

# CHESHIRE EAST COUNCIL

## REPORT TO: CABINET

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Date of Meeting:	17 <sup>th</sup> September 2012
Report of:	Head of HR and OD
Subject/Title:	Notice of Motion – Suspension Of Employees Accused of Misconduct
Portfolio Holder	Cllr Barry Moran

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### **1.0 Report Summary**

- 1.1 This report invites Cabinet to consider the following Motion, proposed by Councillor Murphy which has been referred by Council to Cabinet for consideration. The Motion stated that “In the light of apparent inconsistencies in the use of suspension for disciplinary offences, this Council calls for a review of its practices in this respect with particular reference to the criteria used to determine whether or not suspension is appropriate.”

### **2.0 Recommendation**

- 2.1 That Cabinet consider that the procedures the Council already has in place ensure that each individual case is considered properly on its own merits and that suspensions are used in a consistent manner, as appropriate. Cabinet will not therefore be taking any further action in response to this notice of motion.

### **3.0 Reasons for Recommendations**

- 3.1 To enable Cabinet to consider the Notice of Motion.

### **4.0 Wards Affected**

- 4.1 None

### **5.0 Local Ward Members**

- 5.1 None identified.

### **6.0 Policy Implications**

- 6.1 The Council has a clear policy and procedure. Any changes to how the Council considers and manages the question of suspension may have implications for the Disciplinary Policy, Procedure and related guidance.

### **7.0 Financial Implications (Authorised by the Director of Finance and Business Services)**

- 7.1 None identified specifically however, there could potentially be financial implications as outlined in 9.1 below should a case ultimately be considered by Employment Tribunal or in the appropriate court.

## **8.0 Legal Implications (Authorised by the Borough Solicitor)**

8.1 As identified in paragraphs 9.1 to 9.2.

## **9.0 Risk Management**

- 9.1 Employers face two potentially conflicting risks in considering suspension. Firstly should an employer have un-necessarily suspended an employee and should the employee successfully assert in legal proceedings that this has had an adverse impact on their ability to work within their professional capacity since and ongoing into the future, damages could potentially be awarded against the employer.
- 9.2 Conversely, should an employer not suspend an employee or delay the suspension and should the employee be subsequently dismissed on the grounds of gross misconduct, the employee may seek to use the considerations around their suspension to strengthen their case. Dependent upon the circumstances this may have a material impact upon their claim.
- 9.3 Inappropriate use of suspensions could also have an adverse effect on employee and Trade Union relations.

## **10.0 Background**

- 10.1 On 19<sup>th</sup> July 2012 Council considered a Notice of Motion submitted by Councillor Murphy on apparent inconsistencies in the use of suspension for disciplinary offences and calling for a review of the Council's practices in this respect with particular reference to the criteria used to determine whether or not suspension is appropriate.
- 10.2 The Council has a clear policy and procedure, the practice of which is guided by HR to ensure fairness and consistency. Under the Council's policy, suspension may occur where an allegation has been made of:
- Gross misconduct, or
  - Misconduct - and the continued presence of the employee in the workplace may impede the investigation, or
  - Misconduct, the nature of which could involve potential risks to clients or other employees, or
  - Misconduct - and it is in the best interests of the employee that they do not attend the workplace.
- 10.3 Whilst suspension is not of itself generally considered to be a disciplinary action and there is no guilt attributed to an employee on suspension, it can be a very threatening and damaging experience for the individual. It must not therefore be undertaken as an automatic response to any allegation particularly where there may be strong evidence to support the view that the allegation may be vexatious.

- 10.4 It should also be noted for information, that recent case-law as below has identified some circumstances in which suspension may not be considered to be a neutral act. Where suspension is found later not to have been a neutral act this opens up the potential for claims of damages.
- 10.5 In some exceptional circumstances the employee may be allowed to continue at work, restricted to specific duties or may be temporarily redeployed to another job.
- 10.6 During a period of suspension the employee will continue to receive their normal wage/salary (which may for example, be sick pay if they are unfit for work) i.e. the pay that they would have received if not suspended.
- 10.7 Suspension has historically been considered to be a neutral act and our policies continue to confirm that Cheshire East Council considers it to be such. Recent case law has however, determined that this may not be the case in certain circumstances.
- 10.8 The case of *Mezey v South West London and St George's Mental Health NHS Trust* 2010 (Court of Appeal) primarily dealt with the issue of whether an employee could seek an injunction in relation to her suspension pending the trial of the disciplinary issue. The Court of Appeal granted the injunction, finding that, *"at least in relation to the employment of a qualified professional in a function which is as much a vocation as a job. Suspension changes the status quo from work to no work, and it inevitably casts a shadow over the employee's competence. Of course this does not mean it cannot be done, but it is not a neutral act."*
- 10.9 In another case, *Crawford v Suffolk Mental Health Partnership NHS Trust*, 2012 (Court of Appeal) two nurses accused of assaulting a patient were suspended and later dismissed. They went on however, to win an unfair dismissal claim. The Court of Appeal judge expressed concern that many employers automatically responded to allegations of misconduct with suspension. He further said such "knee-jerk reactions" were a breach of the duty of trust and confidence towards the employee.
- 10.10 By contrast, in the case on *Qasim v Central Manchester Hospitals NHS Foundation Trust* 2009 QBD the High Court refused to grant a doctor an interim injunction lifting her exclusion from work by an NHS Trust pending an investigation into allegations given the seriousness of the concerns that led to the decision to exclude and in particular the potential damage both to patients' interests and the proper and efficient functioning of the service. In other words, the course likely to involve the least risk of injustice and/or harm if it turned out to be wrong, was to refuse the request to return to work.
- 10.11 These cases highlight the legal complexities in relation to suspension and that suspension should only be taken with due care. Managers must have considered and balanced the need for the suspension, for instance the need for the investigation to be undertaken unhindered or in order to protect the service in the interim, against the fact that for the employee in question, such suspension may not

be a neutral act. As such, the employer could be in breach of contract and open to the employee seeking an injunction and/or damages for constructive dismissal or personal injury.

10.12 In accordance with the Council's Disciplinary Policy, Procedure and practices, in determining whether an employee should be suspended, managers will work their way through a number of steps, with the close support of experienced HR colleagues. This will include the following:

- Consider whether the allegation could be construed as gross misconduct
- Consider the question of consistency, i.e. what has the Council done previously in the same or very similar circumstances
- Undertake a prima facie review of the matter. This dependent upon the circumstances, could include the following considerations; to review any evidence relating to the allegation, to consider the employee's employment record, to explore whether any similar allegations been made previously about the employee and whether the complainant has made any similar and / or vexatious allegations previously.
- Consider whether the continued presence of the employee in the workplace may impede the investigation.
- Consider whether the nature of the allegation could involve potential risks to clients or other employees (including safe-guarding considerations).
- Consider whether it is in the best interests of the employee that they do not attend the workplace.
- Consider the implications of recent case law in regards to the particular circumstances in question. In doing this managers will call upon the support of HR and internal legal advice as required.

10.13 Given all of the above, it is being recommended that Cabinet consider that the procedures the Council already has in place ensure that each individual case is considered properly on its own merits and that suspensions are used in a consistent manner, as appropriate. Cabinet will not therefore be taking any further action in response to this notice of motion.

## **11.0 Access to Information**

The background papers relating to this report can be inspected by contacting the report writer. There are no specific background documents.

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