

## **EMPLOYMENT MATTERS COMMITTEE**

**18 JULY 2012**

### **CAPABILITY PROCEDURE**

Report from: Tricia Palmer, Assistant Director, Organisational Services

Author: Barbara Guess Employee Relations Consultant

#### **Summary**

This report details the Council's proposals to implement a new Capability Procedure for non-schools based staff.

#### **1. Budget and Policy Framework**

1.1 These procedures lie within the council's policy and budget framework and the committee's terms of reference. Therefore, this is a matter for the Employment Matters Committee.

#### **2. Background**

2.1 Members are advised that the new Capability Procedure (attached as appendix one) will help encourage good performance, and streamline the processes by which the Council manages employees' poor performance.

2.2 The current Capability Procedure was agreed by Employment Matters Committee in 2008.

2.3 The decision to revise the current Capability Procedure was based on a general perception from managers that the current procedure is cumbersome and takes too long to achieve effective results. This has led, on occasion, to managers feeling disempowered and unable to address poor performance issues in a timely and productive manner

2.4 A revised Capability Procedure for schools is currently being re-written, reflecting changes in performance management processes for Teaching staff. The revised schools Capability Procedure will be submitted at a future Employment Matters Committee.

### **3. Options**

- 3.1 The options available are to continue using the current Capability Procedure which, whilst still legal was written for the Council four years ago. Over the years operational issues have arisen which hinder cases being managed efficiently.
- 3.2 The second option is to agree the new Capability Procedure which is intended to help manage cases of underperformance in a more structured and effective manner.

### **4. Advice and analysis**

- 4.1 The main changes to the principles and process for addressing poor performance, compared to the existing policy and procedure are outlined below.
- i) The policy now includes details of the key roles and responsibilities of employees, managers and HR Services when dealing with issues of capability.
  - ii) The new policy reduces the period for monitoring the employee's performance at each stage in the process.
  - iii) The new policy provides managers with the authority to move through the first two stages of the formal Capability process without the need to hold a formal Capability Hearing, for a decision whether to escalate to the next stage of the formal Capability process.
  - iv) The new policy removes the need for any formal warnings to be issued at Stage 1 and Stage 2 of the process.
  - v) At stage 2 of the Capability process, the new procedure requires for the improved level of performance to be sustained for at least 18 months, or else the procedure can be resumed without the need to restart the process afresh.
  - vi) In the case where an employee is dismissed on the grounds of capability, the new policy removes the previously automatic step of considering the employee for redeployment to another post within the Council.
  - vii) Appendices attached to the previous policy have been removed and will now be part of a new management toolkit providing guidance, and template documents which can be used as necessary, at different stages of the Capability process.
  - viii) The new procedure requires for managers to acknowledge, in writing, positive feedback on performance improvement, where appropriate.
- 4.5 The new Capability process still provides a fair and consistent process which ensures:

- 4.5.1 Significant emphasis on the need to address poor performance in a constructive and supportive manner, and at an informal stage.
- 4.5.2 If the poor performance is of a highly serious nature, it is possible to start the Capability process at any appropriate stage of the formal process. Poor performance due to ill-health is covered by the Council's as Managing Sickness Absence Procedure.
- 4.5.3 The capability procedure complies with the ACAS guidance, in that continues to afford employees the right to have a formal meeting; the right for the employee to be accompanied; and the right of appeal for an employee against a decision to dismiss.

## **5. Risk management**

- 5.1 If poor performance exists and is left unmanaged serious problems for the council could be created, including:
- Lost productivity;
  - Poor quality in care standards and service delivery;
  - Higher risk of serious errors;
  - Lack of 'value for money' for Medway residents;
  - The potential for a reduction in performance standards amongst other employees;
  - Poor morale;
  - The potential for higher turnover of valued staff;
  - Difficulty in attracting and retaining talented employees;
  - Damage to the Council's reputation amongst all its stakeholders.
- 5.2 In order to minimise the above risks, the new policy will be promoted across the council and a toolkit for managers will be available on the Just4you intranet site.

## **6. Consultation**

- 6.1 Consultation has taken place with the following stakeholders, and no issues of concern have been raised:
- the recognised trade unions;
  - the employee forums i.e. the DWF, the BWF and the LGBT forum
  - a selection of service managers and managers.

## **7. Diversity Impact Assessment**

- 7.1 A Diversity Impact Assessment (screening tool) has been undertaken (appendix two). From this assessment there are no concerns that any particular minority group is, or could be, marginalised through the use of this Procedure.
- 7.2 Monitoring the impact is difficult in relation to capability cases, as few capability cases reach the formal stage. A key emphasis of both the current

and proposed Capability Procedure, is for managers to deal with issues informally at an early stage, as a consequence monitoring the impact at the formal stages is not possible.

## **8. Financial and Legal Implications**

- 8.1 The most significant financial and legal implications relate to potential claims of unfair dismissal under the Employment Rights Act (1996), disability discrimination harassment and victimisation under The Equality Act 2010 and wrongful dismissal.
- 8.2 Whilst capability (on the grounds of poor performance) is a potentially fair reason for dismissal under the Employment Rights Act 1996, it is necessary to ensure that a fair procedure is followed prior to taking the decision to dismiss the employee.
- 8.3 This procedure will enable the Council to comply with the requirements of the Employment Rights Act 1996 and the ACAS code of practice. It is important to ensure the procedure is applied fairly and consistently to minimise successful legal challenges against the Council.
- 8.4 Where an employee is dismissed on the grounds of capability ( for poor performance) the employee could bring claims as listed in Paras 8.1 above to an Employment Tribunal.
- 8.5 The maximum compensation limit is currently £72,300. In discrimination cases compensation awarded at Employment Tribunal has no upper limit.
- 8.6 The key legal references are given below:  
Employment Rights Act 1996  
Employment Relations Act 1999  
Employment Act 2008  
ACAS Code of Practice on Disciplinary and Grievance Procedures  
Equality Act 2010

## **9. Recommendation**

- 9.1 The Employment Matters Committee is asked to agree to the revised Capability Procedure, for non-school employees, as set out in Appendix one of this report.

### **Lead Officer Contact**

Barbara Guess, Employee Relations Consultant  
Barbara.guess@medway .gov.uk. Telephone: 01634 334079

### **Background Papers**

None



# **Medway Council**

## **Capability Procedure**

### **July 2012**



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## **1.0 Introduction**

- 1.1 The success of the Council is dependant upon effective contributions from all its employees. Poor or inadequate performance due to lack of capability will be addressed using the Capability Procedure.
- 1.2 Capability refers to the post-holder's ability to carry out the duties of the post to the required standard. The required standard must be appropriate to the level of the job and the skills and experience reasonably expected of an individual in that position.
- 1.3 The Capability Procedure is designed to help and encourage all employees to achieve and maintain an acceptable standard of performance. It provides a framework for dealing with alleged failures to achieve the required work standards in an equitable, supportive and consistent manner.
- 1.4 Under employment law capability means capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

## **2.0 Equalities Statement**

- 2.1 Medway Council is committed to providing equal opportunities and access to all. This policy statement embraces the spirit of managing a diverse workforce. Those managing the process of performance in the workplace must ensure that no employee is discriminated against either directly or indirectly, or victimized, on the grounds of their race, disability, gender, sexual orientation, religion or belief, age, marital or civil partnership status or any stage of gender reassignment.

## **3.0 Core Values and Council Objectives**

- 3.1 This policy supports the Council's Core Values. The Council believes that a consistent, fair and supportive approach to employee management and well-being is fundamental to the delivery of quality services to the public.

## **4.0 Scope**

- 4.1 This policy applies to all staff except: schools based staff: centrally employed teachers who are covered by the School Teachers' Pay and Conditions document: all staff employed at short stay schools (previously known as Pupil Referral Units), the Chief Executive and The Section 151 Monitoring Officer; individuals employed on a casual basis or through the Council's temp agency; and those employees who are within their probationary period of employment.

## **5.0 Principles**

- 5.1 Through the induction process, managers and supervisors will ensure that all staff are made aware of this procedure and have a clear understanding of the acceptable

standard of performance applicable to them, both in their particular setting and in the wider context of the Council.

- 5.2 The Council is committed to ensuring that employees are trained, supported, well - motivated and well-managed so that its employees can excel and be successful. Employees will have the opportunity to discuss their performance and training/development opportunities at least annually at Performance and Development Reviews (PDR) and on a more frequent basis as part of day-to-day management and supervision.
- 5.3 The Council aims to create an environment in which successful performance is encouraged and made possible. This is achieved by carrying out good recruitment, management and employee development practices that motivate employees and actively support employees in their work.
- 5.4 Preference should be given as far as possible to resolving capability issues as part of regular day-to-day management and supervision. However, if this approach fails to bring the standard of work to an acceptable level, recourse will be made to the formal procedure.
- 5.5 This procedure does not apply to matters of poor performance caused by wilful misconduct which should be dealt with under the Council's Disciplinary policy.
- 5.6 This procedure will not be appropriate in cases of sickness absence or sub-standard work performance resulting from ill-health. In such cases, the Managing Sickness Absence Procedure should initially be used. Managers must explore whether inadequate performance is linked to a disability issue. In these circumstances this procedure should not be applied before appropriate actions have been undertaken e.g. reasonable adjustments.
- 5.7 Throughout the Capability Procedure reference is made to role of the line manager. In some cases it may be more appropriate to substitute a more senior manager to carry out the management responsibilities (e.g. the employee's second line manager).
- 5.8 Information relating to Capability proceedings will be kept confidential.
- 5.9 In most cases an employee should not be dismissed because of a failure to perform to the required standard unless warnings of the consequences and an opportunity to improve have been given. However, where an employee commits a single significant error, or a number of substantial errors which are attributable to incompetence or inability to meet the required standards of the job and the actual or potential consequences of that error are, or could be, extremely serious, warnings may not be appropriate and the case could go straight to a stage 3 hearing based on this procedure.
- 5.10 Whilst every endeavour will be made to comply with timescales indicated within this policy, due to the complexity and or specific circumstances of a case, timescales may need to be varied. As a general guide performance review periods should normally be



at least 4 weeks but no longer than 8 weeks. Timescales for meetings may be varied by mutual agreement.

- 5.11 If the cause of poor performance proves to be a work-related matter outside the control of the individual, Medway Council will seek to address the root cause of the problem outside of this Capability Procedure.
- 5.12 At each stage in the procedure, an employee will be informed of the performance concerns and the required standards expected. In addition the employee will be given an opportunity to make representations before any formal action is taken under the capability procedure.
- 5.13 The procedure can be started at any stage, dependent upon the extent, or seriousness of the poor performance. It is not necessary to progress through all stages of the procedure before an employee can be dismissed.
- 5.14 An employee subject to the capability procedure is likely to find the situation stressful, the employee should be made aware of the confidential counselling service available as follows: - Care first – Tel: 0800 174 319 or [www.care-first.co.uk](http://www.care-first.co.uk)

## **6.0 Roles and Responsibilities**

### **6.1 Employee Responsibilities**

- To take personal responsibility for their own performance and behaviour.
- To perform in line with the Council's Values and Behaviours as well as any appropriate Skills or Competency Framework taking into account agreed personal development needs.
- To contribute to 1:1 supervision meetings and to engage in objective setting, problem solving, review and evaluation.
- To work with managers constructively to address any underlying issues which may be affecting the employee's performance.
- To move forward their learning and development by taking joint ownership for their personal development.
- To be open to constructive feedback.

### **6.2 Line Manager Responsibilities**

- To ensure that all direct (and indirect) reports are clear about their roles and responsibilities within their job and the standards of performance required of them.
- To ensure that employees are given the required training and instruction to be able to effectively carry out their role.
- To deal with capability issues promptly and in a supportive and constructive way.
- To monitor and support the performance of employees through both formal processes (such as PDR's) and more informal processes (e.g. meetings).
- To ensure that all direct reports are familiar with the Council's Capability Procedure.

### **6.3 HR Services Responsibilities**

- To provide advice to managers on matters relating to performance and in the implementation of this procedure.
- To advise and support managers through all formal stages of the procedure including if/when suspension is being considered.
- To advise the Chairperson and form part of the Panel at Stage 3 Capability Hearings and at Appeal Hearings.
- To advise managers on the content and timing of letters and meetings.
- To collate and distribute formal documents prior to Stage 3 Hearings and Appeal Hearings.
- To monitor the impact and outcome of the capability procedure on protected groups of staff as per the Council's equal opportunities obligations.

### **7.0 Identifying Poor Performance**

7.1 Unsatisfactory work performance can become apparent in a number of ways. This may include:

- Poor standards of work, e.g. frequent mistakes, not following a job through, unable to cope with instructions given;
- Inability to cope with a reasonable volume of work to a satisfactory standard;
- Lack of apparent skill/method of work required; or
- Through the management process where an employee is consistently not achieving agreed and realistic set targets/objectives

7.2 If an employee's performance fails to meet the required standards through their own carelessness, negligence, uncooperativeness or idleness, this should be dealt with in accordance with the Council's Disciplinary Procedure. The employee must be clearly informed which procedure is being applied to them.

### **8.0 Grievances Raised During the Capability Process**

8.1 The capability procedure shall not be affected or interrupted by the employee invoking the grievance procedure. Any grievance raised during the course of these proceedings, that relates to action being considered or taken in respect of capability, will be considered as part of the Capability or Appeal hearing as appropriate.

### **9.0 Policy Stages**

9.1 The Capability policy contains the following stages;

- Informal Stage – Informing the employee of concerns and setting improvement targets (potential to escalate to Stage 1).
- Formal Stage - Stage 1 Capability Process (potential to escalate to Stage 2).
- Formal Stage - Stage 2 Capability Process (potential to escalate to Stage 3)
- Formal Stage - Stage 3 Capability Process (potential for dismissal with pay in lieu of notice or in exceptional circumstances, alternatives to dismissal).

## **10.0 Ill-Health / Disability**

- 10.1 Managers in conjunction with a member of the HR team, should consider whether an employee may be considered to have a disability under the Equality Act 2010, and if so whether 'reasonable adjustments' might be required to support the employee in remaining in their current post or whether re-deployment to another post might be appropriate.
- 10.2 If ill health or a disability is affecting an individual's performance the employee should be referred to Occupational Health so that advice can be sought regarding reasonable workplace adjustments. If an employee refuses to consent to an Occupational Health referral, any future decisions, which the Council makes regarding the employee's performance, will be based on the evidence and knowledge at its disposal.

## **11.0 Informal Action**

- 11.1 In the first instance it is usually appropriate for the employee's deficiencies to be discussed with him/her as part of the normal supervisory arrangements and in a constructive manner. With specific information about the employee's unsatisfactory work performance, the manager should meet the employee and attempt to resolve the problem. The manager should give the employee the opportunity to explain his/her performance.
- 11.2 The manager and employee should discuss training and support mechanisms and agree any further training and development requirements for the employee to have the required skills and experience to perform the duties of the post. The completion of any training/development must be treated as a work instruction. The manager and employee should also if appropriate, discuss making reasonable adjustments to the duties of the post where considered appropriate (e.g. in cases of disability). Following this, realistic targets and monitoring arrangements should be agreed and confirmed in writing to enable the employee to have the opportunity to achieve the required standard. This may include interim performance targets during training and more detailed targets after the completion of training.
- 11.3 A written performance improvement plan should be shared with the employee, clearly stating what standards are required and by when, and what training/support will be provided and by whom. The agreed plan should be signed by both the manager and the employee and kept on the employee's supervision file.
- 11.4 The manager must advise the employee both verbally and in writing that their performance will be monitored over an agreed period (normally a minimum of 4 and maximum of 8 weeks).
- 11.5 At the end of the monitoring period, the manager will undertake an evaluation of the employee's performance and record the results. The performance of the employee must be objectively monitored and assessed, and feedback given to the employee

during an informal review meeting.

11.6 At the informal review meeting, the manager will decide whether to:

- Take no further action as the employee has met the required standards and inform the employee accordingly; or
- Arrange for further monitoring and support to correct the situation if the employee's performance has improved and has almost met the standards;
- Invoke the next appropriate stage of the formal Capability Procedure; or
- Arrange to hear the matter under the Disciplinary Procedure because the poor performance appears to be due to conduct rather than lack of skill or aptitude.

11.7 Notes of meetings must be kept by the manager and a copy given to the employee.

## **12.0 Operating the Formal Procedure**

### **12.1. Invoking the Formal Procedure**

In general, the procedure will not be invoked unless:

- Informal action has proved ineffective; or
- Serious or gross incompetence is under consideration

### **12.2 Principles That Will Apply**

12.2.1 The employee has a right to be accompanied by a trade union representative or by a workplace colleague of their choice at all stages of the formal capability procedure (hereafter referred to as the 'representative').

12.2.2 With the exception of any informal action being taken, the employee will be given reasonable notice (no less than 5 working days, unless by agreement) to attend any formal review meetings.

12.2.3 An employee or representative who cannot attend a meeting because of illness or other unforeseen circumstances should notify the line manager at the earliest opportunity and give full reasons. The meeting will be rearranged but if the employee or representative fails to attend a second time depending on the reasons for non-attendance then the meeting may proceed in their absence. The reasons for non-attendance and for proceeding will be recorded.

## **13.0 Suspension**

13.1 Suspension is rarely an appropriate measure for an employee whose performance at work is considered unsatisfactory. Management may suspend an employee where it is believed that an act of gross incompetence has occurred but must seek advice from Human Resources first. Any suspension request must be authorised by the relevant Director and the Assistant Director, Organisational Services before it can be implemented.

- 13.2 Suspension, with full pay, will be used for as short a period as possible and is not a penalty for poor performance. It is a decision which may be exercised in a particular case where management consider that the employee should not remain at work.
- 13.3 In this context, full pay shall be the employee's normal pay.
- 13.4 Where an employee is suspended from work, the manager will send a confirmation letter to the employee within 5 working days of the suspension. The suspension letter should give the reasons for the suspension and set out any special terms and conditions relating to the suspension. A copy of the suspension letter must also be sent to Human Resources.

## **14.0 Stage 1 Capability Meeting**

- 14.1 The employee will be issued with a letter from the line manager, normally giving 5 working days' notice, of the requirement to attend a Stage 1 Capability Meeting. This notice will include a reminder about the employee's right of representation.
- 14.2 At the meeting the manager should:
- Identify clearly and fairly the ways in which the employee is under-performing providing examples as appropriate.
  - Explore with the employee what may be the possible causes for the shortfall in performance.
  - Reconfirm the standards of performance, which are expected.
  - Explore the support which has already been provided to date and agree what other help and support may be reasonably provided to the employee to improve their performance.
  - Set clear Specific, Measurable, Achievable, Realistic, and Time-bound (S.M.A.R.T.) targets or objectives for the employee to achieve.
  - Confirm to the employee the subsequent stages within the Capability procedure if the required performance standards are not achieved.
  - Set a date for a formal Stage 1 Outcome Review Meeting (normally a minimum of 4 weeks and a maximum of 8 weeks time) to review the employee's progress against the agreed performance improvement objectives/targets.
- 14.3 At the end of the meeting, the employee should have a clear, understanding of the performance issues causing concern, the levels of support to be put in place, the targets set and the periods set for review.
- 14.4 A letter confirming that the employee is being managed under Stage 1 of the Capability procedure will be issued to the employee by the line manager, following the meeting. The letter will include (as appropriate) copies of the file note of the meeting; the agreed performance improvement plan, any support actions agreed and the potential consequences (including dismissal) of failure to achieve a significant and sustained improvement within the agreed time period. The letter will normally include the pre-agreed date and time for the Stage 1 Outcome Review Meeting.

## **15.0 Stage 1 Monitoring Period**

- 15.1 The employee's subsequent performance should be monitored on a regular and open basis during the monitoring period by the line appropriate manager.
- 15.2 It is recommended that regular (e.g. weekly or fortnightly) meetings take place between the manager and the employee as a supportive approach. At each monitoring meeting, the employee must be given a clear indication of his/her progress to date, and any interim timescales for improvement must fit into the overall performance improvement targets agreed at the Stage 1 Capability Meeting. Positive feedback must be given where appropriate in writing.
- 15.3 If the employee experiences any significant unforeseen difficulties during the review period, he/she should immediately contact the line manager to discuss these issues rather than waiting until the next review meeting.

## **16.0 Stage 1 Outcome Meeting**

- 16.1 Following the performance monitoring period, the employee will meet formally with the line manager to review progress against the performance improvement targets which were set at the Stage 1 Capability Meeting.
- 16.2 If for any reason the date for the Stage 1 Outcome Meeting was not set at the previous Stage 1 Capability Meeting, then the manager will need to write to the employee, normally giving 5 working days' notice, of the requirement to attend a Stage 1 Outcome Meeting. This notice will include a reminder about the employee's right of representation.
- 16.3 At the Stage 1 Outcome Meeting, the line manager will discuss with the employee the overall progress against each of the agreed targets/objectives. This should be a wide-ranging discussion during which the employee will be given the opportunity to make any representations and put forward any concerns or mitigation. The manager will consider the employee's views prior to determining the outcome of the Stage 1 Monitoring Period.
- 16.4 If at the end of the review period the required improvement has been made, this will be confirmed to the employee verbally at the meeting. The manager will also confirm that the improved level of performance must be maintained for at least 12 months and any subsequent lapse in performance may lead to action under the Capability Procedure being resumed without starting afresh. A letter will be issued by the manager confirming the outcome.
- 16.5 If some improvement has been made but the standards have not yet been fully met, the manager may extend the current review period for a maximum period of 4 working weeks. The employee should be reminded of the potential consequences of failure to achieve a significant and sustained improvement. A new Stage 1 Outcome

Meeting will be arranged for the end of the extended period to review progress.

- 16.6 A letter will be issued by the manager confirming the outcome and the potential for dismissal for failing to achieve the required performance standards.
- 16.7 If the conclusion of Stage 1 is that the employee's performance has not sufficiently improved and there is still clear evidence of incapability, it should be made clear to the employee that Stage 2 of the Capability Process will now be invoked.
- 16.8 A letter confirming the outcome of the Stage 1 Capability Process will be issued to the employee by the line manager, following the meeting. The letter will include (as appropriate) copies of the file note of the meeting; the agreed performance improvement plan, any support actions agreed and the possibility that the employee could be dismissed for failure to achieve a significant and sustained improvement within the agreed time period.

## **17.0 Stage 2 Capability Meeting**

- 17.1 The Stage 2 Capability process will be commenced if the employee has not achieved the required performance standards in Stage 1, or if the impact of poor performance is serious enough to warrant entry into the procedure at this stage. The process for Stage 2 will follow a similar pattern to Stage 1.
- 17.2 The employee will be given 5 working days' notice, of the Stage 2 Capability Meeting, unless it is agreed with the employee that the Stage 2 Capability Meeting will be a direct continuation from the Stage 1 Outcome Review Meeting.
- 17.3 As an essential part of the Stage 2 Capability Meeting, consideration will be given to the nature of any further support which may be appropriate for the employee in the circumstances including additional training, or access to other services including Occupational Health.
- 17.4 At the meeting the manager should:
  - Identify clearly and fairly the ways in which the employee is under-performing providing examples as appropriate.
  - Explore with the employee what may be the possible causes for the shortfall in performance.
  - Reconfirm the standards of performance, which are expected.
  - Evaluate the training and support which has been provided to date and investigate what other support may be reasonably provided to the employee to improve their performance.
  - Set clear (S.M.A.R.T.) targets or objectives for the employee to achieve.
  - Confirm to the employee the subsequent steps within the Capability Procedure if the required performance standards are not achieved within the set timescales.
  - Set a date for a formal Stage 2 Outcome Review Meeting (minimum of 4 weeks and a maximum of 8 weeks time) to review the employee's progress against the agreed performance improvement objectives/targets.

- 17.5 At the end of the meeting, the employee should have a clear, understanding of the performance issues causing concern, the levels of support to be put in place, the targets set and the periods set for review.
- 17.6 A letter confirming that the employee is being managed under Stage 2 of the Capability procedure will be issued to the employee following the meeting. The letter will include (as appropriate) copies of the file note of the meeting; the agreed performance improvement plan, any support actions agreed and the potential for dismissal for failure to achieve a significant and sustained improvement within the agreed time period. The letter will include the details of the date and time for the Stage 2 Outcome Review Meeting.

## **18.0 Stage 2 Monitoring Period**

- 18.1 The employee's subsequent performance should be monitored on a regular and open basis during the Stage 2 monitoring period. It is recommended that regular (weekly or fortnightly) meetings take place between the manager and the employee.
- 18.2 At each monitoring meeting, the employee must be given a clear indication of his/her progress to date, and any interim timescales for improvement must fit into the overall performance improvement targets agreed at the Stage 2 Capability Meeting. Positive feedback must be given where appropriate in writing.

## **19.0 Stage 2 Outcome Meeting**

- 19.1 Following the performance monitoring period, the employee will meet formally with the line manager to review progress against the performance improvement targets. If for any reason the date for the Stage 2 Outcome Meeting was not agreed during the previous Stage 2 Capability Meeting, then the manager will need to write to the employee, normally giving 5 working days' notice, of the requirement to attend a Stage 2 Outcome Meeting. This notice will include a reminder about the employee's right of representation.
- 19.2 At the Stage 2 Outcome Meeting, the line manager will discuss with the employee the overall progress against the agreed performance targets. This should be a wide-ranging discussion during which the employee will be given the opportunity to make any representations and put forward any concerns or mitigation. The manager will consider the employee's views prior to determining the outcome of the Stage 2 Monitoring Period.
- 19.3 If at the end of the review period the required improvement has been made, this will be confirmed to the employee verbally at the meeting. The manager will also confirm that the improved level of performance must be maintained for at least 18 months and any subsequent lapse in performance may lead to action under the Capability Procedure being resumed without starting afresh. A letter will be issued by the manager confirming the outcome.
- 19.4 If the conclusion of Stage 2 is that the employee's performance has not sufficiently improved and there is still clear evidence of incapability, the employee will be notified



by the line manager that a Stage 3 Capability Hearing will now be convened, and that dismissal is one of the possible outcomes from this Stage 3 Capability Hearing.

- 19.5 A letter confirming the outcome of the Stage 2 process, will be sent to the employee by the line manager. The letter will include a copy of the file note from the Stage 2 Outcome Meeting.

## **20.0 Stage 3 Capability Hearing**

- 20.1 If the employee's performance has not reached the required standard during Stage 2 of the Capability process, or where serious performance issues arise, or gross negligence is alleged (and after such investigation as is appropriate in the circumstances), the employee shall be invited to a Stage 3 Capability Hearing.
- 20.2 The Stage 3 Capability Hearing will take the form of a formal hearing conducted by a Panel consisting of a Service Manager/ Assistant Director who has not been involved in the line management of the employee during previous stages of the Capability procedure, and a member of the HR team.
- 20.3 A letter will be sent to the employee, normally 10 working days before a Stage 3 Capability Hearing, or a shorter period as may be mutually agreed, detailing the purpose of the Hearing, and the circumstances that have led the Council to consider dismissing the employee on the grounds of incapability.
- 20.4 Any papers which either the employee or management intend to rely on as evidence at the Hearing must be sent to Human Resources at least 5 working days in advance of the Hearing date.

## **21.0 Format of a Stage 3 Capability Hearing**

- 21.1 The purpose of the Stage 3 Capability Hearing is for the Panel to consider both the management case and the employee case and decide what action they wish to take on the basis of the evidence. The panel's decision's will be determined on the balance of probabilities that the performance of the employee is unacceptable and has not shown the required improvement to reach a satisfactory level of performance.
- 21.2 The panel should consider any mitigating circumstances when considering the case.
- 21.3 At the hearing each side will be entitled to present their case and call witnesses (if appropriate). Each side will be able to ask questions and comment on the case presented by the other side. A procedure to be followed at a Stage 3 Capability Hearing can be found at Appendix 1.
- 21.4 Non verbatim notes of the hearing will be taken by an experienced note-taker provided by the Directorate where the employee works. A copy of the typed notes will be sent to the employee and his/her representative.

## **22.0 Outcome of Stage 3 Capability Hearing**

- 22.1 Having listened to both sides present their case, the Panel will adjourn the capability hearing to consider the matter, the Chairperson may decide to:
- Confirm that sufficient improvement has occurred which may include recommendations on further support or guidance required; or
  - Confirm an extension of Stage 2 of the Capability process with the option of moving to a new Stage 3 Capability Hearing if no further improvement of performance is achieved within set timescales.
  - Dismiss the employee with notice (except in an exceptional case, i.e. gross incompetence, which would result in a summary dismissal without notice).
- 22.2 The outcome of the Capability Hearing will be confirmed to the employee in writing, within 5 working days, and will include the employee's right of appeal.
- 22.3 If the employee is dismissed and given contractual notice on full pay, the employee should be told not to attend work during the notice period.

## **23.0 Action against a Trade Union Official**

- 23.1 Although normal capability standards apply to the performance of trade union officials who are employees of the Council, no action under the formal procedure should be taken until the circumstances of the case have been discussed with a more senior trade union representative or full time official.
- 23.2 In cases of alleged gross incompetence against a recognised trade union official and where a full time union official cannot be quickly contacted, the recognised trade union official may be suspended on full pay until the full time union official has been contacted and further action agreed.

## **24.0 Non-Attendance at a Stage 3 Capability Hearing**

- 24.1 If either the employee or their representative is unable to attend a meeting on the date of the Capability Hearing due to sickness or another substantial and valid reason, the meeting may be postponed and normally rearranged for within 10 working days of the original meeting date.
- 24.2 If the employee is unable to attend this second re-arranged meeting, the meeting may proceed in the employee's absence unless there are exceptional circumstances requiring the attendance of the employee at this meeting. However employees will have the option of requesting that their representative be allowed to present the case in their absence or to present any evidence in writing.

## **25.0 Appeal against Dismissal**

- 25.1 Employees are entitled to appeal to a Members' Appeal Panel in cases of dismissal.

- 25.2 The appeal must be made in writing, addressed to the Assistant Director (Organisational Services), stating the grounds for the appeal, within 5 working days of receiving the decision letter from the Level 3 Capability Hearing.
- 25.3 The grounds of an appeal will normally be based on one or more of the following:
- that the penalty is unfair / inconsistent under the circumstances (judgment);
  - new evidence has arisen which was not considered at the original meeting and which may have a bearing on the outcome (facts);
  - that the policy and procedure has not been followed correctly (process).
- 25.4 The appellant will be notified in writing (and the appellant's representative if the appellant is to be represented) of the time, date and venue of the appeal meeting, giving at least 10 working days notice. Appeal hearings will take place as soon as reasonably possible upon receipt of the employee's written notice of appeal.
- 25.5 The Chairperson of the Stage 3 Capability Hearing and the HR Adviser who advised the Chairperson will present management's case at the appeal meeting.
- 25.6 The format of the appeal meeting will be in accordance with appeal hearing format outlined in Appendix 2.
- 25.7 As an appeal is against the decision reached by the Chairperson based upon evidence presented at the Stage 3 Capability Hearing, it is not normally permissible to include any new evidence. However, in exceptional circumstances new evidence that is material to the case may be submitted and must be clearly identified and each side must be given an opportunity to comment on it prior to the appeal meeting.
- 25.8 The Appeals Panel may:
- Uphold the original finding and the decision to dismiss;
  - Not uphold the finding and therefore reinstate the employee.
- 25.9 The HR Adviser will fully appraise the Appeals Panel of the merits of the options available to them.
- 25.10 The employee will be informed of the decision of the appeals panel in writing, the panel will set out the reasons for it's decision within 5 working days.
- 25.11 The Appeal Panel's decision is final. No further right of appeal exists within Medway Council's Procedure.

## **26.0 Monitoring and Review**

- 26.1 This procedure will be reviewed periodically to ensure compliance with changes in employment law and equality and diversity legislation.

## 27.0 Diversity Impact Assessment

- 27.1 A Diversity Impact Assessment will be undertaken at each review of this policy.
- 27.2 HR Services will monitor the impact and outcome of the capability procedure on protected groups of staff as per the Council's equal opportunities obligations.
- 27.3 The capability procedure will be reviewed periodically in line with developments in good practice.

## 28.0 Relevant Legislation

- Employment Rights Act 1996
- Employment Relations Act 1999
- Employment Act 2008
- Employment Act 2008 (Commencement No. 1 Transitional Provisions and Savings) Order 2008
- Equality Act 2010
- Equality Act 2010 (Consequential Amendments, Saving and Supplementary Provisions) Order 2010

## 29.0 Related Documents

None

## 30.0 Document Control

<b>Subject/Title</b>	Capability Procedure
Date agreed by Employment Matters Committee:	
Team responsible for policy	Employee Relations
Date of Review:	
Toolkit updated by:	

## Level 3 Capability Hearing - Format

## Appendix 1

The Stage 3 Capability Hearing will be conducted by an authorised officer who will be accompanied by a Human Resources representative.

The format of the hearing will be as follows:

- A. The line manager will explain in detail all of the steps that have been taken so far, to help support the employee in achieving the required performance standards, bringing forward any witnesses to help support their case, if required.
- B. The employee and/or his/her representative may cross-question the line manager and any witnesses and examine any documentary evidence submitted.
- C. The employee and/or his/her representative may present their evidence, including any mitigation, and call witnesses in support of their case.
- D. Management representative(s) may cross-question the employee, his/her representative and any witnesses.
- E. The Chair of the Panel and the Human Resources representative may question management representative(s), the employee, his/her representative and any witnesses.
- F. Witnesses will remain in attendance whilst they are questioned and will withdraw thereafter.
- G. Management representative(s) and the employee or his/her representative will have the opportunity to sum up their cases if they so wish.
- H. When the Chair of the Panel and the Human Resources representative are satisfied that all the relevant facts have been obtained, they will, in private, consider this evidence, any mitigating circumstances prior to deciding what action is appropriate.
- I. An adjournment may be approved by the Chair of the Panel, if necessary, to obtain further information.
- J. Wherever possible the decision will be notified to the employee and their representative verbally on the day of the hearing and confirmed in writing within 5 working days.

### APPEALS PROCEDURE

The Chair of the Appeals Panel will conduct the appeal hearing and will explain the purpose of the hearing, outline the procedure to be followed and the powers vested in the Appeals Panel.

- A. The appellant has the right to be represented by his/her Trade Union representative or workplace colleague and may call witnesses and refer to documents.
- B. The appellant (or representative) will put the appellant's case in the presence of the management representative(s) and may call such witnesses as required.
- C. The management representative(s) will have the opportunity to ask questions of the appellant and witnesses who have been called on the evidence.
- D. The members of the Appeals Panel will have the opportunity to ask questions of the appellant and witnesses and call such witnesses as required.
- E. The management representative(s) will put the case in the presence of the appellant and representative and may call witnesses as required.
- F. The appellant or representative will have the opportunity to ask questions of the management representative(s) and any witnesses who have been called on the evidence.
- G. The members of the Appeals Panel will have the opportunity to ask questions of the management representative(s) and call such witnesses as required.
- H. Witnesses will remain in attendance whilst they are questioned and will withdraw thereafter.
- I. The appellant (or representative) and the management representative(s) will have the opportunity to sum up their cases if they so wish.
- J. The management representative(s) and the appellant (and representative) will then withdraw.
- K. The Appeals Panel will deliberate in private.
- L. Wherever possible the decision will be notified to the employee and their representative verbally on the day of the hearing and confirmed in writing within 5 working days.

# Diversity Impact Assessment: Screening Form

Appendix two

<b>Directorate</b>		<b>Name of Policy</b>	
<b>Business Support Department</b>		<b>Capability Policy and Procedure</b>	
Officer responsible for assessment		Date of assessment	New or existing?
Tricia Palmer, Assistant Director, Organisational Services		<b>21 June 2012</b>	<b>New</b>
<b>Defining what is being assessed</b>			
<b>1. Briefly describe the purpose and objectives</b>		The new Capability Policy and Procedure has been designed as a direct replacement for the existing Capability Procedure. The policy's purpose is to provide a clear process for promoting good performance and for handling poor performance. This policy is solely for use by Medway Council's corporate employees. Schools based employees have a separate Capability policy and procedure.	
<b>2. Who is intended to benefit, and in what way?</b>		The Council and employees will benefit in the following ways:  <b>Council:</b> if poor performance is left un-managed then, the performance of teams, divisions and ultimately the whole Council would be impacted. This policy provides a framework to enable managers to support employees in meeting, and sustaining, the required standards of performance and in addressing instances of poor performance in a timely and fair manner.  <b>Employees:</b> This policy provides employees with a clear and fair mechanism for understanding how poor performance will be managed.	
<b>3. What outcomes are wanted?</b>		A clear process to enable managers to promotes the required standards of performance and to address concerns about poor performance in a constructive and support manner.  The policy also provides employees with a fair and consistent process by which they can be supported to meet the required performance standards, and enable employees to be aware of the escalatory process which management will adopt if performance does not meet the required standards.	

## Diversity Impact Assessment: Screening Form

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<p><b>4. What factors/forces could contribute to or detract from the outcomes?</b></p>	<p><b>Contribute</b></p> <ul style="list-style-type: none"> <li>- Commitment to the policy from everyone at all levels of the organisation.</li> <li>- Staff and managers being aware of their responsibilities as outlined within the policy.</li> <li>- Training of those involved in all stages of the process.</li> <li>- Good communication of the new policy to all employees.</li> </ul>	<p><b>Detract</b></p> <p>Failure to communicate the policy effectively could lead to:</p> <ul style="list-style-type: none"> <li>- staff not knowing how their performance will be managed.</li> <li>- managers not dealing with poor performance in a consistent and fair manner.</li> <li>- lack of consistency in application of performance management processes.</li> <li>- failing to provide employees with support and training to help achieve performance improvement.</li> </ul>
<p><b>5. Who are the main stakeholders?</b></p>	<p>Everyone employed by Medway Council, Members and Trade Union officials.</p>	
<p><b>6. Who implements this and who is responsible?</b></p>	<p>Tricia Palmer, Assistant Director, Organisational Services.</p>	
<p><b>Assessing impact</b></p>		
<p><b>7. Are there concerns that there <u>could</u> be a differential impact due to <i>ethnicity/ racial groups</i>?</b></p>	<p><b>No</b></p>	<p>The policy provides a process where all employees, regardless of their ethnicity, will be performance managed in a fair and consistent manner.</p>
<p><b>What evidence exists for this?</b></p>	<p>Consultation has been undertaken with the trade unions, the Black Workers Forum (BWF), and a selection of managers. No issues of concern have been raised regarding employees from minority ethnic groups.</p>	
<p><b>8. Are there concerns that there <u>could</u> be a differential impact due to <i>disability</i>?</b></p>	<p><b>No</b></p>	<p>The policy provides a process where all employees with a disability can feel confident that they will not be treated unfairly through the application of the capability process.</p>
<p><b>What evidence exists for this?</b></p>	<p>Consultation has been undertaken with the trade unions, the Disabled Workers Forum (DWF), and a selection of managers. No issues of concern have been raised regarding employees who may have a disability.</p>	
<p><b>9. Are there concerns that there <u>could</u> be a differential impact due to <i>gender</i>?</b></p>	<p><b>No</b></p>	<p>The policy provides a process where all employees, whether they be male, female, or transgender can be confident that they will not be treated unfairly or disadvantaged through the application of the capability process.</p>
<p><b>What evidence exists for this?</b></p>	<p>Consultation has been undertaken with the trade unions, the Black Workers Forum (BWF); the Lesbian, Gay, Bi-sexual and Transgender Forum</p>	



## Diversity Impact Assessment: Screening Form

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		(LBGT) ; the Disabled Workers Forum (DWF), and a selection of managers. No issues of concern have been raised relating to gender.
<b>10. Are there concerns there <u>could</u> be a differential impact due to <i>sexual orientation</i>?</b>		The policy provides a process where lesbian, gay and bisexual employees can be confident they will not be treated unfairly or disadvantaged through the application of the capability process.
	No	
<b>What evidence exists for this?</b>		Consultation has been undertaken with the trade unions, the Lesbian, Gay, Bi-Sexual and Transgender (LBGT) Forum, and a selection of managers. No issues of concern have been raised relating to sexual orientation.
<b>11. Are there concerns there <u>could</u> be a have a differential impact due to <i>religion/belief</i>?</b>		The policy provides a process where employees observing particular religions or beliefs (Including no-religion) can be confident that they will not be treated unfairly or disadvantaged through the application of the capability process.
	NO	
<b>What evidence exists for this?</b>		Consultation has been undertaken with the trade unions, the Black Workers Forum (BWF); the Lesbian, Gay, Bi-sexual and Transgender Forum (LBGT) ; the Disabled Workers Forum (DWF), and a selection of managers. No issues of concern have been raised relating to religion or belief.
<b>12. Are there concerns there <u>could</u> be a differential impact due to <i>age</i>?</b>		The policy provides a process where employees of any age can be confident that they will not be treated unfairly or disadvantaged due to their age, through the application of the Capability process.
	NO	
<b>What evidence exists for this?</b>		Consultation has been undertaken with the trade unions, the Black Workers Forum (BWF); the Lesbian, Gay, Bi-sexual and Transgender Forum (LBGT) ; the Disabled Workers Forum (DWF), and a selection of managers. No issues of concern have been raised relating to age.
<b>13. Are there concerns that there <u>could</u> be a differential impact due to <i>being transgendered or transsexual</i>?</b>		The policy provides a process where transsexuals or those being trans-gendered can be confident that they will not be treated unfairly or disadvantaged, through the application of the Capability process.
	NO	
<b>What evidence exists for this?</b>		Consultation has been undertaken with the trade unions, the Black Workers Forum (BWF); the Lesbian, Gay, Bi-sexual and Transgender Forum (LBGT) ; the Disabled Workers Forum (DWF), and a selection of managers. No issues of concern have been raised relating those being transgendered or those who are transsexuals.
<b>14. Are there any <i>other groups</i> that would find it difficult to access/make use of the policy, or who might</b>		The policy provides a process in which all employees can be confident that they will not be treated unfairly or discriminated against , regardless of their location or any caring

## Diversity Impact Assessment: Screening Form

Appendix two

experience unfavourable treatment (eg people with caring responsibilities or dependants, those with an offending past, or people living in rural areas)?	NO	responsibilities.
What evidence exists for this?	Consultation has been undertaken with the trade unions, the Black Workers Forum (BWF); the Lesbian, Gay, Bi-sexual and Transgender Forum (LBGT) ; the Disabled Workers Forum (DWF) and a selection of managers. No issues of concern have been raised relating to other groups.	
15. Are there concerns there <u>could</u> be a differential impact due to <i>multiple discriminations</i> (eg disability and age)?	NO	The policy provides a process where all employees, regardless of having either single or multiple protected characteristics, can be confident that they will not be treated unfairly or discriminated against, through the application of the Capability process.
What evidence exists for this?	Consultation has been undertaken with the trade unions, the Black Workers Forum (BWF); the Lesbian, Gay, Bi-sexual and Transgender Forum (LBGT) ; the Disabled Workers Forum (DWF), and a selection of managers. No issues of concern have been raised relating to multiple discriminations.	

### Conclusions & recommendation

16. Could the differential impacts identified in questions 7-15 amount to there being the potential for adverse impact?		Not applicable
	NO	
17. Can the adverse impact be justified on the grounds of promoting equality of opportunity for one group? Or another reason?		Not applicable

## Diversity Impact Assessment: Screening Form

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Recommendation to proceed to a full impact assessment?		
<b>No</b>	This policy complies with the requirements of the legislation and there is evidence to show this is the case.	
<del>NO, BUT ...</del>	<del>What is required to ensure this complies with the requirements of the legislation? (see DIA Guidance Notes)</del>	
<b>YES</b>	<del>Give details of key person responsible and target date for carrying out full impact assessment (see DIA Guidance Notes)</del>	N/A

Action plan to make minor modifications		
Outcome	Actions (with date of completion)	Officer responsible

Planning ahead: Reminders for the next review		
Date of next review		
Areas to check at next review (eg new census information, new legislation due)		
Is there <i>another group</i> (eg new communities) that is relevant and ought to be considered next time?		
Signed (completing officer/service manager)	Date	
Signed (service manager/Assistant Director)	Date	

Related documents