

Governance Committee

11 July 2018

Staff Appeals Panel – Proposals for Change

Report by Director of Law and Assurance and the Director of Human Resources and Organisational Change

Executive Summary

The Appeals Panel is a pool of members from which are drawn Boards of Appeal to hear and determine appeals in specific areas of Council business, including staff appeals against dismissal and against the outcomes of grievance claims.

In order to address certain constitutional anomalies in relation to the role and responsibilities of the head of the paid service and to better manage certain risks attaching to the roles of members in connection with staff appeals some options for changes to arrangements are presented for consideration by the Committee. No changes are proposed for school transport appeals.

Members of the Appeals Panel met recently to consider the options and the majority of those that attended arrived at a preferred approach. Changes would require the approval of the County Council and could be included in other recommendations for revisions to the Constitution at the July meeting.

The Committee will be receiving a separate report which acts as the Appeals Panel's annual report to the Committee and provides an account of its business.

Recommendations

- (1) That the Committee considers options for changes to the constitutional arrangements for the Appeals Panel to deal with staff disciplinary or grievance appeals and makes recommendations for approval by the County Council; and
- (2) That, in the event that changes are proposed and approved, the Discipline and Grievance policies, and other relevant procedures and guidance be amended accordingly.

1. Background

- 1.1 The arrangements for (a) grievances raised by staff and (b) managing dismissals arising from disciplinary action against staff and through other HR processes are covered in a comprehensive set of policies supported by procedures. These procedures include provision for appeals against decisions.

- 1.2 Currently Boards of Appeal, made up of members drawn from the Appeals Panel, hear all final appeals against dismissal (involving the County Council's Disciplinary, Capability, Redeployment and Redundancy Policies), and the final appeal in relation to the grievance procedure. The Appeals Panel is a sub-committee of the Governance Committee. Each Board of Appeal is made up of between three to five members, drawn from the Appeals Panel of 18 members. Members are appointed to the Panel by the Governance Committee.
- 1.3 The numbers of staff dismissals and the number of appeal hearings and their outcomes for the last few years are set out in the tables below (using financial years).

Appeal Panel outcomes (staff appeals)

Year	Number and type of appeal	Outcome
2013/14	6 dismissal appeals	All dismissals upheld
2014/15	2 dismissal appeals	1 overturned 1 upheld
2015/16	4 dismissal appeals 1 joint dismissal/grievance appeal	All dismissals upheld Dismissal upheld/grievance rejected
2016/17	1 dismissal appeal 1 grievance appeal	Dismissal Upheld Grievance Rejected
2017/18	3 dismissal appeals	2 Dismissals overturned 1 upheld

- 1.4 Outcomes and learning from individual cases are dealt with through reviews by senior officers responsible for the policies and any significant action would be reported to the Chief Executive as head of the paid service responsible for all staffing matters.
- 1.5 It is necessary for the members of the panel to receive training in order to keep up to date with developments in employment law and fair process, to cover internal policies and procedures, so as to ensure that hearings are conducted in a fair and proper manner.
- 1.6 As members currently provide the last internal forum for appeal, members of boards of appeal can be called to provide evidence at Employment Tribunals where dismissal decisions are challenged. This has, on occasion necessitated members' attendance at tribunals for significant amounts of time, and needing to set aside dates scheduled for tribunal hearings even where the hearing is later adjourned or abandoned.

2. Reasons for considering changes

- 2.1 The Constitutional position is that the Chief Executive is personally accountable to the County Council for all staff matters, including their disciplinary arrangements. This derives from the fact that, as a matter of law the Chief Executive discharges the role of head of paid service. Within

the County Council's current arrangements however the Chief Executive plays no part in the hearing or determining of appeals against dismissal or the final stage of staff grievances as these are dealt with through the Appeals Panel.

- 2.2 Within the context of staff appeals the Boards of Appeal which hear cases are acting as the employer and therefore discharging an executive function – effectively on behalf of the head of paid service. It is not a scrutiny function where members are holding the head of paid service to account for the effectiveness of staff disciplinary or other arrangements. This explains why members of a Board of Appeal may need to be available to act as witnesses should any case be appealed to an Employment Tribunal. This risk, and the fact that the function is an executive one, has also led to a number of members declining to chair a Board of Appeal.
- 2.3 The absence of a direct role for the head of paid service has also meant that concerns and issues connected with processes which have come before Boards of Appeal are addressed after the event – with Boards of Appeal making representations to the head of paid service following any hearing which has given rise to such concerns. The Chief Executive as head of the paid service is responsible for the effectiveness of and compliance with HR policies and procedures but also carries responsibility for developing the culture of the organisation and for ensuring the performance management discipline needed to support it.
- 2.4 In addition to the potential for having to account for an upheld dismissal (or for action relating, for example, to a TUPE claim or a matter relating to unlawful discrimination or other matter) before Tribunal the members of Board of Appeal may also face some challenges where, for example, a dismissal is overturned and a reinstatement ordered. The practical and service implications for this would be outside the control of the Board of Appeal taking such a decision, despite the members acting as the employer. The current arrangement has the potential to create tensions within those lines of accountability with no direct involvement for the head of paid service.
- 2.5 The role of elected members is to set the outcomes and direction for the Council, to define the policies (including HR policies) through which those outcomes are delivered and to oversee and monitor performance against those defined outcomes, calling out inconsistencies or poor practice when it is seen. These critical member roles can operate alongside operational decision making within the employment context but only if the tensions described above and the current anomalies are addressed.

3. Proposals for change

- 3.1 A number of options are available which could enable members to continue to fulfil the role of ensuring the Council's employment arrangements are fair reasonable and well managed. These options offer differing degrees of direct involvement in the decision making in individual cases whilst affording some involvement by the head of the paid service. These options are presented for consideration by the Committee. It is not proposed that any other changes are made to the Appeals Panel. In particular there is no change proposed for the handling of school transport appeals which the Appeals

Panel also handles. The other option for members to consider is that there is no change made to current arrangements. This would however not address the concerns set out above.

Option 1

That the Boards of Appeal comprise up to three elected members and the Chief Executive or his nominee who shall all have equal voting and decision-making rights. This would address all of the issues including direct accountability for the outcome jointly by members and the head of paid service, with the latter being able to be responsible for the implementation of decisions and to address any issues that arise from a matter, as well as being available to attend any Tribunal on behalf of the Council.

Option 2

That the Boards of Appeal comprise up to three elected members and the Chief Executive or his nominee who shall chair and take the decision as head of paid service, the members acting as advisers or observers. This also addresses all of the concerns set out above but does of course provide members with a consultative role rather than one of direct decision making. It does however emphasise the accountability of the head of paid service whilst allowing members direct oversight of individual cases.

Option 3

That Boards of Appeal comprise up to four elected members with the Chief Executive or his nominee acting as adviser or observer. This option would fall short in addressing all of the issues set out above as the head of paid service would not be accountable for the decision either in terms of implementation or before a Tribunal. It would also cause potential confusion or conflict with HR and legal advice to the panel.

- 3.2 Should the Committee decide that any of the change options should be pursued then a report setting out the proposal would be prepared for consideration and decision at the next County Council meeting. Any changes would take effect following the Council meeting, with any amendments needed to policies and procedures being made to give effect to the changes. This would include ensuring that changes keep or bring them in to line with ACAS minimum requirements.
- 3.3 The proposals do not affect school based staff as they currently do not have a right of appeal to the member appeal panel.

4. Consultation

- 4.1 The members of the Appeals Panel met on 15 May as their annual meeting to review the year's activity and to approve the annual report. The members received a short presentation on the subject of this report and then had a full and lively debate about the options (including the option of no change and an option to remove the role of the Appeals Panel in hearing individual staff appeals). The preference of the majority of the members present was for Option 1 set out above. Members agreed the need to change for the reasons set out in this paper but also rejected the option of removing members from individual cases and moving them to a monitoring role.

- 4.2 UNISON and FBU have made their views known to members who sit on Staff Appeals Panels. These are attached at Appendix 1.
- 4.3 Both unions believe that reinstatements are only recently increasing in number due to the inadequacies of HR processes, which are linked to the previous outsourcing of this key strategic function.
- 4.4 Both unions do not believe there is a case for any change to the existing arrangements. UNISON and FBU wish the Staff Appeals Panel to remain wholly member-led so it can remain principally an arena where natural justice considerations are given to a case. Both unions believe that the Head of Paid Service role will bring to the panel a desire to set natural justice considerations against other factors, and that natural justice will no longer be a primary consideration. This focus is what members bring to Staff Appeals Panel, is valuable and should be retained unfettered by the Head of Paid Service role.
- 4.5 It is the Head of Paid Service's duty to ensure there is an appeals panel, but there is not statutory direction or requirement for the Head or Paid Service or their nominee/s to sit on that panel. There is a mixed approach to appeals panels across the country and even within West Sussex. Despite the table shown at paragraph 4.9 there are many examples of councils with exclusively member-led appeals panels, including within districts and boroughs in our own county.
- 4.6 The Appeals Panel has historically performed a very effective service for the county. There is no reason for change other than a desire to extend officer control into this area of decision-making. Therefore, our unions support the retention of the status quo and would encourage members to reinstate this option. This is not currently an option within the papers, so the unions would view Option 3 as the most desirable of those options remaining.
- 4.7 It should be noted that separate arrangements apply in relation to disciplinary action concerning the Chief Executive and members of the Executive Leadership Team as these require member involvement as provided in Council Standing Orders and there is no plan to change those arrangements.
- 4.8 Arrangements would continue for a regular annual report to be presented to the Governance Committee in relation to its responsibility for overseeing the effectiveness of and compliance with disciplinary and grievance arrangements. This helps to enable the County Council to meet its objectives in terms of staff performance and in meeting corporate expectations in terms of standards of behaviour. It would remain the responsibility of the Committee to consider and approve any changes to policies that may arise from any learning or performance monitoring.
- 4.9 Enquiries have been made of similar authorities to identify whether the County Council's current and planned arrangements are out of line in terms of member involvement. The information is set out in the table below.

Authority	Member role	Type of HR process	Form of member role
Devon	Yes	Dismissal and grievance appeals for statutory chief officers only	To hear chief officer cases
Dorset	Yes	Dismissal and grievance appeals for chief officers only	To act as consultee in chief officer cases
East Sussex	No	N/A	N/A
Essex	Yes	Dismissal and grievance appeals for chief officers only	To hear chief officer cases
Hampshire	Some	Staff Dismissal appeals	Option to sit in on hearings as observer
Herts	Yes	Dismissal and grievance appeals for chief officers only	To hear chief officer cases
Kent	Yes	Dismissal and grievance appeals for chief officers only	To hear chief officer cases
Surrey	Yes	Dismissal and grievance appeals for chief officers only	To hear chief officer cases

This shows that no other comparator authorities have elected members hearing grievance or disciplinary matters other than those relating to the senior leadership team. In one authority members are able to observe appeal hearings conducted by the head of paid service or their nominated person.

5. Resource Implications

There are no financial resource implications of any of the options for change. The implementation of an option that would include a role for the Chief Executive or his nominee at all staff appeal hearings would mean additional time commitment and would require some planning but should not add to the overall senior staff resource.

6. Equality Impact, Crime and Disorder Act and Human Rights Act implications

None, save that the revised arrangements will maintain current policy assurance relating to fair and equal treatment and rights to a fair hearing.

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Background Papers

None