

# Capability in the Workplace Policy v0.2

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## 1. PURPOSE

This policy is to be used when the performance of an employee has been identified as falling below the acceptable standard. The capability policy aims to enable managers to address capability concerns with employees by stating clear standards and providing an improvement plan, so performance can be improved. The policy will provide a framework to support the employee to resolve performance concerns in a fair and supportive way. In circumstances where performance does not improve even with reasonable measures and support from managers, this policy alongside the practice notes will provide guidance on how to progress with the formal stage of the capability process including the hearing stage and any potential outcomes that may be considered at a capability hearing.

## 2. SCOPE

This policy applies to all council employees except for teachers and staff working in schools who have their own local management and policies. Capability concerns for agency workers should be addressed through Matrix, the Council's temporary staffing system to inform the locums agency or directly to an alternative agency provider. Managers should use the [probation policy](#) for employees who are currently on probation and have capability concerns. For employees who are currently on long-term sickness and are unable to return to their normal duties, the manager should refer to the [sickness policy](#) and [practice notes](#) when managing capability during sickness.

## 3. GENERAL PRINCIPLES

This policy sets out the general principles that should be followed when dealing with capability concerns.

- Managers are responsible for setting standards and monitoring the progression of performance improvement as soon as performance concerns become apparent. This will include scheduling a meeting with the employee to address the concerns and provide a plan to support the employee. Where an employee has long-term condition or disability, the support plan should include any reasonable adjustments such as alterations to the workstation and if applicable, using occupational health and/or access to work to offer a guidance for adjustments within the workplace.
- Managers are responsible for ensuring that all employees being managed under the capability policy are informed in writing of the concerns and given the improvement plan with agreed reasonable timeframes for improvement.
- Managers are expected to monitor and review performance regularly and where necessary, progress to a formal procedure if performance improvement has not been made.
- Employees are required to fully engage and work with their manager during the capability process. Refusal to do so, could be considered a conduct issue and be managed through the disciplinary procedure.
- Employees should ensure they understand what is expected of them related to the performance improvement and seek clarification where required.

- The Council will make every effort to deal with capability concerns as quickly as possible and at the appropriate management level.
- Any grievances raised during Capability procedures will be managed in line with the Grievance Policy (**see section 10 of this policy**).
- All employees who are the subject of this procedure have the right to be accompanied at formal meetings (**see section 7 of this policy**) by a recognised trade union representative or work colleague. It is the employee's responsibility to make these arrangements.
- All parties involved in this procedure must ensure that they maintain the confidentiality of the process within and outside the Council.
- All capability records will be treated as confidential and will be kept in line with the data protection guidelines.
- If at any stage within this procedure, it becomes clear that the performance concern relates to misconduct, the matter will be addressed in line with the [Disciplinary Policy](#) and the capability process will cease.
- Implementation of any stage of the formal capability procedure will be discussed first between the line manager and the HR Employee Relations Team.
- A member of the HR Employee Relations team will be consulted and provide advice on formal procedures.
- An employee will have the right to appeal against an outcome imposed under the formal capability procedure. Warnings issued will remain in place pending the outcome of any appeal and to be kept for a reasonable period in line with the GDPR.
- The Council will provide coaching and support to all Head of Services, Managers and Supervisors related to this policy and periodically offer training through formal learning and development training events.

#### **4. NEGLIGENCE AND CAPABILITY**

Negligence can be an action undertaken by an employee, which results in harm or injury, this may be due to inadequate training, mistakes, or deliberate action of refusing to follow instructions. It is important to identify if the negligence was linked to capability (unable to do something) or misconduct (unwilling to do something). All negligence actions that are related to misconduct must be referred to the [Disciplinary Policy](#).

#### **5. DEFINITION OF CAPABILITY AND REASONABLE MEASURES**

Capability management is the process of managing performance when the employee is unable to perform at the standard required for the role. Managers should have an informal discussion with the employee when underperformance is identified. It is important to differentiate between misconduct and underperformance to make an informed decision on how to manage the case. Underperformance related to misconduct is linked to behaviour or attitude from the employee towards the duties at work, for example not following instructions or refusing to complete tasks, when asked. Whereas capability is related to the employee not being able to complete a task because of lack of ability, health or external factors that would have a negative impact on how the employee performs at work. When it has been identified as underperformance due to

capability, the manager and the employee should put a plan in place to resolve the underperformance as such offering necessary training, flexible working adjustments, refer the employee to occupational health and/or request for the employee to self-refer to access to work for further advice and guidance.

### **5.1 Protected Characteristics**

It is important for all council officers to be aware of the protected characteristics and to be able to identify the differences of colleagues at work in line with the legislation. The Equality Act 2010 provides a framework to protect individuals from unfair and discriminatory treatment in and out of the workplace. Being aware of the protected characteristics can help managers in identifying potential barriers at work and provide reasonable adjustments for employees.

The protected characteristics under the Equality Act 2010 are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex, and sexual orientation.

### **5.2 Reasonable Adjustments**

Reasonable adjustments are changes or adaptations which help to remove or reduce disadvantages for an employee with a known disability or long-term health condition. It is important to identify what would be a reasonable adjustment for the employee and establish the feasibility of such changes within the workplace. The manager is required to communicate with the employee, discuss with medical professionals such as the occupational health team and where necessary, request the employee to apply for a workplace assessment report from access to work to ensure that, where possible, reasonable adjustments are made in the workplace to enable the employee to do their role up to an accepted standard. Further guidance on how to manage reasonable adjustments is provided in the [Reasonable Adjustment and Access to Work Guidance](#).

### **5.3 Occupational Health Referral**

The Occupational Health provider used by the Council is PHC Healthcare Ltd, and if a manager wants to refer an employee to Occupational health, the manager must discuss this first with the employee and fill in an OH management referral form. The manager will email the form to the provider.

Employees who have been referred to OH, has the responsibility to attend the appointment or reschedule the appointment at least 48 hours before the scheduled appointment. The employee needs to prioritise the OH appointment and ensure they give sufficient time to travel to the appointment. A charge of £195 will be made for each missed occupational health appointment. Further information on [Occupational Health referrals](#) can be found on the intranet.

## **6. STANDARD-SETTING**

Capability concerns may be resolved through day-to-day management interventions. The line manager should take every opportunity to promptly raise concerns informally by discussing with the employee to establish the reasons of underperformance. It is important for managers to keep a note of meetings where such discussions have taken place. By providing examples of where performance has been unsatisfactory, clarify the standard required for performance and manage any challenges that the employee may be facing at work (standard-setting meeting). If it is identified the performance concern is related to the employee's personal life, the manager should encourage the employee to contact Employee Assistance Programme and agree on a timescale with the employee in which expected performance will be restored and provide reasonable adjustments such as flexible working, where appropriate.

### **6.1 Outcome of the standard-setting meeting**

The employee should be given sufficient time to demonstrate performance improvement. The manager should confirm the agreed outcomes of any discussions in writing to the employee; a form is attached on the practice notes. The Improvement Plan should include measurable objectives, expectations, and timescales for review. The timescale for the standard setting is a minimum of 1 month and a maximum of 3 months before proceeding with the formal capability process.

### **6.2 Regular meetings**

Managers are required to have regular supervision meetings with the employee during the standard setting stage and formal stages of the capability process. The recommendation is weekly supervision meetings within the 1 to 3 months' timeframe depending on the nature of the work and the requirements. At the end of the standard setting, managers must schedule a meeting to discuss the progress and next steps. The manager may progress to the formal stage earlier than expected if the employee has not achieved their performance requirement during the review period or does not maintain their performance within 12 months after the capability case has been closed. The manager should keep all the written notes and documentation of all the meetings they have with the employee and provide copies to the employee of what has been agreed. If the employee's performance has improved to the standard required, then the capability case will close. Should the employees' performance fail to improve after reasonable support and adjustments (if needed) are made, the manager will notify the employee during supervision meeting that the capability process will move to the formal stage and invite the employee for a first formal capability meeting with a minimum of 5 working days.

### **6.3 Underperformance due to misconduct**

If it becomes apparent that the performance concern is conduct-related issue rather than capability, the manager should refer to the [Disciplinary Policy](#) and start the preliminary investigation before proceeding with the formal disciplinary process. Managers are recommended to check the [code of conduct](#) for behaviours and actions that would be managed under the Disciplinary Policy instead of Capability.

## **7. RIGHT TO BE ACCOMPANIED**

The employee has the statutory right to be accompanied at any formal stage of a capability process, they may be accompanied by a work colleague, a trade union representative, or an official employed by a trade union.

For the informal capability processes, the employee does not have the right to be accompanied but may be accompanied by a work colleague for support. Legal representation is not appropriate or allowed for the capability process.

## **8. FORMAL CAPABILITY PROCESS**

### **8.1 First Formal Meeting**

If the employee has not improved their performance after the standard-setting meeting, the next step would be to invite the employee to a first formal meeting. During this meeting, the manager will outline the areas of concern/underperformance, the improvement plan and any support and reasonable adjustments provided in the standard setting stage. The manager will inform the employee why they do not feel performance has reached an acceptable standard. The employee and their representative will have the opportunity to respond and outline any contributing reasons.

During this meeting, the manager should discuss the following:

- Notes from the standard-setting meeting and what was not achieved
- Identify the causes of continuing poor performance and if any further support can be provided
- Targets and what needs to be achieved or improved
- If there is any, the impact the underperformance has on the service and other colleagues
- Reasonable adjustments
- Setting review periods for the employee to reach the required standard
- Considering redeployment for employees with permanent medical conditions, in consultation with Occupational Health
- The employee should be made aware of possible outcomes if they fail to achieve and maintain the required standards.

### **8.2 Outcome of First Formal Meeting**

Following the first formal capability meeting, the manager should implement an improvement plan with reasonable timescales. The outcome of the meeting may be:

- No formal action (continue to manage informally and regular review the improvement plan)
- Issue a first formal warning with monitoring period of 6 to 12 months with a review period of 1 to 3 months.
- Agree on a performance improvement plan with timescale and regular reviews.

In the outcome letter for the first formal meeting should include what was discussed, the improvement plan, review period, next steps in the process and if applicable, the first formal warning and how long it will be in place for. The manager should deliver the outcome in writing within 5 working days.

During the review period, the manager is required to have regular meetings with the employee to review performance and provide regular feedback, this should be completed weekly. At the end of the review period, the manager must review performance and decide if they will proceed with the second formal meeting or conclude the capability process, depending on whether performance has reached the required standard. However, If the employee continues to underperform during the review period, the manager, in consultation with the HR Employee relations team, can invite the employee for a second formal meeting before the end of the review period. If the case closes after the review period due to the employee improving their performance, they will be monitored for 12 months and if their performance falls below the standard required, they will be invited to a second formal meeting.

### **8.3 Second Formal Meeting**

If the manager decides to proceed with the second formal meeting, they will inform the employee during the supervision meeting and send out the invite for the meeting. During second formal meeting, the manager will provide feedback on what was agreed in the first formal stage and why the employee has been invited to a second formal meeting. The employee and their representative will have the opportunity to comment on any feedback given by the manager and discuss any challenges, support and training needed to support the employee's performance improvement.

During the second formal meeting, the manager will discuss the following:

- The previous plan and targets
- What was not achieved
- Setting review periods for the employee to reach the required standard
- What if any, impact the underperformance has on the service and other colleagues
- Considering redeployment for employees with permanent medical conditions, in consultation with Occupational Health.
- Further reasonable adjustments, if needed
- The employee should be made aware of possible outcomes if they fail to achieve and maintain the required standards.

### **8.4 Outcome of the Second Formal Meeting**

Following the second formal capability meeting, the manager should revise the improvement plan with new reasonable timescales. The outcome of the meeting may be:



- No formal action (continue to manage informally and regular review the improvement plan)
- Issue a second formal warning with monitoring period of 6 - 12 months with review period of 1 to 3 months.
- Agree on an extension of the performance improvement plan

The outcome letter for the second formal meeting should include what was discussed, the improvement plan, review period and if applicable, a second formal warning and how long the warning will be in place. The manager should deliver the outcome in writing within 5 working days.

During the review period, the manager is required to have regular meetings with the employee to review performance and provide regular feedback, this should be completed weekly. At the end of the review period, the manager must review performance and decide if they will proceed with the capability hearing or conclude the capability process, depending on whether performance has reached the required standard. However, if the employee continues to underperform during the second review period, the manager, in consultation with the HR Employee relations team, can invite the employee for a capability hearing before the end of the review period. If the case closes after the review period due to the employee improving their performance, they will be monitored for 12 months and if their performance falls below the standard required during that period, they will be invited to a capability hearing.

## **9. CAPABILITY HEARING**

### **9.1 Invitation to Hearing**

The employee will be informed verbally during the supervision meeting and notified in writing of the date of the Capability Hearing. The invitation will be sent at least 5 working days before the hearing date. The invite will include the name of the manager chairing the hearing, the capability concerns and enclose all relevant documents including outcome letters from the previous meetings. A member of the HR Employee Relations team will be present at the hearing. The manager chairing the formal capability hearing must be senior to the manager who carried out the first and second formal meeting. The capability hearing must be chaired by an Assistant Director if one of the potential outcomes of the hearing is dismissal. The employee will be invited to submit evidence and/or written statements to the HR Employee Relations Team at least 2 working days before the Capability hearing.

### **9.2 Purpose of Hearing**

The purpose of the hearing will be to:

- Review the case and history of the capability process

- Invite the employee to make comments about the underperformance
- Take notes of the employee's and the manager's comments.
- Explore other factors before deciding on the outcome.
- Issue an outcome which may be a warning for first formal capability hearing, redeployment, or dismissal in the event of second formal capability hearing.

The Chair should keep notes of the hearing and provide an outcome letter to the employee within 5 working days. The hearing will be recorded unless the employee gives a minimum of 2 days' notice that they do not wish it to be recorded. It is the responsibility of the Chair to provide a suitable notetaker for the hearing if the employee refuses for the meeting to be recorded. For information about the capability hearing process please see the practice notes.

### **9.3 Rearranging Hearings**

If the employee or their representative cannot attend at the hearing scheduled date, the employee must inform their line manager and/or the HR Employee Relations team immediately and an alternative time may be arranged. The employee must make every effort to attend a hearing. If the employee fails to attend without giving a good reason or is unable to attend the re-arranged hearing, the hearing may be heard in their absence on the available evidence. The chair of the hearing may decide on the request of the trade union representative to represent the employee in the capability hearing if the employee is unable to attend.

### **9.4 Capability Hearing Outcomes**

The Chair will consider all the information given by the manager such as the improvement plan, support, training, and any reasonable adjustments for the employee were adequate. Also, the Chair will consider any mitigating factors to support the employee's evidence. After reviewing all the evidence, the Chair will decide on the capability case outcome, the outcome may include:

- A decision to take no further action
- Issue a capability warning active for six to twelve months
- Permanent redeployment to a suitable role if the employee has a disability or long-term condition, for this outcome the chair should review the organisational change policy for redeployment process.
- Extension of an improvement plan for maximum of 6 weeks
- Termination of Employment on the grounds of capability (In the event this is a second capability hearing and considering the previous sanction)

The chair should consider all alternative outcomes to dismissal including redeployment. When considering redeployment, the chair must consider the ability of the employee to be able to perform in the alternative role, pay protection if the role is less senior to the current role and any potential impact on the employee's contract of employment, following the **Organisational Change Policy Section 8 Redeployment Process**.

The employee can refuse to be redeployed, however, the only alternative available is usually dismissal. Any dismissals will be with full notice in line with the employee's contract and payment will be made in lieu of notice. In cases where an employee has had a previous hearing and breached the outcome such as a warning, a second formal capability hearing can be scheduled. The steps in **section 8.1** should be followed and assistant director should chair the hearing as the outcome could be dismissal.

The outcome of the capability hearing will be communicated to the employee in writing within 5 working days of the decision. The outcome letter will set out what was discussed, the reason for the decision, why other options were not appropriate including any mitigation and the outcome of the hearing. It will also give information on how the employee can appeal the decision. Enclosed with the outcome letter will be a transcript of the hearing recording or a copy of the meeting notes.

### **9.5 Dismissal Hearing for Chief or Deputy Chief Officer**

A Chief Officer (defined as a postholder who reports directly to the Head of Paid Service, i.e., a Director) or a Deputy Chief Officer (defined as a postholder who reports direct to a Chief Officer, i.e. an Assistant Director or any other post that reports to a Chief Officer) may only be dismissed by a panel of Members.

When a hearing is due to take place where the realistic outcome may be dismissal, the case must be heard by a Member panel and not by an Officer panel.

The HR Employee Relations Team will liaise with the Committee Services team to arrange the date, time and venue for the hearing and will confirm the names of the Members who will form the panel.

The process and timescales for Member hearings will normally be the same as for Officer panel hearings but will be subject to the diary commitments of Members.

The hearing will be recorded, and a transcript provided to the employee. The relevant Cabinet member may be invited to attend the hearing, but they may vote only as a substitute member for one of the substantive members of their Group on the Panel (not in addition).

To be quorate, there must be at least 3 members in attendance.

## **10. APPEAL PROCESS**

### **10.1 Appeal Hearing for Officers**

The employee may appeal the outcome of the capability hearing. Appeals lodged against an outcome less than dismissal will be reviewed by an officer of more senior level than the officer who chaired the Capability hearing. Appeals against Dismissal will be heard by a panel of members.

## 10.2 Grounds of Appeal

- The process is unfair.
- Any part or the overall process of the formal capability was unreasonable.
- The evidence presented in the hearing is not substantiated.
- The employee believes the decision at the capability hearing is unduly harsh.
- New evidence to be presented by the employee.
- Failure to implement reasonable adjustments.

Appeals must be submitted no later than **10 working days** after the date of the final decision/dismissal letter and appeals are to be held normally **no later than 20 days upon receipt of the appeal**. Details on how to appeal will be provided in the outcome letter. The decision of the appeal panel is final. A member of the HR Employee Relations team will provide HR advice to the panel. The employee is entitled to be represented at the appeal hearing by a workplace colleague or Trade Union Representative.

## 10.3 Appeal Hearing for a Chief or Deputy Chief Officer

As with other employees, an appeal lodged against the decision to dismiss must be heard by a Member panel. The dismissal appeal panel for Chief and Deputy Chief Officer hearings must be a different panel to the one involved in the original dismissal decision. As with all other hearings, the Member appeal panel hearing will be recorded, and a transcript provided to the appellant in line with the policy.

Details on how to appeal will be outlined in the outcome letter, an appeal must be received by the HR Employee Relations team no later than **10 working days** after the letter confirming the outcome of the hearing has been received.

## 11. GRIEVANCE DURING CAPABILITY

There is no legal requirement that a capability process should be postponed whilst responding to a grievance raised by the employee. The process to respond to a grievance should be followed as detailed in the [Grievance Policy](#).

The manager has three options that they can follow to ensure that the grievance is responded to:

- Dealing with the grievance separately from the capability process
- Temporarily placing the capability process on hold whilst responding to the grievance
- Managing both the Grievance and Capability together

Managers should consider that temporarily placing the capability process on hold can give them enough time to properly investigate and consider the grievance. However, underperformance is likely to persist while the grievance is investigated. Depending on the nature of the grievance and its relationship to the capability process, it may be appropriate to handle both at the same time. It is important to ensure that both processes are managed properly, and that the manager keeps a written record of all processes followed.

## 12. OTHER CONSIDERATIONS

Any attempts to hinder the capability process will be considered a conduct issue and dealt with appropriately under the [disciplinary procedure](#). Should an employee choose to resign to circumvent the capability process, they may be required to serve a notice period. In this case, all efforts should be made to conduct and conclude the capability process before the end of their notice period. In the event the process is not concluded, it may be taken into account in the event the colleague applies to re-join Haringey Council as an employee within 12 months.

Where it is not possible to hold a face-to-face meeting under this procedure, the Council will conduct the process remotely. The employee and their representative will have to access [MS Team guidance](#) on the intranet to be able to access the meeting and hearing remotely. Their rights will not be affected, and the Council will ensure that the procedure remains fair and reasonable.

If the employee has a disability that may have an impact on their ability to participate fully in this process, they should inform the Employee Relations team who will consider appropriate reasonable adjustments.

Capability concerns will be dealt with sensitively and with due respect for the employee involved. Any information communicated during the capability policy must be treated as confidential.

## 13. FURTHER REFERENCES

Capability Policy Practice Notes

Reasonable Adjustments and Access to Work

Flexible working policy

Sickness Absence Policy

### Document Control

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<b>Key Information</b>
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