

Human Resource Management and the Operation of the Disciplinary Procedure

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1 Introduction

The delivery of a high quality health service requires all staff to adhere to high standards of work performance and conduct. Line managers are responsible for making employees aware of these standards and for dealing with shortcomings in performance or conduct in a fair and consistent manner.

Very often poor performance or conduct can best be dealt with by informal discussion and coaching rather than through the disciplinary procedure. This is usually referred to as the counselling stage. Only when counselling, training or other forms of support have failed to bring about the necessary improvements should the line manager invoke the disciplinary procedure. The main objective of the disciplinary procedure is to provide the employee with whatever assistance is necessary to make the necessary improvements whilst warning the employee of the consequences of failure to improve.

The objectives of this guide are as follows:

- To demonstrate the role of four key human resource policies in fostering commitment to high standards of performance and conduct and addressing shortcomings without having to resort to the formal disciplinary procedure;
- To show how shortcomings in performance and conduct can be addressed through the proper operation of the disciplinary procedure;
- To give practical guidance on preparing for and conducting a disciplinary hearing;
- To outline the procedures to be followed in dealing with cases of serious misconduct.

IMPORTANT: This document gives general guidance to health service employers on good HR practice and the operation of the disciplinary procedure. It is not a legal document and is not intended to provide definitive advice on any of the issues covered.

2 Role of HR policies in achieving high standards of performance and conduct

Human resource policies such as induction, probation, performance review and counselling play an important role in ensuring good performance and conduct and also have an important preventative role in terms of communicating the required standards to employees and dealing promptly with any shortfalls in these standards.

2.1 Induction

What is induction?

Induction is the process by which new employees are integrated into the Agency in a planned and systematic way. New employees need to be informed about their job, conditions of employment and the standards of performance and conduct expected from them. The induction process also conveys an important message about how the Agency values its staff and demonstrates the line manager's commitment to good people management.

Some health care agencies conduct a formal induction course for new employees at regular intervals. While these induction courses are a useful way of imparting general information of relevance to all new employees, it is still useful for the line manager to devise a personalised induction programme that focuses on the employee's role within the Agency.

Managing the induction process

The letter of confirmation to the new employee should contain clear instructions about reporting for work on the first day. The line manager may wish to set the reporting time a little after normal starting time to ensure that the relevant staff members are present when the new employee arrives. The new employee should also be given details of the department's dress code (e.g. whether a uniform is provided, what standards of dress are expected if a uniform is not worn). This basic information helps to lessen the employee's anxiety about starting a new job.

The rest of the staff should be briefed in advance about the new employee's arrival and made aware that they have an important role to play in ensuring that s/he is integrated into the work team as quickly as possible. It may be useful to designate a work colleague to act as a guide and to assist with the new employee's on-the-job training.

How the new employee is received on arrival at work creates a strong first impression about how the Agency values its staff. The Department Head should try to be available to personally welcome the new employee as this will help to establish a positive and supportive working relationship from the outset.

The Department Head has overall responsibility for ensuring that the induction programme is completed within the allocated timescale but can assign induction activities to appropriate members of staff. The Department Head should devise a checklist of all the topics to be covered, the staff member responsible for each element, and a timescale for completion. It is important to structure the induction programme carefully so that essential items are covered in the first few days and the employee is given sufficient time to absorb new information and ask questions.

The following are suggested topics for the induction programme:

Job information

Outline the main duties of the job together with the standards of conduct and performance expected. Provide any other information which the employee requires to carry out his/her job effectively, e.g.

- protocols to be observed when dealing with patients/clients and members of the public
- procedures for obtaining stationary, equipment, medical supplies, maintenance, etc.
- dress code
- requirements for confidentiality
- use of agency facilities, i.e. is private use of phones, e-mail or internet permitted?

Organisational information

Outline the physical layout and staffing structure within the Agency. Ensure that the employee understands how his/her job fits into the Agency as a whole and how his/her work relates to that of other departments.

Absence from work

- Whom should the employee notify when they are absent
- When should the employee give notice that s/he is unable to attend for work
- When should medical certificates be submitted

Health and safety requirements

Outline the hazards in the safety statement and the preventative measures designed to minimize the risks associated with the job. The issues to be covered may include

- Wearing of protecting clothing
- Prevention of needle-stick injuries
- Smoking policy
- Good housekeeping, e.g. to prevent "slips, trips and falls"
- Manual handling
- Fire procedures
- First aid procedures

HR policies

Outline the main provisions of various HR policies, e.g.

- Grievance procedure
- Equal Opportunities/Diversity policy
- Anti-bullying/harassment policies

Disciplinary procedure

Outline the various stages of the disciplinary procedure and the type of offences that could lead to disciplinary action, e.g.

- Poor attendance/timekeeping
- Poor work performance
- Refusal to obey reasonable instructions
- Breach of health and safety rules
- Circulation of offensive e-mails

The line manager should also outline the type of offences which would be serious enough to warrant dismissal or other serious disciplinary action without prior warnings, e.g.

- Physical or sexual assault of a patient/client or another member of staff
- Serious bullying or harassment
- Serious breach of health and safety rules
- Falsification of records or reports
- Theft
- Deliberate damage to property
- Incapacity for work due to being under the influence of alcohol, unprescribed drugs or misuse of prescribed medication.

2.2 Probation

The majority of new employees who are offered permanent employment are required to serve a probationary period. The objective of the probationary period is to monitor new employees' progress in the job in order to establish their suitability for continued or permanent employment.

Although a probationary employee must clearly establish his/her suitability for the job, there is a corresponding obligation on the line manager to ensure that the employee is given the necessary training and assistance to enable him/her to meet the required standards. It is not sufficient to let an employee go at the end of a probationary period merely on the grounds that his/her performance or conduct has not been satisfactory.

Frequently, however, line managers regard probation as a mere formality and automatically certify new employees as suitable for continued employment without having properly assessed their performance during this period. As a result, the line manager may lose a valuable opportunity to either correct deficiencies in performance/conduct at an early stage or to terminate the employment and recruit a more suitable person.

Managing the probationary process

The employee should be advised of the length of the probationary period and that his/her performance and conduct will be reviewed to determine suitability for continued employment.

The line manager should conduct progress reviews with the employee at regular intervals and keep a formal record of his/her assessment for the period under review. The line manager should also document any follow-up action that was agreed during the discussion.

Where the new employee persistently fails to achieve the required standards, the line manager should advise the employee of his/her deficiencies. The objective at this stage should be to help the employee to improve whilst making it clear that failure to do so will result in his/her employment being terminated.

The line manager should carry out a final overall assessment shortly before the end of the probationary period and arrange to meet with the employee to advise him/her of the outcome. Where the employee has not established his/her suitability, s/he should be given notice that his/her employment will be terminated on expiry of the probationary period.

The contract of employment may provide that the probationary period may be extended at the discretion of management. However, this provision should not be applied automatically to employees who have not successfully completed their probationary period as it would not serve any useful purpose. An extension to the probationary period would only be appropriate in exceptional circumstances, e.g.

- absence on maternity leave or parental leave;
- long-term absence on sick leave.

Good employment practice in relation to temporary staff

Difficulties have arisen in dealing with allegations of unsuitability against temporary employees. When asked to substantiate such allegations, the supervisor or manager will often state that there is no record of having counselled or disciplined the employee, but everyone is complaining about this person and it has got to the stage where s/he cannot be kept in employment any more. Responses to questions on whether the employee was counselled or warned in relation to his/her deficiencies typically include:

- s/he was only "temporary" so we did not feel that it was worth the effort;
- s/he was only temporary so we knew that we could get rid of him/her when the right opportunity presented itself;
- s/he is only a relief employee so I decided that I would just use some pretext not to recall him/her for further work;
- the supervisor/work colleagues reported various incidents but did not want to be named in connection with adverse reports;
- everyone knew that s/he was not suitable for various reasons, but nobody felt that it was their responsibility to discuss these deficiencies with the employee.

In order to avoid these difficulties, the following procedures should be applied to all temporary staff:

- Where possible, temporary employees should undergo the full rigours of the recruitment process;
- Arrange for new employees to undergo a formal induction programme to ensure that they are aware from the outset of the standards of conduct and performance expected from them;
- Employees should be monitored and assessed at regular intervals during the early stages of their employment to establish their suitability;
- Employees who have been given adequate assistance and time to meet the required work/conduct standards but fail to do so should have their employment terminated well before they have completed 12 months' service;
- Employees who are serving on short-term contracts and fail to meet the required work/conduct standards should not be re-employed or have their contracts renewed;
- Employees who have twelve months' service and are not meeting required work/conduct standards should be dealt with under the disciplinary procedure.

In the event of a temporary employee being "let go" before s/he has twelve months' service, it is desirable that:

- the employee was informed of the ways in which his/her performance or conduct was below standard;
- the employee was placed under the direct supervision of an experienced and competent employee;
- the employee was counselled/warned in relation to his deficiencies, the need to improve and the consequences of failing to meet the required standards;
- the employee was given a reasonable time to improve and was dismissed only after s/he failed to improve.

2.3 Performance Review

Constructive feedback plays a key role in maintaining morale, motivation and commitment. Most employees are anxious to know if they are meeting the required standards and to be given recognition for a job well done. Line managers should organize annual performance reviews with employees on an individual basis to give feedback on current performance and discuss opportunities for career development.

The objectives of the annual performance review may include the following:

- Outline the department's objectives for the forthcoming period and the employee's role in achieving those objectives;
- Clarify the standards of performance and conduct expected from the employee;
- Examine barriers to maximising performance and jointly explore possible solutions;
- Identify training and development needs;
- Discuss an employee's career aspirations and how best these can be matched to opportunities within the Board/Hospital;
- Allow the employee to express his/her views, concerns, grievances and expectations.

It should be noted that feedback to employees should be given on a continuous basis and shortcomings in performance should be dealt with promptly - there should be no "surprises" at the review meeting. Indeed, the success of a formal performance review will depend to a large extent on the willingness of line managers to develop a climate of openness and trust through their day-to-day dealings with staff. This can only be achieved by regularly giving feedback to employees on an informal basis and by responding to their suggestions and concerns in a positive manner.

Guidelines for conducting a review

Preparation

- Give the employee sufficient notice to allow him/her the opportunity to prepare for the review.
- Make a note of the key issues to be discussed at the review. Ensure that there are specific examples to support feedback.
- Review any notes from the previous meeting to follow-up action agreed.
- Set aside sufficient time for the discussion and ensure that there will be no unnecessary interruptions.

Conducting the review

- Aim to keep the atmosphere relaxed but businesslike.
- Begin the discussion by giving praise and recognition for work well done.
- Discuss any shortcomings in the employee's performance and jointly examine how these might be addressed, e.g. further training. Refer to specific examples and avoid vague criticisms or attacks on the employee's personality.
- Discuss any training courses or career development opportunities which the employee might wish to undertake.
- Always end the review by asking the employee if s/he would like to ask questions or make any comments (this will provide an opening for the employee to raise any issues that have not been addressed).
- Keep a note of any follow-up action agreed.

2.4 Counselling

Counselling is an informal method of dealing with shortcomings in an employee's performance or conduct without invoking the disciplinary procedure. The objective of the counselling interview is to give constructive feedback to the employee on his/her shortcomings and to decide what measures should be taken to bring about the required improvements.

It is important to note that counselling in this context does not mean attempting to resolve personal or health problems that require professional help. If it becomes apparent that the employee is experiencing difficulties outside of the workplace, the line manager should be supportive and encourage the employee to seek appropriate assistance, e.g. the Employee Assistance Programme.

The following are some guidelines on conducting a counselling interview:

Be specific: It is important to be very precise about complaints and to give specific examples to illustrate what aspects of the employee's conduct or performance require improvement. Back up generalised statements with supporting evidence, e.g. "You tend to be very careless in your work" should be accompanied by specific examples such as:

- You forgot to write appointments into the diary;
- You addressed letters incorrectly;
- You frequently leave paperwork and files strewn around the office.

Allow the employee to respond: The employee should always be given an opportunity to respond to criticisms and careful consideration should be given to any explanations given, e.g. lack of resources, inadequate training or failure on the part of the line manager to clarify what was expected.

Focus on solutions: Having made the employee aware of deficiencies in his/her performance or conduct, the line manager should make suggestions as to how the employee might make the necessary improvements.

3 Operating the disciplinary procedure

3.1 Purpose of the disciplinary procedure

Shortcomings in an employee's performance or conduct should always be addressed promptly and every effort should be made to resolve the matter informally. If, following the counselling stage, the employee continues to fail to meet the required standards then the disciplinary procedure should be invoked. The purpose of the disciplinary procedure is to help employees whose performance or conduct has fallen below the required standards to make the necessary improvements and to prevent any recurrence. Disciplinary warnings should refer to the action to be taken to assist the employee (e.g. training) and allow for regular reviews to monitor the employee's progress.

Generally, the steps in the disciplinary procedure are progressive and provide for disciplinary action as follows:

<i>Stage 1</i>	<i>Oral warning</i>
<i>Stage 2</i>	<i>Written warning</i>
<i>Stage 3</i>	<i>Final written warning</i>
<i>Stage 4</i>	<i>Dismissal</i>

The procedure should also provide that other forms of disciplinary action short of dismissal may be taken at any stage. These sanctions may include:

- redeployment to other duties;
- demotion;
- suspension without pay.

3.2 Who conducts the disciplinary hearing?

The disciplinary procedure should specify the different levels of management which are responsible for the various stages of the procedure. Responsibility for operating stages 1 and 2 of the procedure (*oral and written warnings*) normally rests with Heads of Department. A member of senior management (e.g. human resources manager, hospital manager, general manager) would normally operate stage 3 of the procedure (*final written warning*). The Chief Executive Officer or the person to whom the power to dismiss has been delegated would be responsible for operating the final stage of the procedure (*dismissal*).

The following guidelines apply to disciplinary hearings under stages 1-3 of the disciplinary procedure.

3.3 *Preparing for a disciplinary hearing*

1. The line manager should gather together any relevant documentation in advance (e.g. attendance records, samples of poor work, records of any previous warnings, etc.).
2. Arrange for a management colleague to attend the hearing to take notes.
3. Advise the employee that s/he is required to attend a disciplinary hearing under the disciplinary procedure and state precisely what the complaint is. The employee should be given sufficient notice of the meeting to allow him/her to prepare a response.

Confirm the following information in writing:

- The time and place of the meeting (ensure that sufficient time is set aside for the hearing as it may prove to be more complicated than had been anticipated);
- The purpose of the meeting (i.e. that it is a formal disciplinary hearing under the Agency's disciplinary procedure.);
- The precise nature of the complaint;
- The right to be represented by a union representative or work colleague.

3.4 *Role of the employee representative*

The Labour Relations Commission's **Code of Practice on Grievance and Disciplinary Procedures** states that "employee representative" includes a colleague of the employee's choice and a registered trade union but not any other person or body unconnected with the enterprise.

The employee representative has an important role to play in supporting the employee and should be allowed to assist the employee in presenting his/her case. The representative would not normally answer questions on the employee's behalf but should be allowed to ask questions and make representations on behalf of the employee. The employee should also be permitted to confer privately with his/her representative if requested.

3.5 Conducting a disciplinary hearing

A disciplinary hearing should follow a structured format as follows:

- Introduce those present and explain that this is a hearing under the formal disciplinary procedure;
- Outline the nature of the complaint and any supporting evidence. Remember to stick to the facts surrounding the complaint and avoid expressing moral outrage. For instance, if the complaint relates to poor time-keeping, avoid comments such as "Your time-keeping record is disgraceful!";
- Allow the employee to respond to the complaint;
- Allow representations on the employee's behalf;
- Close the hearing by summarising the key points emerging from the interview and allow the employee to have a final say;
- Adjourn the meeting to consider the facts and any explanations put forward by the employee or his/her representative. Even in relatively straightforward cases, the practice of adjourning – even if only for a few minutes – before making a decision is strongly recommended as it allows for careful consideration to be given to the matter. The outcome of the hearing may include the following:
 - no further action on the grounds that the employee has given a satisfactory explanation of events or there were strong mitigating circumstances;
 - non-disciplinary action, e.g. arrange for the employee to receive coaching/training and set targets for improvement;
 - a formal warning and/or other disciplinary sanction.
- Reconvene the meeting to inform the employee of the decision;
- Confirm the decision in writing,;
- A detailed note of the hearing should be put on the employee's file.

3.6 Warnings

The primary purpose of a warning is to give the employee an opportunity to make the required improvements whilst making clear the consequences of failing to do so. A warning (oral or written) should convey the following information:

- How the employee's performance/conduct has fallen short of the required standards;
- What improvement is required;
- What measures will be taken to assist the employee;
- When a review of the employee's progress will take place;
- What further action will be taken if the employee does not make the necessary improvements.

A record should be kept on the employee's file of all warnings - both oral and written - issued under the disciplinary procedure.

A **written warning** generally contains the following information:

- the stage of the disciplinary procedure which has been invoked;
- the nature of the unsatisfactory conduct or performance;
- details of the improvements required;
- measures to assist the employee (e.g. training or coaching);
- timescale for reviewing progress;
- the length of time that the warning will remain on the employee's file;
- what further action will be taken if the employee does not make the necessary improvements.

3.7 Final written warning

The final written warning should contain a clear and unambiguous statement to the effect that failure to reach the required standards could result in dismissal. A final written warning should normally be issued only once, as its effect would be diluted by the issuing of a second final warning.

3.8 Number of warnings

There is no absolute limit to the number of warnings which may be given at the oral and written warning stages of the procedure. While the procedure should normally be operated on a progressive basis, there may be cases where the employee needs to be disciplined during the currency of a warning without invoking the next stage of the procedure e.g. an employee is on an oral warning for poor time-keeping and during this period commits an unrelated offence such as smoking in a no-smoking area.

3.9 Removal of warnings

The period for which warnings should be retained on an employee's record normally depends on the nature of the offence and the stage of the disciplinary procedure which has been invoked. The following timescales may be appropriate:

<i>Oral warning</i>	<i>six months</i>
<i>Written warning</i>	<i>twelve months</i>
<i>Final written warning</i>	<i>twelve months to two years</i>

If the employee's performance/conduct has been satisfactory during this period, the expired warning should be removed from the employee's file. Minutes of the disciplinary hearing should also be removed. *No use can be made of expired warnings in any future disciplinary proceedings against the employee.*

3.10 Disciplinary action short of dismissal

In addition to the issuing of warnings, the disciplinary procedure may provide for other sanctions short of dismissal, e.g.:

- Transfer to another department;
- Withholding of an increment;
- Demotion;
- Suspension without pay.

Any sanctions must be expressly provided for in the contract of employment or disciplinary procedure.

Sanctions such as suspension without pay may be applied in conjunction with the issuing of a final written warning to impress upon the employee that his/her continued employment with the Agency is in jeopardy.

3.11 Dismissal

Note: *Permanent officers of health boards are covered by sections 23 and 24 of the Health Act, 1970.*

If there is no improvement in conduct/performance following the issuing of a final written warning, the employee should be notified in writing that s/he is required to attend a disciplinary hearing. The letter should:

- give precise details of the employee's unsatisfactory conduct/performance;
- inform the employee that the hearing is being carried out under the disciplinary procedure and that the outcome of the hearing could include a decision to terminate his/her employment with the Agency;
- advise the employee of his/her right to representation at the hearing.

The employee should be given sufficient notice of the hearing to arrange for representation and to prepare his/her case.

The decision-maker (i.e. the person in whom the power to dismiss has been vested) must be present at the disciplinary hearing. This may be the chief executive or a designated manager. Another management colleague should also be present to act as a witness and take notes.

The complaints and supporting evidence should be outlined to the employee and s/he should be given an opportunity to respond. The employee's representative should be allowed to make representations on behalf of the employee. The hearing should then be adjourned to allow the CEO (or designated manager) to make his/her decision. The employee should be notified of the decision in writing.

If the decision is to dismiss, the employee must be given the appropriate period of notice or payment in lieu of notice.

3.12 Appeal

The disciplinary procedure may provide for a right of appeal against the outcome of the disciplinary hearing. An appeal should not be heard by those persons involved in reaching the original decision. The procedure should specify the time limits within which the appeal should be lodged and require the employee to submit the grounds for appeal, such as:

- Appeal against the severity of the penalty;
- Procedural deficiencies;
- Presentation of new evidence (including mitigating circumstances).

3.13 Summary

The overriding objective of the disciplinary procedure is to assist the employee to achieve the required standards of performance/conduct and not just to reprimand the employee. Even if the outcome of the disciplinary hearing is the issuing of a warning and/or other disciplinary action, the focus should continue to be on helping the employee to make the required improvements.

When invoking the disciplinary procedure, the following points should be borne in mind:

- Ensure that all the facts surrounding the complaint have been established;
- Arrange for the employee to attend the disciplinary hearing and ensure that s/he understands the status of the meeting (i.e. it is a hearing under the formal disciplinary procedure);
- Confirm the details of the complaint in writing and advise the employee that s/he is entitled to bring a representative;

- Arrange for a colleague to be present at the hearing;
- Outline the facts surrounding the complaint in an objective manner and allow the employee to respond;
- Allow representations on the employee's behalf;
- Adjourn the hearing to consider all the facts and any extenuating circumstances before reaching a decision;
- Convey the outcome of the hearing to the employee;
- Keep an accurate record of the meeting on the employee's file;
- Ensure that any action agreed at the meeting (e.g. training) is followed-up and the employee's progress is reviewed on a regular basis;
- Warnings and minutes of disciplinary hearings should normally be removed from the file following the specified period of satisfactory performance or conduct and may not be relied upon for future disciplinary purposes.

4 Dealing with allegations of serious misconduct

4.1 Introduction

The disciplinary procedure should set out examples of the type of misconduct for which the progressive stages of the disciplinary procedure would not apply and which may warrant dismissal without prior warnings. Serious misconduct generally refers to offences that are serious enough to undermine the relationship of trust between employer and employee. These may include:

- Physical or sexual assault of a patient/client or another member of staff;
- Serious bullying or harassment;
- Serious breach of health and safety rules;
- Breach of confidentiality;
- Falsification of records or reports;
- Serious insubordination;
- Theft;
- Deliberate damage to property;
- Incapacity for work due to being under the influence of alcohol, unprescribed drugs or misuse of prescribed medication.

The disciplinary procedure should contain a rider that the examples listed are not intended to be exhaustive.

Dismissal without notice does not mean that the employee can be dismissed on the spot, without having carried out a thorough investigation into the allegation. In all cases of serious misconduct, an employer must conduct a full investigation to establish the facts and afford the employee an opportunity to respond.

4.2 *The following procedure normally applies in cases of alleged serious misconduct:*

Formulating the complaint

The complainant and any witnesses should be asked to write up their version of events including, where possible, date, time and place of the alleged incident.

Notifying the employee against whom the allegation is made

The employee's right to natural justice must be respected at all stages of the process. Management should meet with the employee to inform him/her of the nature of the allegation. The employee should be advised of his/her right to be accompanied at this meeting by a representative.

The employee should be furnished with a copy of the complaint and afforded an opportunity to make an initial response to the allegation if s/he so wishes. The employee's representative should be allowed to make representations on behalf of the employee.

Where the continued presence of the employee on duty could pose a threat to patients/clients or other staff members, the employee would normally be put off duty with pay pending the outcome of the investigation. In other cases it may be deemed appropriate to redeploy the employee pending the outcome of the investigation.

Establishing the investigating team

The investigating team should consist of person(s) who have the necessary expertise to conduct an investigation impartially and expeditiously. Where appropriate, the investigating team may request appropriately qualified persons to carry out medical assessments, validation exercises, etc.

Time limits

Every effort should be made to complete the investigation as soon as possible, particularly if the staff member has been put off duty pending the outcome of the investigation. Where possible a timeframe for completing the investigation should be agreed. This time limit should only be breached in exceptional circumstances, e.g. the case may be particularly complicated or essential witnesses may be unavailable.

4.3 Conducting the investigation

It is important to ensure that the investigation is handled with sensitivity and with due respect for the rights of both the complainant and the employee against whom the allegation is made. The investigation normally incorporates the following:

- The terms of reference for the investigation should be formulated in writing and give precise details of the nature of the allegation. The terms of reference should also specify if the investigating team is confined to forming conclusions as to the guilt or otherwise of the employee or if its remit extends to recommending an appropriate course of action;
- The investigating team should interview the complainant, witnesses and any other person who may have knowledge about the circumstances surrounding the alleged incident. During the course of the investigation, more people may be identified as witnesses and they should also be interviewed;
- The investigating team should interview the employee against whom the allegation is made. The employee should be informed in advance that s/he has a right to representation at this meeting;
- The investigating team should assess all the evidence and form its conclusions as to whether there is a reasonable belief that the alleged misconduct occurred. Where there is a conflict of evidence between the accused employee and witnesses, the investigating team may form its conclusions based on the credibility of the evidence presented by each side. For example, if the employee vehemently denies the allegation but the investigating team finds the evidence of witnesses more convincing, it may conclude that, on the balance of probabilities, the alleged misconduct occurred;
- The employee should be advised of the outcome of the investigation. If the outcome is that there is a reasonable belief that the employee is guilty of the alleged misconduct, a hearing should be convened to determine the appropriate disciplinary sanction. The chief executive officer or designated manager who is empowered to make decisions regarding disciplinary action should attend this meeting.

Note: *Permanent officers of health boards are covered by sections 23 and 24 of the Health Act, 1970.*

5 Contacting An Garda Síochána

Even where the alleged misconduct could potentially constitute a criminal offence, the Agency is obliged to conduct an internal investigation into the allegation and to take appropriate action in the context of the employer/employee relationship.

There is no general rule with regard to when the gardai should be notified of alleged misconduct which could constitute a criminal offence. Senior management must decide at what stage to involve the gardaí on a case-by-case basis.

Where the gardaí are notified, the Agency must conduct its own independent investigation in parallel with the criminal investigation. If the employee refuses to co-operate with the internal investigation pending the outcome of criminal proceedings, this should not deter the Agency from proceeding with its investigation. The employee should be advised that if s/he does not co-operate with the internal investigation, the Agency will have to form its conclusions on the basis of the information available and then proceed to take appropriate action (which could include dismissal).

The key point is that an allegation of misconduct on the part of an employee is an employment matter which must be investigated under the Agency's disciplinary procedure. The Agency must be satisfied on the balance of probability that the alleged misconduct occurred but does not have to prove the case beyond all reasonable doubt. In other words, the Agency must form a reasonable belief that the employee committed the alleged offence and take disciplinary action accordingly.

6 Off-duty misconduct

Off-duty misconduct may result in an employee being charged with or convicted of a criminal offence. In such cases the Agency must decide whether the alleged offence warrants disciplinary action because of its employment implications. ***Criminal offences committed outside the scope of employment cannot be treated as automatic reasons for dismissal.*** The main consideration should be whether the nature of the offence is such as to render the employee unsuitable for the job for which s/he is employed, e.g. a conviction for joy-riding would not necessarily render an employee unsuitable for continued employment.

If the Agency becomes aware that the employee has been charged with a criminal offence related to off-duty misconduct, it is generally advisable to investigate the facts as far as possible and to afford the employee an opportunity to respond. If the employee refuses to answer any questions at a disciplinary hearing, s/he should be advised that the Agency will have to form its conclusions on the basis of the information available and then proceed to take appropriate action (which could include dismissal).

7 Unfair dismissals

Introduction

The majority of health service employees who have twelve months' continuous service with their present employer are covered by the Unfair Dismissals Acts, 1977-1993. Permanent officers of health boards are excluded from the Act, but would have the same entitlement to fair procedures in the event of disciplinary action being taken against them.

In order to prove that a dismissal was not unfair, an employer must be able to prove that:

- (a) there were "substantial grounds" for dismissing the employee; and
- (b) fair procedures were followed at all stages of the disciplinary process.

Substantial grounds

To justify a dismissal, an employer must show that it was resulted "wholly or mainly" from one or more of the following reasons:

- (a) the capability, competence or qualifications of the employee for performing the work for which s/he was employed;
- (b) the employee's conduct;
- (c) redundancy;
- (d) the fact that continuation of the employment would contravene another statutory requirement.

A dismissal will also be upheld where the employer can demonstrate 'other substantial grounds'. What these grounds are and whether they would justify a dismissal will depend on the entire circumstances of the case.

Procedural fairness

Apart from proving one or more of these grounds, the employer must be able to show that fair procedures were followed prior to taking the decision to dismiss. A Rights Commissioner or the Employment Appeals Tribunal will place great emphasis on the procedural aspect of a dismissal when adjudicating on a claim for unfair dismissal. Employers are required to give all new employees, within 28 days of their commencing work, a notice in writing setting out the procedure which the employer will observe before, and for the purpose of, dismissing an employee.

In order to satisfy the requirement for procedural fairness, an employer will generally be expected to show that the employee was counselled, advised and given every opportunity to achieve the required standards. The employer will also have to prove that the employee was formally warned in relation to the non-achievement of these standards, and that s/he was issued with a final written warning to the effect that failure to achieve the required standards would result in his/her dismissal.

