

PERSONNEL COMMITTEE

6 OCTOBER 2014

HUMAN RESOURCES – REVISED CAPABILITY POLICY & PROCEDURE

REPORT OF THE HEAD OF ORGANISATIONAL DEVELOPMENT

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RECENT REFERENCES:

None

EXECUTIVE SUMMARY:

The Capability Policy and Procedure has been updated to reflect changes in employment law and to strengthen the Council's position in relation to performance management.

There will be briefing sessions for managers and the policy will be available on the Intranet, and publicised in City Voice and through Core Brief.

RECOMMENDATION:

1. That the Revised Capability Policy and Procedure be agreed and implemented.

PERSONNEL COMMITTEE6 OCTOBER 2014HUMAN RESOURCES – REVISED CAPABILITY POLICY AND PROCEDUREREPORT OF THE HEAD OF ORGANISATIONAL DEVELOPMENTDETAIL:1 Introduction

- 1.1 For the Council to provide an efficient and effective service it requires staff who are capable of carrying out the tasks expected of them to a high standard. Employees have a contractual responsibility to perform to a satisfactory level.
- 1.2 The purpose of this policy and procedure is to provide a consistent framework to support and encourage those employees whose performance is considered unacceptable, for a variety of reasons, to improve to the standard required and to subsequently sustain that improvement throughout their employment.
- 1.3 The Capability Policy and Procedure will ensure that everyone is treated in the same way in similar circumstances, to ensure that issues are dealt with fairly and reasonably and that they are compliant with current employment legislation and best practice; it is intended to help employees achieve and maintain a high standard of performance in their work.
- 1.4 The Capability Policy and Procedure will apply where there is an underlying lack of knowledge, skill or ability resulting in an acceptable standard of work.

2. CAPABILITY POLICY AND PROCEDURE

- 2.1 The current Capability Policy and Procedure has been reviewed to ensure that it is legally compliant and continues to follow best practice, as set out in the ACAS Code of Practice; the revised policy gives clarity to managers and staff about the processes to be followed when dealing with capability issues.

- 2.3 The Capability Policy and Procedure is shown in Appendix 1.
- 2.3. The policy is based on principles of addressing performance concerns early, through informal means and where this approach does not result in the required improvement there are clear steps to follow within the policy to arrange formal meetings to resolve capability concerns.
- 2.4. The formal meetings may result in a formal warning, redeployment to an alternative role within the Council or dismissal. Unlike a disciplinary process, there is no legal requirement to exhaust a series of formal warnings before dismissal may be considered. The policy also includes details of the right to appeal.
- 2.5. The policy has been revised to provide guidance to managers where performance concerns may be related to ill health (in circumstances where an employee is not absent from work); withdrawal of a professional or statutory qualification which is essential for the post or addressing other substantial reasons for capability.
- 2.6. The revised policy also defines what action should be taken where there are both capability and misconduct concerns arising at the same time.
- 2.7. Currently, there is limited guidance and advice for managers when considering whether an adjustment to support an employee with a disability is reasonable and therefore whether the Council has a statutory duty to make the adjustment in accordance with the Equalities Act 2010. The revised policy and procedure address this issue and clarifies the action to be taken by managers to document the decision making process.
- 2.8. There is also provision in the policy for appropriate senior officers to consider suspension in circumstances where the capability concerns are so severe that allowing the employee to remain in the workplace is untenable due to significant risks to the reputation of the Council; health and safety or where there is a significant risk to service delivery. This approach mirrors the provisions within the Council's Disciplinary Policy, with the decision to suspend resting with a Chief Officer, in consultation with the Head of Organisational Development.
- 2.9. Briefing sessions will be held for managers as part of the implementation of the revised policy.
- 2.10. The Human Resources Department will monitor the impact of the policy.

3. Consultation

- 3.1 There has been consultation on the Policy with Unison and comments made have been incorporated into the Policy and Procedure.

OTHER CONSIDERATIONS:

4. COMMUNITY STRATEGY AND PORTFOLIO PLANS (RELEVANCE TO):

- 4.1 The need to make the best use of all available resources by the continued consistent application of policies and procedures which enable resources to be utilised effectively within the City Council is an integral part of the Corporate Strategy.

5. RESOURCE IMPLICATIONS:

- 5.1 Contained in the detail of the Policy and procedure.

6. RISK MANAGEMENT ISSUES

- 6.1 Unresolved capability issues impact on productivity, Council Service standards and the ability to deliver a cost effective service.

BACKGROUND DOCUMENTS:

Held in Organisational Development (excluding information on individuals which is exempt information).

APPENDICES:

Appendix 1 Capability Policy and Procedure

Winchester City Council

Capability Policy and Procedure

Winchester City Council

Capability Policy and Procedure

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Winchester City Council

Capability Policy and Procedure

Document History

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0.1	07/08/2014	JC	Initial Draft
0.2	23/09/2014	JC	Revised Draft incorporating comments from HR, Corporate Management Team and Unison

Winchester City Council

Capability Policy and Procedure

1. Introduction

For the Council to provide an efficient and effective service it requires staff who are capable of carrying out the tasks expected of them to an acceptable standard, as defined by individual service areas. Employees have a contractual responsibility to perform to a satisfactory level.

This document defines the approach that the Council will take in terms of addressing concerns relating to an employee's ability to perform their role to the required standard. The Capability Policy and Procedure will apply where there is an underlying lack of knowledge, skill or ability resulting in an unacceptable standard of work.

This Policy and Procedure provides a consistent framework to support and encourage those employees whose performance level is considered unacceptable, for a variety of reasons, to improve to the standard required and to subsequently sustain that improvement throughout their employment.

This document is important so that all employees understand what is expected of them and that concerns about performance are addressed promptly and effectively.

The aim of this Policy and Procedure is to ensure that everyone is treated in the same way in similar circumstances, to ensure that issues are dealt with fairly and reasonably and that they are compliant with current employment legislation and best practice; it is intended to help employees achieve and maintain a high standard of performance in their work.

Wherever practical, employees should be assisted through training, coaching or similar development opportunities and given a reasonable time to improve their performance.

2. Scope

This policy and procedure applies to all employees of Winchester City Council, regardless of length of service, including those who are on probation.

It does not apply, to those undertaking the statutory roles of Head of Paid Service, Section 151 Officer, Monitoring Officer or any other Chief Officer employed under

JNC Conditions for Chief Officers. There is a separate procedure for these officers set out in the Council's Constitution.

In cases where there is a deliberate failure or act leading to misconduct on the part of the employee to perform to the standards of which they are capable of achieving, the **Disciplinary Policy and Procedure** will apply instead.

In exceptional circumstances, there may be situations where there are **both** performance concerns **and** misconduct concerns arising at the same time. In this situation, managers should seek advice from HR on the most appropriate way to address the concerns.

Although each case will be reviewed on its individual merits, it is likely that in circumstances where there are **both** performance **and** misconduct concerns, the Council's **Disciplinary Policy and Procedure** will apply.

Issues relating to **sickness absence** (whether persistent, short term absence; long term sickness absence and/or permanent ill health) will be addressed using the Council's **Sickness Absence Management Policy and Procedure**.

In cases where the employee is absent due to sickness once either the informal or formal stages of this procedure have started, the line manager should record the absence in the usual way and take advice from HR on the most appropriate way to continue.

When an employee's continuous absence exceeds or is likely to exceed 20 working days, the manager may choose to temporarily suspend the capability process and implement the Council's **Sickness Absence Management Policy**.

When the employee returns to work, the Council reserves the right to allow for reasonable adjustments and a period of up to one month to allow the employee to resume normal duties following sickness absence unless Occupational Health advise a longer period of time to facilitate recovery. Following this rehabilitation period, the Council will resume this procedure at the stage it was temporarily suspended prior to sickness absence.

3. Definitions

For the purpose of this Policy and Procedure the following definitions apply:

Accompanied by refers to the individual who attends formal meetings to provide support who is normally a trade union representative or colleague to provide support to an employee.

In exceptional circumstances, following consultation with the HR Manager or Head of Organisational Development, the employee may be accompanied by someone other than a colleague or Unison Representative, especially in cases relating to long term ill health or disability. Each request outside the normal parameters of a colleague or Unison Representative will be reviewed on its individual merit, taking into account the full circumstances of the case. Examples of additional support at a meeting may include an advocate from Solent Mind, a Community Health Practitioner or similar specialist adviser.

Appellant means the individual who is appealing against decisions made at meetings held within the formal stages of this procedure.

Capability is the “ability to perform a role, assessed by reference to skills, aptitude, health or any other physical or mental quality” (Employment Rights Act 1996).

Disability means a physical or mental impairment that has or is likely to have a ‘**substantial**’ and ‘**long-term**’ negative effect on your ability to carry out normal daily activities (Equality Act 2010).

- In this context ‘**substantial**’ is more than minor or trivial – e.g. it takes much longer than it usually would to complete a daily task.
- ‘**Long Term**’ means has lasted or is likely to last more than **12 months**

Formal Stages means the meetings held as set out in paragraphs **13.4** and following of this Policy and Procedure.

Gross incompetence is where the unacceptable performance is so serious that the employees continued presence in the workplace potentially presents a significant risk to the Council’s reputation, effective service delivery or the Council’s ability to perform effectively as a business.

Improvement Plan means a structured action plan which highlights the improvement required and the timescales for improvement to be achieved.

Informal Action means management action as set out in **Paragraph 13.2** of this Policy and Procedure, to address capability issues.

Long Term ill health means a medical condition which has lasted or is likely to last more than 12 months.

Manager means the individual's normal line manager. In exceptional circumstances, following consultation with HR, it may be appropriate to nominate another manager to fulfil the role of line manager for the purposes of this procedure.

Medical capability is where the individual's ability to perform their role is directly related to an individual's long term ill health and/or a disability.

Review Meetings are a series of meetings between the manager and the employee to determine progress against an Improvement Plan. Such meetings are considered as normal management meetings and there is therefore no right to be accompanied.

Right to be accompanied means employees are entitled to be accompanied at meetings and hearings held under the **formal stages** of this procedure by a trade union representative or colleague.

The right to be accompanied does not extend, however, to **Review Meetings** held under this procedure.

SMART Targets are structured targets which clearly set out the expectations for the employee. Targets should be **Specific, Measurable, Achievable, Realistic and Time-bound**.

Managers should record how the targets will be assessed and how progress will be monitored. **SMART Targets** should reflect what a competent member of staff would reasonably be expected to achieve, within a reasonable timescale.

Unacceptable performance is the repeated failure over time to carry out the duties associated with a particular role to a satisfactory standard.

The list below provides an indication of what may be considered as **unacceptable performance**, subject to reasonable adjustments and within the needs of the business to maintain efficient and effective service. The list is not intended to be exclusive:

- An employee who is unable to carry out the main purpose of the job to the required standard.
- An employee with poor quality or low quantity of work when compared to peers.
- An employee who is significantly slower than their peers.
- An employee who is unable to adapt to changing circumstances, such as allocation of work or new technology.

- An employee who, despite training, lacks the knowledge, skills and aptitude required in the job.
- A new or newly promoted employee who, although technically competent in the particular area of work, is found to be lacking in other skills required in the job, such as the ability to manage subordinates and the overall work of the section.
- An employee who consistently fails to meet deadlines or targets.

4. Roles and Responsibilities

Line Managers are expected to:

- Ensure that all employees in their teams are aware of the performance standards expected from them.
- Raise concerns with the employee as early as possible during one to one/supervision meetings in the first instance and these should be recorded.
- Deal with matters confidentially, promptly and fairly.
- Seek advice from Human Resources, especially before starting the formal stages of the procedure and in all cases where the unacceptable performance may be related to ill health/disability.
- Keep adequate records of all meetings held under this procedure, including discussions with employees within the informal stage of the procedure.
- Consider the full range of support required for employees to reach the required standards.

Employees are expected to:

- Ensure that they are aware of the performance standards required of them in order to perform their role and to meet the needs of the service.
- Act upon any guidance and feedback to improve performance such as appraisals and performance improvement plans.
- Inform their line manager at the earliest opportunity of changes to their personal circumstances which may have a negative impact on their ability to perform their role to the required standard (e.g. when domestic circumstances are causing increased personal stress; or where long term health concerns or a disability may be contributing to the situation.)
- Identify any support they require in order to meet the required standards.
- Make themselves available for meetings as required under this procedure.
- Engage fully with the people who have been identified to provide appropriate support during the application of this procedure (e.g. primary health care providers, Occupational Health, Counselling Services, Management Coach/Mentor etc.)

Human Resources are expected to:

- Promote Learning and Development to all employees and advise managers on options available to them.
- Provide advice, guidance and support to line managers in relation to the application of the Capability Policy and Procedure.
- Provide welfare support to employees and/or provide details of other agencies who can provide support as required.
- Clarify the procedure where the member of staff has questions, especially where the member of staff is not a member of a Trade Union.
- Ensure that there are clear and demonstrable reasons to justify decisions to bypass stages of the procedure.
- Consider each case on merit and liaise with Unison as appropriate to balance the needs of the business with the needs of the individual.
- Help with the interpretation of the Policy and Procedure to ensure a consistent approach across the Council.
- Monitor the Policy and Procedure and update it to reflect changes in employment law.

5. Key Principles

Nothing in this Policy and Procedure is intended to prevent the normal process of management where line managers allocate work, monitor performance, highlight work well done and draw attention to areas for improvement.

Effective performance management underpins the every day working relationship between managers and their teams. Managers should therefore set **SMART targets** as part of the annual appraisal cycle and monitor performance against those targets on a regular basis.

This enables managers to identify good performance, successes and achievements as well as any problems that have arisen and to be able to discuss concerns about an employee's level of performance in a timely and informal way.

The member of staff will be given the opportunity to state their case at a meeting, before any decision is made relating to whether appropriate management action should be taken.

Wherever possible, managers will consider **reasonable adjustments** to support employees who have a long term illness and/or disability. Further guidance on reasonable adjustments is set out in **Section 8** of this Policy and Procedure.

No **Formal Action** will be taken against a trade union representative under this Policy and Procedure without the Branch Secretary first being notified by HR. In the same way, no **Formal Action** will be taken against the Branch Secretary without first informing the appropriate Regional Officer.

As part of the Appraisal process pay progression within scales includes an assessment of an employee's skills, competencies and performance against the requirements of the role.

On this basis, employees who are subject to the **formal stages** of this Policy and Procedure will not be entitled to an increment, if one is available to them. The employee is entitled to receive any nationally negotiated pay awards on their salary.

Once an employee has achieved the required level of performance, which needs to be sustained for **12 months**, they may progress to the next incremental point from the next April as appropriate.

6. Right to be accompanied

Employees are entitled to be accompanied at meetings and hearings held under the **formal stages** of this procedure, including Appeal Meetings, by a colleague or Unison Representative where the individual is a member of Unison. There is no right to legal representation at any meeting held under this procedure.

The right to be accompanied does not extend to **Review Meetings** held under this procedure, which are considered to be normal line management discussions.

In exceptional circumstances, following consultation with the HR Manager or Head of Organisational Development, the employee may be accompanied by someone other than a colleague or Unison Representative, especially in cases relating to long term ill health or disability. Each request outside the normal parameters of a colleague or Unison Representative will be reviewed on its individual merit, taking into account the full circumstances of the case. Examples of additional support at a meeting may include an advocate from Solent Mind, a Community Health Practitioner or similar specialist adviser.

The employee is responsible for contacting their chosen companion to ask them to attend meetings. The chosen companion does not have to agree to accompany the employee at meetings.

If the companion is a colleague rather than a Unison Representative, the chosen companion should seek agreement from their manager to be released from their operational role to allow them to accompany an employee at a meeting.

The Council reserves the right to refuse to release a companion where their attendance may either hinder the effective service delivery within their operational role or their presence at the meeting may prejudice the proceedings.

The companion should be allowed to address the hearing to present and summarise the employee's case, respond on behalf of the employee to any views expressed at the meeting and confer with the employee during the hearing.

The companion does not, however, have the right to answer questions on the employee's behalf, address the hearing if the employee does not wish it or prevent the employer from explaining their case.

7. Suspension

In cases where the capability concern is so serious and/or the employee's continued presence in the workplace potentially presents a significant risk to the Council's reputation; the health and safety of the employee or others; effective service delivery or the Council's ability to perform effectively as a business, the employee may be suspended from duty on full pay.

The Council may also consider suspension in situations where the loss of a professional or statutory qualification required for a role, prevents the employee fulfilling their contract of employment or where a statutory restriction (or similar substantive reasons) means that the employee is unable to fulfil their role.

Alternatives to suspension such as temporary redeployment to an alternative role within the Council should be considered where this can be sustained.

The decision to suspend should be taken by the Chief Executive or the relevant Director in consultation with the Head of Organisational Development and may be delegated as appropriate.

The employee will be requested to attend a meeting with the appropriate Head of Team (or other senior manager). A representative from HR will normally attend the meeting to advise the Head of Team.

The member of staff has the right to be accompanied by a union representative or work colleague.

Reasonable notice of the meeting will be given to allow the individual to be accompanied; the meeting should be held as soon as possible on the same working day and the lack of availability of a chosen companion will not be considered as a reason to delay the meeting to inform the employee of the suspension.

The employee should be told the reasons for the suspension and informed that suspension is not a form of disciplinary action. The manager should nominate an

appropriate manager who will not be involved in formal meetings as a contact point for the employee for the duration of the suspension. The employee should be informed of the support available to them.

The employee should be given a letter to confirm the suspension and leave the Council's premises immediately.

The member of staff should return small items of Council property they have on them including ID Cards, Keys, remote working devices (e.g. "Cryptocards"), mobile phones and similar devices. Following the meeting, the HR Adviser will contact IM&T to arrange for the individual's IT access to be temporarily suspended.

During suspension, the member of staff will remain on full pay and should have reasonable access to their union representative.

The employee will be permitted to retain their company car for the duration of the suspension, except in cases where their driving licence has been revoked.

A **Stage 2 – Formal Capability Hearing** (see **paragraph 13.7** of this policy and procedure) will be held within **one calendar month** of the suspension to consider the employee's suitability to remain employed by the Council.

In the unlikely event that the suspension needs to continue beyond the initial month, the need to suspend will be reviewed on a regular basis by the Head of Organisational Development or in their absence, the HR Manager.

There is no right of appeal against the decision to suspend a member of staff.

8. Capability linked to Long Term Ill Health/Disability

In cases where employees with disabilities or long term ill health are experiencing difficulties with their performance, managers must comply with the Equality Act 2010 and must be able to demonstrate that they have considered reasonable adjustments.

Managers should discuss the matter with an HR Adviser, who may refer the individual to Occupational Health or seek advice from an external organisation.

Under the Equality Act 2010 a person has a disability if they have a physical or mental impairment that has a 'substantial and long term adverse effects on their ability to carry out typical day to day activities'.

Where an employee's disability is resulting in unacceptable performance, it is the employer's responsibility to make reasonable adjustments that may help the employee to improve their performance.

Reasonable adjustments are specific to the individual and their role. The best approach is to ask the person concerned whether they consider themselves to be

covered by the definition of disability referred to above; if so, the employee should be asked to identify what impact their disability has on their ability to perform their role to the required standard.

The employee is often well-informed of what adjustments have helped them previously and therefore may be aware of what adjustments could benefit them in the future.

Examples of reasonable adjustments, which may be temporary or permanent, include, although not exclusively:

- allocating some of the disabled person's duties to another person
- transferring the person to fill an existing vacancy
- altering the person's hours of work
- providing additional training
- assigning the person to a different place of work or training
- allowing the person to be absent during working or training hours for rehabilitation, assessment or treatment
- giving or arranging for training or mentoring (whether for the disabled person or any other person)
- making physical adjustments to premises
- acquiring or modifying equipment
- modifying instructions or reference manuals
- providing a reader or interpreter
- providing supervision or other support

Whether it is reasonable to make any particular adjustment will depend on a number of factors which have to be looked at in totality.

Managers should consider the issues identified in **Appendix 3** to help determine whether an adjustment is likely to be reasonable. These factors include considering the financial impact of the proposed adjustments, the long-term impact on colleagues and whether the adjustments can be sustained over a prolonged period of time without having a negative impact on service delivery.

Through making as many reasonable adjustments as possible, the Council aims to prevent an employee with a disability from facing significant disadvantage.

If an adjustment is reasonable to make then an employer **must** do so.

9. Re-arranging of Meetings

Employees are required to make all reasonable efforts to attend meetings and hearings under this procedure, including informal and formal meeting.

In the event that either party is not able to attend a meeting for a reason that was not reasonably foreseeable at the time the meeting was arranged, the meeting will be rearranged as soon as possible.

Where a meeting is postponed because of the ill health of the employee, the meeting will be rearranged once with the second date normally being within **5 working days** (variable in exceptional circumstances by mutual consent).

Where a formal meeting has been rescheduled the manager will write to the employee to inform them of the revised date for the meeting. The letter should explain that the employee will be given the opportunity to submit a written statement for the manager to consider or to instruct their representative to present their case on their behalf.

If the employee chooses not to exercise these options, or fails to attend the rescheduled meeting due to ill health, the Head of Team will take advice from HR and may decide to continue with the meeting in the employee's absence, considering all the information which is available to them at the time of the meeting.

If an employee is **unwilling** to attend a meeting without "good cause" the Manager should take advice from HR and may decide to continue with the meeting in the employee's absence.

When an employee's continuous absence exceeds 20 working days, the manager may choose to temporarily suspend the capability process and implement the Council's **Sickness Absence Management Policy**.

When the employee returns to work, the Council reserves the right to allow a period of up to one month to allow the employee to resume normal duties following sickness absence unless Occupational Health advise a longer period of time to facilitate recovery. Following this rehabilitation period, the Council will resume this procedure at the stage it was temporarily suspended prior to sickness absence.

10. Records of Capability Meetings

It is important that Managers conducting capability meetings, review meetings, hearings or appeals keep written records. These should include: a summary of management case, the details of the evidence against the employee, the employee's response, findings made and actions taken, the reason for the decision and details of any appeal and outcome.

A note-taker may be made available at formal meetings and appeal hearings who should provide a typed summary of the meeting.

Should any action be re-considered and effectively withdrawn on appeal, any written reference to it will be removed from the employee's personal file and the employee will be notified accordingly.

All documentation relating to the capability should be sent to Human Resources, who will retain a confidential record in keeping with the requirements of the Council's Retention Policy.

11. Resolving Grievances

The Council's Grievance Procedure is set out in the Resolving Workplace Issues Policy which states that the Policy does not apply "where separate rights of appeal are given under different procedures (for example but not exclusively issues relating to redundancy, disciplinary, capability, attendance management, job evaluation or whistle blowing etc.) or where the matter is related to a collective agreement."

This is because the employee should use formal meetings under the Capability Procedure to offer any explanation or mitigation.

In exceptional circumstances, however, an employee may potentially have a grievance which relates to the way in which the Capability Procedure is being applied, rather than the fact that capability processes have been applied. In the first instance, they should discuss the matter with their Trade Union Representative or a member of HR.

Where an employee raises a grievance during the capability process, the capability process may be temporarily suspended in order to resolve the grievance. Where the grievance and capability cases are related it may be appropriate to deal with both issues concurrently.

12. Revision

This policy and procedure will be reviewed every 2 years or sooner if required, taking into account changes to legislation, ACAS guidelines and best practice.

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13. Capability Procedure

13.1 Overview of Procedure

This Procedure is intended to be followed in a linear way which will incorporate the following stages and where reasonable, the **Informal Action** and **Informal Review Period** will be completed before commencing the formal stages.

The Procedure has the following Formal Stages:

- **Stage 1 - Formal Capability Meeting**
- **Formal Review Period**
- **Stage 2 – Formal Capability Hearing**

In exceptional circumstances and subject to advice from a senior member of the HR Team, the Council reserves the right to start the formal procedure at a **Stage 2– Formal Capability Hearing**.

Examples of when this may be appropriate include:

- where the capability is very serious and potentially amounts to **gross incompetence** and/or the employees continued presence in the workplace potentially presents a significant risk to the Council's reputation; the health and safety of the employee or others; effective service delivery or the Council's ability to perform effectively as a business; **or**
- where **long term illness or disability** appears to be having a significant impact on performance, where the employee is **not** absent due to sickness; **or**
- where the loss of a professional or statutory **qualification** required for a role, including withdrawal of a driving license, prevents the employee fulfilling their contract of employment; **or**
- where a **statutory restriction** (e.g. an unsatisfactory result from the Disclosure and Barring Service) or similar substantive reasons mean that the employee is unable to fulfil their role; **or**
- where the employee is in their **first year of service** and informal action has not resulted in the required improvements.

13.2 Informal Action

Where there are concerns about an employee's capability, the line manager should establish the facts, which may include obtaining evidence from others for whom work has been undertaken if necessary.

Having established facts, the line manager should hold an **informal discussion** with the employee to discuss the concerns.

Meetings under the Informal Stage of the procedure are part of day to day management. There is therefore **no right to be accompanied** at meetings held under the **Informal Stage** of the Procedure.

Any discussions with an employee should be held with the aim of encouraging and helping them to improve to the standard required. It may be that mentoring, coaching, training or counselling is appropriate to help the employee to improve.

During the meeting the manager should:

- Clearly explain the standards which are required to fulfil the role.
- Explain specifically in what way the individual is falling short of the required standards.
- Encourage the individual to offer their explanation for the apparent unacceptable performance.
- Establish whether there are any external factors such as a change in personal circumstances which are adversely affecting performance. If so, discuss what additional support the employee needs at this time.
- Identify the specific improvements required.
- Discuss and agree what steps need to be taken by both the manager and the employee will take to address these concerns.
- Identify and agree what additional support is required to enable to employee to improve.
- Agree reasonable timescales within which improvements should be made. It is unusual for a reasonable timescale to exceed **3 months**.
- Explain how the performance will be reviewed.
- Record the agreed action on an improvement plan.
- Inform the employee that if the required improvement is not achieved within the agreed timescale, or is not sustained for a period of **6 months**, the formal stages of the procedure may apply.
- Explain that if there is further deterioration in the standards of work or sufficient cause for concern during the agreed review period, the manager can

initiate the next stage of the procedure even if the review period has not been exhausted.

At any time during the meeting, the manager may adjourn the meeting to seek advice from HR. The employee may request an adjournment to allow them to seek advice from their Unison Representative.

The manager should take into account the employee's personal circumstances, both in work and outside of work, especially in cases where a change in personal circumstances appear to be impacting on otherwise acceptable performance.

Depending on the individual case, it may be appropriate to offer welfare options such as Occupational Health advice, counselling services, or a temporary change of hours or other flexible working arrangements which may be appropriate in the circumstances.

In cases where the basis of the capability concerns appear to relate to a long term health problem and/or a disability the manager should seek advice from Human Resources before any action is taken and should consider whether **reasonable adjustments** need to be made.

It may be appropriate to seek the opinion of the Occupational Health Adviser and/or any external organisation to seek expert advice on any health/disability related issues.

Guidance on reasonable adjustments can be found in **Section 8** of this Policy and Procedure.

Having considered the explanation from the employee, if the capability concerns remain, the manager should make a record of the discussion, including any action required and the timescales for improvement.

Appendix 1 of this procedure contains a template which can be used to record the outcome of the informal meeting. A copy of the record of informal discussion should be given to the employee.

13.3 Informal Review Period

The manager should meet with the employee regularly to review progress against the agreed improvement plan, noting progress and informing the employee if there are further concerns arising during the review period.

The employee should be given the opportunity to state why they feel their performance is not sufficient and whether there are mitigating circumstances which may include the availability of training courses.

The manager should take notes of the discussions during the review period and give copies to the employee.

There should be at least **2** informal review meetings before a decision is made to move to the formal stages of the procedure.

13.4 Formal Action

Where the informal stage has been unsuccessful, or in consultation with HR, it is determined that the incapability is such that immediate formal action is required without using the informal stage of the procedure, the manager should invoke the formal capability procedure.

Prior to invoking the formal stage of the capability procedure, managers should seek advice from an HR Adviser who will provide appropriate advice and support on the application of the Formal Stages of the procedure, including advising on letters and similar documents as required.

13.5 Stage 1 - Formal Capability Meeting

The Manager will write to the employee to notify them of the details for a **Stage 1 - Formal Capability Meeting**.

The letter should inform the employee of the areas for concern to be discussed at the meeting and advise them of the **right to be accompanied** at the meeting by a colleague or Trade Union representative. A representative of HR will also attend the meeting.

The letter should also include any documentary evidence which is to be referred to at the meeting to allow the employee time to consider the documents ahead of the meeting.

The employee will be given a minimum of **5 working days** notice of the meeting, which may be waived by mutual agreement.

During the meeting, the Manager should:

- Explain the support and measures that have already been implemented to try to improve the employee's capability.
- Clearly explain the standards which are required to fulfil the role.
- Explain specifically in what way the individual is falling short of the required standards.
- Encourage the individual to offer their explanation for the apparent unacceptable capability.
- Establish whether there are any external factors such as a change in personal circumstances which are adversely affecting performance. If so, discuss what additional support the employee needs at this time.

If the manager concludes that there is not a capability issue, but some other circumstances which account for the unacceptable performance, the manager should notify the employee of this and confirm in writing what support will be provided.

If during the meeting, however, it is concluded that there are capability issues, the Manager should:

- Identify the specific improvement required.
- Discuss what steps need to be taken by both the manager and the employee to address these concerns.
- Identify and agree what additional support is required to enable the employee to improve.
- Set out reasonable timescales within which significant improvements should be made. It is unusual for a reasonable timescale to exceed **3 months**.
- Explain how the performance will be reviewed.
- Record the agreed action on an **improvement plan**.
- Inform the employee that if the required improvement is not achieved within the appropriate timescales, or there are further concerns within a **12 month period**, the next stage of the formal procedure will apply.
- Ensure that the employee understands the consequences of continued failure to meet the required standard may result in dismissal.
- Inform the employee that they will receive a formal letter which summarises the issues discussed during the meeting and constitutes a **Formal Warning** which will remain in place for **12 months**.
- Inform the employee of their right of appeal.

Within **5 working days** of the meeting, the Manager will write to the employee summarising the issues discussed during the meeting, including confirming the **Formal Written Warning**, the appropriate **SMART targets**, the **right of appeal** and

providing a copy of the **improvement plan**. A copy of the letter will be forwarded to HR for inclusion on the employee's personal file.

13.6 Formal Review Period

Following the **Stage 1 - Formal Capability Meeting**, the manager should meet with the employee regularly to review progress against the agreed improvement plan, noting progress and informing the employee if there are further concerns arising during the review period.

Review meetings under this procedure are seen as normal management meetings. There is therefore no right to be accompanied by a colleague or Trade Union representative at such meetings.

The manager should provide regular feedback and acknowledge where progress is being made, while being clear about any areas where further improvement is required.

The employee should be given the opportunity to state why they feel their performance is not sufficient and whether there are mitigating circumstances which may include the availability of training courses.

The manager should maintain notes of the discussions, including an updated action plan, during the review period and give copies to the employee.

If during the review period the desired standards have been achieved, a letter confirming that there will be no further action will be sent to the employee and a copy forwarded to the HR Department to be placed on the personal file. The manager should inform the employee that failure to **sustain** the desired standards during the following **12 months** will result in progressing to **Stage 2** of this Procedure.

The manager should not wait until the end of the review period to tell the employee that there has been insufficient progress. If during the review period, insufficient progress has been achieved, the Manager will inform the employee of this and confirm that a **Stage 2 – Formal Capability Hearing** will be arranged.

In exceptional circumstances, following consultation with the HR Manager, the manager may determine that the capability has deteriorated or that there is sufficient concern to initiate the next stage of the procedure even if the review period has not been exhausted. Normally, there should be at least **2 review meetings** before a decision to proceed to the final stage of the procedure is made.

The manager will give an assessment of the progress and improvement made by the employee during the review period and the employee will have the opportunity to respond.

13.7 Stage 2 – Formal Capability Hearing

The Council will arrange a **Stage 2 – Formal Capability Hearing** in the following circumstances:

- where previous stages of the procedure have not resulted in sufficient improvement; **or**
- where improvements are not sustained for a period of **12 months** following a **Stage 1- Formal Capability Meeting**; **or**
- where the capability is very serious and potentially amounts to **gross incompetence** and/or the employees continued presence in the workplace potentially presents a significant risk to the Council's reputation; the health and safety of the employee or others; effective service delivery or the Council's ability to perform effectively as a business; **or**
- where **long term illness or disability** appears to be having a **significant** impact on performance, where the employee is **not** absent due to sickness and further reasonable adjustments cannot be sustained by the service; **or**
- Where the loss of a professional or statutory **qualification** required for a role, including withdrawal of a driving licence, prevents the employee fulfilling their contract of employment; **or**
- Where a **statutory restriction** (e.g. an unsatisfactory result from the Disclosure and Barring Service) or similar substantive reasons mean that the employee is unable to fulfil their role; **or**
- Where the employee is in their **first year of service** and informal action has not resulted in the required improvements.

The **Stage 2 – Formal Capability Hearing** will be heard by the appropriate Head of Team. Unlike a disciplinary hearing, there is no requirement for a capability hearing to be chaired by someone independent to the issues. This is because the Head of Team is likely to be in the best position to judge acceptable levels of capability.

A representative of HR will also attend the Hearing to advise the Head of Team.

The employee will receive written notice **7 working days** prior to the **Stage 2 – Formal Capability Hearing**. The letter should state the details of the capability being considered at the meeting and advise the employee of the right to be accompanied. The letter should inform the employee that while all reasonable alternatives will be considered, dismissal with notice may be the appropriate outcome of the meeting.

Both parties are required to exchange all documentary evidence to be referred to at the **Stage 2 – Formal Capability Hearing**, at least **5 working days** before the date of hearing. The details of how this is to be achieved will be set out in the letter informing the employee of the date of the **Stage 2 – Formal Capability Hearing**.

The purpose of the hearing is to determine the likelihood of the employee achieving the required standards and to make a decision on the most appropriate course of action, taking all factors into account.

Outline of Stage 2 – Formal Capability Hearing

The employee's line manager will summarise the case to date, referring to any documents which have previously been submitted.

The employee will then be given adequate opportunity to respond to the issues raised by the manager and set out their case, including any mitigation they wish the Head of Team to consider.

The Head of Team and HR Adviser may ask either party questions to clarify issues which arise during the **Stage 2 – Formal Capability Hearing**.

Both parties will be given the opportunity to ask each other questions.

The Hearing will adjourn to allow the Head of Team to consider the facts of the case.

Once the Head of Team has reached a decision, the Hearing will reconvene and the Head of Team will inform the both parties of the decision.

In exceptional circumstances, where it is not possible to reach a decision immediately, the decision will be given verbally to the employee no later than **3 working days** from the conclusion of the hearing.

The decision and the right of appeal will be confirmed in writing to the employee within **5 working days** of the employee being informed verbally of the outcome of the hearing.

A copy of the letter will be forwarded to HR for inclusion on the employee's personal file.

Possible Outcomes of a Stage 2 - Formal Capability Hearing

The Head of Team should consider all possible options relating to the on-going employment of the employee.

The Head of Team may consider the following options:

- **Extend the Formal Written Warning**
- **Redeployment to alternative employment with the Council**
- **Dismissal with notice on the grounds of capability.**

Extend the Formal Written Warning

If the Head of Team concludes that the employee has made **significant improvement**, but not to the required level, or there are significant extenuating circumstances, they may decide to extend the duration of the **Formal Written Warning**. The extension should be reasonable to allow for further improvement but will not exceed **2 months**.

The review period will normally only be extended once, except in cases where the capability concerns are directly related to ill health and/or disability; in such cases, the Head of Organisational Development or, in their absence the HR Manager, may agree to subsequent extensions based on the individual circumstances of the case.

Redeployment

The HR adviser, in consultation with the Head of Organisational Development or HR Manager may decide that it is appropriate to consider redeployment to an alternative post within the Council, depending on the individual circumstances of the case.

In this situation, the employee will be issued with **notice of dismissal** while redeployment opportunities within the Council are explored.

An employee who is eligible for redeployment on the grounds of capability may apply for posts where the salary grade is the same as or lower than their current role. Where the employee is successful in securing a role on a lower grade, salary protection will not apply.

If the redeployment is on the grounds of **medical capability**, however, the employee may apply for a post of a higher grade where this would be a considered reasonable adjustment. If an employee is redeployed to a post of lower grade on the grounds of medical capability, the Head of Organisational Development may agree to salary protection for a period of two years.

The appointment to a post on the grounds of **medical capability** will be subject to satisfactory Occupational Health advice.

Posts will be advertised internally and the employee should apply vacancies for which they wish to be considered.

HR will maintain a list of all current redeployees and will notify them of all vacancies which arise in the Council, prior to the post being advertised externally.

Priority at selection for interview will be given to redeployees who demonstrate they meet the essential criteria for the post as set out in the Person Specification.

Redeployees will be given an interview ahead of other candidates. If the redeployment is successful an HR Adviser will meet with the employee and the new manager to identify any specific training needs and to draw up a specific induction programme. The HR Adviser will also meet with the new line manager confidentially to provide a summary of the capability concerns and any live warnings so that the support available to the employee can continue where appropriate.

In exceptional circumstances (e.g. where the employee has applied for a post but has not been notified of the outcome of the recruitment process) the Head of Organisational Development or HR Manager **may** agree to a short extension to the redeployment period of no more than **2 weeks**.

The redeployment period may also be extended in consultation with the Head of Organisational Development or the HR Manager in cases where the capability is a direct result of long-term illness or disability where an extension may be considered a reasonable adjustment.

If suitable alternative employment is found, it will be offered in writing, giving reasons for the redeployment and the possible consequences of refusing the offer.

The employee must be given sufficient time to consider the offer, which should not normally exceed **5 working days**. Refusal to accept an offer of suitable alternative employment will result in dismissal on the grounds of capability.

Dismissal

Where none of the options identified above are appropriate or achievable, the employee will be dismissed (with statutory notice) on the grounds of capability.

Where the Head of Team determines that the capability amounts to **gross incompetence**, the employee will be dismissed and receive pay in lieu of notice.

In cases other than gross incompetence, the Head of Team in consultation with HR will determine whether it is appropriate for the employee to work their notice or whether the employee should be paid in lieu of notice.

The decision will be based on the nature of the capability concerns and the risks to the Council should the employee remain in post for the duration of their notice period.

13.8 Right of Appeal

An employee may appeal against a decision made at a **Stage 1 – Formal Capability Meeting** or at a **Stage 2 – Formal Capability Hearing**. There is no right of appeal against a management decision made at the informal stage of the procedure.

There will not be a delay in implementing management decisions pending appeal, but they may be subsequently amended as a result of the appeal hearing.

As far as reasonably possible, the Appeal Hearing will be held within **28 calendar days** of the date the appeal notice is received.

The Appeal Hearing is not a re-hearing of the original meeting but should focus on the original decision and whether the procedure has been applied correctly.

Any appeal should be addressed in writing to the relevant Head of Team within **5 working days** of the date of the letter confirming the outcome of the meeting which is being appealed, clearly stating the grounds for appeal.

13.9 Appeal against the outcome of a Stage 1 – Formal Capability Meeting

An appeal against the outcome of a **Stage 1 – Formal Capability Meeting** will be heard by the appropriate Head of Team who will be supported by a representative of the HR Team to advise.

The employee has a right to be accompanied at the Appeal Hearing by a colleague or Trade Union Representative.

The chair of the **Stage 1 – Formal Capability Meeting** will attend the Appeal Hearing to present management case.

The Appeal Hearing will follow the process set out at **Paragraph 13.11** of this procedure.

13.10 Appeal against the outcome of a Stage 2 – Formal Capability Hearing

An appeal against the decision of a **Stage 2 – Formal Capability Hearing** will be heard by the Chief Executive, supported by a representative of the HR Team. The Chief Executive may delegate to an appropriate senior manager with no prior involvement in the case.

The employee has a right to be accompanied at the Appeal Hearing by a colleague or Trade Union Representative.

The chair of the **Stage 2 – Formal Capability Hearing** will attend the Appeal Hearing to present management case.

The Appeal Hearing will follow the process set out at **Paragraph 13.11** of this procedure.

13.11 Conduct of Appeal Meetings

The appellant will be given a minimum of **5 working days'** written notice of the Appeal Hearing.

Both parties should **exchange** documents which are to be relied upon at the Appeal Hearing no later than **3 working days** prior to the hearing.

The details of how documents should be exchanged will be included in the letter informing the appellant of the details of the Appeal Hearing.

The appellant (or their representative) will outline the reasons for the appeal setting out any mitigating circumstances they wish the panel to consider.

The Chair of the Appeal Hearing and/or the HR Adviser may ask the appellant questions to clarify anything which has been raised in the documentation supplied prior to the Appeal Hearing or verbal statements made during the Appeal Hearing.

The manager will have an opportunity to ask the appellant questions.

The Chair of the Appeal Hearing will ask the management representative to present their case, including confirming the basis on which the original decision was made.

The Chair of the Appeal Hearing and/or the HR Adviser may ask the presenting manager questions to clarify anything which has been raised in the documentation supplied prior to the Appeal Hearing or verbal statements made during the Appeal Hearing.

The appellant will have the opportunity to ask the management representative questions relating to either documents which have been submitted or verbal presentations made during the Appeal Hearing.

Both parties should be offered the opportunity to summarise their case.

The Appeal Hearing will adjourn while the Chair of the Appeal Hearing considers the information available to them and takes advice from HR.

The Chair of the Appeal Hearing should consider the following in reaching their decision:

- Have the requirements of the procedure been properly complied with?
- Was the manager's decision reasonable based on the evidence relating to the case?
- Have any mitigating circumstances put forward by, or on behalf of, the employee been considered fully?
- Were the concerns sufficiently serious to justify the sanctions imposed?
- Is the treatment of the appellant consistent with City Council's general approach to similar cases?
- Has the matter been handled fairly and appropriately?
- Is there any new evidence, which if known at the time, would have altered the decision?
- In appeals against dismissal, have all reasonable alternatives to dismissal been considered?

When the appeal is against the decision to dismiss, the Chair of the Appeal Hearing should consider the working relationship between the employee, the manager and the team concerned.

It may be appropriate to consider whether the appellant should be reinstated (i.e. return to the post from which they were dismissed) or whether it is more appropriate in the circumstances for them to be re-engaged (i.e. moved to a reasonable, alternative role within the Council where a suitable vacancy exists.)

The decision to re-engage the appellant into an alternative, existing vacancy will only be taken once the Head of Organisational Development, or in their absence the HR Manager, has been consulted. The appellant must be able to demonstrate they meet the essential criteria for the proposed role and any offer of alternative employment must be subject to satisfactory medical clearance.

The Chair of the Appeal Hearing should consider whether mediation would be beneficial to support the reintegration of the appellant into the workplace.

The appellant will be informed verbally of the outcome of the Appeal Hearing, which will be confirmed in writing within **5 working days** of the hearing.

Appendix 1: Record of Informal Discussion
PART A

Employee:	
Manager:	
Date of Interview:	

Summary of Key Points Discussed:

Signed: _____ Manager

Signed: _____ Employee

Now complete Part B overleaf

DRAFT

PART B

PERFORMANCE IMPROVEMENT PLAN

IMPROVEMENT NEEDS	ACTION STEPS REQUIRED	SUPPORT/TRAINING REQUIRED	TARGET DATE
What specific improvement/development needs have been identified?	What improvements/developments are to be taken and by whom?	What other support/training is required to enable the employee to achieve the target?	When should each action be completed?

DRAFT

Appendix 2: Deciding whether an adjustment is reasonable

When deciding whether an adjustment is likely to be reasonable to support an employee with a disability, the manager should consider the following issues:

The effectiveness of the step in preventing the disadvantage

- An adjustment is unlikely to be reasonable which achieves little benefit to the employee
- However, if the adjustment is of some benefit, but is part of a number of adjustments, which together are effective, it is likely to be reasonable to have to make it.

The practical implications

- An adjustment is likely to be reasonable for an employer to make if it is relatively easy to make the adjustment.
- For example: it may not be practical to adjust the physical access to the building but it may be practical to consider an alternative office for a short period, such as using a less convenient entrance, following consultation with the employee.

The financial implications

- If an adjustment costs little or nothing and is not disruptive, it would be considered reasonable unless some other factor made it unreasonable.
- Managers should take into account what the Council might spend in the circumstances if they did not make the adjustment (e.g. it would be reasonable to spend at least as much on an adjustment to retain the employee with a disability as would be spent on recruiting and training a replacement).
- In some cases, external funding may be available from Access to Work
- The financial resources for the whole Council, rather than a specific team would be taken into account to determine whether an adjustment is reasonable.

Significance of the value of the employee's experience and expertise

- Consider the amount of resources (such as training) invested in the individual by the employer.
- Consider their length of service both with WCC and local government.
- Consider their level of skill and knowledge.
- If there is a significant cost attached to the adjustment(s), it is more likely to be reasonable where this is for someone who is likely to be in the job for some time more than a temporary employee.

Availability of financial assistance to help make an adjustment

- Availability of outside help (e.g. advice and assistance from Access To Work) may be a factor to consider.
- If equipment has been supplied through Access To Work in a previous employment it is reasonable to expect the employee to bring the equipment with them.
- The disabled person is not required to contribute to the cost of the workplace adjustment but if the person is already has a particular piece of equipment it would be reasonable to allow the use of such equipment and it might make it reasonable for the employer to have to consider another adjustment, (e.g. any costs associated with repairs or software updates).

Extent of the disruption to existing staff and service provision and other factors

- An employer is more likely to have to make an adjustment which might cause only minor inconvenience to other employees, or the employer, than one which might unavoidably prevent other employees from doing their job, or cause other significant disruption.
- Adjustments already made for other disabled employees need to be considered.
- The extent to which the disabled person is willing to co-operate is a significant factor.
- Health and Safety considerations are vital - if making the adjustment would increase the risk of health and safety to the disabled person or any other person, then it may not be reasonable to make the adjustment. It may be appropriate to conduct a risk assessment to determine the likelihood and severity of risk to enable a view to be reached.