From the Chief Executive
Carolyn Downs

2 October 2014

Clive Betts MP
House of Commons
London
SW1A 0AA

Dear Mr Betts

Child sexual exploitation in Rotherham

I refer to your letter of 11 September, asking for the LGA’s views on the role suggested for the LGA in your letter to the Rt Hon Eric Pickles MP of the same date. In that letter it is suggested that the LGA could, working in combination with the appropriate professional bodies, devise arrangements for appropriate personnel investigations and advise on the need and scope for further disciplinary and managerial action to be taken against senior employees working in Rotherham from 1997 to 2013.

Since your letters we have spoken and I have explained that the LGA does not have the resources to conduct an investigation into the conduct of senior staff at the relevant time. This is because such an investigation would necessarily be a complex one, which would need to be carefully structured with all witnesses relevant to the allegation being interviewed with some degree of formality. More importantly though, ultimately any decision to take disciplinary or other dismissal action against an employee has to be made by the employer in line with its own procedures, the employer being accountable for those actions, so it would not be appropriate for the LGA to be involved in the investigation nor any consequent action. Unless specifically requested to do so by the employing council.

Nevertheless, we recognise that it is important that there is a process in place to ensure concerns about senior staff are addressed. I am aware from speaking to Rotherham Council that they will be conducting an enquiry into the case studies within the Jay Report, which will consider all professional staffing issues, with external human resources and social work support. I have said to the Chief Executive that we would be happy to have a relevant input into that work.

For those staff who have moved on to other employers, the LGA is able to set out what it considers would be a ‘best practice’ process, to ensure that concerns about those staff are addressed in respect of their current role by their current employer and, where relevant, any professional registration body. Substantively the same processes would apply, irrespective of whether the individual in question had moved to a public or private sector employer.

As we see it, best practice processes would follow the models below, with different routes being taken for those employees whose role is subject to a professional registration body (e.g. solicitors regulated by the Solicitors Regulation Authority and social workers registered...
by the Health and Care Professions Council), and those who are not. However, it must be recognised that ultimately the process used will depend on the facts of each case. Another important factor is that the time which has elapsed between the period of time in question at the original employing council which may well impact on the evidence that is available. Further, where the question of dismissal arises, the employer would need to take into account the individual’s professional conduct since the period of time in question, and that conduct may impact on whether dismissal is appropriate.

**Individuals in a regulated role**

In respect of those in a role regulated by a professional body, three issues arise:

1. Whether the individual’s past conduct is sufficient to warrant a referral to the relevant body, which could result in the individual being ‘struck off’ the professional register meaning they could not work in that profession again.
2. Whether the individual is fit to perform their current role, and should be dismissed or moved to another role.
3. Whether the individual should be referred to the Disclosure and Barring Service (DBS), for consideration of whether they should be placed on the ‘barred’ list. Local authorities have the power to make such referrals, and the question of referral will arise where the individual’s role includes specified activities which involve contact with children or vulnerable adults, including teaching, training, care and supervision.

In practice, it is the LGA’s view that registration bodies’ actions will normally underpin the question of whether the individual is fit to perform their current role, and if referred to the DBS whether they should be placed on the barred list.

Therefore, the first step in the process should be that the council who used to employ the individual investigate and gather the evidence they have about the individual’s fitness to work with reference to the relevant professional standards. The council’s investigation need not be extensive to the extent that it produces compelling evidence, but should nevertheless be adequate enough to establish credible evidence of concerns about the individual’s fitness to practice in the relevant role. In the case of a social worker, that would be done with reference to the HCPC standards and HCPC ‘Allegations: Standards of Acceptance’. Wherever possible, confidentiality should be maintained in the investigation process.

Provided there is sufficient evidence to warrant a referral then in making the referral the council should ask the registration body whether the individual’s current employer and the DBS will be contacted about the body’s investigation (the expectation being that they will make such contact if warranted). If the registration body does not intend to make such contact then they should be asked why not. If they do not give substantive reasons for not contacting the other parties, then the council should consider contacting the other parties to tell them that concerns about the individual’s fitness to practice have been referred to the relevant body.

Where the registration body, the current employer or the DBS ask for further information, the council should cooperate with such requests, complying though at all times with data protection requirements. It should also ensure that it takes reasonable care to avoid providing any inaccurate information. The reason for this is to avoid a successful negligent misstatement (or related) claim against the council from any individual who may incur a
financial loss as a result of any inaccurate information provided. Further, should inaccurate information result in the current employer suffering loss, for example because an individual is allowed to continue in their current role because the full extent of their actions is not disclosed, when in fact they are not capable to perform the role, then the current employer could seek to make a claim against the council for that loss. This means the council will want to be open in their approach to the disclosure of information.

Assuming the registration body then conducts an investigation into the matter, that will then result in an investigation by an independent body into the individual's conduct, which will then impact on the current employer's and the DBS's actions. It will be for the current employer to determine what action to take against the relevant individual. However, the individual would probably be suspended pending the result of the registration process, although it could be legitimate for the employer to dismiss earlier. In respect of any DBS action, when a complaint has been referred to a professional registration body, the DBS will normally wait for the outcome of that process before taking any action.

Should the registration body find that the individual is not fit to practice in their relevant profession, then it is likely that the individual would be dismissed from their current role, or certainly be moved to another role. Such a dismissal would, provided it was carried out in accordance with the employer’s procedures, in all likelihood be found to be a fair one under the unfair dismissal legislation.

Finally, irrespective of whether the ex-employer decides to make a referral to the regulator or a referral is made to the DBS, the current employer may still feel that there are sufficient concerns which warrant it carrying out its own investigation to establish whether it considers the individual is fit to perform the current role. The employer could then take appropriate action and such an approach would be perfectly legitimate.

**Individual in a non-regulated role**

For non-regulated roles, for example a Chief Executive or Director of Children’s Services role, the focus instead will be on the current employer’s actions and the following process would be an appropriate model.

The council which used to employ the individual may have already been contacted by the current employer about the individual’s actions, and as set out above it would be perfectly legitimate for the current employer to instigate its own investigation and take appropriate action. If the current employer has not started an investigation though, the council which used to employ the individual should take the initiative and establish whether there are sufficient concerns about the individual’s action that might warrant an employer taking action leading to dismissal. Provided those concerns are established, the individual’s employer should then be contacted about those concerns and the employer will then want to conduct a fair and thorough investigation, in line with its relevant procedures. There would be a strong expectation that the process would be distinct from the employer’s formal disciplinary and performance procedures.

The council which used to employ the employee should cooperate fully with any subsequent investigation. In doing so that council should comply with data protection requirements and, for the reasons stated above, ensure that the information it provides is accurate.
In investigating the individual's actions, the two key issues for the current employer are likely to be:

1. whether the individual's actions at the council which used to employ the employee mean that the employer can no longer have confidence in them to perform their role; and/or
2. whether the actions have brought the employer into disrepute.

Both issues amount to potentially fair reasons for dismissal. The employer though will want to ensure its investigations and procedures are thorough as it will be conscious that such a dismissal could be high profile, and the employee could in any event seek to challenge it through, for example, an unfair dismissal claim or by seeking an injunction to prevent dismissal. It should be recognised though that in some cases the question of dismissal may not be 'clear cut' and therefore the employer may want to explore whether the employee should leave under the terms of a settlement agreement, to achieve a swift and efficient resolution to the matter. However, in such cases the employer will be well aware that such a resolution is likely to attract public criticism.

Running parallel to the employer's investigation and dismissal procedures, the employer should also consider whether the matter should be referred to the DBS. The employer has a duty to make such referrals where the conditions for referral are met. This can be where the employer thinks a person poses a risk of harm to a child or vulnerable adult and that the person works with children or vulnerable adults. However, whether a referral is necessary will depend on the facts of the case.

Other issues

Relevant to both regulated and non-regulated roles are the following issues:

- action in respect of an individual who has retired and is no longer working in any role;
- action in respect of an individual who is working abroad;
- references for a prospective employer; and
- the engagement of social workers as agency workers, through temporary work agencies.

Retired individuals

Where an individual has retired then the council who used to employ the individual at which the concerns about the individual arose may take the following steps, all of them aimed at ensuring the individual could not return to a similar role:

- Where the individual worked in a regulated role, the council could contact the regulator, which could then result in the individual being struck off if their professional registration had not already lapsed, or if it had, prevent it from being renewed.
- Where the concerns would warrant a referral to the DBS the council could make such a referral.
- A note of the concerns could be placed on the individual's employment records so it would be referred to in any future reference request. The council may also want to contact any subsequent employers of the individual, so a similar note could be placed on its employment records.
Aside from those actions, the council could consider whether any action could be taken to forfeit or recover sums from the individual’s pension. However, the ability to take such action is very limited, it being governed by regulations 91 to 95 of the Local Government Pension Scheme Regulations 2013, which provide that the question of such action will normally only arise where the individual left the council as a consequence of grave misconduct or a criminal, negligent or fraudulent act or omission in connection with the individual’s employment at the council. Isn’t it a decision for the pension scheme administrative and not the council?

**Individuals working abroad**

Where an individual is working abroad, then substantively the same issues arise as for those working in the UK. Therefore, the council who used to employ the individual at which the concerns about the individual arose could contact the current employer, with a view to that employer taking action as appropriate and in line with the law in the employer’s country. The council could also establish what regulatory framework may operate in the relevant country which may apply to the individual, and see whether it is able to make a referral, or if the current employer should be prompted to do so. Where relevant the council itself should also make a referral to the relevant UK regulator and the DBS, so if relevant steps could be taken by the regulator and the DBS to ensure the individual could not return to the UK and take up a similar role to the one they performed at the council.

**References**

In respect of references, public sector employers have a public law duty to provide fair and accurate references and it is best practice for all employers would normally be for the employer giving the reference to include information about any dismissal procedures, including where an employee has resigned before such procedures are concluded.

**Agency workers**

Where the employee is an agency worker, the current hirer of the worker could legitimately terminate the assignment where they have concerns about the worker’s past actions, and such action could lead to dismissal by the temporary work agency and referral to the regulatory body or the DBS, as appropriate. A past employer or hirer of the agency worker could also contact the employment agency, if it had concerns about the worker’s conduct whilst they were working for them, which in turn could lead to dismissal by the agency or referral to the appropriate bodies.

I hope these observations prove helpful to the considerations of the work of your select committee.

_Carolyn Downs_
Chief Executive