

# **DISCIPLINARY HANDBOOK**

**For use in conjunction with the Disciplinary Code, Circular 19/2016**

**Version Dated 1 September 2016**

## **PART 1 – PURPOSE & PRINCIPLES**

- 1.1** The Civil Service Disciplinary Code (the "Disciplinary Code") sets out the arrangements for dealing with disciplinary matters in the Civil Service. This Disciplinary Handbook (the "Handbook") is for use by line managers, HR managers, relevant managers (as referred to in the Disciplinary Code) and HR Units. Any reference to a manager in this Handbook shall mean the line manager, a more senior manager, a HR manager or a relevant manager as appropriate to the specific situation.
  
- 1.2** The purpose of the Handbook is to provide assistance in the use of the Disciplinary Code. The Handbook is not a replacement for the Disciplinary Code. It provides additional information on the different processes throughout the Disciplinary Code and addresses some issues that tend to arise in the course of disciplinary cases.
  
- 1.3** Record keeping is a crucial part of a manager's job. The manager should ensure that an appropriate record is kept of all disciplinary matters along with a record of any concerns that arise and are dealt with on an informal basis. See **Appendix A** of the Handbook for further guidance on record keeping.

## **2. PART 2 – THE DISCIPLINARY PROCEDURE AND USE OF THE CODE**

### **2.1 Commencing the disciplinary procedure**

2.1.1 The disciplinary procedure set out in the Disciplinary Code should be commenced where concern has arisen that there may have been misconduct on the part of a civil servant. A “concern” that misconduct may have occurred might arise in various different circumstances. For example, as noted in the Code, a concern may arise because an allegation has been made in respect of the civil servant or where other types of evidence indicate that the civil servant may have misconducted himself or herself.

### **2.2 When might a “concern” arise?**

2.2.1 The manager should consider the examples of misconduct and serious misconduct contained at Appendix A of the Disciplinary Code when considering if the disciplinary procedure should be commenced. However, the manager does not need to have proof of misconduct before commencing the process. The manager only needs to have a concern that misconduct may have occurred.

2.2.2 For example, a manager might receive a complaint from a member of the public or an allegation might be made by a colleague. Alternatively, a manager may have a suspicion based upon his or her interaction with the civil servant or knowledge of the civil servant's work or conduct. That concern can then be investigated during the disciplinary procedure.

### **2.3 Prior investigations**

2.3.1 A previous investigation (under the Grievance, Dignity at Work or Protected Disclosures Policy or other investigation) may make findings in respect of the conduct of a civil servant. That investigation may also give rise to a concern that misconduct has occurred. The investigation report may contain a recommendation that the disciplinary procedure be commenced or the manager may determine, on the basis of the report, that the procedure should be commenced.

2.3.2 If, at the commencement of other/previous investigations, there is the potential for disciplinary action arising from that investigation, then the manager should notify the civil servant of that potential. For example, if a civil servant is accused of bullying, an investigation into that allegation may take place under the Dignity at Work policy. The civil

servant should be notified that, depending on the outcome of the investigation under the Dignity at Work Policy, the findings of the investigation may ultimately lead to disciplinary action being taken. This is not a pre-judgment of the outcome of the investigation; it is to ensure that the civil servant understands the seriousness of the investigation process.

2.3.3 The manager should consider the report of any separate investigation and any findings made in respect of the civil servant before proceeding to a disciplinary meeting. In the event that the investigation in question was not under Step 2, but was under a separate workplace investigation process, the manager will normally be entitled to take such findings into account as part of the disciplinary process. However, the manager should consider whether adequate fair procedures (consistent with the general principles set out in paragraph 3.2.9 of the Code) were provided to the civil servant during any separate investigation process and before those findings were made.

2.3.4 As part of this consideration, the manager should allow the civil servant comment on the investigation report prior to the disciplinary meeting and should consider such comments if they are provided. The manager should inform the civil servant in writing that he or she intends to take the investigation report into account and, where the report has not already been provided to the civil servant, should provide a copy of the report to the civil servant. The manager should provide the civil servant with a reasonable period of time to respond (in most cases this will be approximately five working days).

2.3.5 If the manager is satisfied that the investigation report can be relied upon then the manager should proceed with the disciplinary meeting. If the manager is not satisfied that adequate fair procedures were provided to the civil servant before those findings were made, then the manager may decide to undertake a separate investigation under Step 2 of the Disciplinary Code before any decision is made to arrange a disciplinary meeting, or may determine that a fact finding exercise will take place as part of the disciplinary meeting (as suggested in paragraph 3.2.3 of the Code).

## **2.4 Misconduct / underperformance / capability**

2.4.1 Managers should consider the distinction between misconduct, underperformance and incapability for health reasons when determining whether to commence the disciplinary procedure.

2.4.2 Misconduct encompasses any type of behaviour that breaches acceptable standards in the workplace. Examples of misconduct and serious misconduct are contained at Appendix A of

the Disciplinary Code. Misconduct may also include inappropriate behaviour outside the workplace which has an impact, or could reasonably be likely to have an impact, within the workplace. Misconduct should generally be dealt with through the application of this Disciplinary Code.

2.4.3 Underperformance includes, but is not limited to:

- ongoing failure to meet specified, realistic objectives and standards;
- and unsatisfactory work performance, i.e. a failure to perform the duties of the position.

Underperformance should generally be dealt with through the application of the Civil Service Management of Underperformance Policy.

2.4.4 However, there may be circumstances where the conduct of a civil servant could fall under either or both of the headings “misconduct” or “underperformance”. In such circumstances, the manager has the discretion to use the Disciplinary Code or the Underperformance Policy to deal with those concerns.

2.4.5 For example, some types of behaviour (such as lateness) might be regarded as underperformance in one context or misconduct in another. Managers have discretion to apply whichever policy they believe to be appropriate to the circumstances. The fact that certain behaviour could have been addressed within the Underperformance Policy does not preclude it from being addressed under the Disciplinary Code and vice versa.

2.4.6 If a civil servant is incapable of undertaking work as a result of health reasons then advice should be sought from the HR Unit as to how to proceed.

## **2.5 Frustration of the disciplinary procedure**

2.5.1 The Disciplinary Code makes it clear that it is the duty of all civil servants to participate in the disciplinary procedure when required to do so. The Code also confirms that where a civil servant fails or refuses (without reasonable cause) to participate, then the manager may make a decision in the absence of the civil servant’s full participation.

2.5.2 A civil servant may fail or refuse to participate in the disciplinary procedure for many different reasons. Sometimes the civil servant will have reasonable cause to fail or refuse to participate and sometimes the civil servant will not. It is up to the manager to determine what is or is not reasonable cause.

2.5.3 Where the civil servant refuses to participate in the process, the manager should:

- a) ask the civil servant to confirm in writing the reason for the refusal / failure to participate (if such reason has not been confirmed already);
- b) consider the reason provided by the civil servant;
- c) determine whether such reason amounts to “reasonable cause”;
- d) inform the civil servant of the manager’s decision; and
- e) if the manager’s decision is that the reason does not amount to “reasonable cause”, the manager should give the civil servant a further opportunity to participate in the process.

2.5.4 Situations that may be put forward as reasonable cause for non-participation may include:

- (a) Where the civil servant is certified as medically unfit to participate.

See **Appendix B** for further information and guidance on situations where the civil servant may be medically unfit to participate.

- (b) Where there is a breach of the disciplinary procedure that is likely to imperil a fair hearing or a fair result.

See **Appendix B** for further information and guidance on fair procedures.

- (c) Where the civil servant claims that the manager or another person involved in the disciplinary process has bullied the civil servant in the past or the disciplinary process itself is a form of bullying.

See **Appendix B** for further information and guidance on situations where the civil servant claims that the manager or another person involved in the disciplinary process has bullied the civil servant in the past or the disciplinary process itself is a form of bullying.

Also see **Appendix C** for some tips for managers to avoid complaints of bullying and harassment.

- (d) Where it has not been possible for the civil servant to arrange appropriate representation for the meeting.

See **Appendix D** for further information and guidance on the right to representation and requests for alternative representation.

- (e) Where the civil servant may be subject to criminal proceedings and may claim that to participate in the process will affect the civil servant's privilege against self-incrimination.

See **Appendix E** for further information and guidance on situations where the civil servant may claim that to participate in the process may affect the civil servant's privilege against self-incrimination.

Related guidance and information on situations where a civil servant has acted illegally or is convicted of a criminal offence can be found in **Appendix F**.

- (f) Where the civil servant claims that the disciplinary process is a form of penalisation (for example, for making a protected disclosure).

It would only be in very rare cases that this would amount to reasonable cause for non-participation, but the manager may wish to seek an independent view / advice from the HR Unit in such cases. See **Appendix J** for further information on situations where protected disclosures may be relevant to the disciplinary process.

- (g) Other circumstances where it may be reasonable for the civil servant to decline to participate.

It is not possible to predict in advance every possible circumstance in which a civil servant may decline to participate. Managers should ensure that civil servants have a fair opportunity to explain their reasons, and should consider those reasons in the context of the facts as they are presented. If in doubt, the manager should seek advice from the HR Unit.

2.5.5 Where the manager decides that there is no reasonable cause for the civil servant's failure or refusal to participate, the manager should inform the civil servant of the manager's decision and provide the civil servant with a further opportunity to participate in the process. This may involve rescheduling an investigation or disciplinary meeting to facilitate the attendance of the civil servant. The Disciplinary Code provides that where there is a repeated pattern of non-participation (without reasonable cause) the manager should:

- (a) continue with the disciplinary procedure;
- (b) advise the civil servant accordingly; and

(c) inform the civil servant of each step as it is reached.

2.5.6 The manager should take appropriate steps to allow the civil servant to participate in the process. For example, if the civil servant refuses to attend investigation meetings, then the manager should normally provide the civil servant with an opportunity to comment in writing on the notes of the meetings with witnesses before concluding the investigation, as an alternative to providing comments at a meeting.

2.5.7 Civil servants who fail or refuse to participate at an earlier stage in the process should always be given the opportunity to participate at a later stage in the process.

2.5.8 Where the manager determines that there is reasonable cause for the civil servant's failure or refusal to participate, the manager should contact the HR Unit for advice on next steps.

## **2.6 Determining the Relevant Manager**

2.6.1 Each Department or Office may determine who the relevant manager (as defined in the Code) is in respect of disciplinary matters and may issue appropriate guidance on such matters. In general, the civil servant's line manager will be the relevant manager unless there are reasons for a different manager to act as the relevant manager. Ultimate discretion in each case lies with the Department or Office.

## **2.7 Record keeping**

2.7.1 The manager should ensure that an appropriate record is kept of all disciplinary matters and this should include the creation of a disciplinary file at the commencement of the disciplinary procedure. See **Appendix A** for further guidance on record keeping.

### 3. PART 3 – THE DISCIPLINARY PROCEDURE

#### Step 1

- Commence the Process

- 3.1** The manager should generally attempt to resolve any minor concerns by way of informal measures. This will normally involve a meeting with the civil servant where the concern is raised in an informal manner and discussed with the civil servant. The feedback from the civil servant is taken into account and appropriate assistance considered. A period of time may be allowed for the civil servant to improve before proceeding to the formal process. However, an informal process may not always be appropriate (for example, where the misconduct is serious) and it is up to the manager to determine what approach is reasonable in any given case.

## Step 2

# • Investigation: Establish the facts

**3.2** The Disciplinary Code provides that the nature of any investigation under the Code, and the identity of the appropriate investigator, will depend on the complexity and seriousness of the issue and will be a matter for the manager to determine.

### 3.2.1 **Gathering information**

The Disciplinary Code provides that a manager may gather available information prior to commencing an investigation or undertaking a disciplinary meeting. Information gathering which does not involve making any findings about disputed facts does not necessitate the application of fair procedures. Such information gathering would include collating correspondence; collating time and attendance records; taking short statements from witnesses without making judgments about their veracity; and summarising facts about which every party agrees.

The manager should note that making findings about disputed facts – such as whether a disputed event happened or did not happen, or whether a disputed action was deliberate or accidental – requires the application of fair procedures.

### 3.2.2 **Nature of the investigation – a one-stage or two-stage process**

The Disciplinary Code provides that, in cases where the facts are not complex and where the suspected misconduct is not serious, the investigation may take place as part of the disciplinary meeting. In all other cases, an investigation will be completed prior to any disciplinary meeting taking place.

- (i) **A one-stage process refers to a process where any necessary investigation takes place as part of a disciplinary meeting. This will normally occur where the facts are not complex and where the suspected misconduct is not serious. See the following examples:**

**Scenario A:** A civil servant (A) has very poor time keeping. She has flexi clock infringements on an ongoing basis over a period of two months of at least two each week. You also notice that she is late every Monday and Friday. You have spoken to A on an informal basis but the time keeping has not improved.

**Scenario B:** You have received a complaint from the public in relation to a civil servant (B). The member of the public gives details of a phone call where B was rude, refused to answer a question in relation to the work of the Office and hung up the phone on her.

**Scenario C:** You discover that a civil servant working in your Department (C) was convicted of a public order offence last year and a fine was imposed. This was not disclosed to you or anyone else in the Department.

The line manager should generally take responsibility for dealing with such matters and, in most cases, it will not be necessary to have a separate investigation in advance of a disciplinary meeting. The line manager should consider what information needs to be gathered and determine next steps on the basis of the information gathered. The manager will need to provide the civil servant with any information gathered in advance of the disciplinary meeting and discuss the issues with the civil servant at the disciplinary meeting. In most cases similar to A and B, the issues will be investigated and addressed at the disciplinary meeting.

In scenario A, the information to be gathered might include collating time and attendance records; and any record of the informal discussions that took place previously.

In scenario B, the information to be gathered might include the email or statement from the member of the public; and any records showing that the civil servant was working on that day (if there is any confusion about who took the call). This is a situation where the manager may need to determine whether to deal with the concern on an informal basis through discussion and appropriate assistance or through the disciplinary process. The approach will depend upon an assessment of the seriousness of the issue (after considering the statement of the member of the public) and other factors such as the disciplinary and/or performance record of the civil servant, any previous issues of a similar nature and any previous informal discussion.

In scenario C, the manager will need to consider the nature of the public order offence and any information that can be gathered in relation to that, whether that is a newspaper report or some other record of what occurred. The role and duties of the civil servant will also need to be considered. Would a public order offence be a serious issue, considering the role and duties of the civil servant? If the manager is of the view that this is unlikely to be a serious matter then a one-stage process will be appropriate. If the manager is of the view that this is likely to be a serious matter then a two-stage process may be more appropriate. This should be clearer after information has been gathered and considered by the manager.

(ii) **A two-stage process refers to a process where the investigation is completed before a disciplinary meeting takes place. A two-stage process will be more appropriate where the facts are complex or the suspected misconduct is serious. See the following examples:**

**Scenario D:** You have recently been informed by a colleague that a civil servant in your Department (D) has not been responding to calls from the public. Another colleague has been informed by a member of the public that D was rude to him on a call and referred to the member of the public (who is a French national) as a "foreigner". The member of the public also said that the information he received from D was incorrect in part, misleading and contrary to the information contained on the Department's website.

**Scenario E:** A colleague has reported a concern in relation to a civil servant in your Department (E). He says that E has found a means to manipulate the system to allow rents that are payable to the Department to be diverted to another account.

**Scenario F:** A colleague makes a complaint of bullying against a civil servant (F) in your Office.

In such cases, it will normally be necessary for an investigation to be undertaken in advance of a disciplinary meeting but all the circumstances of the case should be considered to determine whether the facts are complex or the suspected misconduct is serious. The line manager should contact the HR Unit to discuss the matter and determine whether an investigation should be initiated by the HR Unit on the basis of the information available or any information gathered by the manager.

In scenario D, it may be necessary to gather information initially to determine whether this is a case where the facts are complex or the suspected misconduct is serious. The information provided to date is through a colleague and it is not clear whether that information has been provided in writing. It may be necessary to ask the colleague to set out his or her concerns in writing (if this has not already occurred) and to contact the member of the public to determine if that individual is willing to provide a statement in relation to the matter. The statement will then need to be assessed to determine the seriousness of the concern but, in circumstances where there appear to be alleged comments related to race it is likely that a separate investigation may be required prior to any disciplinary meeting.

In scenario E, the colleague should be asked to make a statement and to provide as much information as possible in relation to the colleague's concern. It is also likely to be necessary to seek some input from an expert on the system to determine what has been happening on the system. The manager should seek advice immediately from the HR Unit in relation to the steps to be taken in respect of a potentially serious case such as this.

In Scenario F, the investigation will be conducted under the Dignity at Work Policy and the Dignity at Work Policy should be consulted to determine next steps. If the complaint is upheld following that investigation under the Dignity at Work Policy, the findings of that report can be used in any disciplinary meeting that follows.

**Note: The examples set out above are for the purposes of explaining a general approach to the use of the Disciplinary Code. What is serious or not may differ for each Department / Office and it is up to the manager to determine the correct approach in consultation with the HR Unit when appropriate.**

### 3.2.3 Identity of the investigator(s) - line manager or another

The Disciplinary Code provides that in cases where the facts are not complex and the suspected misconduct is not serious, it is generally expected that the line manager will investigate the concern about the civil servant's conduct. The line manager may wish to gather information in advance and the investigation will generally occur at the disciplinary meeting. This will normally be the case where the line manager is dealing with scenarios such as scenario A to C above.

In all other cases (i.e. where the facts are complex or the suspected misconduct is serious or where the manager is unsure), the HR Unit should be consulted and a determination made as to whether the matter should be referred to the HR Unit to initiate an investigation. The HR Unit will then consider the issues and appoint an appropriate investigator.

#### **3.2.4 Where the civil servant alleges that the line manager is not a suitably independent or unbiased person**

The civil servant may allege that the line manager is not a suitably independent or unbiased person to investigate the matter and deal with the disciplinary meeting. For example, where the civil servant claims that the manager has bullied the civil servant in the past or the disciplinary process itself is a form of bullying.

See **Appendix B** for information and guidance on situations where the civil servant claims that the manager involved in the disciplinary process has bullied the civil servant in the past or the disciplinary process itself is a form of bullying.

Also see **Appendix C** for some tips for managers to avoid complaints of bullying and harassment.

In such cases, the line manager may wish to contact the HR Unit to seek advice. The HR Unit will then consider the issues and determine whether it is appropriate for the line manager to deal with the process or whether an alternative person should be appointed to deal with the matter.

#### **3.2.5 Transferring an investigation to the HR Unit**

It will not always be obvious that a matter is complex or the suspected misconduct is serious and a line manager may only realise this to be the case in the course of an investigation. This does not invalidate the investigation undertaken by the line manager. In such cases, once it becomes clear to the line manager that the matter is complex or the misconduct is serious, the line manager should contact the HR Unit for further advice. The HR Unit will then determine how best to proceed and whether it is appropriate to appoint an alternative person to conclude the investigation.

Where a matter is referred or transferred by the line manager to the HR Unit for investigation the entire file on the matter should be sent to the HR Unit including any and

all evidence gathered by the line manager. This information can be used in any investigation of the matter and the HR Unit will determine how best to proceed.

### 3.2.6 **General principles that apply to investigation processes**

#### (a) **The right to be informed of concerns.**

A civil servant should not normally be the subject of a prolonged investigation without his or her knowledge. Doing so may give rise to concerns about privacy, data protection, and prejudgment of subsequent disciplinary process. However, it is not necessarily the case that the civil servant needs to be informed of concerns immediately on those concerns arising. Managers may need to complete some preliminary information-gathering before informing the civil servant that this is occurring. This may arise where there is a question about whether there is anything worth investigating; or where there is ambiguity about the extent of the investigation; or where there is ambiguity about who should be investigated.

For example, in scenario B, if the member of the public is not clear on the name of the civil servant allegedly spoke to, the manager might take steps to cross-refer attendance records against the date and/or time of the call in an attempt to shorten the list of potential candidates for investigation before notifying them.

Alternatively, if a manager receives a second hand report that a civil servant is persistently late, the manager might first gather the civil servant's time and attendance records to determine whether or not there is a matter worth investigating. Only if the records provide potential evidence of lateness would the manager need to inform the civil servant that the matter will be investigated. Similarly, in scenario D above, where a concern is raised by a colleague in relation to a civil servant's interaction with the public, a statement might be sought from the colleague and, depending upon the information provided, it may be appropriate to speak to the member of the public. The matter would then need to be assessed on the basis of the information provided and the civil servant provided with a copy of the statement(s) and confirmation of next steps (investigation or disciplinary meeting).

If a manager learns that there is evidence that an irregularity may have occurred on a particular day, the manager might first gather evidence to identify whether the same irregularity may have occurred on other days before notifying the civil servant. The scope

of the investigation would be significantly different if the irregularity appears to be a once-off, as opposed to a frequent, occurrence.

Similarly, if the manager has a reasonable concern about evidence being destroyed or potential witnesses being intimidated, it may be appropriate for the manager to gather the evidence and interview the witnesses prior to informing the civil servant.

**(b) The right to be provided with appropriate documentation**

A civil servant has the right (subject to some limited exceptions) to be provided with the appropriate documentation, namely any documentary evidence that is to be considered by the investigator when arriving at a decision. The investigator / manager should ensure that the investigation is fair and reasonable and that the appropriate documentation is provided to the civil servant. This should include documentation that may tend to show that the concern is not well founded along with documentation that may tend to show that the concern is well founded.

All information that is relevant to the investigation (including information that tends to show that the concern about the civil servant is not well founded) should normally be provided to the civil servant.

Information such as witness statements should normally be provided to the civil servant because they will normally be relevant to the investigation.

When considering what documentation is appropriate to provide to a civil servant, and/or whether some exceptions might apply, the investigator/manager should take all the circumstances of the case into account. These circumstances would include the civil servant's right to fair procedures; the relevance of the information to the concern raised and any legal requirements (such as the requirements of the Data Protection Acts 1988 to 2003 or the Protected Disclosures Act 2014).

It would only be in very limited circumstances that documentary evidence that is to be considered by the investigator/manager when arriving at a decision would be redacted or withheld from a civil servant. An example might be where sensitive personal information is disclosed in respect of a member of the public during an investigation in relation to a civil servant which is manifestly irrelevant to matters under investigation. The investigator may determine in that case that it is appropriate to redact the name of the member of the

public to protect the privacy of that individual and to comply with the Data Protection Acts 1988 and 2003.

(c) **The right of reply**

A civil servant should be notified of the investigation as promptly as practicable unless there is a good reason not to tell him or her. If the investigation is nothing more than a gathering of evidence (collating records; interviewing witnesses) the civil servant will not normally have an entitlement to fair procedures. If the investigation moves to a finding of fact (making judgment about records that have been collated; deciding which witnesses are more credible than others) the civil servant is entitled to fair procedures, including a right to know the allegation and an appropriate right to reply.

The format of the reply will depend on the format of the evidence to which the civil servant is replying. A manager is entitled to expect a civil servant to verbally reply to questions, provided the civil servant has had sufficient notice of the subject matter of the investigation. While civil servants should be facilitated if they wish to supplement verbal replies with written replies, a civil servant is not normally entitled to decline to answer questions verbally.

(d) **The right to representation**

See **Appendix D**, which deals with requests for alternative representation (by an individual who is not a serving civil servant / union official or by a legal representative).

If the civil servant is represented, the manager should consider the role of the representative at any investigation meeting or disciplinary meeting. The representative will normally be allowed to confer with the civil servant, make submissions on behalf of the civil servant at the start of the meeting and sum up the case at the conclusion of the meeting. However, the representative will not normally be allowed to answer questions on behalf of the civil servant.

(e) **Witnesses**

The investigator or manager (as the case may be) should consider what witnesses are required at any investigation or disciplinary meeting and how the witnesses will provide evidence to the investigation or disciplinary meeting.

There are different approaches to taking evidence from witnesses. In some cases, it will be more appropriate for the witnesses to be interviewed and notes taken, which are then confirmed as accurate accounts of the meeting (or as a witness statement) by the witnesses. The meeting notes / statements are then provided to the civil servant for comment and reply. In other cases, it may be more appropriate to call the witnesses to a meeting where the civil servant is afforded the opportunity to listen to the evidence that is provided by the witnesses and ask (through the chair of the meeting) questions of the witnesses at the meeting in respect of the evidence that the witnesses provide.

In some exceptional cases, very formal processes may be required and this may include a right to legal representation and a right to put questions to witnesses. See **Appendix D** in respect of requests for legal representation and **Appendix G** in respect of a request to put questions to witnesses.

(f) **Notes of meeting(s)**

The Disciplinary Code provides that appropriate notes will be taken at any investigation meetings and copies of those notes (either typed or handwritten) will be provided to the civil servant in good time (normally within 3-5 days) after each meeting.

Where a witness is being interviewed, the witness should be provided with a copy of the notes of the meeting and asked to confirm that the notes are an accurate reflection of what was stated at the meeting. Confirmation in writing should be sought and received (where possible). If the witness has any clarifications to make, the clarifications should be appended to the notes of the meeting. The notes of the meeting can then be provided to the civil servant who is the subject of the investigation.

Where the civil servant who is the subject of the investigation is being interviewed, the civil servant should be provided with a copy of the notes of the meeting and asked to confirm that the notes are an accurate reflection of what was stated at the meeting. Confirmation in writing should be sought and received (where possible). If the civil servant has any clarifications to make the clarifications should be appended to the notes of the meeting.

(g) **Making findings of fact on the balance of probabilities**

The standard of proof in a disciplinary case is referred to as "the balance of probabilities". This means that it must be more likely than not that the something occurred before it can be proven that it did occur and it must also be more likely than not that this was

misconduct if a finding of misconduct is to be made. The degree of probability (i.e. whether it should be the bare balance of probability of 51% or something more such as 55%, 60%, 65% etc) will depend upon the nature and gravity of the concern in respect of the civil servant. The degree of probability should always be proportionate to the nature and gravity of the issue being investigated and advice should be sought from the HR Unit if the manager is unsure of the balance to be struck.

Of particular relevance in this context is the case of *Georgopoulos v Beaumont Hospital Board* [1998]. That case involved a doctor who was dismissed from his employment with Beaumont Hospital. In that case, the Supreme Court found that the criminal standard of proof (where matters must be proved beyond a reasonable doubt) had no application in an internal inquiry in an employment context. The Supreme Court also found that complaints involving charges of great seriousness and with serious implications for the employee's reputation could be dealt with on "the balance of probabilities" "bearing in mind that the degree of probability required should always be proportionate to the nature and gravity of the issue to be investigated."

The standard of proof applicable to disciplinary cases was affirmed by the High Court in the case of *Kelly v Minister for Agriculture, Fisheries and Food and Others* [2013]. Mr Kelly was employed as harbour master at Killybegs Fisheries Harbour Centre. During the course of his employment an anonymous letter was received by the Department of the Marine and Natural Resources alleging that Mr Kelly had private business interests in contravention of his paid employment in the civil service. This led to his dismissal after an investigation and disciplinary process. In that case the Court found that the gravity of the offence alleged against Mr Kelly was towards the top end of the scale. Thus while the test should still be on the civil standard, a higher degree of probability was required and any conclusion reached should be based on something more convincing than just the bare balance of probabilities.

The balance of probabilities in most cases is a "more likely than not" standard. Was it more likely than not that an incident occurred? Was it more likely than not that the incident amounted to serious misconduct? The bare standard of probabilities would be 49% / 51%, but certain cases, where the wrongdoing is particularly serious may require the decision-maker to be satisfied of a civil servant's guilt to a higher standard than the bare standard of probabilities. It would be impossible to provide an exhaustive list of all charges that would require more than the bare balance of probabilities but it is likely that a charge that is akin to a criminal charge, or a charge involving dishonesty, would require something more than

the bare standard of probabilities. As noted above, advice should be sought from the HR Unit if the manager is unsure of the balance to be struck.

(h) **Confidentiality**

In general, all investigations and disciplinary matters will be conducted in a confidential manner. That does not mean that matters can be conducted in absolute secrecy. A manager may need to ask questions of witnesses during the investigation or disciplinary process. Either during or after the process, the Department or Office may have statutory obligations or governance requirements to report to outside parties, such as the Gardaí or the Office of the Comptroller and Auditor General. Where a civil servant has a pattern of a certain type of behaviour, the outcomes from an earlier process may need to be considered during a later process. Civil servants who are the subject of a process are entitled to discuss the matter with their representative (normally a colleague or trade union representatives or legal representative where the civil servant chooses to engage one).

In these and other circumstances, information should only be shared to the extent that it is appropriate to do so. People participating in a relevant process in any capacity are required to refrain from casual conversation about the process, and may not share information about a process except where doing so is a requirement of the process or is otherwise justified.

**3.2.7 Investigation of complex or serious matters**

The Disciplinary Code provides that where the facts are complex or there is a possibility that serious misconduct may have occurred, the matter should be referred to HR to initiate an investigation. This will be a two-stage process with a separate investigation in advance of any disciplinary meeting.

The Disciplinary Code provides that fair procedures are to apply in all cases. In cases where the matters being investigated are complex and/or serious, the application of those procedures will normally mean that the investigation will be more formal and should be governed by clear terms of reference. The terms of reference should set out:

- (a) that the investigation is being carried out under the Disciplinary Code, and may, where appropriate, lead to disciplinary action;
- (b) the matters that are to be investigated;

- (c) the timescale for the investigation;
- (d) the findings that can be made; and
- (e) the identity of the person(s) to whom the investigation report is to be sent.

For example, in scenario E above, where a colleague has reported a concern in relation to a civil servant in your Department (E). The colleague claims that E has found a means to manipulate the system to allow rents that are payable to the Department to be diverted to another account.

This is a very serious case of suspected fraud, where dismissal may be considered. As noted above, the colleague should be asked to make a statement and to provide as much information as possible in relation to the colleague's concern. It is also likely to be necessary to seek some input from an expert to determine what has been happening. A formal report may be required that involves a forensic analysis of the system. The manager should seek advice immediately from the HR Unit in relation to the steps to be taken in respect of a potentially serious case such as this.

This is a case where a two-stage process will be more appropriate with an investigation to be undertaken in advance of a disciplinary meeting. The HR Unit will determine whether an investigation should be initiated by the HR Unit on the basis of the information available or any information gathered by the manager. In this type of case, an external investigator might be considered appropriate.

The investigation should be governed by terms of reference, which set out:

- a) That the investigation is being carried out under the Disciplinary Code, and may, where appropriate, lead to disciplinary action. In this case the terms of reference should note that the investigation may lead to disciplinary action (up to and including dismissal);
- b) The matters that are to be investigated. This section should set out in detail the concerns in respect of the civil servant. The alleged conduct including dates and times should be set out if possible and any forensic report that is available should be referenced in the terms of reference;
- c) The timescale for the investigation;

- d) The findings that can be made. The possible findings should be specified so that the gravity of the matter is evident to the civil servant; and
- e) The identity of the person(s) to whom the investigation report is to be sent.

The investigator(s) will consider any forensic report, meet with relevant witnesses and meet with the civil servant. On the basis of the evidence provided, the investigator(s) will come to a conclusion (on the balance of probabilities) and determine whether the civil servant manipulated the system to allow rents payable to the Department to be diverted to another account. The investigator will need to determine whether there are reasonable grounds to come to that conclusion taking into account all the evidence provided as part of the investigation including the civil servant's reply.

### 3.2.8 **Protective measures**

See separate guidance in **Appendix H** on suspension and other protective measures.

## • Prepare for the Disciplinary Meeting

### 3.3

3.3.1 There is a distinction between a one-stage and two-stage process:

- (a) **As noted above, in a one-stage process, any necessary investigation will take place as part of a disciplinary meeting. This will normally occur where the facts are not complex and where the suspected misconduct is not serious.**

When preparing for this type of disciplinary meeting the manager will need to consider what information has been gathered prior to the disciplinary meeting and when and how this information should be provided to the civil servant. For example, considering the scenarios set out above:

In scenario A, involving poor timekeeping, the information to be gathered might include collating time and attendance records; and any record of the informal discussions that took place previously.

In scenario B, involving a complaint from a member of the public of rudeness, the information to be gathered might include the email or statement from the member of the public; any telephone records and any records showing that the civil servant was working on that day (if there is any confusion about who took the alleged call).

In scenario C, involving a suspected criminal conviction for a public order offence, the information to be gathered might include a newspaper report or some other record of what occurred. The role and duties of the civil servant will also need to be considered.

- (b) **As noted above, in a two-stage process, the investigation will take place before the disciplinary meeting. This will normally occur where the facts are complex or the suspected misconduct is serious.**

When preparing for this type of disciplinary meeting the manager will have an investigation report which will set out the facts of the case. The civil servant may have been provided with a copy of the investigation report at the end of the investigation process but, if the manager is unsure whether this has occurred, then the manager should provide the civil servant with a copy of the investigation report in advance of any disciplinary meeting. The

civil servant should also be afforded an opportunity to comment on the report (see further information in respect of prior investigations at section 2.3 above).

3.3.2 In general, the following steps should be taken by a manager to prepare for a disciplinary meeting:

- Ensure that all the evidence is obtained and made available to the civil servant (whether that is in the form of an investigation report or other evidence). Review the evidence (including any investigation report) and consider whether all the issues that should be addressed are covered.
- To get a balanced view try to consider if there is anything that might explain the civil servant's conduct, such as low staffing levels, work overload or personal difficulties.
- Check the civil servant's record and whether he or she has already received warnings under the Disciplinary Code.
- Become familiar with the outcomes available under the Disciplinary Code if misconduct is found to have occurred.
- Confer with the HR Unit in advance of the hearing and consider if there are similar cases and the outcomes in those cases.
- Draw up a structure for the meeting: Although no two disciplinary meetings will be identical a brief structure should be mapped out. Start by trying to define what you need to achieve from the meeting and note important points that need to be covered. Thought should be given to the reasons, mitigating circumstances or excuses that the civil servant might provide and whether they can be checked. For example, consider if the alleged misconduct is widespread within the Office / Department, as this is something that the civil servant may raise in his or her defence.
- Consider who should be present at the meeting and, in particular, consider any request for representation outside of the representation allowed in the Disciplinary Code. See **Appendix D** for further guidance on the issue of representation and requests for alternative representation.

- Consider how evidence will be presented and, in particular, consider what witnesses (if any) will attend the disciplinary meeting.
- If witnesses are attending, consider how questions can be put to the witnesses. See guidance in **Appendix G** on requests to put questions to witnesses.
- A suggested structure for the disciplinary meeting is set out in **Appendix I**.

## Step 4

# • Disciplinary Meeting

### 3.4

- 3.4.1 The chair of the disciplinary meeting is responsible for determining the structure of the disciplinary meeting, how the meeting should proceed on the day, establishing facts (where this is required), determining if misconduct has occurred and deciding on the outcome of the meeting.
- 3.4.2 A suggested structure for the disciplinary meeting is attached at **Appendix I**.
- 3.4.3 The civil servant who is the subject of the disciplinary meeting should be provided with a copy of the notes of the meeting and asked to confirm that the notes are an accurate reflection of what was stated at the meeting. Confirmation in writing should be sought and received (where possible). If the civil servant has any clarifications to make the clarifications should be appended to the back of the notes of the meeting.

**3.5**

- 3.5.1 The Disciplinary Code provides that it is important to ensure that decisions are fair and consistent and that the facts of each case are considered carefully.
- 3.5.2 If establishing the facts, the manager is required to consider whether, on the balance of probabilities, the concern about the civil servant's conduct is proved. Normally, in a two-stage process, the facts will be established in the investigation report. It would be very unusual for a manager to make a finding of fact at a disciplinary meeting which runs contrary to a finding of fact at an investigation, but the manager has the discretion to do so in exceptional circumstances. For example, where new information is brought to the attention of the manager at a disciplinary meeting that was not considered by the investigator during the investigation.
- 3.5.3 The manager will also have to consider whether, on the balance of probabilities, the conduct of the civil servant amounts to misconduct and, if so, the appropriate outcome.
- 3.5.4 The manager should consider the reasonableness of the outcome taking all factors into account. In particular, the manager should consider:
- The nature and extent of any investigation carried out in the case;
  - The conclusion arrived at after any such investigation;
  - Whether the Disciplinary Code has been complied with during the process;
  - Whether the civil servant was made aware of all concerns that formed the basis for the disciplinary process;
  - Whether the civil servant had adequate opportunity to reply to the concerns or explain the circumstances before the decision was taken;
  - Whether the civil servant was allowed appropriate representation;
  - Whether the manager believes (on the balance of probabilities) that misconduct occurred;

- Whether there are reasonable grounds to sustain that belief and what those reasonable grounds might be; and
- Whether the civil servant has received a fair and impartial determination of the matter after all relevant facts have been considered.

## Step 6

# • Decide the Appropriate Disciplinary Action

### 3.6

3.6.1 The Disciplinary Code provides that when deciding what disciplinary action is appropriate, the following should be taken into account:

- (a) The nature and seriousness of the misconduct.

In particular, what is the effect of the misconduct on the Office/Department, the public and other colleagues?

Does the misconduct cause a break down in the trust and confidence that you as a manager should have in the civil servant?

Does the misconduct affect the civil servant's ability to undertake the civil servant's current role and duties and/or any other suitable role and duties within the Office / Department / Civil Service?

- (b) Any active disciplinary warnings issued to the civil servant.

What action has been taken against this civil servant in the past for similar misconduct or otherwise?

- (c) The explanation provided by the civil servant.

How has the civil servant explained his or her actions?

Are the explanations credible?

- (d) Any mitigating circumstances presented by the civil servant.

Mitigating circumstances could include length of service, age, personal circumstances and medical or psychological evidence.

The manager should consider whether there may be any mitigating circumstances even if none are presented by the civil servant.

- (e) Any other matters which, in all the circumstances, are relevant.

How did the civil servant conduct himself or herself during the disciplinary process?

Are there any reasons that might explain or excuse the civil servant's misconduct which have not been presented by the civil servant?

What action has been taken against other civil servants for similar misconduct in the past?

3.6.2 The manager should consider what a reasonable and proportionate action is, taking all the circumstances into account. In particular, does the disciplinary action that is proposed lie within the range of reasonable responses of a reasonable employer?

3.6.3 It is important that a manager considers all actions when deciding a case and, particularly in cases of dismissal, considers if a lesser action would be acceptable in the circumstances. If the manager considers that no lesser action would be acceptable then the manager should consider why not. The manager will need to consider the seriousness of the misconduct and weigh that against the effect of the action (particularly dismissal) on the civil servant concerned.

3.6.4 A range of disciplinary actions (1-13) with the appropriate decision-maker are set out at Table A. The manager should note that certain disciplinary actions (1-8 in Table A) can be taken by the manager but the ability to take more serious disciplinary actions (9-13 in Table A) will rest with the Appropriate Authority after a recommendation from the manager.

3.6.5 Before deciding that a civil servant should be reassigned to another location or other duties (Action 8) the manager should take account of the potential impact of such a reassignment on the civil servant and on civil servants who are currently carrying out the proposed new duties or who are working at the new location and on the managers of those civil servants.

#### **Table A, Actions 9 to 13**

Before taking any of these reserved disciplinary actions, the appropriate authority should be satisfied that the appropriate statutory requirements are met, including those provided in section 15 of the Civil Service Regulation Act 1956 as amended.

That section provides, amongst other things, that the sanctions of reduction in pay, demotion, and suspension without pay are limited to circumstances in which the appropriate authority has formed the opinion that the "civil servant has, in relation to his official duties, been guilty of misconduct, irregularity, neglect, unsatisfactory behaviour or underperformance". Those penalties therefore are not available in respect of other matters

that might give rise to disciplinary action but that are unrelated to the civil servant's official duties, such as conviction for a criminal offence.

### **3.7 Examples of disciplinary action on the basis of the scenarios referenced above**

**3.7.1 Scenario A: A civil servant (A) has very poor time keeping. She has flexi clock infringements on an ongoing basis over a period of two months of at least two each week. You also notice that she is late every Monday and Friday. You have spoken to A on an informal basis but the time keeping has not improved.**

This would appear to be a relatively straight forward disciplinary issue. In most cases, unless there has been disciplinary action taken in the past, the likely disciplinary action will be a Level One (Verbal) Warning. However, certain issues may arise during the disciplinary meeting that may change the approach. It is possible that during the disciplinary meeting the civil servant may claim that personal issues (family issues, illness, disability etc) are responsible for the lateness. The Chief Medical Officer may need to be consulted if medical issues are cited. If there are sufficient mitigating circumstances, the manager may decide that misconduct occurred but no disciplinary action will be taken on this occasion.

**3.7.2 Scenario B: You have received a complaint from a member the public in relation to a civil servant (B). The member of the public gives details of a phone call where B was rude, refused to answer a question in relation to the work of the Office and hung up the phone on her.**

There are a number of facts that need to be established in this scenario.

Firstly, the identity of the civil servant needs to be established. Can the member of the public name the civil servant and can it be established that the civil servant was working on the day that the call was made, and, on the balance of probabilities, the civil servant was the person who spoke to the member of the public in question.

Secondly, what was said on the telephone call will need to be established. There may well be two different versions of events. A statement should be sought from the member of the public involved with details of what was said, when the call was made (time and date) and any other relevant information. Time and attendance and other records should be sought to determine whether the civil servant accused was the person who took the call, if the call was made.

The civil servant should be provided with all the evidence and invited to a disciplinary meeting. At the disciplinary meeting, the civil servant will be provided with an opportunity to reply and explain the circumstances before any decision is taken.

The manager will need to determine (on the balance of probabilities) what happened on the telephone call and whether misconduct has occurred. The manager will need to determine whether there are reasonable grounds to determine that there was misconduct and what those reasonable grounds might be.

The manager will then need to consider the nature and seriousness of the misconduct concerned and, in particular, the effect of the misconduct on the Office/Department, the public and other colleagues. Any active warnings may be considered, as will any explanation provided by the civil servant. The civil servant may claim that the member of the public in question was rude and abusive to him. This will not necessarily excuse rudeness on the part of the civil servant, but it may be taken into account as a mitigating factor.

Depending upon the detail provided by the member of the public, the explanation of the civil servant and other mitigating factors, the manager may consider that a Level One (Verbal) or Two (Written) Warning is appropriate in a case such as this.

**3.7.3 Scenario C: You discover that a civil servant working in your Department (C) was convicted of a public order offence last year and a fine was imposed. This was not disclosed to you or anyone else in the Department.**

When determining what disciplinary action (if any) to take in such cases the manager should consider:

- the nature of the alleged illegal activity / criminal conviction;
- the nature of the work that the civil servant undertakes in the Department / Office;
- the position of the civil servant (including his or her level of seniority); and
- whether the general public and colleagues of the civil servant might reasonably have cause for concern arising from the conviction, having regard to the position of the civil servant.

What is an appropriate sanction will depend upon the particular circumstances of each individual case. In this scenario, the manager will need to consider if this was a serious offence and what were the facts of the case. Would a public order offence be a serious issue, considering the role and duties of the civil servant? Does the conviction have implications for the civil servant's employment and how he might be viewed by colleagues or members of the public? Does the civil servant have any active warnings or any other previous convictions?

It is very difficult to provide anything more than very general guidelines in the area as each case turns on its own facts. In some cases, a public order offence may be a very serious matter and a Level Two (Written) or Level Three Final (Written) Warning may be appropriate. In other cases, a Level One (Verbal) Warning may be appropriate. Mitigating factors such as the length of service and any personal issues should also be considered. See **Appendix F** for further information.

- 3.7.4 **Scenario D: You have recently been informed by a colleague that a civil servant in your Department (D) has not been responding to calls from the public. Another colleague has been informed by a member of the public that D was rude to him on a call and referred to the member of the public (who is a French national) as a "foreigner". The member of the public also said that the information he received from D was incorrect in part, misleading and contrary to the information contained on the Department's website.**

In this scenario, the information gathered, or any investigation report, will need to be considered. Is there a statement from the colleague? Is there a statement from the member of the public?

Has it been proved, on the balance of probabilities, that D was rude on the phone call and called the member of the public a "foreigner"? Is there any other evidence of racist comments from D? Has D given incorrect and/or misleading information to the member of the public?

- 3.7.5 Giving incorrect or misleading information on its own would be unlikely to result in a disciplinary action and should generally be dealt with informally. However, if racism has been proved then the matter may warrant a serious sanction such as a Level Two (Written) or Level Three Final (Written) Warning. The level of sanction may depend upon a number of factors. How serious / abusive were the racist comments? Are there any active warnings on

D's record? Has D been responsible for any previous similar misconduct? Was there provocation? Are there any other mitigating factors (length of service, personal issues)?

**Scenario E: A colleague has reported a concern in relation to a civil servant in your Department (E). He says that E has found a means to manipulate the system to allow rents that are payable to the Department to be diverted to another account.**

This is a very serious case of suspected fraud, where dismissal may be considered. As a result, a two-stage process will be more appropriate with an investigation to be undertaken in advance of a disciplinary meeting. Guidance on the investigation to be undertaken is set out in section 3.2.7.

After the investigation has concluded, the report will be provided to the person named in the terms of reference for that purpose and that person will determine whether the civil servant should be called to a disciplinary meeting. Notice of the disciplinary meeting should be given to the civil servant in accordance with the Disciplinary Code and the notice should state that a finding of misconduct may lead to disciplinary action (up to and including dismissal).

A disciplinary meeting should take place in accordance with the suggested structure for a disciplinary meeting set out at **Appendix I**. This may be a case where the civil servant could request to be represented by a legal representative and any such request should be considered in line with the guidance provided at **Appendix D**.

The manager will then need to consider the nature and seriousness of the misconduct concerned and, in particular, the effect of the misconduct on the Office/Department, the public and other colleagues and the possible breakdown in trust and confidence between the manager and the civil servant. Disciplinary action in the past will be considered, as will any explanation provided by the civil servant. In most cases, if the manager is satisfied that the civil servant has taken part in fraud, which has resulted in a loss to the Department and/or a gain for the civil servant, the appropriate disciplinary action will be to recommend dismissal. The civil servant may claim that there are mitigating circumstances and any such mitigating circumstances should be taken into account along with considering other possible sanctions and the proportionality of the action.

If the manager decides that dismissal, or one of the other disciplinary actions at 9-13 of Table A is appropriate then the manager should recommend this action to the Appropriate

Authority in the Relevant Manager's Report. The civil servant has an opportunity to appeal (in accordance with the Disciplinary Code) and the Appropriate Authority will then decide on the disciplinary action to be taken.

**3.7.6 Scenario F: A colleague makes a complaint of bullying against a civil servant (F) in your Office.**

Cases of bullying should be investigated under the Dignity at Work Policy and a report will then be provided. The report will determine whether bullying has occurred or not. It would be very unusual for the manager hearing the disciplinary to look behind those findings and come to a different finding of fact as both the Disciplinary Code and the Dignity at Work Policy provide that such reports can be relied upon at a disciplinary meeting.

At the disciplinary meeting, the manager will normally need to determine whether the findings amount to misconduct. In most, if not all cases, a finding of bullying will amount to misconduct. However, that is separate to a consideration of what the sanction should be. Any mitigating factors will need to be taken into account such as the conduct of the other party, the personal circumstances of the civil servant, any active warnings or similar previous misconduct. In minor cases, where there are mitigating circumstances, a Level One (Verbal) Warning may issue. In very serious cases, where there are no mitigating factors, a Level Three Final (Written) Warning or a more serious sanction (such as dismissal) may be appropriate.

If the manager decides that dismissal, or one of the other disciplinary actions at 9-13 of Table A is appropriate then the manager should recommend this action to the Appropriate Authority in the Relevant Manager's Report. The civil servant has an opportunity to appeal (in accordance with the Disciplinary Code) and the Appropriate Authority will then decide on the disciplinary action to be taken.

## PART 4 – DISCIPLINARY APPEALS

### Appeals

#### • Appeals Process

- 4.1 The internal appeals process relates to the imposition of sanctions which are not sanctions reserved to the "appropriate authority". A person may be appointed to be an Appeals Officer for the purposes of any particular internal appeal. The Appeals Officer may be a manager in the Department or Office in which the appellant civil servant works or may be a civil servant in a different Department or Office.

The Appeals Officer must be of a grade not lower than the grade of the manager who imposed the disciplinary action against which the appeal has been made.

The external appeals process relates to recommendations to the appropriate authority to take disciplinary action reserved to the appropriate authority. Such appeals will be heard by the Disciplinary Appeals Board ("the Board").

- 4.2 It is not sufficient that the appellant civil servant recites one or more of the possible grounds of appeal. He or she is required to provide specific details of each ground relied upon. For example, it is not sufficient for the appellant to assert that "all the relevant facts were not considered, or not considered in a reasonable manner". The appellant should specify the facts which he or she believes were relevant but were not considered, or not considered in a reasonable manner.

Failure to provide sufficient detail will not normally render an appeal invalid. The Appeals Officer (or the Board, as the case may be) will review the appeal that has been submitted. If, in the opinion of the Appeals Officer or the Board, the appeal does not contain sufficient detail, then the Appeals Officer or the Board will request (in writing) further detail from the appellant. In the event that the appellant fails or refuses to provide satisfactory detail to the Appeals Officer or the Board, this failure is a matter which the Appeals Officer or the Board may take into account in determining the appeal.

- 4.3 Note that, further to paragraphs 4.4 and 4.5, failure to comply with the prescribed timeframes does not automatically invalidate an appeal. However, the Appeals Officer or

the Board may reject an appeal where the civil servant fails, without reasonable cause, to comply with the respective timeframes.

- 4.4 An internal appeal will be a review of the disciplinary action taken (including any investigation which led to the disciplinary action) but will not be a full re-hearing of all matters. The Appeals Officer should normally provide the appellant the opportunity to present a verbal account of his or her appeal. The fact that the internal appeal is a review does not mean that the Appeals Officer is precluded from taking evidence. He or she has discretion to meet witnesses and ask them questions. The fact that it is a review means that he or she is not obliged to hear all the same evidence which was before the disciplinary manager and/or the investigating officer. He or she has discretion to re-hear some, none or all of the evidence presented in the disciplinary or investigation processes, subject to ensuring that a fair result is not imperilled.

The nature of a review is that the Appeals Officer should only reach a different conclusion (in relation to facts established or disciplinary action taken) to the conclusions of the investigating or disciplinary manager if there are good grounds for doing so.

The fact that the appeal is a review does not preclude the Appeals Officer from reaching a different finding of fact than was reached by the investigating manager.

If the Appeals Officer conducts meetings with the appellant or witnesses, then the guidance provided at Appendix I (suggested structure for a disciplinary meeting) will apply to such meetings, subject to any amendment required by the fact that the meeting is an appeal meeting and not a disciplinary meeting.

If the internal appeals officer hears witnesses at any appeal meetings then the guidance provided at Appendix I (suggested structure for a disciplinary meeting) will apply to such meetings.

The appellant should be provided with a copy of the notes of any appeal meeting and asked to confirm that the notes are an accurate reflection of what was stated at the meeting. Confirmation in writing should be sought and received (where possible). If the appellant has any clarifications to make the clarifications should be appended to the back of the notes of the meeting.

- 4.5 The guidance relating to the internal appeals process at paragraph 4.4 also applies to the external appeals process to the Board.

4.6 As outlined in paragraph 4.8 of the Code, a civil servant may refer a case which has been subject to an Internal Appeal to an External Appeals Officer. This option applies for decisions which have been made for Sanctions 2-8. Ordinarily, it is expected that the recommendation of the External Appeals Officer will be taken into account. For guidance on this element of the process, please contact your organisation's HR Unit.

## **APPENDIX A - Record keeping**

Record keeping is a crucial part of the management of any civil servant and of the management of any disciplinary process.

A note should be taken of any concerns that have arisen in respect of a civil servant and any steps that have been taken to deal with such concerns on an informal basis through discussion and appropriate assistance. No formal warning should be recorded, as there has been no formal action taken against the civil servant. The issue of concern should be noted on the civil servant's personnel file with confirmation that it was dealt with on an informal basis. The reason for recording such concerns is so that there is a clear record of same in case there is any dispute in future.

Once a disciplinary process is commenced, the manager should keep a comprehensive, well documented and confidential disciplinary file, which will be separate and independent of the civil servant's personnel file.

The following is a check list for what documentation should be held on the disciplinary file:

- A working document outlining any concerns that arise throughout the course of the process;
- Record objective facts in respect of such concerns, as they occur, rather than relying on memory (include dates, times, parties involved);
- Record only behaviour and facts that relate to the disciplinary process, rather than opinion or unrelated matters;
- Record direct observations rather than rely on hearsay reports from others;
- Describe specific behaviour rather than making evaluative statements or describing an individual's personality;
- Record both positive and negative conduct;
- Keep an appropriate level of detail and format of documentation for each civil servant;
- Record ongoing discussions that have taken place with the civil servant over the course of any review period;
- Be accurate;

- Be consistent;
- Correspondence in respect of the disciplinary process (for example, invitations to meetings and responses from the civil servant);
- Terms of reference for any investigation;
- Witness statements or any other information provided by witnesses;
- Notes taken at any investigation meetings or disciplinary meetings and any comments or clarifications received from the civil servant in respect of such notes;
- Any investigation report and all appendices;
- Record disciplinary actions such as warnings with the period for which the warning is active (A copy of any warning should be placed on the civil servant's personnel file as well as the disciplinary file);
- Record efforts taken to improve conduct during the period that a warning is active; and
- Any appeal lodged by the civil servant, meetings during the appeal process, correspondence and outcome.

The manager should be aware that the information that is recorded on the disciplinary file may need to be provided to the civil servant during a disciplinary process, where that information is relevant to the process. The civil servant may also be entitled to access to some (or all) of that information under the Freedom of Information or Data Protection Acts. It is important that the information contained on the file is accurate, correct and the manager can stand over any of the information provided by him or her.

## **APPENDIX B - Examples of possible reasonable cause for non-participation**

The following are examples of situations that may be put forward as reasonable cause for non-participation:

### **a) Where the civil servant is certified as medically unfit to participate.**

It may be necessary to delay an investigation or disciplinary process where the civil servant is on sick leave (stress related or otherwise) but such matters should not delay an investigation or disciplinary process in all cases. The manager will need to consider:

- the nature of the illness (whether it is physical or psychological, stress related or otherwise);  
and
- the likely date when the civil servant will be capable of engaging in the process.

If this is unclear then the manager should consider referring the civil servant to the Chief Medical Officer (CMO) requesting the CMO to assess:

- whether the stated illness means that the civil servant is unfit to engage with the process (which is different to being unfit to work) and,
- if the civil servant is unfit to engage with the process, when the civil servant will be fit to engage.

The manager will need to balance the competing risks in this situation. Risks may arise from proceeding, including the possibility of creating legal exposure in circumstances where you proceed without the input of the civil servant and this is found to be unreasonable by an Adjudication Officer or Court. Risks may also arise from delaying the process, including the risk of not vindicating the rights of other people, such as another civil servant or member of the public who may have complained about the civil servant and the potential financial and administrative risks arising from delays in disciplinary processes. If it is likely that the illness is long term then the manager may wish to seek the advice of the HR Unit to consider whether the matter should be dealt with through other processes.

### **b) Where there is a breach of the disciplinary procedure that is likely to imperil a fair hearing or a fair result.**

If the civil servant is legitimately claiming that the process is flawed from a procedural point of view then the civil servant may have a reasonable excuse for non-participation. In the case of *Giblin v Irish Life and Permanent Plc*, Mr Giblin refused to attend a disciplinary meeting in circumstances where he was challenging the investigation team's entitlement to hold the meeting and claiming that the process was in breach of fair procedures. The investigation team proceeded with the meeting in his absence, decided that the allegations gave rise to serious misconduct, and dismissed Mr Giblin. In the High Court, Laffoy J accepted that an employer is entitled to ensure that an investigation is not "stonewalled" by the employee's refusal to cooperate, but the evidence in the Giblin case suggested that Mr Giblin had been cooperating with the investigation, until an issue regarding the propriety of the investigation team was raised. Laffoy J found that the investigation team should have addressed the legitimate procedural concerns raised by Mr Giblin, and should not have made the decision at a time when his legal advisors were challenging such issues and had not responded to specific allegations of misconduct because of that challenge.

In a case where a civil servant raises a legal issue in relation to the procedures adopted, and dismissal is the likely outcome of the disciplinary meeting, it is advisable that advice is sought from the HR Unit before proceeding with the disciplinary meeting. While a decision may still be made to proceed in the circumstances, in general the civil servant's concerns should be considered and replied to before proceeding.

- c) **Where the civil servant claims that the manager or another person involved in the disciplinary process has bullied the civil servant in the past or the disciplinary process itself is a form of bullying.**

The Civil Service Dignity at Work Policy aims to promote respect, dignity, safety, and equality in the workplace. Every member of staff should be aware that all forms of bullying, harassment, and sexual harassment are unacceptable and every member of staff has a duty to behave in an acceptable and respectful manner.

During the course of a disciplinary process, a civil servant may make allegations of bullying and harassment against persons involved in the disciplinary process, such as their supervisor, line manager, a witness, the investigator or the HR manager.

Such a complaint should always be taken seriously and never be dismissed out of hand. However, it should not be allowed to derail the disciplinary process. The manager should seek the advice of the HR Unit if this happens before deciding how to proceed.

In some circumstances, it will be prudent to pause the disciplinary process until the allegations of bullying and harassment have been investigated or at least the lack of a strong relationship between the issues to be investigated has been established. However, this will not always be the case.

For example, the civil servant may claim that the person making the complaint that gave rise to the disciplinary process has bullied the civil servant in the past. In general, if such a complaint is made the appropriate response will be for the manager to recommend that the civil servant make a complaint under the Dignity at Work Policy; to take into account the allegation insofar as it may be relevant to the disciplinary process before him or her; and to conclude the disciplinary process as expeditiously as possible.

The most difficult scenarios can arise where the complaint of bullying is made against the manager who is carrying out the disciplinary process. Such complaints tend to fall into three different scenarios:

The first scenario is where the allegation of bullying made by the civil servant relates to different matters to the matter which is the subject of the disciplinary process – possibly matters that happened in the past. In this scenario, the simplest approach may be to separate the two matters and have separate investigations. One would be into the allegation of bullying under the Dignity at Work Policy and the other in relation to the alleged misconduct under the Disciplinary Code. Ideally, those investigations would be conducted by a different manager than the manager who is the subject of the bullying complaint.

The second scenario is where the allegation of bullying is inextricably linked to the matter which is the subject of the disciplinary process – possibly because the civil servant asserts that the disciplinary process itself is the instrument of the bullying. This can happen in some cases. In that type of scenario, a single investigation by a different manager may be the best approach as it significantly reduces the risk that the decision-maker could be accused of bias. The terms of reference of that investigation can permit findings of fact about both issues, and appropriate disciplinary action in respect of either (or both) of the civil servant and the first manager may follow depending upon the outcomes of the investigation.

There is a third scenario where it may not be appropriate to have the disciplinary process investigated by a different manager. This might include a situation in which the first manager contends that the reason why he or she is being complained of is to prevent him or her performing his core duty, namely managing the civil servant. In that situation, taking the disciplinary process out of the hands of the first manager may undermine that manager. In such a situation, it may be

appropriate to pause the disciplinary process until the complaint of bullying is investigated under the Dignity at Work Policy and ensure that it is investigated as expeditiously as possible. If the manager is cleared of the allegation of bullying, the manager will normally be free to proceed to conduct the disciplinary process.

- d) Where it has not been possible for the civil servant to arrange appropriate representation for the meeting.**

See **Appendix D** for further information and guidance.

- e) Where the civil servant may be subject to criminal proceedings and to participate in the process may affect the civil servant's privilege against self-incrimination.**

See **Appendix E** for further information and guidance.

- f) Other circumstances where it may be reasonable for the civil servant to decline to participate.**

It is not possible to predict in advance every possible circumstance in which a civil servant may decline to participate. Managers should ensure that civil servants have a fair opportunity to explain their reasons, and should consider those reasons in the context of the facts as they are presented. If in doubt, the manager should seek advice from the HR Unit.

## **APPENDIX C - Tips for managers to avoid complaints of bullying and harassment**

As noted in the Handbook, the Civil Service Dignity at Work Policy aims to promote respect, dignity, safety, and equality in the workplace. Every member of staff should be aware that all forms of bullying, harassment, and sexual harassment are unacceptable and every member of staff has a duty to behave in an acceptable and respectful manner.

During the course of a disciplinary process, a civil servant may make allegations of bullying and harassment against persons involved in the disciplinary process, such as their supervisor, line manager, a witness, the investigator or the HR manager.

There are genuine cases where the manager has failed in their responsibilities and there are cases where a civil servant may make a complaint in a frivolous or vexatious manner or as a means to avoid or avoid dealing with the misconduct or underperformance concerns that have arisen.

It is important that managers avoid such situations arising, where possible, and take steps to protect themselves against such claims when managing staff. In particular, the manager should:

- Be aware of the provisions of all employment policies and procedures in place;
- Follow the appropriate employment policies and procedures when dealing with staff;
- Keep accurate records of any concerns that arise in respect of a civil servant and any efforts to address those concerns;
- Always act in a professional manner and treat civil servants in a manner that protects their dignity;
- Establish trust between the manager and the civil servant;
- Explain each step of the procedure, clearly and simply, to the civil servant;
- Explain the consequences of not conforming to rules and regulations;
- Conduct meetings in private;
- Take a break if necessary and remain calm throughout; and
- Where possible, agree records of meetings between the manager and the civil servant.

The following lists some of the key pitfalls for a manager:

- Not seeking advice or assistance from the HR Unit when appropriate to do so;
- Not preparing for meeting and interviews;
- Not keeping records of meeting and interviews;
- Not dealing with the matters discreetly in private. It is not appropriate to discuss issues that arise between you and the civil servant you are managing at coffee break or to discuss issues of a private nature in an open plan office or in a corridor;
- Relaying detail of the discussion to other staff members who do not need to know or relaying more detail than is needed;
- Isolating/ignoring a civil servant;
- Ignoring the problem and hoping it goes away;
- Inappropriate body language and/or tone of voice;
- Not allowing the civil servant the right to reply;
- Withholding information from the civil servant;
- Not including the civil servant in relevant meetings;
- Setting targets and deadlines that are unreasonable;
- Unfair distribution of work/assignments;
- Constantly criticising the civil servant and their work without justification;
- Abusive behaviour, shouting, clicking fingers to attract attention, inappropriate bad/foul language;
- Removing work or adding work without consultation;
- Ignoring the complaints of civil servants about an underperformer; and
- Favouritism.

However difficult and troublesome the situation may be, always act in a professional manner; treat all staff in a fair and equitable manner. Remember as a manager you have a duty of care to all civil servants you manage.

## **APPENDIX D - The right to representation and requests for alternative representation**

The Disciplinary Code provides that the civil servant has a right to be represented by a serving civil servant or by an official employed by a trade union holding recognition from the relevant Department or Office in respect of civil servants at the grade or rank of the civil servant. The Industrial Relations Act 1990 (Code of Practice on Grievance and Disciplinary Procedures) Order 2000 (the “Code of Practice”) also provides that representation in the context of an investigation or disciplinary meeting refers to representation by a colleague or trade union representative.

In some circumstances a civil servant may seek to be represented by a person who is not a civil servant or trade union representative. This may include a request to be legally represented by a solicitor and/or barrister.

If a request is made for alternative representation the manager should request that the civil servant state in writing why such representation is required. The civil servant’s request should then be considered by the investigator, or the manager chairing the disciplinary meeting, as the case may be, before informing the civil servant of the decision.

### **What to consider when deciding on a request for alternative (non-legal) representation**

When the request is for an alternative non-legal representative, the manager should consider:

- a) Why an alternative representative is required in the case and why it is not possible to have a fellow civil servant or union representative attend;
- b) The identity of the alternative representative. In particular, whether any issues of confidentiality arise and whether the alternative representative is an appropriate individual in all the circumstances of the case; and
- c) The capacity of the civil servant to present his or her own case and whether the civil servant is suffering from any condition that might affect his or her ability to do so.

### **What to consider when deciding on a request for legal representation**

A right to legal representation will only arise in exceptional circumstances, such as scenarios where dismissal might be a possible outcome. The manager should consider whether failure to allow legal representation is likely to imperil a fair hearing or a fair result, taking into account the general circumstances of the case including:

- a) The seriousness of the charge and of the potential penalty. Is the charge something equivalent to a criminal charge? Is the charge something equivalent to a professional regulatory charge? Is the charge (if proven) likely to be damaging to the reputation of the civil servant? Is the civil servant likely to be dismissed if misconduct is proven?;
- b) Whether any points of law are likely to arise;
- c) The capacity of the civil servant to present his or her own case and whether the civil servant is suffering from any condition that might affect his or her ability to do so;
- d) Whether there is any procedural difficulty involved in the case. How formal will the investigation or disciplinary meeting be? Will witnesses be attending? Will it be necessary for the civil servant to challenge the evidence by putting information to the witnesses? Would the civil servant be capable of doing this without legal representation?;
- e) The need for reasonable speed in making the adjudication, that being an important consideration; and
- f) The general need for fairness as between the parties.

### **The representative's role at the disciplinary meeting**

If the civil servant is represented, the manager should consider the role of the representative at any investigation meeting or disciplinary meeting. The representative will normally be allowed to confer with the civil servant, make submissions on behalf of the civil servant at the start of the meeting and sum up the case at the conclusion of the meeting. However, the representative will not normally be allowed to answer questions on behalf of the civil servant (unless this is specifically agreed with the Chair at the commencement of the meeting).

### **Irish case law and legal principles**

One of the leading cases on the right to legal representation is the High Court case of *Gallagher v Revenue Commissioners & O'Callaghan* [1991]. Mr Gallagher was an officer of customs and excise in charge of a mobile customs and patrol unit. Among his duties was the task of identifying vehicles which had been imported illegally into the State and, in certain cases, determining the value of the particular vehicle so that the outstanding duty could be paid and the vehicle released. A number of allegations were made against Mr Gallagher to the effect that he had deliberately undervalued vehicles and thereby caused a loss to the State. He was informed that an oral hearing would be held

and that he could make representations and call witnesses if he so wished but that neither party would have legal representation at the hearing.

The High Court determined in that case that Mr Gallagher should have been allowed legal representation as the inquiry dealt with very serious allegations which, if established, would have far reaching effects on Mr Gallagher and might result in his dismissal as an officer of the Revenue Commissioners and a civil servant with 20 years' experience.

In the more recent case of *Burns & Hartigan v Governor of Castlerea* [2009] the Supreme Court also considered the issue. In that case, two prison officers were detailed to accompany a prisoner to a medical appointment in a Galway hospital. It was alleged that having left the hospital following the appointment, it took the officers three hours more than it should have to return to the prison. It was also alleged that they made false and inaccurate statements with intent to deceive and knowingly solicited an unauthorised gratuity. Basically, the case involved the alleged improper claiming of overtime. Investigation and disciplinary proceedings were commenced pursuant to the Prison Disciplinary Code for Officers Rules 1996.

The prison officers requested that they be permitted to be accompanied by their legal representatives however the Governor expressly refused them legal representation due to the fact that the Prison Disciplinary Code for Officers Rules did not provide for this. The High Court took the view that the charges were sufficiently serious to warrant legal representation notwithstanding the absence of any specific mention of such representation in the Rules. The High court noted that "[t]he breaches with which the respondents stood accused were not in the least trivial, in that, at the very least, they suggested dishonesty on the part of the applicants in carrying out their duty. The potential penalties which the applicants faced included recommendations for a reduction in rank and dismissal from the prison service."

The Supreme Court disagreed and found that legal representation was unnecessary in the case. The Court noted that at least one of the charges involved the alleged making of a deliberately false statement with intent to deceive. The Court found that while, from a human point of view, that is a serious allegation in the mind of an accused, in the context of the factual matrix to the particular case, the charges could very easily be defended without a lawyer. The Rules specified who is to be an advocate and, therefore, subject to the overall obligation of fairness, they should be followed. The Court also found that the cases for which the Governor would be obliged to exercise discretion in favour of permitting legal representation would be exceptional. The position is similar in cases under the Disciplinary Code. Legal representation need only be allowed in exceptional cases.

The Supreme Court referred to the matters at (a) to (f) above as considerations but made it clear that by listing the above criteria, it was merely suggesting that they were the starting points to be considered and, even if the case falls within one of those categories, it would still remain to be considered whether or not a fair hearing would be imperilled if legal representation was refused taking all the circumstances of the case into account.

## **Appendix E - Guidance on cases where the civil servant may be subject to criminal proceedings and may claim that to participate in the process will affect the civil servant's privilege against self-incrimination.**

The manager will sometimes deal with situations where a civil servant is suspected of an offence that may have repercussions outside of the workplace. For example, if a civil servant is suspected of fraud the civil servant may be subjected to a disciplinary process in the workplace. Outside of the workplace that civil servant may also be facing criminal proceedings (as fraud is a criminal offence). The matter may be investigated by the Gardaí, a file may be sent to the Director of Public Prosecutions and the civil servant may be charged and eventually tried for the alleged offence.

The Irish Constitution provides protection against self-incrimination in criminal proceedings. There is an obligation on the prosecution in such cases to prove its case and the principle generally provides that an accused should not be forced to assist the prosecution by being obliged to make comments that could incriminate them. This can cause practical problems in disciplinary procedures where a civil servant refuses to co-operate or make a statement as part of an investigation/disciplinary process referring to the civil servant's privilege against self-incrimination in parallel criminal proceedings.

The Disciplinary Code makes it clear that it is the duty of all civil servants to participate in the disciplinary procedure when required to do so. The Code also confirms that where a civil servant fails or refuses (without reasonable cause) to participate, then the manager may make a decision in the absence of the civil servant's full participation.

It is not necessarily the case that a disciplinary process should come to a halt when the civil servant raises a concern in respect of self-incrimination. A number of questions arise:

- Is the civil servant's refusal to attend at an investigation or disciplinary meeting reasonable in the circumstances?
- Can the investigation or disciplinary meeting proceed without the civil servant's input?
- Can findings validly be made without the input of the civil servant?

In such cases, the manager should review the case carefully and consider:

- what (if anything) the civil servant has been charged with in the criminal case; and

- when (if ever) the criminal proceedings are likely to be heard.

The manager needs to consider that, in serious cases involving a possible criminal offence, the civil servant is likely to be suspended on paid leave and may remain suspended until the disciplinary process has concluded. It may take six months, a year, or longer for a criminal case to conclude and if the disciplinary process does not continue the civil servant will normally remain on paid leave for that period of time.

In general, it should be possible to commence an investigation even if the civil servant refuses to attend an investigation meeting, although it is best for the civil servant to be involved as much as possible. In most cases, if the civil servant refuses to attend a first investigation meeting, the investigator may proceed to investigate the allegations by speaking to other witnesses and collating other evidence (if this has not already happened).

Once the investigator has spoken to other witnesses, and collated as much evidence as possible, the investigator can then invite the civil servant to a second investigation meeting. The aim should be to persuade the civil servant to engage with the process and attend the investigation meeting and address the concerns that have been raised as, by doing so, it may be possible to collate enough evidence to come to a conclusion on the case. The investigator may be able to question the civil servant on certain constituent elements of the allegations as part of the disciplinary process without affecting any subsequent criminal case and this should be considered at this stage. The more the civil servant engages the better, as the more the civil servant engages the less likely it is that the civil servant will make an employment claim and/or be successful in such a claim.

If the civil servant refuses to attend the second investigation meeting the investigator will need to consider whether to conclude the investigation and what findings, if any, can be made in respect of the allegations made against the civil servant. It is advisable, at this stage, to seek further advice from the HR Unit to determine if findings can be made in the absence of the civil servant.

### **Relevant case law**

The recent High Court case of *Rogers v An Post* [2014] dealt with the issue of parallel criminal proceedings. In 2012, Mr Rogers, who has since been acquitted, was accused of interfering with an item of registered post (a urine sample) from another postal worker which was en route from the Gardaí in Roscommon to the Medical Bureau of Road Safety in Dublin for analysis in connection with a suspected drink driving case. He was suspended with pay subject to a disciplinary process and also charged by the DPP with perverting the course of justice. Two years later the criminal proceedings

were still not concluded (as the first criminal trial ended with a hung jury) and An Post wished to proceed with the disciplinary process.

Mr Rogers sought an injunction from the High Court to halt the disciplinary investigation. The Court found that in order to prevent the disciplinary process from proceeding Mr Rogers had to show more than the mere existence of a pending criminal trial arising out of the same events. Some prejudice would need to be established. In circumstances where An Post provided an undertaking to Mr Rogers that it would not require him to provide any information which he believed might incriminate him, prejudice was not evident.

In many cases, it will be quite difficult for a civil servant to satisfy the Court that he or she will be prejudiced by an investigation or disciplinary process to such an extent that a Court would be persuaded to grant an order halting the process until a criminal trial takes place. This is why it is best to attempt to get the civil servant to attend meetings and engage in relation to the charges against them rather than halting the process entirely. However, if the civil servant continues to refuse to engage then legal advice should be sought.

This scenario has also been considered by the Employment Appeals Tribunal in a number of cases under the Unfair Dismissals Acts. The end result can often depend very much on the facts of the case, the level of engagement in the disciplinary process by the accused, and the nature, and strength, of the evidence against them.

The case of *Kelly v CIE* [1978] is a good example of the difficulties that can arise when dealing with these issues. Mr Kelly was a general operative in the Maintenance and Valeting Plant of CIE and was dismissed for his alleged involvement in the theft of goods from a Catering Service Car. A foreman discovered Mr Kelly in possession of a plastic bag containing bottles of alcohol and cigarettes, which were later discovered to be goods that were stolen from the Service Car. Mr Kelly was suspended and, after an investigation, he was called to a disciplinary hearing. He refused to respond to the charges at the disciplinary hearing on the advice of his solicitor because the criminal case had not yet concluded. Mr Kelly was dismissed, but was subsequently acquitted of the charge of larceny in the District Court.

In the *Kelly* case, the Employment Appeals Tribunal strongly supported the privilege against self-incrimination, finding that involvement of the Gardaí in a criminal investigation should properly have resulted in the suspension of the employer's internal investigation insofar as they required the accused person to comment on the allegations the subject of the criminal charge unless the accused person consented with the knowledge and agreement of his legal representative where such a

representative has been instructed. The Tribunal also criticised CIE in the Kelly case for failing to have witnesses available during the process and noted that, as a result, Mr Kelly did not have an opportunity to question those witnesses or seek corroboration. In the view of the Tribunal, this was reasonably required in an impartial investigation or disciplinary hearing. Those two factors led the Tribunal to determine that Mr Kelly was unfairly dismissed and the Tribunal ordered re-instatement.

A different approach was taken in the more recent Tribunal case of *Maher v AHP Manufacturing* [2005]. In that case the employee, a packaging operative, was dismissed by her employer following an investigation into an incident where a colleague's purse had been taken from the ladies locker-room and an attempt was made to draw money from that employee's bank account at an ATM. The employee was suspended with pay pending the outcome of the investigation and was prosecuted for theft. Both the employee and her trade union representative complained about the issue of parallel investigations (disciplinary and criminal) on a number of occasions but did not refuse to take part in the process. The employer dismissed the employee and the employee sought to have her internal appeal delayed until the criminal investigation had been dealt with. The employer refused and dealt with the appeal in her absence.

The criminal case was subsequently dealt with before the District Court and (as was the case in Kelly) the employee was acquitted of the charges against her. The District Court assessed the evidence and found that Ms Maher could not be identified in the CCTV footage of the incident beyond a reasonable doubt. However, the Tribunal in *Maher* found that it did not have to rule on the privilege against self-incrimination. This may be because Maher's union representative had engaged with the process or possibly because of the nature of the CCTV footage and other evidence provided by the employer at the hearing - the reasoning is not clear in the determination. Unlike in Kelly, the Tribunal assessed the evidence provided by the employer and held that, on the standard of proof required in civil cases (i.e. on the balance of probabilities), Ms Maher had been the person identified in the CCTV footage and by witnesses.

Fewer problems arise when the disciplinary investigation only occurs after the criminal case has concluded. The earlier case of *Mooney v An Post* [1998] had demonstrated that there are circumstances in which a person may be acquitted of a criminal charge and nevertheless be fairly dismissed for the same offence of which he or she has been acquitted. A postman was accused of offences related to interfering with post. He was acquitted, but later dismissed from his employment. The High Court held that acquittal of criminal charges did not preclude employers from considering whether an employee should or should not be dismissed because of the same circumstances which had given rise to the charges.

See also separate information contained in **Appendix F** in respect of illegal activity or criminal convictions.

## **Appendix F: Illegal activity or criminal convictions**

In certain circumstances, illegal activity or criminal conviction could amount to serious misconduct. The following examples are provided in the Disciplinary Code:

*“- Disrespect for the law, e.g. illegal activity /criminal conviction that has implications for the Officer’s employment whether it relates to an alleged wrong inside or outside the employment;*

*- Bringing the Department / Office / Civil Service into disrepute; subject to the provisions of the Protected Disclosures Act 2014.”*

### **Illegal activity in the workplace or during the course of employment**

If there is a concern that the civil servant has acted illegally in the workplace or during the course of employment it may be dealt with under the disciplinary procedure in the same manner as other misconduct cases. The manager will need to follow fair procedures and ensure that the matter is appropriately investigated under the Disciplinary Code.

The case of *Mooney v An Post* [1998] had demonstrated that there are circumstances in which a person may be acquitted of a criminal charge and nevertheless be fairly dismissed for the same offence of which he or she has been acquitted. A postman was accused of offences related to interfering with post. He was acquitted, but later dismissed from his employment. The High Court held that acquittal of criminal charges did not preclude employers from considering whether an employee should or should not be dismissed because of the same circumstances which had given rise to the charges.

### **Illegal activity outside the workplace or outside the course of employment**

The Disciplinary Code also provides that misconduct and serious misconduct can include inappropriate behaviour outside the workplace which has an impact or could reasonably be likely to have an impact within the workplace. However, dealing with illegal activity or criminal conviction outside the workplace can be more challenging.

When determining what disciplinary action (if any) to take in such cases the manager should consider:

- the nature of the alleged illegal activity / criminal conviction;

- the nature of the work that the civil servant undertakes in the Department / Office;
- the position of the civil servant (including his or her level of seniority); and
- whether the general public and colleagues of the civil servant might reasonably have cause for concern arising from the conviction, having regard to the position of the civil servant;
- some effect on the civil servant's work would normally be necessary before dismissal would be considered but what is an appropriate sanction will depend upon the particular circumstances of each individual case. It is very difficult to provide anything more than very general guidelines in the area as each case turns on its own facts.

### **Relevant case law**

An example of a serious crime committed outside employment with a clear link with the employment is *Barry and French v Irish Linen Service Ltd* [1986], in which the claimants were dismissed because of their involvement in an attempted robbery of a public house. One of the company's vehicles had been used in the attempted robbery. Management also discovered that statements had been made to the Gardaí by two persons implicating the claimants. The employer gave evidence that the matter was viewed as extremely serious and as something that could bring the employer into disrepute. The Employment Appeals Tribunal found that the decision to dismiss was not unreasonable as the employer "had substantial grounds for believing the claimants were involved in the attempted robbery".

Where an employee commits a crime outside employment which affects a neighbouring employer, and could seriously undermine the relationship between the two employers that could be a legitimate concern in deciding whether or not to dismiss: *Owen v Superquinn Ltd* [1982]. The mutual bond of trust between employer and employee is arguably broken. Similarly in *Martin v Dunne Stores (Enniscorthy)* [1988] the claimant broke into and stole from the premises of another retailer in the town. The offences were reported in the local newspaper. The dismissal was upheld as fair.

By contrast, in *Brady v An Post* [1991] the employee was a cleaner and was convicted of criminal assault. The offence of assault was held to be unconnected to the employee's work. There was no evidence that the conviction made him unacceptable to others or that it had damaged the employer's reputation. Each case will necessarily turn on its own facts. For instance, in *Clarke v CIE* [1978] a carriage cleaner was found guilty of house breaking and larceny and given a suspended sentence. The Employment Appeals Tribunal found that his dismissal was unfair as to dismiss a

person immediately after a court has exercised leniency 'because of the fact of employment' might frustrate the intention of the court.

In *Noonan v Dunnes Stores* [1988], the employee was dismissed after the employer's manager read in a newspaper that the claimant had been convicted for assaulting a Garda. While the employer argued that publicity in local papers regarding its employee would have an adverse effect on the company's image and sales, the Employment Appeals Tribunal was not convinced. It stated that "while the publicity might not have done the company any good, we cannot see that it did it any harm". The Tribunal re-instated the claimant. On appeal, the Circuit Court agreed with the Tribunal's decision that the dismissal was unfair, but found that it was "probably undesirable that [the employee] should be returned to the employment". The Court modified the Tribunal's determination to an award of compensation, as opposed to re-instatement.

In a recent case of *Moore v Tesco Ireland Limited* [2014] an employee pleaded guilty to a charge of possession of drugs with intent to supply and was convicted. He was subsequently dismissed. The Employment Appeals Tribunal held that the dismissal was unfair as the employer had not considered sanctions other than dismissal and had not given enough regard to the employee's 15 years of unblemished service. The employer was ordered to pay €11,000 in compensation.

In *Purdy v Commissioner of An Garda Síochána* (2013), a civilian employee of the Garda was charged with possession of child pornography he pleaded guilty but was not sentenced; the case was struck out on his payment of a contribution to the Rape Crisis Centre. He was later dismissed by the Garda Commissioner despite a recommendation by the Civil Service Disciplinary Appeal Board that he not be dismissed. His application for judicial review of his dismissal was rejected by the President of the High Court. Kearns P said:

"I am satisfied that the Commissioner was entitled to take the view that the conduct admitted by the applicant was of a nature that warranted being classified as "serious misconduct" ... and, therefore, such as to justify dismissal".

If you are considering dismissal on the basis of a criminal conviction you should seek further advice from the HR Unit.

## **APPENDIX G - A request to put questions to witnesses**

The Disciplinary Code provides under the heading "General principles that apply to investigation processes" that witnesses may be interviewed (where relevant and appropriate). The Code of Practice on Grievance and Disciplinary Processes provides that the general principles of fair procedures may require that the allegations or complaints against an employee be set out in writing, that the source of the allegations or complaints be given, or that the employee concerned be allowed to confront or question witnesses. This is in line with the general requirement of fair procedures that an accused be allowed to challenge the evidence against them.

The Disciplinary Code does not confirm what procedures should apply in practice in respect of witnesses as the procedures that apply will depend on the circumstances of the case. In most cases it will be appropriate to provide the civil servant with written statements from the witnesses and an opportunity to respond and challenge that evidence by commenting on the witness statements. The civil servant might also request that certain questions be put to the witnesses by email or during a subsequent meeting with the witnesses.

It is up to the relevant investigator / manager to determine the procedures that apply and to ensure that such procedures are fair. The key question to ask when considering what procedures should apply (including how the civil servant should be allowed to challenge relevant information) is whether the procedures to be applied would be likely to imperil a fair hearing or a fair result.

In some exceptional cases, where matters are particularly contentious, it may be necessary to have witnesses attend an investigation or disciplinary meeting. In such cases, the right to challenge relevant information from witnesses may be satisfied by allowing the civil servant (or his representative) to put questions to the witnesses through the Chair of the meeting. It would be very unusual to be required to allow a representative put questions directly to witnesses (sometimes referred to as cross-examination in a legal process).

The investigator or manager (as the case may be) should consider any request from the civil servant for witnesses to attend at an investigation or disciplinary meeting and, in particular, consider:

- What could be achieved by asking witnesses to attend and give oral evidence and be challenged directly on that evidence by the civil servant or his or her representative; and
- Whether it would be reasonable to expect the witnesses to attend such a meeting and be questioned on their evidence, particularly where the witness may object to being questioned

in such a manner. It is necessary to balance the rights of the accused against any competing rights of the witnesses.

The key question is whether the procedure that is to be applied is likely to imperil a fair hearing or a fair result. If the main facts arising in the investigation or disciplinary meeting are substantially agreed between the various witnesses, then it is unlikely that providing an opportunity to put questions directly to witnesses (cross-examination) will be necessary to ensure a fair hearing or a fair result. Conversely, if the main witnesses contradict each other about the main facts, then it may be necessary to permit witnesses to be challenged directly in their evidence so that the decision-maker can determine which evidence he or she will decide to believe.

### **Relevant Irish case law and principles**

In the second part of the disciplinary case involving Mr Gallagher (*Gallagher v Revenue Commissioners & O'Callaghan (No. 2)* [1995]), the Supreme Court considered whether Mr Gallagher was entitled to cross examine witnesses. The Supreme Court found that, given the consequences for Mr Gallagher in the event of a decision adverse to him, the person chairing the disciplinary meeting, Mr O'Callaghan, was obliged to act judicially and adopt procedures which were fair and reasonable.

Mr Gallagher was charged with improperly valuing vehicles and the valuation of the vehicles was a key issue in contention between the parties. Mr O'Callaghan failed to adduce proper evidence as to the value of the vehicles. He had reports and hearsay evidence, but no direct evidence in the form of oral evidence from the valuer at the hearing that could be subject to cross examination by Mr Gallagher's legal team. This was a fundamental flaw and contrary to the requirements of fair procedures.

In the case of *Shortt v Royal Liver Assurance* [2009] the High Court determined that a refusal to allow an accused to cross examine a witness was not in breach of fair procedures. Mr Shortt was the subject of a disciplinary hearing by his employer in relation to a complaint made by his personal assistant regarding the manner of her treatment by him. She claimed Mr Shortt had subjected her to aggressive and intimidating behaviour. Mr Shortt attended a disciplinary hearing with his trade union official. He requested that the assistant be available for questioning by him during the disciplinary process, a request which was refused by the employer due to the nature of the complaint and the refusal of the personal assistant to submit to being questioned at the disciplinary hearing. After the hearing, Mr Shortt was issued with a final written warning and was subsequently dismissed (for reasons unrelated to the accusation from his personal assistant).

The Court analysed the nature of the evidence and found that there was a large measure of consistency in both parties' accounts. As a result, it was not clear that cross examination would have achieved much for Mr Shortt. Refusal to allow cross examination was unlikely to imperil a fair hearing or a fair result. The employer was also entitled to take into account the likelihood of a detrimental effect on the complainant by being subjected to cross examination by Mr Shortt.

## **APPENDIX H - Suspension and other protective measures**

The Disciplinary Code provides that pending the outcome of the investigation, management may take whatever protective measures it deems necessary. Such measures are not disciplinary actions, nor are they an indication of wrongdoing. Protective measures may include:

- i. Reassigning the civil servant to other duties;
- ii. Providing an appropriate level of supervision or oversight to the civil servant; or
- iii. Placing the civil servant off duty with pay.

Placing a civil servant off duty with pay pending the conclusion of a disciplinary process is generally known as a “holding suspension”.

### **The Civil Service Regulation Act**

The Civil Service Regulation Act 1956 provides that a civil servant can be suspended if:

- i. *"a charge of grave misconduct or grave irregularity is made against the civil servant and it appears to that suspending authority that the charge warrants investigation."*

The 1956 Act specifically requires that an officer should only be suspended under this ground where the charge to is one of “grave misconduct”, or “grave irregularity”. This is a high threshold, and accordingly, the power to suspend should only be exercised under this heading in cases where the suspected misconduct is serious and where dismissal may be considered should the officer be found guilty.

- ii. *"it appears to that suspending authority that the public interest might be prejudiced by allowing the civil servant to remain on duty."*

While it is difficult to anticipate all circumstances the “public interest” might be prejudiced by allowing a civil servant remain on duty, suspension in such cases may be appropriate where an officer has, for example, been accused of falsifying computer records, and he/she might delete incriminating files/entries/records if allowed to return to his/her computer. It might also be appropriate where suspension is necessary to protect the health and safety of the public, of other staff members or the organisation in general.

### **What to consider before deciding to suspend**

In all cases, before placing a civil servant off duty, the manager should consider whether (i) above (reassignment) or (ii) above (supervision) might achieve the same result. Suspension of a civil servant, even as a holding mechanism, can have serious implications.

The High Court found in the *Governor and Company of the Bank of Ireland v Reilly* [2015] that a decision to place an employee off duty with pay ought not be undertaken lightly and only after full consideration of the necessity for it pending a full investigation of the conduct in question. The Court found that a suspension will normally be justified if necessary to prevent a repetition of the conduct complained of, interference with evidence or perhaps to protect persons at risk of such conduct. The Court also stated that placing an employee off duty with pay may also be necessary to protect the employer's own business and reputation where the conduct in issue is known by those doing business with the employer. The Court also stated that, in general, placing an employee off duty with pay ought to be seen as a measure designed to facilitate the proper conduct of the investigation and any consequent disciplinary process.

Where protective measures are to be applied, the manager should inform the civil servant of the protective measures and summarise the reason for the measures. The manager should consider the matter in light of any response by the civil servant or his or her representative. The civil servant should also be informed that the protective measures are not a sanction or disciplinary action. The civil servant should be notified of the decision in writing with the summary of reasons and any response by the civil servant / representatives and the consideration of same. If possible, the notification should confirm when the investigation is likely to commence.

The High Court has found in *Allman and McAuley v Minister for Justice, Equality and Law Reform and Others* [2003] (in the context of section 13 of the Civil Service Regulation Act 1956 prior to its amendment in 2005), that the power to suspend "must be construed in employment circumstances as permitting a suspension to continue only for such period of time as may be necessary or reasonably practicable to have a full hearing into the matter giving rise to the suspension, so as to determine whether the employee should be dismissed, reinstated, or dealt with in some other way."

An investigation should be undertaken without delay following the suspension.

### **Suspension as a disciplinary action**

A holding suspension (or other protective measure) is not a disciplinary action. However, the Disciplinary Code sets out a range of disciplinary actions that can be taken against a civil servant by

reason of, or as a direct consequence of a finding of misconduct. Included in this range of disciplinary actions is suspension of the civil servant without pay. This power is also provided for in the Civil Service Regulation Acts 1956. Suspension without pay can only apply where a finding of misconduct has been made, following a disciplinary process. Suspension without pay cannot be used pending an investigation as a “holding suspension”.

## **APPENDIX I - Suggested structure for a disciplinary meeting**

- At the commencement of the meeting, welcome all in attendance and explain (briefly) the reason for holding the disciplinary meeting.
- Introduce the people attending and explain the reason for their attendance and each person's role. In particular identify the person who will act as a note-taker and confirm that a copy of the notes will be sent to the civil servant after the meeting.
- If the civil servant is not represented, confirm that the civil servant has been informed of the civil servant's entitlement to representation and has decided to proceed in the absence of representation. Note this for the record.
- If the civil servant is represented, confirm the role of the representative, i.e. that the representative will be allowed to confer with the civil servant, make submissions on behalf of the civil servant at the start of the meeting and sum up the case at the conclusion of the meeting. However, the representative will not normally be allowed to answer questions on behalf of the civil servant (unless this is specifically agreed with the Chair at the commencement of the meeting).
- If the civil servant is not in attendance, take a careful note of all proceedings. Note whether or not there is evidence of the civil servant having received notice of the meeting and any reply in respect of notice so received. Only proceed in the absence of the civil servant if there is evidence that the civil servant was aware that a meeting would proceed in his or her absence (for example, because the civil servant missed a previous meeting and was later informed that future meetings would proceed in his or her absence).
- Request that all attendees turn off any electronic devices to avoid unnecessary interruptions during the meeting. Advise that the Policy expressly prohibits the recording of meetings on audio, visual or other recording device except where (and as) agreed in advance with you as the manager chairing the meeting.
- Explain that the meeting is held under Part 3, Step 4 of the Disciplinary Code.
- Confirm that the civil servant has received a copy of the Disciplinary Code and the evidence or investigation report.

- Explain how the meeting will be structured.
- Explain that all communications during the meeting go through you as the Chair.
- Where it is a one-stage process, explain that the concerns in respect of the civil servant's conduct will be presented first, followed by any reply from the civil servant. Explain that the Chair will then:
  - establish the facts as part of the disciplinary meeting;
  - determine if misconduct has occurred; and
  - decide on the appropriate outcome of the meeting.
- Where it is a two-stage process, explain that the information and finding(s) contained in the investigation report will be presented first, followed by any reply from the civil servant. Explain that the Chair will then:
  - determine if misconduct has occurred; and
  - decide on the appropriate outcome of the meeting.
- Explain that breaks will be facilitated during the meeting where reasonable and appropriate. If the civil servant or his or her representative asks for a short break, this should generally be facilitated unless repeated requests are proving disruptive.
- Present the concerns or information and finding(s) contained in the investigation report: Detail the concerns / information and finding(s), including any dates and times that important events occurred or are alleged to have occurred. If there has been a warning (or warnings) at earlier stages in the disciplinary process, present an outline of the previous stages, the actions taken and the results.
- Allow the civil servant to respond to the case against them, allowing the civil servant to present evidence. Listen carefully to what the civil servant has to say and provide the civil servant with a reasonable opportunity to address the concerns / information and findings. However, if the civil servant is not addressing the point then it is appropriate for you to point this out and ask direct questions to obtain clarifications. It is generally not acceptable for a civil servant to refuse to answer questions during a disciplinary meeting (unless reasonable cause can be shown – see further guidance in **Appendix B**). The manager may draw an

adverse inference from a civil servant's non-participation (refusal to answer questions without reasonable cause) at a disciplinary meeting.

- If witnesses are in attendance, ensure the witnesses have an appropriate opportunity to provide their evidence and ensure that, where the civil servant is in attendance, the civil servant has an appropriate opportunity to challenge the evidence provided by the witnesses.
- Discuss the case: Allow both sides to ask questions, particularly over ambiguous issues in the evidence. Ask open-ended questions to gain a general picture and more precise questions to obtain more specific information or clarifications. It is important to ascertain whether there were any mitigating circumstances, of which you are unaware, which may be relevant. If appropriate, allow the civil servant to suggest ways in which the problem could (if possible) be overcome.
- If it becomes clear that some matters cannot be resolved at this meeting, agree to reconvene the meeting in several days' time. This may allow an opportunity to gather further information. Do not feel under pressure to conclude the matter at one very long meeting; this may be oppressive. Permit breaks at reasonable intervals and if the meeting runs for a very long period adjourn to another day.
- Summarise the case: Following the discussion, the main points from both sides should be reiterated and the whole case summarised and, if possible, the Chair should set out his or her understanding of a summary of the case and invite any observations on same.
- If the civil servant is not in attendance, the manager will still need to consider the evidence in the absence of the civil servant and determine the appropriate outcome on the basis of the evidence. The manager may have written communications from the civil servant to consider as part of the evidence. The manager may also draw an adverse inference from the civil servant's non-participation (where that non-participation was without reasonable cause). Confirmation that the manager considered the evidence available should be set out in the notes of the meeting, and a copy of the notes should be provided to the civil servant after the meeting.

## **APPENDIX J - Protected disclosures**

The Protected Disclosures Act 2014 provides protections to workers who make disclosures in respect of certain wrongdoings that came to the attention of the worker in the course of their employment. In general, the Act protects a worker with a form of redress where the worker is dismissed or penalised for making a protected disclosure. The wrongdoings referenced in the Act include a failure to comply with any legal obligation, other than one arising under the worker's contract of employment, a danger to the health and safety of an individual or oppressive behaviour of a public body.

Protected disclosures may be relevant to disciplinary processes in the following ways:

A civil servant may disclose information under the Protected Disclosures Policy of the Department or Office. That disclosure may be investigated under that procedure and findings may be made against another civil servant. That investigation may, subject to the requirements of the Code, and specifically the requirements of section 3.2, be relied upon during a disciplinary meeting to take disciplinary action against the person responsible for the wrongdoing.

Alternatively, a civil servant may make a disclosure of information during a disciplinary process and claim that the disclosure should be investigated before the disciplinary process continues. In general, the making of a disclosure during a disciplinary process should not delay the disciplinary process. If the disclosure is a disclosure that could, if proved, amount to bullying then it should, in general, be dealt with under the Dignity at Work Policy and the guidance at Appendix B, paragraph (b), above applies. If the disclosure relates to a failure to comply with the Code itself, then that is a matter that should be raised with the relevant manager during the disciplinary process (whether during the investigation and/or disciplinary meeting). Alternatively, the appeal process can generally be used to canvass any concerns that the civil servant may have in respect of the process and any alleged failure to comply with the Code.

A third possibility is that a civil servant may claim that a disciplinary process is a reaction to a protected disclosure that the civil servant has made and is a form of penalisation. This could only arise if the civil servant had made a protected disclosure prior to the initiation of the disciplinary process. This is not necessarily a reason to halt the disciplinary process but, if this claim is made, then the manager should consider the matter carefully and may wish to seek an independent view / advice from the HR Unit before deciding to proceed with the disciplinary process.