

## Appendix 5



*Cherwell*

DISTRICT COUNCIL  
NORTH OXFORDSHIRE

# Capability Policy

## Appendix 5

### DOCUMENT CONTROL

<b>Organisation(s)</b>	Cherwell District Council (CDC)
<b>Policy title</b>	Capability Policy
<b>Owner</b>	Human Resources
<b>Version</b>	1.0
<b>Date of implementation</b>	1 December 2022

### DOCUMENT APPROVALS

This document requires the following committee approvals:

<b>Committee</b>	<b>Date of meeting pending approval</b>
Personnel Committee	17 November 2022

### DOCUMENT DISTRIBUTION

This document will be distributed to all employees of Cherwell District

### DATE FOR REVIEW

No later than 1<sup>st</sup> November 2025 but sooner if impacted by legislative changes.

### REVISION HISTORY

<b>Version</b>	<b>Revision date</b>	<b>Summary of revision</b>

## Appendix 5

### CONTENTS

1	Introduction	4
2	Exclusions	4
3	Principles	5
4	Responsibilities	5
5	Day to day management	6
6	Informal Stage	6
7	Formal Stage	7
8	First Stage	7
9	Second Stage	8
10	Third Stage	9
11	Formal Capability Hearing	9
12	Time Limit	10
13	Appeal	11
Appendix 1	Action Plan Template	
Appendix 2	Hearing order of proceedings	

# Appendix 5

## 1. Introduction

- 1.2 The Capability Policy provides a framework for dealing with cases where employees fail to achieve the performance standards expected of them due to lack of ability and where there is no evidence of deliberate misconduct by the employee.
- 1.3 The purpose of this procedure is to provide a framework within which managers can work with employees to maintain satisfactory performance standards and to encourage improvement where necessary. It provides employees with the opportunity to improve through a series of informal and formal stages. Failure to improve in a required timeframe could result in dismissal. Employees will not normally be dismissed for performance reasons without previous formal warnings. However, in serious cases of gross negligence, or in any case involving an employee who has not yet completed their probationary period, dismissal without previous warnings may be appropriate.
- 1.4 This procedure does not form part of any contract of employment or other contract to provide services and it may be amended at any time following consultation with trade union and subject to agreement from the Personnel Committee.

## 2. Exclusions

- 2.1 This policy applies to all employees of Cherwell District Council. However, the Council may depart from this procedure where appropriate (including but not limited to during an employee's probationary period). It does not apply to agency workers, consultants, self-employed contractors, volunteers or interns.
- 2.2 Those who are covered by a separate policy include:
- Chief Executive
  - Monitoring Officer
  - Section 151 Officer
- 2.3 The Capability Policy does not apply in the following circumstances:
- Cases of gross negligence will be dealt with in accordance with the Disciplinary Policy and Procedure.
  - Staff within their probation period will be subject to the Probationary Policy.
  - Cases of ill health should be dealt with in accordance with the Sickness Absence Policy.
  - Cases where the lack of capability may be due to disability or pregnancy, in which case advice should be sought from Human Resources.
- 2.4 Consideration should be made by managers as to whether an employee's poor performance might be health and/or disability related and whether reasonable adjustments should be made in accordance with the Equality Act 2010 to the employee's working arrangements, including changing their duties or providing additional equipment or training. The Council may also consider making adjustments to this procedure in appropriate cases.

## Appendix 5

### 3. Principles

- 3.1 All employees have a contractual duty to be competent and to perform their role in an acceptable way.
- 3.2 Where this is not happening, employers are entitled to intervene with a view to:
- Improving the performance of the employee informally first.
  - Invoking the formal process if no satisfactory improvement is made or where the matter is deemed very serious.
- 3.3 If an employee fails to reach the required performance standards as a result of carelessness, negligence or idleness this will not constitute a capability issue but will be managed through the Council's Disciplinary Policy and Procedures.
- 3.4 The timescales adopted for the various stages of this policy will vary in accordance with the seriousness of the problem, and the nature of the work carried out by the post holder.
- 3.5 If following formal capability action, the employee's performance improves to a satisfactory standard they will no longer be monitored in accordance with the Capability Policy. However, if further unsatisfactory performance occurs whilst the warning is still live this Policy will be re-invoked at the next stage.
- 3.6 Employees will have the right to be accompanied at all formal meetings by a trade union representative or colleague.
- 3.7 Employees will be made aware of their right of appeal against any formal action taken in this procedure.
- 3.8 Under the Equalities Act 2010 managers are required to consider, and where practicable, make reasonable adjustments for employees with a disability.
- 3.9 The Council will deal with performance matters sensitively and with due respect for the privacy of any individuals involved. All employees must treat as confidential any information communicated to them in connection with a matter which is subject to this capability procedure.

### 4. Responsibilities

#### 4.1 Managers are responsible for:

- ensuring that performance issues are addressed promptly, fairly, and consistently.
- clearly explaining the shortfall between the employee's performance and the required standards.
- providing regular feedback on work performance.
- establishing the cause of the poor performance and any action which can be taken to help improve the situation.
- making reasonable adjustments in cases where the employee is not performing their duties satisfactorily due to health reasons.

## Appendix 5

- identifying any support services which might be required (e.g. the identification of a mentor, training or coaching, referral to Occupational Health or Counselling).
- ensuring that reasonable time limits and clear and measurable targets are agreed with employees to achieve the required standard of performance. During these time periods, performance must be closely monitored and recorded, and employees advised of any shortcomings and the degree to which performance must be improved. This may include reviewing the amount of supervision needed.
- maintaining clear records of difficulties encountered, assistance given, and any actions taken.
- setting a date for a review meeting.

### 4.2 **Employees are responsible for:**

- ensuring that they are aware of their responsibilities in their role.
- performing their duties to the required standard.
- engaging in any training and development that will enable them to reach the required standard.
- responding to corrective measures that are identified.
- familiarising themselves with the Council's policies and procedures.
- informing their manager of any issues which could be affecting their work.

### 5. **Day to day management**

5.1 Employees have a contractual responsibility to perform to a satisfactory level and should be given every help and encouragement to do so as part of day-to-day management. Supervision should include opportunities for the manager to provide training, support and feedback to the employee about their performance against the job role and targets.

5.2 Where under-performance is identified the manager should seek to provide appropriate training and support to assist the employee to rectify this.

### 6. **Informal stage**

6.1 Wherever possible, managers should seek to address any individual or minor performance problems as they occur on an informal basis. Only in serious cases should the informal action stage be omitted.

6.2 The manager should record their own notes of informal meetings held with the employee to ensure that there is evidence of discussions taken place and actions agreed as a result of the meeting. Notes of any such informal discussions will be ignored for the purposes of any future capability hearings.

6.3 Where performance continues to be unsatisfactory after day-to-day management, then the manager should seek to agree an informal action plan (appendix 1) of performance improvements. This may be incorporated in the employee's appraisal or can be in a separate document. If following a review of the action plan the manager feels that the employee's performance is still below standard it will be appropriate to proceed with the formal stages of this policy. The manager should seek advice from Human Resources.

## Appendix 5

### 7. Formal Stage

#### 7.1 Stage One

#### 7.2 First Stage - formal capability meeting

7.3 If following informal assistance, the employee's performance hasn't satisfactorily improved, or where the matter is serious, the Council will undertake an assessment or investigation to decide if there are grounds for taking formal action under this policy. If so, the employee will be invited in writing to attend a first stage formal meeting, where a HR representative will also be present. The employee will be offered the right to be accompanied and should be given five working days' notice of the meeting and its purpose in writing. The letter must include full details of the areas of under-performance identified by the line manager and the reasons for those concerns so that the employee can prepare for the meeting.

7.4 During the meeting the performance against any previous informal action plan will be discussed. Any additional capability issues must also be fully discussed and considered. The manager and employee should agree an action plan based on SMART objectives (Specific, Measurable, Achievable, Realistic, Time bound).

7.5 The line manager will chair the meeting and will explore whether there are any reasons for the under-performance. If necessary, consideration should be given to carrying out a referral to Occupational Health in parallel to the monitoring period. Only in exceptional circumstances will the process be halted pending the results of an Occupational Health referral.

7.6 Following the meeting, the line manager must write to the employee within five working days, notifying them of the outcome. If it is decided that the employee's performance is unsatisfactory, the Council will give the employee a first written warning setting out the areas in which the employee has not met the required performance standards, targets for improvement, measures to be implemented (such as training required), a period of review and the consequences of failing to improve within the review period. After the active period, the warning will remain permanently on the employee's personnel file but will be disregarded in deciding the outcome of future capability proceedings.

7.7 The employee must also be given a date for a review meeting so that they are aware how and when their performance will be reviewed.

7.8 The line manager will monitor and assess the employee's performance for an appropriate period of time (long enough to overcome any barriers previously identified). The line manager will arrange regular feedback / 1-2-1 sessions, in private, and not wait until the end of the review period.

#### 7.9 First Stage - formal capability review meeting

7.10 At the end of the first stage monitoring period, the manager and a HR representative will meet with the employee to review progress. The employee will be offered the right to be accompanied and should be given five working days' notice of the meeting and its purpose in writing. The line manager will give a clear indication of the outcomes of the monitoring process, and identify any progress made and any further improvements needed. The

## Appendix 5

employee should be allowed to respond to the outcomes of the monitoring process and have the opportunity to ask questions.

- 7.11 The line manager must decide based on the discussions and progress what action is appropriate. Available options include:
- No further formal monitoring under the Capability Policy as the employee's performance has improved sufficiently. In this situation a record of the first stage capability action will be held on the employee file for a period of one year and if performance becomes unacceptable during this time then the second stage of the policy will be invoked.
  - Progression to the second stage of the Capability Policy if no significant improvement is evident.
  - An extension of the review period
- 7.12 The line manager must write to the employee informing them of the decision. If the second stage of the policy is to be invoked the letter should provide details of the further improvements in performance required and also set a date for the second stage review meeting. The letter should also warn the employee that if the required improvement in their performance is not achieved then following a stage two review they may progress to a formal hearing where one outcome could be dismissal.
- 7.14 The employee has the right of appeal against this decision; however, the second stage will commence immediately, and will only be halted in circumstances where an appeal is received.
- 8.0 **Stage Two**
- 8.1 **Second Stage - capability review meeting**
- 8.2 If the employee's performance does not improve within the review period set out in a first written warning / improvement note, or if there is further evidence of poor performance while the employee's improvement note is still active, the Council may decide to hold a Stage 2 capability meeting.
- 8.3 At the end of the second stage monitoring period the line manager and a HR representative will meet with the employee to review progress. The senior manager (line manager's manager) not involved in the first stage should chair the meeting. The employee will be offered the right to be accompanied and should be given five working days' notice of the meeting and its purpose in writing.
- 8.4 If the line manager decides that the employee's performance is unsatisfactory, the employee will be given a final written warning setting out the areas in which the employee has not met the required performance standards, targets for improvement, measures to be implemented (such as training required), a period of review and the consequences of failing to improve within the review period. A final written warning will normally remain active for 12 month. After the active period, the warning will remain permanently on the employee's personnel file but will be disregarded in deciding the outcome of future capability proceedings.

## Appendix 5

8.5 The employees performance will be monitored during the review period and the line manager will then decide based on the discussions and progress what actions are appropriate. Available options are:

- No further formal monitoring under the Capability Policy but a record of the Second Stage Capability Action will be held on the employee file for a 12 month period and if performance becomes unacceptable during this time then the Third Stage will be invoked.
- To extend the monitoring period, only in exceptional cases, where good improvement is evident, but the employee has just fallen short of the required performance standards.
- Progress to the Third Stage of the Capability Policy if no significant improvement is evident.

### 9.0 **Stage Three**

#### 9.1 **Formal Capability Hearing**

9.2 Where an employee has failed to reach the required standards of performance or conduct required for their position after previous stages of the Capability Policy, they should be invited to a formal capability hearing.

9.3 The Council may decide to hold a Stage 3 formal capability hearing if it has reason to believe:

- (a) the employee's performance has not improved sufficiently within the review period set out in a final written warning.
- (b) the employee's performance is unsatisfactory while a final written warning is still active, or
- (c) the employee's performance has been grossly negligent such as to warrant dismissal without the need for a final written warning.

9.4 The employee should be invited in writing to attend the capability hearing and be given five working days' notice of the hearing. The letter should state the reasons why they have fallen short of the required standards, the reasons for the concerns and should advise them that a possible outcome of the capability hearing could be dismissal.

9.5 Any documents or other evidence which will be considered during the capability hearing must be provided to the designated hearing manager and the employee at least five working days prior to the hearing. The employee will also be provided with, where appropriate: a summary of the relevant information gathered as part of any assessment or investigation and/or a copy of any relevant witness statements, except where a witness's identity is to be kept confidential, in which case the employee will be given as much information as possible while confidentiality is maintained.

9.6 The employee will have a right to be accompanied at the meeting by a work colleague or trade union representative. The employee's companion may make representations, ask questions and sum up the employee's case, but will not be permitted to answer questions behalf of the employee.

## Appendix 5

- 9.7 If the employees' companion is unavailable at the time a hearing is scheduled and will not be available for more than five working days, the Council may require the employee to choose someone else.
- 9.8 The Council may, at its discretion, allow the employee to bring a companion who is not a colleague or trade union representative (for example, a member of the employee's family) where this will help overcome a particular difficulty caused by a disability, or where the employee has difficulty understanding English.
- 9.9 The hearing will be chaired by an independent designated manager who will be assisted by an HR representative. Neither should have been involved in previous stages of the process.
- 9.10 The employee may ask relevant witnesses to appear at the hearing, provided the employee provides the Council with sufficient advance notice to arrange the attendance of the witnesses. The employee will be given the opportunity to respond to any information given by a witness.
- 9.11 If it is found that the employees' performance is unsatisfactory the Council may consider a range of options including:
- (a) dismissal (with full notice unless performance has been so negligent as to amount to gross misconduct)
  - (b) demotion or redeployment into another suitable job at the same grade
  - (c) extending an active final written warning and setting a further review period (in exceptional cases where the Council believe a substantial improvement is likely within the review period); or
  - (d) a final written warning (where no final written warning is currently active).
- 9.12 If there are reasons for conducting any capability hearing remotely (for example, by using remote working platforms or technologies), the Council will provide those reasons to the employee and notify the employee of the relevant arrangements and instructions for joining the capability hearing. The use of remote working platforms or technologies may not be appropriate (for example, where an employee has a hearing condition or does not have access to relevant equipment or software). In these cases, the capability hearing will take place in person where possible.
- 9.13 If the employee, or their witnesses, are unable to attend the capability hearing, they should inform the Council immediately so that an alternative date and time for the hearing can be arranged. An employee must make every effort to attend the capability hearing, and failure to attend without good reason may be treated as misconduct. If the employee fails to attend without good reason or are persistently unable to do so (for example, for health reasons), the Council may have to take a decision at the capability hearing based on the available evidence including any written representations the employee has made.

### 10. Time Limits

- 10.1 Copies of formal capability action will be held on an employee's personal file and will be marked as 'spent' after the following periods:

## Appendix 5

- Stage One - Capability action 6 months
- Stage Two - Capability action 12 month

### 11. Appeals

#### 11.1 Appeals against the first and second stages

11.2 Employees will be advised in writing about their right to appeal against the outcome of the first or second stage of the process. The letter will detail who the appeal should be addressed to. If the employee considers that a decision about poor performance under this policy and procedure is wrong or unjust, they should appeal in writing stating their full grounds of appeal to the Assistant Director – Human Resources. The employee's notice of appeal shall include a statement in writing of the grounds on which they wish to challenge the decision and must be made within five working days of receipt of the outcome.

11.3 Appeals against warnings shall be considered by the Assistant Director – Human Resources and assigned to an independent Manager.

11.4 Appeal hearings for warnings will normally take place within fifteen working days of receipt of the employee's written notice of appeal where possible.

11.5 If the outcome of the second stage is that the manager recommends the disciplinary policy is invoked, during the disciplinary process the employees will not be able to appeal in respect of this outcome. However, the employee will be able to appeal against any decision or sanction made at the disciplinary hearing.

#### 11.6 Appeals against the third stage formal hearing

11.7 Employees will be advised in writing about their right to appeal against the outcome of the third stage of the process. The letter will detail who the appeal should be addressed to. If the employee considers that a decision about poor performance under this policy and procedure is wrong or unjust they should appeal in writing stating their full grounds of appeal to Assistant Director - HR. The employee's notice of appeal shall include a statement in writing of the grounds on which they wish to challenge the decision and must be made within five working days of receipt of the outcome.

11.8 Appeals against dismissal shall be held in accordance with the appeals process as set out in the Council's Disciplinary Policy. The date on which dismissal takes effect will not be delayed pending the outcome of the appeal. However, if the employee's appeal is successful, the employee will be reinstated with no loss of continuity or pay.

11.9 Appeals against any other outcome of the third stage will be heard in accordance with the procedures for Stages One and Two.

11.10 If the employee raises any new matters in their appeal, the Council may need to carry out further investigation. If any new information comes to light, the Council will provide the employee with a summary including, where appropriate, copies of additional relevant documents and witness statements. The employee will have a reasonable opportunity to consider this information before the hearing.

## Appendix 5

- 11.11 The Council will give the employee written notice of the date, time and place of the appeal hearing. This will normally be two to seven days after the employee receives the written notice.
- 11.12 The appeal hearing may be a complete re-hearing of the matter or it may be a review of the fairness of the original decision in the light of the procedure that was followed and any new information that may have come to light. This will be at the Council's discretion depending on the circumstances of the employee's case. In any event, the appeal will be dealt with as impartially as possible.
- 11.13 Where practicable, the appeal hearing will be conducted by a senior manager who has not been previously involved in the case. A member of the HR team and manager who conducted the capability hearing will also usually be present.
- 11.14 A hearing may be adjourned if the Council need to gather any further information or give consideration to matters discussed at the hearing. The employee will be given a reasonable opportunity to consider any new information obtained before the hearing is reconvened.
- 11.15 Following the appeal hearing the Council may:
- (a) confirm the original decision.
  - (b) revoke the original decision; or
  - (c) substitute a different penalty.
- 11.16 The Council will inform the employee in writing of the final decision as soon as possible, usually within one week of the appeal hearing. We will aim to inform you of the final decision in person where possible. There will be no further right of appeal.

# Appendix 5

## Appendix 1 Action Plan

Development area	Specific requirement	Measure of success	Timeframe	Progress/comments

**Employee signature:**

**Date:**

**Manager signature:**

**Date:**

# Appendix 5

## Appendix 2

### Hearing Order of Proceedings

#### Opening

The designated officer should begin by explaining how the hearing will be carried out.

#### The Capability issue

At the hearing the line manager will explain the capability issues and the outcomes of the formal monitoring process.

#### Right to reply

The employee will be invited to respond to the management presentation and state their case. The employee should also be given a reasonable opportunity to ask questions and seek clarification.

#### Summing up

After questioning is completed the designated officer will summarise the main points of the discussion and will ask the employee to sum up and add anything further they wish to say.

#### Adjournment

The designated officer will then adjourn the hearing before a decision is taken about whether a sanction is appropriate. This allows time for reflection and proper consideration.

#### More matters come to light

If new matters come to light in the course of a hearing, not being matters which could have been previously raised by the employee, the hearing shall be adjourned if requested by either the management or the employee side to investigate the new facts and the hearing will be reconvened when this has been done. The employee will be given a reasonable opportunity to consider any new information obtained before the capability hearing is reconvened.

#### Penalty/Sanction

The designated officer will consider why any measures previously taken have not led to improvement and may identify whether there are measures that could be taken which may improve the employee's performance. If it is decided that, on the balance of probability, the employee's performance has been poor and is unlikely to reach an acceptable standard the appropriate sanction will be considered.

If dismissal is a possibility, the designated manager should also establish whether there is any likelihood of a significant improvement being made by the employee within a reasonable time and whether there is any practical alternative to dismissal, such as redeployment.

At the end of the hearing the designated officer should inform the employee of the outcome. The outcome of the capability hearing should then be confirmed in writing to the employee.