

Capability policy and procedure

This policy forms part of your contract of employment. The councils are entitled to introduce minor and non-fundamental changes to this policy by notifying you of these changes in writing and will consult all employees on any significant changes.

Introduction

1. For each council to function effectively it needs employees capable of carrying out the tasks expected of them. Unfortunately there are occasions where employees do not display the expected capability. This may manifest itself through unacceptable performance, where an employee consistently fails to carry out their duties in a satisfactory manner, or through persistent or long-term absence from work through ill health.
2. This policy sets out how each council will deal with capability issues in a fair and consistent way.
3. This policy, and accompanying appendices, applies to all employees except those undertaking the statutory roles of head of paid service (the chief executive), section 151 officer, and monitoring officer, for whom a separate statutory procedure exists, as set out in the council's constitution. This policy does not apply to casual workers, temporary workers employed by a recruitment agency, employees who have not completed their probationary period and those on a trial period under the Organisational Change policy.

When to use the capability policy

4. In dealing with cases of poor performance, the councils distinguish between what is within the employee's control (e.g. negligence, lack of application or attitudinal problems) and what is outside their control (e.g. health, a lack of training or the changing nature of the job). If the reason is within the employee's control, the disciplinary policy and procedures apply. This will include employees with unsatisfactory attendance records where no medical reason is established. If the reason is outside the employee's control, the capability policy applies.
5. Heads of service, and line managers authorised on their behalf, have a right and responsibility to supervise the employees in their teams and to deal promptly with poor performance.

Principles

6. The principles of this policy are to ensure that:
 - managers use capability procedures primarily to help and encourage employees to improve and carry out tasks expected of them
 - whenever possible, managers use informal and low-key methods in resolving difficulties related to unsatisfactory performance
 - whenever possible, managers make reasonable adjustments to assist employees who have a disability
 - at all stages of the process the employee will be given the opportunity to state their case before any decision is reached
 - employees have the right of appeal against a decision to terminate their contract of employment on grounds of capability

Responsibilities of each council as an employer

7. Each council will:
 - ensure the recruitment process is robust and fairly reflects the job being recruited for
 - train and develop employees to ensure they can perform the duties of their post
 - ensure that all employees are aware of their objectives and know how to meet them
 - encourage informal coaching and mentoring
 - ensure managers are liaising with their HR partner to deal with unsatisfactory performance
 - provide welfare support and advice
8. Where standards change because of a council or management decision, the employee should be properly informed, trained as required and made fully aware of their new obligations and the required standards.

Responsibilities of the HR team

9. The HR team will:
 - keep this policy updated

- ensure all employees and managers are aware of this policy and how it should be applied
- provide advice and support at formal capability hearings as appropriate

Responsibilities of every line manager

10. Line managers should:

- use the capability procedures primarily to help and encourage employees to improve and carry out tasks expected of them
- use the service planning and performance review processes to ensure employees know what is expected of them
- use informal methods to resolve difficulties relating to poor performance initially such as informal advice, coaching and counselling
- ensure the appropriate training is given to help the employee in their current job
- make reasonable adjustments to cater for employees who have a disability in line with the Equality Act
- make reasonable adjustments to cater for employees returning from long term sickness absence, taking into account the Equality Act
- ensure they consider whether there are any factors outside of the working environment that could be affecting performance
- be aware of this policy and understand how to apply it
- record evidence relating to unsatisfactory performance
- provide clear guidelines and targets to help an employee improve their performance as part of an informal or formal capability process
- advise their HR representative in advance of any formal action they intend to take

Unacceptable performance

11. Unacceptable performance is repeated failure over time to carry out the duties associated with a particular job in a satisfactory manner. None of these failures may be especially significant individually but cumulatively they may cause a manager to conclude that the individual concerned is not capable of delivering against the job description set out for their particular post. The manager should take into account that poor performance may

also arise from factors outside the employee's control including poor communication, lack of supervision and inadequate team working by colleagues.

Informal capability procedure

12. When a line manager first identifies that the performance of an employee has become unacceptable or their performance is not to the standard required, the manager will hold an informal discussion with the employee to establish the reason(s), giving them examples of where their performance has been unsatisfactory. Where necessary, the manager will act on any explanation given by the employee, including referral to the councils' occupational health (OH) advisor if appropriate. The manager will then arrange subsequent meetings to agree a way to help the employee bring their performance up to an acceptable level. Any or all of the following outcomes and actions are possible:

- the manager decides that the performance targets already agreed are unreasonable, in which case the manager will revise the targets
- if poor performance is attributable to a change in the duties of the post, the manager will explain the new duties and, provide additional support in the form of training and/or coaching at the earliest opportunity
- if the problems experienced by the employee are related to his/her personal life the manager will encourage the employee to contact the employee assistance programme for advice and guidance and agree a timescale with the employee within which full/acceptable performance will be restored
- if the problems stem from ill health outside the employee's control, the manager will deal with the issue using this capability policy.
- if the manager considers that the poor performance is within the employee's control they will deal with the issue under the disciplinary procedure.
- the manager and employee agree reasonable adjustments if poor performance is disability related

13. Following this meeting, the manager will hold regular (normally fortnightly) performance review meetings for an appropriate time (normally two months). The manager will keep records / diary notes of these review meetings, provide a copy to the employee and place copies on the employee's personnel file.

14. The manager may consider withholding a pay increment (where applicable) whilst an employee is subject to capability proceedings.

Formal capability procedure

15. Should the employee fail to show adequate improvement in performance after following the informal capability procedure, the manager will arrange an initial capability hearing between the employee and their head of service, at a time to be agreed. If the employee is a head of service, or reports directly to a head of service, the formal meeting will be between the employee and a member of the Strategic Management Board, SMB (a strategic director of a different portfolio in the case of a head of service).
16. The letter inviting the employee to an initial capability hearing will:
 - include details of why the employee's performance is still considered to be unsatisfactory
 - state the time and place of the hearing, giving at least five working days' notice
 - inform them who will chair the hearing
 - inform them that they have the right to be accompanied by a colleague or trade union representative at the hearing
 - inform the employee that they will be supplied with copies of all documents to be referred to in the hearing, normally provided by the HR representative at least five working days in advance
 - ask them to submit any documents they wish the chair to consider to the relevant HR representative at least two working days in advance of the hearing so that these documents can be referred to in the hearing
 - remind the employee that they can access the capability policy and procedures document via the intranet or include the policy.
17. The aim of the hearing will be to:
 - explain clearly the shortfall between the employee's performance and the required standard
 - identify the cause(s) of the continuing poor performance and to determine what, if any, support the council can give agreeing reasonable adjustments if poor performance is disability related
 - determine whether the main cause of the poor performance relates to ill health
 - allow the employee the opportunity to challenge and put forward any facts or evidence for consideration. This may include the need to

review what standards are required or in some instances a review of the manager's approach in their interactions with the employee

- set a reasonable review period for the employee to reach the required standard and agree how their performance will be monitored during that period
- explain to the employee what will happen if they do not reach the required standard.

Initial capability hearing

18. Appendix one gives an example of the process followed at an initial capability hearing.
19. Roles of all parties involved in an initial capability hearing are as follows:

- **Chair** – this will be the head of service of the employee's service team (or a member of SMB) and their role is to consider evidence presented by the line manager and also the employee's response to this evidence and make a decision based on the cases presented to them in the hearing.
- **Employee** – opportunity to state their case and state any mitigating factors that should be taken into consideration.
- **Line manager** - presents evidence to support why the employee has not sustained the required level of performance.
- **HR representative**– ensure that employee and chair have copies of all documents relating to the hearing and needs to advise all parties on capability procedures where necessary.
- **Colleague / trade union rep** - may put forward and sum up the employee's case, confer with them and call for an adjournment. They should not present the case on behalf of the employee, address the hearing if the employee does not want them to or prevent other attendees from explaining their case.
- **Note taker** – take notes of the hearing and circulates final version to employee, chair and the HR representative. The HR representative may take on this role or bring a separate note taker.

20. Line managers are required to make reasonable adjustments for employees with a disability. Where a line manager is already aware that an employee has a disability, or believes this to be the case, they should work closely with their HR representative before taking any formal capability action, seeking advice from the council's OH advisors if necessary.

Outcome of initial capability hearing

21. Having heard from the employee and the employee's line manager in the hearing and considered any relevant precedents, the chair can decide to take the following actions:
 - confirm that the employee has now sustained the required level of performance and no further review period or hearing is necessary
 - set a reasonable review period for the employee to reach the required standard (normally two months), confirm how performance will be monitored during that period and confirm whether any further training or support is required. The chair may consider withholding a pay increment (where applicable).
 - ask the employee to attend an appointment with the council's OH advisors to establish whether there should be any reasonable adjustments made to the employee's responsibilities or workplace. If an employee refuses to attend an OH appointment they may be subject to the disciplinary procedure. OH may ask the employee to consent to them contacting their GP
22. The chair will inform the employee of the outcome verbally and in writing, normally within five working days.

Review period

23. If, after the initial capability hearing, the chair decides that a further review period is necessary the line manager should continue to review the employee's performance during the review period and give regular feedback to the employee on their progress.

Final capability hearing

24. At the end of the review period the line manager will either confirm to the employee that they have reached the required standard and that no further action is necessary providing they maintain this improved performance, or write to the employee to outline that they have not made the required improvements and to arrange a second and final formal capability hearing. If a final capability hearing is arranged, the employee will again have the right to be accompanied by a colleague or trade union representative. The final capability hearing will involve those attending the original hearing wherever possible.
25. Roles of all parties involved in a final capability hearing will be the same as in the initial capability hearing.
26. Appendix one outlines the process normally followed at a final capability hearing.

Outcome of final capability hearing

27. Having heard from the employee and the employee's line manager in the final capability hearing and considered any relevant precedents, the chair can decide to take the following actions:
 - confirm that the employee has now sustained the required level of performance, encourage the employee to maintain this level of performance and confirm that no further review period is necessary
 - agree to offer an extended review period if they consider there to be mitigating circumstances affecting the employee's performance throughout the review period. In this instance, the chair will adjourn the final capability hearing and reconvene it at a later date to review progress and make a final decision.
 - offer the employee an alternative vacant post if appropriate, potentially with a trial period of up to 12 weeks.
 - terminate the employee's contract of employment.
28. The chair will inform the employee of the outcome verbally and in writing within five working days.
29. If the outcome is to confirm that the employee has now sustained the required level of performance, the outcome letter will be kept on the employee's personnel file for 12 months. If the employee's performance becomes unacceptable again within this period, the line manager will arrange another final capability hearing which could lead to dismissal.
30. If the outcome is to offer the employee an alternative vacant post then the employee will have five working days to decide whether to accept the offer.
31. If the outcome is to terminate the employee's contract of employment the outcome letter may advise the employee that they will receive pay in lieu of notice and will also advise them of their right of appeal.

Appeal against dismissal

32. If an employee wishes to appeal, they must write to the chair of the hearing clearly stating the grounds of the appeal within five working days of receiving the outcome letter of the final capability hearing. The appeal letter should state at least one of the following grounds of appeal:
 - the finding or penalty is unfair
 - the capability procedure was not used correctly

33. The purpose of the appeal is to investigate whether the decision to dismiss was reasonable in all the circumstances. The appeal will not take the form of a complete re-hearing of the case. The appeal hearing need not take place before any dismissal takes effect. The appeal hearing will normally take place within ten working days of the receipt of the formal appeal.
34. The appeal will be chaired by a member of the strategic management board not previously involved in the case.
35. The chair of the original hearing will respond to the employee in writing within five working days of receipt of their appeal and will:
 - invite them to an appeal hearing stating the time and place of the hearing and giving at least five working days' notice
 - inform them who will chair the appeal hearing
 - inform them that they have the right to be accompanied by a colleague or trade union representative at the appeal hearing
 - ask them to submit any documents supporting their appeal to the chair of the appeal hearing at least two working days in advance of the hearing so that these documents can be referred to in the meeting. The employee may introduce new evidence only if it has become available since the date of the latest capability hearing
36. The chair(s) of the initial and final capability hearings will attend the appeal hearing as well as the chair of the appeal hearing, the employee concerned, their line manager, the employee's colleague or trade union representative, a HR representative and a note taker.
37. The chair conducting the appeal hearing has the authority to uphold or reject the appeal and their decision is final.
38. The chair will normally inform the employee of the outcome verbally and in writing and will normally provide the written outcome within five working days of the hearing.
39. Appendix two gives an example of the process to be followed at an appeal hearing.

Additional information regarding ill health

40. Whilst the councils are sympathetic to employees who are absent from work due to sickness or injury it is important to have a policy for dealing with unacceptable absence from work due to ill health as this causes disruption to services and puts pressure on colleagues.

41. Both councils apply the Bradford Factor (BF) when managing sickness (see the sickness absence policy). This calculates an absence ‘score’ based on the individual absences on a 12 month rolling basis. Due to the nature of the BF score, instances of frequent absences are identified as well as those which continue for a considerable length of time.
42. If a formal process is undertaken due to a high Bradford Factor score or ill health, the chair of the capability or disciplinary hearing will need to be satisfied that the correct process has been followed i.e. if the issues are within the employee’s control they will be reviewed under the disciplinary policy, if they are outside the employee’s control this capability policy will be used. The chair has the option of changing the process if at any time they believe the hearing should be held under the alternative policy. In this instance, they will reconvene the meeting under the appropriate policy.
43. Managers should ensure that they are adhering to the Equality Act and can contact their HR representative for further advice. They need to ensure that the following options have been explored prior to arranging an initial capability hearing due to a high Bradford Factor score or ill health:
- should the employee seek proper medical attention where there is evidence of a medical problem, if they have not already done so. This can include occupational health.
 - giving an opportunity for the employee to explain any personal problems affecting attendance so appropriate support can be considered which may include contacting the employee assistance programme
 - considering if there is a case for making reasonable adjustments to the employee’s role, responsibilities or working arrangements to accommodate their short or long term requirements
 - deciding whether a medical certificate will be required for all absences due to sickness regardless of duration. The employing council would reimburse the full, reasonable cost of obtaining these certificates.
 - setting a formal target and review date for improved attendance. Progress will be monitored through this review period
 - explaining what will happen if the attendance target is not met
 - offering alternative employment if there are medical reasons why an employee will struggle in their current role
44. If an employee is off work due to long-term sickness the following should be explored in addition to the points above, prior to arranging an initial capability hearing:
- clearly establishing the reasons for the absence

- a likely return to work date and a return to work plan (for example including a potential phased return to work, initially allowed reduced hours or reduced workload).
 - If the employee is too unwell to attend the meeting at their normal place of work the meeting can take place at the employee's home or any other venue that is mutually acceptable. If an employee unreasonably refuses to attend a formal meeting then the manager is likely to follow the disciplinary policy.
45. An employee's contract may be terminated for due to ill health, even if their ill health is outside their control. This would be an option if reasonable adjustments are proving impractical or if the employee is not prepared to accept reasonable changes to their role. Any decision to dismiss will need to take into account the requirements of the Equality Act. If the employee is a member of the pension scheme, a retirement due to ill health will provide protection to their pension contributions (see the pension policy for more details).

Alternative formats of this policy

46. Alternative formats of this publication can be made available on request. These include large print, braille, audio, email, easy read and other languages. Please contact the HR team on 01491 823424.

Version 1 issued February 2010

Version 2 issued August 2011

Version 3 issued July 2014

Version 4 issued November 2014

Appendix one

Example process for an initial/final capability hearing

The chair:

- convenes the hearing and makes the necessary introductions
- explains the purpose of the hearing and confirms that all attendees have copies of the evidence being presented
- explains that the line manager and employee will both be able to present their cases
- explains that either party can at any time request an adjournment for a comfort/distress break
- clarifies with the employee the role the employee's colleague / trade union representative may take.

The chair:

- invites the line manager to present their case
- invites the employee and/or their colleague / trade union representative to question the line manager.

The chair:

- invites the employee and their colleague / trade union representative to present their case
- invites the line manager to question the employee and their colleague/ trade union representative.

The chair:

- invites each party to sum up their case, if they wish, in the order they presented their evidence.

The chair:

- adjourns the hearing to allow consideration of the points raised and any mitigating circumstances (only the Chair and HR representative will remain)
- decides whether there is a need to delay reconvening the hearing until later in the day or, possibly, on another day in order to clarify any issues
- recalls both parties in the event that they need clarification from either party on any evidence presented
- decides which outcome is appropriate in the circumstances.

The chair:

- reconvenes the hearing and informs all parties of their decision and the reasons for it, highlighting any changes in behaviour required, the timescale involved and suggested support and training
- informs the employee that they will receive written confirmation, normally within five working days of the decision and of their right to appeal (final hearing only), and a copy of the notes taken at the hearing.

Appendix two

Example process for an appeal hearing

The chair:

- explains that the purpose of the appeal hearing is not to rehear the evidence that formed part of the initial or final capability hearing, but to focus on whether:
 - the finding or penalty is unfair
 - the capability procedure was not followed correctly
- explains that the chair(s) of the initial and final capability hearing will have the opportunity to explain their decision
- clarifies with the employee the role the role their colleague / trade union representative will take.

The chair:

- invites the employee concerned and their colleague/trade union representative to present their appeal case
- invites the chair of the initial and final capability hearing to reply to the employee's appeal.

The chair:

- invites each party to sum up their case, if they wish, in the order they presented their evidence.

The chair:

- adjourns the hearing to consider whether to uphold the decision made to dismiss in the final capability hearing or apply a lesser sanction
- reconvenes the hearing to inform all parties of the result of the appeal and the reasons for the decision
- informs all parties that they will receive written confirmation of the final decision, normally within five working days.