

1. INTRODUCTION

- 1.1. Section 98(3) of the Employment Rights Act 1996 defines capability as follows:-
"Capability means capability assessed by reference to skill, aptitude, health or any other physical or mental quality".
- 1.2. Reference to "capability" in this Procedure is in respect of the above definition. Reference to "health" in that definition includes unsatisfactory attendance due to sickness absence.
- 1.3. It is considered to be in the best interests of both the Authority and individual employees, for concerns regarding the capability of an employee to undertake efficiently the duties and responsibilities of their post, to be handled consistently and sympathetically with an emphasis on facilitating improvement and with dismissal being a final resort.
- 1.4. The purpose of this Procedure is therefore to provide a suitable framework within which these objectives can be achieved.

2. SCOPE OF CAPABILITY PROCEDURE

- 2.1. This procedure applies in all cases where the capability of the employee is in question. It will not apply to staff working under a probationary period or to staff subject to retirement from the Borough Council on the grounds of ill health on the recommendation of the Council's Occupational Health Physician.

3. PRINCIPLES APPLYING TO THE PROCEDURE

- 3.1. This Procedure indicates a sequential approach to dealing with concerns about an employee's capability. However, there may be exceptional circumstances where the parties involved agree that in view of the nature of the capability issue, the matter needs to be considered immediately under Stages 2 or 3, as appropriate. In determining whether it is appropriate to pursue a concern through this Procedure it is important to recognise the following distinctions. Whilst the procedure is designed to provide a consistent framework for managers and employees, timescales as specified in 4.12 need to be flexible to accommodate the variety of different circumstances including employee needs.
- 3.2. Work Performance
Poor work performance may arise through the innate incapability of the employee (i.e. they lack the skills and competencies required for satisfactory job performance) or as a result of a failure to exercise reasonable skill and care in carrying out their duties due to negligence or lack of effort (i.e. they possess the required skills but wilfully fail to apply them). The former situation should be pursued through this Procedure and the latter via the Disciplinary Procedure.
- 3.3. Ill-Health/Poor Attendance Record
Cases of incapability related to ill-health normally fall into one of the following categories:

- Ill-health retirement on the recommendation of the Council's Occupational Health Physician.
- Intermittent short-term absence where no specific underlying medical problem can be identified.
- Cases where the Council's Occupational Health Physician acknowledges that there is an underlying health problem which will continue to give rise to high levels of sickness absence but ill-health retirement is not recommended.

Ill-health retirement should be pursued in accordance with the Absence Management Policy. Cases of incapability relating to long term ill health, other than ill-health retirement should be handled through the use of the Capability Procedure, so the stages of both policies mirror each other. Therefore, where concerns regarding an employees capability are found to be due to ill-health, the procedures are transferable. It should be noted that any dismissal other than ill-health retirement on the recommendation of the Council's Occupational Health Physician will not result in early payment of pension or any enhancement to service for pension purposes.

- 3.4. The principal aim of this Procedure is to encourage the employee to improve their performance and/or attendance. The required standards should therefore be specified as clearly as possible and will provide the basis for evaluating any improvement. It is the responsibility of management to establish appropriate standards and to ensure they are properly communicated to and understood by their staff. It is also the responsibility of management to ensure that appropriate training and guidance is made available where reasonably practicable and to provide feedback to staff, in respect of their work performance, through the supervisory process.
- 3.5. Appropriate written records of any interviews, hearings or action taken under this Procedure should be compiled and retained for reference purposes together with copies of any other relevant documentation. Copies of such documentation will be made available to the employee.

4. SAFEGUARDS FOR THE EMPLOYEE

- 4.1. Employees are entitled to be represented by their Trade Union representative or work colleague. Representation, as such, is not always necessary at the informal stage. The constructive purpose of the informal stage is to try to avoid recourse to the formal stages, unless it is necessary to do so. Trade Union representatives have an important role to play in resolving matters in the informal stage, and therefore, should an employee request to be accompanied by their Trade Union representative or work colleague, this will not be unreasonably refused. At each formal stage of the Procedure the employee must be informed beforehand of this right of representation.
- 4.2. Representatives can take an active part in review meetings.
- 4.3. Suitable notice (i.e. at least 5 working days) of the time, date and place of the review meeting should be given in writing to the employee. The reasons for calling the review must be clearly stated and any written reports compiled for the review should be enclosed.
- 4.4. Where it is accepted that, in exceptional circumstances, an individual is unable to attend a formal review which has been convened they have the right, if they so

wish, to have their case presented by their Trade Union representative or fellow work colleague in their absence. Full account will be taken of any points the employee wishes to be considered.

- 4.5. At each stage of this Procedure the employee must be given adequate time and opportunity to explain or state their case before any formal decision is taken.
- 4.6. Nothing in this Procedure alters the rights of an employee under the appropriate national and/or local conditions of service.
- 4.7. To safeguard the interests of the employee copies of the relevant paperwork will be retained on the employee's personal file together with any formal note confirming that the employee's capability has been satisfactorily established.
- 4.8. Should the employee be dismissed by reason of incapability a right of appeal exists to the Council's Employee Appeals Committee. Any such appeal must be made in writing to the Borough Solicitor to be received within ten working days of the date of receipt by the employee of the notice of dismissal. In their letter the employee must state their grounds of appeal.
- 4.9. No formal action shall be instigated against an accredited representative of a recognised Trade Union until the circumstances of the case have been discussed with the appropriate Branch Officer/Full-Time Official.
- 4.10. In all cases consideration will be given to the provision of relevant support guidance and/or training, where appropriate in the circumstances, to help the employee to achieve the required improvement.
- 4.11. In circumstances where an employee suffers a reduction in remuneration as a direct result of redeployment under this procedure, the Local Government Pension Scheme can offer a degree of protection. The Human Resources Section will provide details of the protection available.
- 4.12. The manager will determine and give reasons for an appropriate period which they consider sufficient to enable a proper assessment of the situation to be made. Each situation could differ in terms of the amount of time between each stage. In all cases, a minimum of one month must have elapsed before the next stage of the procedure is invoked. In most cases this is likely to be around 3 months to enable an improvement to be made. In all cases, the Human Resources Section will advise all parties of the review period and support them through the process.
- 4.13. It is the intention of this procedure that the reference period between stages will be mutually agreed between the manager and the employee. Each case will be looked at individually. In the event of disagreement, the manager shall before making their decision hold a meeting with the employee, Human Resources and Trade Union representative, where appropriate, and take into account the views expressed. If the employee remains dissatisfied they can follow the procedure in 4.15.
- 4.14. Where sufficient improvements have been made, this procedure will come to a satisfactory conclusion, and the manager should let the person know verbally and in writing.

- 4.15. Decisions taken under this policy do not preclude any employee from pursuing a grievance in accordance with the Grievance Procedure.

5. STAGE ONE (The Informal Procedure)

- 5.1. Initial concerns regarding the standard of work performance and/or attendance of the employee should generally be discussed with them through the normal supervisory procedures in the first instance with the employee's line manager. The aim should be to ensure the employee is aware of the nature of the manager's concerns and in what ways they are falling short of the required standards. Possible causes of the poor performance and/or attendance should be explored (e.g. a training need, domestic problems, ill-health etc), with a view to reaching agreement as to any appropriate remedial action. This may be in the form of an agreed action plan over a specified period and the manager should monitor subsequent performance and provide feedback on progress through the normal supervisory procedures. If the required improvement is not forthcoming within an agreed/appropriate period the employee should be advised that continued failure to achieve and sustain the required standards may result in the matter being pursued formally through the Capability Procedure. The manager should continue to provide any appropriate support and guidance to facilitate the necessary improvement and should also keep a note of relevant discussions for reference purposes.
- 5.2. A meeting with the employee to discuss poor work performance/and or attendance should be arranged and any problems or areas for concern should be raised by the manager. Appropriate support and training should be offered to assist the employee in meeting the required standards in the future. Realistic targets should be agreed with the employee and future expectations made clear by the manager. The manager should record the points discussed in the meeting and confirm this in writing to the employee along with the agreed plan to achieve acceptable levels of performance and/or attendance.
- 5.3. The Manager should hold regular, informal review meetings, at agreed intervals, with the employee to provide feedback on whether targets are being met and whether performance and/or attendance is improving.
- 5.4. In most cases these meetings should provide sufficient guidance, support and clarification of standards to rectify the situation. In which case the procedure in 4.14 should be followed.

6. THE FORMAL REVIEW

- 6.1. If the necessary improvement is not achieved after Stage One has been exhausted, or if the concerns regarding standards of performance and/or attendance are of a serious nature (i.e. Stage One is considered inappropriate in the circumstances), the matter should be pursued through the following formal stages of the Capability Procedure. From this stage onwards the manager should seek appropriate Human Resources advice regarding the application of the procedure and prior to any formal hearing. There are three stages to the formal procedure and the employee will have the right of representation at each stage.
- 6.2. During each stage the employee's performance and/or attendance will be monitored closely. The method of doing this will be made clear to the employee at the conclusion of each review meeting.
- 6.3. A representative from the Human Resources Section should be present at each formal review meeting.
- 6.4. In cases where the procedure has come to a conclusion, but within twelve months of that conclusion there are further concerns about an employee's capability the procedure will be invoked at the next stage of the capability procedure. In the case of an employee having previously reached Stage Three of the capability procedure, the procedure will be invoked at Stage Three in order to give the employee a further opportunity to improve.

7. STAGE TWO (First Formal Review)

7.1. Stage Two, which is the first formal stage of the Procedure, is chaired by a manager senior to the employee's line manager, the purpose of which is for the line manager to state formally the concerns regarding the standards of the employee's work performance and/or attendance and to afford the employee an opportunity to offer any explanation and/or to put forward any mitigating factors. The manager chairing the review will reach a conclusion regarding the issues which have been raised. Where facts are in dispute it may be appropriate to adjourn the review to allow further investigation/clarification prior to reaching a decision on the balance of probability.

7.2. The review has 4 main purposes

a) To allow the Manager to discuss with the employee:

The standards of work required and/or the level of attendance required
 What improvements are necessary
 How the employee can be helped to achieve them.
 How improvement will be assessed, the timescale which must be reasonable and when the situation will be reviewed

b) To allow the employee to:

Obtain a clear understanding of what is expected of them
 Give an explanation or comment on their work and/or attendance
 Give their views on how the problem can be tackled

c) To allow the manager and the employee to explore other options:

Additional instruction, training or personal development activity
 Referral to Occupational Health
 The possibility of alternative employment

d) To make it clear to the employee:

The timescale for improvement
 How and by whom their work and/or attendance will be monitored through the review period
 The consequences if their work and/or attendance does not improve or if improvement is not maintained

7.3. Where the Chairperson concludes that the concerns regarding the employee's capability are valid the employee will receive a formal written letter of caution as to their capability to do the job. This letter will make clear that should there be a continuing failure to achieve and sustain the required standards the matter will proceed to the next stage of the Capability Procedure. The employee will also formally be made aware that their continued employment with the Borough Council may be at risk if they are unable to demonstrate their ability to achieve and sustain satisfactory work performance and/or attendance standards within the appropriate timescales. The length of time given to improve will depend on the nature of the job and the performance gap and/or the reason for their lack of

attendance. This letter will also confirm any arrangements which may have been agreed regarding the provision of relevant support, guidance and/or training. The manager should confirm the outcome of the meeting in writing to the individual within 5 working days.

8. STAGE THREE (Second Formal Review)

- 8.1. If concerns continue regarding the employee's capability, a further formal review will be convened. The format of this review will again be as specified under Stage Two. If it is held that valid concerns remain regarding the employee's capability a final caution will be confirmed in writing. This letter will indicate that unless the necessary improvements are achieved within a specified period and sustained thereafter the employee will be dismissed by reason of incapability. This letter will also confirm any arrangements which may have been agreed regarding the provision of relevant support, guidance and/or training. In addition, this letter will ask the employee whether or not they would like to be included in the Council's Redeployment Register. The manager should confirm the outcome of the meeting in writing to the individual within 5 working days.

9. STAGE FOUR (Third Formal Review)

- 9.1. If the employee continues to fail to meet the required standards, a further formal review will be convened, chaired by the Chief Officer or their nominated representative, at which the situation regarding the employee's capability will be reviewed. The format of this review will be the same as for Stages Two and Three and careful consideration will again be given to any explanation or mitigating factors presented by the employee.
- 9.2. If the Chairperson is satisfied that despite all reasonable efforts to facilitate improvement the employee remains incapable of achieving and sustaining the satisfactory standards, they will be dismissed by reason of incapability by issue of the appropriate notice (i.e. contractual or statutory notice, whichever is the longer).
- 9.3. The employee's dismissal will be with notice or, if serving their notice is not in the interests of the Council, they will receive pay in lieu of notice. The dismissal must be confirmed in writing within 5 working days, stating the reason for it and informing the employee of their right of appeal.

10. ALTERNATIVE EMPLOYMENT

- 10.1. While the emphasis of the Procedure is to facilitate the improvement necessary to establish the employee's capability to do their job it will be necessary, if that improvement is not achieved, to consider the possibility of offering alternative employment. Any alternative employment offered must be to a post deemed to be within the employee's capabilities and may be at a lower grade/rate of pay.
- 10.2. If the employee is offered and accepts alternative employment this will be subject to a trial period, agreed with the prospective new line manager, to establish the suitability of the transfer. During the trial period the employee will continue to receive their normal pay in respect of their current substantive post. The purpose of the trial period is to provide the employee with an opportunity to assess the

suitability of the post and for the employee's standard of work performance to be monitored. If the trial period proves to be unsuccessful and no further suitable alternative employment is available the contract of employment will be terminated. *Note: The employee is not limited to just one offer of alternative employment if one proves unsuitable. If it is possible to offer the employee further alternative employment, this will also be subject to a trial period in accordance with the above.*

- 10.3. Any offers of alternative employment will be made in writing and the employee should be given appropriate information regarding the job details. The employee should be allowed adequate time within which to consider the offer and the date by which a decision is required should be specified in the offer letter.
- 10.4. On appointment to the alternative post following successful completion of the trial period there will be no grade/pay protection but the employee will be assimilated at an appropriate salary point within the new grade which minimises any salary/rate of pay reduction.

11. TRAINING

- 11.1. Appropriate training will be given to any managers who might be involved in capability meetings to ensure they fulfil their responsibilities under this procedure.

**Capability Procedure
Flowchart**

