WLDC DISCIPLINARY POLICY SUGGESTED CHANGES

page / para	Change made	Rationale
2/ 1.1	Reworded introduction Removed reference to bullying and harassment	Clarity Already clear that this procedure does not give examples of misconduct / gross misconduct as these are detailed separately in disciplinary rules and officer code of conduct so no need to highlight this particular example of misconduct/gross misconduct
2/ 1.2	Reworded scope	Clarity
2/ 1.3	Reworded existing principles Moved existing principle re exceptional circumstances to scope Added principles – complying with ACAS code, fairness and respect to all parties including reasonable adjustments,	Clarity Good practice
	Added para 1.4 re preliminary fact finding investigation by line manager with HR	To make clear roles and responsibilities and decision making consistency To address issue of how decision to move forward with full investigation is made

	Added para 1.5 re disciplinary action against a TU rep	**Compliance with ACAS code of practice**
	Added para 1.6 Remote investigations / hearings	**Modernisation**
	Para 1.7 Reworded absence during procedure due to sickness / or other reasons	**Clarity**
	Para 1.8 Principle on grievances raised during investigations now a separate section	**Clarity and to ensure WLDC deals correctly with grievances received during disciplinary matters as if unrelated should be dealt with concurrently so they are not subject to unreasonable delay (ACAS code) and if about the disciplinary policy should be dealt with under the disciplinary policy i.e. at hearing or appeal**
	Included para 1.8 – manager independent to the disciplinary and service will review the grievance with support from HR	**Good practice**
4/ 1.9		
	Added para 1.9 re record of meetings electronic recording of meetings, covert recording of meeting and dealt with covert recordings whilst retaining the option for WLDC to record	**No current mention of note taking during process and Modernisation**
4/ 1.10	**Added table 1.10 Limits of authority for suspension**	**Clarity**
	Reworded first sentence to include restricted duties	**Clarity**
	Updated Table 1	**Added Team Manager to minimum level of Authority**
4/ 1.10	**Moved and reworded section on suspension prior to investigation**	**Reworded for clarity , Suspension first needs to be considered prior to formal investigation**

	Removed "safeguarding" reason for suspension	**Safeguarding employees / public etc would fall under gross misconduct and so not need to be called out specifically**
	Removed investigating manager as decision maker on suspension	**The investigating manager should not determine suspension, instead the line manager / more senior line manager in consultation with HR should determine this**
	Tightened role of HR in suspension – if cannot be consulted before suspension must be told asap	**To protect the organisation**
	Included that suspension will be last resort with alternatives such as moving the employee explored, kept as short as possible and employee kept up to date and supported.	**Keeping suspension as short as possible and update/support to employee in line with ACAS 2022 advice on suspension**
5 / 2.1	**Reworded section on investigation, to say it will follow an initial fact finding by the line manager / other more senior manager / HR to determine if a formal investigation needs to happen in which case an investigation officer will be appointed who will conduct the investigation without unreasonable delay included more detail on what the investigating officer will do**	**Clarity, compliance with acas code, no current details on workplace witnesses**
5 / 2.1	**Covert surveillance- I have not seen this in any other LG disciplinary policies and have left this in for now as you may have a particular reason why you want to ensure it is included, I have added appendix 1 to this document to explain these issues around this but note that the existing policy says appropriate senior officers will make the decision**	
6 /2.2	**How to proceed reworded and made clear that investigating officer does not decide the sanction but will make a make a recommendation about whether**	**Clarity and in line with ACAS guidance and wording**

	there is a case to answer – amended to Formal action recommendation, Informal action recommendation, No further action recommendation	
6/3.1	**Moved table showing level of authority to take disciplinary action to start of hearing procedure. Updated Assistant Director / Director for gross misconduct**	**Clarity and ease of following process**
7/3.3	**I have removed Investigating manager as the person that sends the invitation to hearing – this could be either the line manager / next level of manager or HR team I would suggest that HR hold a standard letter for this if they don't already**	**Investigating manager should not invite employee to hearing they should be separate from the process**
7/ 3.3	**Reworded section on re-arranging hearings as to say each case considered individually with advice from HR**	**Clarity and good practice**
8 / 3.4	**Added clarity on role of HR to provide procedural advice to Hearing Officer**	**To be clear HR are not decision makers and only advise the Hearing officer on process**
9 / 3.5	**Reworded** **Changed how long warnings are left on file to 6 months for Written warning (current policy says 12-24 months_ and final written warnings for 12 months (current policy says 12-24 months)**	**Clarity in line with ACAS guidance**
11/ 4.1	**3.1 Inserted table - updated dismissal level authority to Manager/Assistant Director / Director**	**Clarity**
11 / 4.1	**Reworded appeal**	**Clarity**

	Removed option that a penalty may be increased on appeal	**See attached appendix 2 – all the LG policies (and private sector) I have seen have removed this option - see attached explanation as it goes against ACAS code – whilst the case outlined might seem to suggest it can be increased if it is explicit in policy it goes on to say that the correct way to deal with it is with a new disciplinary process**
11/4.1	**Removed reference to claim to ET**	**Not seen this in any other disciplinary policy and factually incorrect as may not be able to make a claim if for example less than 2 years' service**

Appendix 1 - Covert Surveillance

In considering whether or not to arrange covert surveillance to investigate employee misconduct, an employer must have regard both to art.8 of the European Convention on Human Rights, the right to respect for private and family life, and to its duties under the UK General Data Protection Regulation (retained from EU Regulation 2016/679 EU) (UK GDPR) to process information about the employee lawfully and fairly.

Covert surveillance will be justified only in exceptional circumstances. In *López Ribalda and others v Spain [2020] IRLR 60 ECHR*, the European Court of Human Rights (ECHR) held that Spanish shop workers' art.8 right was not violated when a supermarket installed hidden cameras without their knowledge to monitor suspected employee thefts. The ECHR concluded that the employer's "reasonable suspicion" that serious misconduct was being committed and the extent of the losses identified constituted a "weighty justification" for undertaking covert surveillance until the thieves were identified.

In *City and County of Swansea v Gayle [2013] IRLR 768 EAT*, the Employment Appeal Tribunal (EAT) held that there had been no breach of art.8 when the employer arranged covert video surveillance of an employee whom it believed was regularly leaving work early (without permission) to go and play squash. It held that the employee could not have had a reasonable expectation of privacy because he had been filmed in a public space. It was also relevant that he had been filmed during working time and the employer was entitled to know where he was and what he was doing during working hours. The employer's use of covert video surveillance did not affect the reasonableness of its investigation and did not make the subsequent dismissal unfair.

The Information Commissioner's Employment practices data protection code, says that, before considering arranging for covert surveillance to be carried out on an employee, the employer's senior management should carry out an impact assessment to decide if and how to carry out the surveillance. The impact assessment should clearly identify the purpose behind the covert surveillance and consider alternative ways in which the surveillance might be carried out. The employer must have reasonable grounds for its belief in the employee's misconduct

and must be satisfied that notifying the employee about the surveillance would prejudice detection of the malpractice. While the code relates to the Data Protection Act 1998, rather than the GDPR regime, it remains useful for employers, pending updated guidance from the Information Commissioner.

The code states that covert surveillance should be used only in exceptional circumstances where there is suspected criminal activity or equivalent malpractice. An evidence-based suspicion that an employee is claiming company sick pay when they are not really sick and is working elsewhere could be an example of this, but this would depend on the circumstances. For example, if the outside work is not incompatible with the reason for sickness absence and takes place outside the employee's normal working hours, it is unlikely to justify surveillance.

To show that the use of covert monitoring is justified and a reasonable part of the investigation, the employer must ensure that the surveillance does not go beyond that which is reasonably necessary to protect the business, i.e. it must be a proportionate response to the problem that it is seeking to address. Monitoring should be strictly restricted to the specific investigation being conducted and kept within a fixed time frame. The employer should set out clear rules limiting disclosure of and access to the information obtained. If information that is not relevant to the investigation is revealed in the course of surveillance it should be deleted. If the employer engages a private investigator, this should be under a contract that requires the investigator to collect information only in accordance with the employer's instructions and in a way that satisfies its obligations under the code.

Appendix 2 Can a disciplinary sanction be increased as a result of an appeal hearing?

The opportunity to appeal against a disciplinary decision is essential to natural justice and appeals may be raised by employees on various grounds, including new evidence having come to light, or the undue severity or inconsistency of the penalty imposed. The non-statutory Acas guide on discipline and grievances at work, which provides good practice advice for dealing with discipline and grievances in the workplace, makes clear that an appeal must not be used as an opportunity to punish the employee for appealing the original decision, and that it should not result in any increase in penalty, as this may deter individuals from appealing.

In *McMillan v Airedale NHS Foundation Trust [2014] IRLR 803 CA*, the Court of Appeal held that an employer does not have the right to increase a disciplinary sanction on appeal unless it expressly provides for this in its disciplinary procedure. The Court noted that the general understanding is that the right of appeal is conferred for employees' protection and that its exercise will not leave them worse off.

Where new evidence that results in new or more serious allegations being levelled against the employee comes to light during the appeal process, the new allegations should not be dealt with at the appeal hearing simply by increasing the disciplinary sanction. The correct way to deal with the issue is to adjourn the appeal hearing and then commence a disciplinary investigation into the new allegations. If there is a case to answer, this should result in a new disciplinary hearing being convened.