt [2010])

20.12. Instructions on how to appeal should be provided (including the name of the person to whom the appeal must be submitted, the timescale of appeal and the requirement for the grounds of appeal to be articulated). It is usual for the Clerk to the Governors to arrange a meeting of the appeals panel to hear an appeal. The adopted disciplinary procedure will set out the information required and this must be considered alongside the advice given here.

21. Appeals

21.1. Under The ACAS Code of Practice on Discipline and Grievance an employee must be advised in writing of the right of appeal when the employer's decision is communicated. The time scale for lodging the appeal should also be stated. The non-statutory ACAS guide recommends five working days as a reasonable time limit, although the ACAS Code does not specify a time limit and employers should consider all surrounding circumstances before rejecting an appeal as out of time. The adopted disciplinary procedure will specify the time period allowed for an appeal.

21.2. In the event an employee fails to pursue an appeal but submits an application to the employment tribunal for unfair dismissal, the Employment Tribunal may reduce an award of any compensation by up to 25% in the event that the employee is successful.

21.3. So far as possible, any appeal against, or review of, the dismissal or disciplinary sanction should be dealt with "impartially" by someone not previously involved in the case (The ACAS Code of Practice on Discipline and Grievance, para 27). Ideally the appeal should be to "a higher authority" wherever possible (Human Rights Act 1998) which means that the appeal should be to a more senior person(s) than the person responsible for making the decision to dismiss or imposing the disciplinary sanction in the first instance, e.g. if the Headteacher made the disciplinary decision a governor or governors (depending on the adopted disciplinary procedure) should hear the appeal.

21.4. The employee should be asked to state their full grounds for appealing so that a decision can be taken as to whether the appeal will be a review of the decision and evidence available at the original hearing or whether it will be a full rehearing. The adopted disciplinary procedure should be consulted to see what it states, if anything, about this.

21.5. The appeal panel of the Governing Body should have access to the evidence presented at the disciplinary hearing and copies of the minutes from the disciplinary hearing. The panel must not confer with the initial decision maker prior to the appeal meeting as this may lead to a biased view being taken before the employee has presented their arguments on appeal. Informal discussion outside of the formal meetings must not take place whether verbally or by email.

21.6. Employees have the same right to be accompanied at the disciplinary appeal as at an initial disciplinary hearing.

21.7. It is possible that any procedural defects in an initial disciplinary hearing may be remedied on appeal, provided that the appeal is sufficiently comprehensive, e.g. a re-hearing. (Taylor v OCS Group Limited 2006). New evidence arising at the appeal stage may be taken into account in justifying a dismissal, even if the evidence available at the initial disciplinary hearing would not have justified it. However, evidence that comes to light at the appeal stage may only be considered by an Employment Tribunal for the purpose of assessing the fairness of a dismissal, if it justifies the original reason for the dismissal relied on at the disciplinary stage. If the evidence demonstrates that a different reason would justify a dismissal (and not the reason actually given at the disciplinary stage), an employer would not be able to rely on it to justify the dismissal.

21.8. The appeal panel may wish an EPM Adviser to attend to offer guidance on the law and procedure. However, the decision will be made by the appeal panel and the adviser will not vote on the issue.

22. Record Keeping

22.1. Records should be made of all disciplinary proceedings. These records should include details of the allegation, details of the investigation that was carried out and information which came to light as a result, copies of correspondence sent to the employee with the statements sent and other documents, notes from the disciplinary and any appeal meetings.

22.2. So far as possible, the rationale for decisions taken at various stages should be recorded: for example, an employer may subsequently be required to justify the choice of investigator or chairman of the disciplinary hearing, or why, following the investigation, it was decided that disciplinary proceedings were warranted.

22.3. Records kept should be clear and concise, bearing in mind that it may be necessary not only to refer to them, but also to produce and disclose them to the employee during the course of any subsequent disciplinary hearing or Employment Tribunal proceedings, or if the employee makes a subject access request under the Data Protection Act 1998. It is important to note that copies of all emails, correspondence and notes of any meetings, including governing body meetings, may be requested by the employee as part of a subject access request. To ensure that records of disciplinary proceedings are compliant with the Data Protection Act 1998 it is important that employers only retain and use the documents in connection with the purpose for which they were obtained and, once the proceedings are concluded, are retained for no longer than is necessary.

22.4. Disclosing Records under Data Protection Act Subject Access Requests

Documents prepared for the purposes of an investigation or disciplinary hearing may need to be made available to the employee if they make a subject access request, or if the matter becomes litigious, through the normal rules of disclosure in litigation. In responding to a subject access request, the employer should consider whether the disclosure of certain documents is appropriate, given the risk that they may be privileged, "without prejudice" or identify third parties or contain personal data about them. Advice can be sought from an EPM Adviser.

22.5. The most recent version of the statutory guidance document Keeping Children Safe in Education draws an important distinction between allegations relevant for record keeping and allegations relevant for references. Unsubstantiated or unfounded child protection allegations should be recorded on an employee's personnel file, but should not be used in references. No record should be kept of malicious allegations.

23. Equality Act 2010

23.1. The employer has important obligations towards disabled employees under discrimination legislation. The Equality Act 2010 provides that an employer must make reasonable adjustments where its premises or working practices put a disabled person at a substantial disadvantage to others. Such adjustments could apply to meetings held by way of investigations or disciplinary hearings and may relate to the location or other physical factors, or in the manner in which the meeting is conducted. Further information can be found at the Government's website and ACAS website.

23.2. Adjustments could include allowing the employee to be accompanied by someone other than a colleague or trade union representative if the presence of a companion would help overcome a substantial disadvantage caused by the disability. This may be appropriate where an employee has a learning difficulty or long-term depression. In addition, the investigation must take into consideration whether or not the employee's disability was a contributory factor in the misconduct which is alleged.

24. Where Employees Allege that Recordings have been made of Meetings/Hearings and ask for these to be Disclosed in Employment Tribunal Proceedings

24.1. There have been two recent cases regarding alleged discrimination or bias in investigatory meetings or disciplinary hearings and the disclosure of covert recordings.

The case of Punjab National Bank v Gosain held that where an employee had hidden a tape recorder and captured comments made during the employers private deliberations during a disciplinary hearing the evidence is admissible in the Employment Tribunal. This was because the employer made "wholly inappropriate" comments about the employee when she was out of the room and the comments did not form part of the governors' legitimate deliberations which was in their remit under the procedure.

This is at odds with the case of Amwell View School v Dogherty which held covert recordings were not admissible. This recording was of the panel's legitimate deliberations and considerations as part of the procedure.

It appears that where the comments are part of the legitimate deliberations of the panel as part of the grievance/disciplinary process then this will not be admissible (as long as these comments do not show discriminatory conduct/bias) but if the comments do not relate to the remit of the panel and are for example, about the employee's physical appearance, personality or irrelevant gossip then this is likely to be admissible and may be introduced to show the employer in an unfavourable light/ that the panel was bias/discriminatory or had pre-determined the outcome.

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