

Background

1. This procedure is designed to assist in addressing issues of employee capability as opposed to misconduct, which is covered by Cherwell District Council's Disciplinary Procedure.
2. Procedures are necessary for encouraging fairness and consistency in the treatment of people at work. It is recognised that the onus is on managers to assist employees in reaching appropriate standards of performance by ensuring that effective systems for recruitment, induction, training, performance monitoring and managerial support are in place. These should reduce the need for the Capability Procedure to be used.
3. The day to day supervision of employees is part of the normal managerial process and is outside the scope of this procedure. Any shortcomings should be brought to the employee's attention as soon as possible in an effort to achieve an improvement in an informal way.
4. Once informal measures have been used, and there is still no improvement in performance, managers should consider taking action under either the Capability or Disciplinary procedure.
5. The Capability Procedure applies in cases where an employee is not meeting the required standards of performance due to a lack of ability, where there is no evidence of deliberate misconduct by the employee. The issue is rather one of a lack of capability due to lack of skill, experience, knowledge or aptitude.
6. In some cases there may be an element of culpability and therefore the Disciplinary Procedure is more appropriate. For example, a situation where a measure of personal blame is involved, arising from lack of motivation or inattention. A member of the Human Resources team will be involved in determining which procedure is more appropriate in each individual case.

Who does the procedure apply to?

7. The procedure applies to all employees, including those who are on a temporary or fixed term contract except:
 - the Chief Executive, Monitoring Officer and Section 151 Officer who are covered by separate arrangements.

- Employees who are under probationary periods who are covered by a separate policy.

Use of the Procedure

8. Before using the Capability Procedure, a manager should consider whether an employee's poor performance might be health and/or disability related and whether reasonable adjustments should be made in accordance with the Disability Discrimination Act 1995. The advice of the HR team should be sought at the earliest opportunity.
9. It may still be necessary to follow this procedure but this will be, as far as is reasonably practical, in the context of having clarified the extent to which the employee's health is affected by his/her work (or vice versa). The policy on Sickness Absence should also be referred to.
10. While it is necessary to have formal procedures to address performance issues that have not been resolved, it should be recognised that an employee may find his/her situation uncomfortable or distressing. Personal support for employees is available from the Trade Union or may be made available from other sources.
11. Tact, honesty and clarity are essential. Depending on the individual circumstances it is important to keep an open mind in terms of alternative solutions. This could include considering whether it might be mutually beneficial for an employee to work in a different work area or in a less senior role, either through demotion (where there would be no salary protection) or redeployment (where the Pay protection policy will apply). The overarching aim is to achieve satisfactory service delivery while, where reasonably practical, retaining the employee in the Council's employment.
12. During the formal stages of the Capability Procedure the employee has a right to be accompanied by a trade union representative or work colleague. In addition, the employee has a right to call witnesses.
13. An employee has the right of appeal against any formal decision taken under this procedure or related action.
14. An employee will be given a copy of this procedure before any meetings about his/her capability under this procedure take place.
15. All matters relating to this procedure must be treated as confidential by all parties.
16. Before meeting with an employee under this procedure, the manager should discuss the situation with HR and gather evidence to demonstrate:
 - What are the issues causing the concern, e.g. detail examples of poor service delivery, lack of accuracy, significant mistakes etc?
 - How and when has this been raised with the employee?

- Has consideration been given to any health/disability or personal/domestic issues affecting performance and action taken?
 - How have the issues causing concern been addressed, e.g. further training, mentoring, shadowing, issue of written procedures, extra supervision etc?
 - Other factors which might have a bearing on the situation such as personal circumstances/responsibilities, changes at work etc.
 - What personal support has been offered to the employee?
 - How has the employee responded?
 - How long the staff members performance has been at an unsatisfactory level and the effect any remedial action has had.
17. Where the HR Manager is satisfied that suitable performance management techniques have been followed and there has been no significant improvement in the employee's performance, a capability hearing should be arranged to include the employee, his/her immediate line manager (or more senior manager as appropriate) and an HR Manager (as appropriate), under the Capability Procedure.

Before the hearing

18. The employee must be given at least five clear working days' written notice of a hearing, the intention being to agree a mutually convenient date. The notice must inform the employee of the allegations and their basis and the fact that they will have the right of appeal and to be accompanied. Where appropriate and practical, the appropriate trade union will be informed of the date of the hearing. In any event, it is important to hold the hearing as soon as reasonably possible. A copy of the evidence will be issued with the notification letter and to the employee's representative where appropriate.
19. In the written notice of the hearing the following will be made clear:
- that s/he is required to attend a capability hearing under the procedure
 - the reasons for the hearing, including the specific issues to be addressed and all supporting evidence
 - the time and place of the hearing
 - the right to be represented or accompanied by a trade union representative or work colleague
 - that reasonable adjustments will be made to the arrangements for the hearing on request for employees with a disability or who require additional support.
 - Similarly, the needs of the employee's representative or any witnesses should be accommodated where reasonably practical.
 - That s/he will have the right to appeal.
20. If either party intends to present written evidence at the hearing, this must be received in time for management to circulate a copy to all interested

parties so that they can consider it fully before the hearing. The employee can request the hearing be delayed if additional time is needed to consider documentation. Where witnesses are to be called, by either side, these should be named to both sides before the day of the hearing. If any substantial new evidence appears at the hearing, an adjournment must be offered. All relevant papers must be given to all parties present.

The Panel

21. The panel hearing the evidence will be made up of 2 members of the Extended Management Team with a member of the HR team to provide policy advice. All panel members must be completely independent and have had no previous involvement with the case.

The Capability Hearing

22. At the hearing the employee must be reminded that it is part of the Council's Capability Procedure. In addition, the employee must be reminded of his/her rights under the procedure and the details of the reason for the hearing. The following should be discussed:
 - the reasons why action under the capability procedure has been initiated, including evidence of poor performance
 - background to the performance problem
 - what is agreed in terms of an improvement plan, how satisfactory performance is to be measured and the timescales for improvement and review
23. The employee or his/her representative must be asked to give his/her views and suggestions and to explain any factors which affected performance.
24. Having listened to this input, the chairman of the panel will decide on the appropriate action or sanctions to be taken.
25. The hearing will normally proceed in the following order: The Chairman will:
 - introduce those present at the meeting
 - invite the officer presenting the case to state it (including hearing any witness statements)
 - invite the employee or his/her representative to question the presenting officer on the statement
 - invite the employee or his/her representative to state his/her case (including hearing any witness statements)
 - invite the officer presenting the case to question the employee on his/her statement
 - invite other members of the Panel to put questions to either party and then ask his/her own questions
 - invite the officer presenting the complaint to summarise (no new evidence should be presented at this stage)

- invite the employee or his/her representative to summarise his/her statement (no new evidence should be presented at this stage)
 - ask both parties to withdraw
 - ask the Panel to consider the case and then the Chairman will come to a decision
 - call back both parties to announce the decision or to advise that a decision will be communicated in writing at a later date
 - advise of the right of appeal
26. The hearing is, of necessity, a formal meeting and therefore it is important to follow a sequence which allows all parties to participate fully and to gain a clear understanding of both the current position and what needs to happen in the future. However, the meeting should be conducted in a manner which supports and encourages the employee and reiterates the goal of achieving an effective improvement in performance.

Actions resulting from the hearing

27. After the deliberation at the conclusion of the hearing, the employee will be informed of the outcome and of any action to be taken. The outcome should be given as soon as possible and in any case within no more than five working days. It will be confirmed in writing.
28. The employee will be reminded of the right of appeal which must be made within 10 working days of the written outcome. The management notes taken at the hearing will be circulated to all parties with the written outcome. Any disagreement by the employee or his/her representative as to the accuracy of the record should be noted.
29. In concluding the capability hearing, the chair will consider carefully whether any further action is necessary apart from any relating to the individual, such as whether there is a need to review or change any working practices as a result of what has been presented.
30. Where a First Written Warning is issued, the following should be made clear in writing:
- the expectations in terms of 'satisfactory performance' – this should be clearly described
 - the measures which will be put in place to support and assist the employee in achieving a satisfactory improvement
 - when review meetings will be held
 - timescales
 - what will happen if the required improvement is not forthcoming.
31. A note of the outcome of the meeting should be agreed and signed by the manager and the individual and copied to the HR team to be placed on the individual's personnel file.

32. If an employee's performance does not improve in the stated period following a first written warning, a further hearing should be arranged after which, where appropriate, a Final Written Warning will normally be issued. A final written warning may also be appropriate after the first meeting under this procedure where an employee's shortcomings are exceptionally serious.
33. A final written warning will make it clear that any further failure to reach the required standards could result in dismissal. It is of course essential that any training or other support agreed as a means to assist the employee in achieving the desired outcome is delivered effectively and on time.
34. In addition to warnings under the procedure, action might include:
 - no further action where there is no case to answer
 - withholding increments or career grade progression until a satisfactory level of performance has been achieved
 - redeployment to an alternative post
 - demotion
 - dismissal

Dismissal

35. In cases where the employee's performance remains unsatisfactory despite warnings and the agreed support given, a further hearing will take place and dismissal will normally result. In some cases of gross incapability with no real prospect of improvement, and where there is no practical alternative, dismissal may be appropriate without prior warnings. In all cases the decision to dismiss requires the agreement of the Head of Human Resources.

Appeals

36. An employee has the right of appeal against capability. For first written warnings, this appeal will be heard by 2 independent Heads of Service.
37. In the case of a final written warning, dismissal or demotion the appeal will be heard by the Appeals Panel.
38. If an employee wishes to appeal against a capability decision, she/he should do so in writing to the Head of Human Resources within ten working days of the receipt of the written notification of the capability decision.
39. The outcome of the appeal will be notified either immediately after the hearing and confirmed in writing, or in any event by written notification within five working days of the appeal hearing.

Capability Records

40. Employees subject to action under the capability procedure will have access to their personal records in accordance with data protection legislation. After the satisfactory completion of any actions resulting from a capability hearing all records will be removed from the employee's personal file. The specified period of retention on this file will not normally be less than one month or longer than 12 months, other than in exceptional circumstances.

Financial Irregularities

41. Any investigation into financial irregularities when investigating an employee's performance must involve Internal Audit.

Trade Union Officials

42. Trade union officials are subject to the normal capability procedure. However, no formal action will be taken against a trade union official until the circumstances of the case have been discussed with a full-time officer of the union.

Probationary Period

43. There are separate procedures covering employees who are in their probationary period.

Review of the Procedure

44. The procedure will be monitored continuously and will be subject to formal review after three years by the Head of Human Resources in conjunction with the relevant trade unions.