

## **STAFF CAPABILITY PROCEDURE**

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## INTRODUCTION

- 1.1 If employees are incapable of performing their duties satisfactorily, it is often inappropriate to apply a disciplinary procedure and to issue disciplinary warnings. The Capability Procedure has been drawn up as an aid to the process of identification of the reasons for unsatisfactory performance by employees, and helping them achieve the appropriate level of performance required for their posts within a reasonable time scale. It is important that this Policy is read in conjunction with other potentially relevant policies to ensure that the appropriate policy is being applied (for example, the Trust's Attendance Management Policy and the Disciplinary Procedure).

## SCOPE

- 2.1 The procedure applies to all employees of DRH
- 2.2 A separate disciplinary procedure is available for handling misconduct. Some elements of unsatisfactory or unacceptable work performance will be dealt with under the disciplinary procedure e.g. lapses in work standards, errors, negligence, unacceptable quality or quantity of work output; deliberate actions or wilfulness on the employee's part, for example, arising from a lack of motivation, inattention, idleness or deliberate under-performance, where a measure of personal blame is involved.
- 2.3 On occasion, it is not immediately clear whether some issues, for example, poor performance or persistent short-term sickness absence, fall into the scope of the capability or the disciplinary procedure/attendance policy. Line managers should take advice from Senior Managers and decide which is the more appropriate after weighing up all the circumstances. **The line manager will explain the reasons for their decision to the employee.**
- 2.4 The employee will be told which DRH procedure is being followed. If at any stage management has good reason to believe that an alternative procedure is more appropriate, then the process will be halted and the issue examined under another.
- 2.5 On occasions, a post-holder may identify a lack of capability themselves. Line managers should create an environment where individuals feel able to freely discuss their concerns and should be supportive in exploring how best to take forward any issues identified. Managers may ask for further advice from any appropriate source to assist with an assessment of a self-diagnosed lack of capability identified by a member of staff (e.g. from Occupational Health). The principles of this policy will apply where the manager agrees with the individual's assessment of his/her capability.

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## 3 GUIDING PRINCIPLES

- 3.1 The procedure has been drawn up to comply with the requirements of the Employment Rights Act 1996, the Employment Rights (Dispute Resolution) Act 1998, the Employment Relations Act 1999, Human Rights Act 1998 and generally in line with the good practice guidelines of the ACAS advisory handbook 'Discipline and grievances at Work'.
- 3.2 The procedure will be applied in a non-discriminatory way, irrespective of an employee's age, disability, gender, marital status, race, religion and sexual orientation.

- 3.3 **Some employees, such as those with learning difficulties, may need help in understanding this procedure.** Other employees may need a translator, a signer, an interpreter or help with reading or writing and they or their representative should contact an Senior Manager to assist with the necessary arrangements.
- 3.4 At all formal stages of the Capability Procedure, an employee will have the right of representation. Details of this right are given in section 9.
- 3.5 Capability issues will be treated as confidentially as possible, so that only those who need to know will be involved.
- 3.6 Issues involving health, safety and disability will be handled with particular sensitivity.
- 3.7 No employee will be dismissed on capability grounds without the appropriate stage(s) of this procedure being followed.
- 3.8 No formal action will be taken in respect of a recognised trade union representative until the case has been discussed with the appropriate full-time trade union official.
- 3.9 Before starting the formal procedure and at every stage, managers should consult an Senior Manager for advice to ensure fairness and consistency.
- 3.10 Throughout this procedure, it is assumed that any letter confirming a decision after a meeting or hearing is received by the employee on the second working day after it was sent.

#### **4. DEFINING THE TERM "CAPABILITY"**

'Capability' in the Employment Rights Act 1996 is defined as an employee's 'capability assessed by reference to skill, aptitude, health or any other physical or mental quality'. Management needs to take different approaches for the various issues which can arise under this definition. The frameworks in Sections 5 to 13 give details, as do the procedures in the attached appendices.

- 4.2 Lack of capability or loss of capability can arise for various reasons. It can be short or long term in its effects. Examples are:
- 4.2.1 Stress for any reason e.g. connected to any aspect of an individual's home or employment life
- 4.2.2 Promotion beyond ability
- 4.2.3 Appointment to a job that is inappropriate for the individual's skills or experience
- 4.2.4 Acquired disability or ill health
- 4.2.5 Development in job demands over the years or changes brought about by outside influences, such as new technology, or new work methods or legislation
- 4.2.6 The employee becoming a danger to themselves or others.

## 5. Measuring acceptable standards of competence or capability

- 5.1 The standard of work performed can be assessed in various circumstances, by using various techniques, for example:
  - 5.1.1 Day-to-day management and regular contact with the line manager.
  - 5.1.2 Management feedback/supervision and regular assessment of progress against targets jointly agreed with the line manager
  - 5.1.3 Assessment of the employee's performance against the job description and the person specification for the post
  - 5.1.4 Assessment of the employee's performance against the competencies required for the particular post

## 6 Disability Issues

- 6.1 Current legislation means that a broad range of people now qualify for protection against discrimination on the grounds of their disability. Many employees lose capability because of 'acquired disability' during the course of their working lives. Employers have a duty to make 'reasonable adjustments' if a work arrangement or physical feature places a disabled employee at a substantial disadvantage compared to someone who is not disabled.
- 6.2 A line manager will need to clarify whether the employee falls into the definition of a disabled person under legislation and good practice. They should **consult the employee** and also ask for from Senior Managers supported by occupational health, before deciding whether and what 'reasonable adjustments' can or should be made.
- 6.3 This process may be done easily, or may take a number of meetings and consultations. Laying down specific time limits for this is not appropriate but managers should try to resolve an employee's situation as quickly as possible. Further guidance on these issues is given in Appendix B.

## 7 Incapability through ill-health or injury

- 7.1 If the reasons for incapability involve factors related to health or injury, the line manager and a senior manager will consult the employee and take occupational health advice. **It is in everyone's interests to do this at an early stage.** The procedures for making medical enquiries are given in Appendix B.

- 7.2 The employee will be fully consulted throughout and may be represented at all stages. Laying down specific time limits to cover health-related issues is not appropriate but managers should aim to resolve an employee's situation as quickly as possible.
- 7.3 On occasion, occupational health advice will be that the employee is not physically or mentally fit to undertake the duties of their current post but is fit for other duties. In such cases the manager will, together with the employee (and his or her representative) and the appropriate HR manager, use the redeployment procedure. This is set out in section 13.
- 7.4 Occupational Health may be of the opinion that the employee's ill health or condition will persist until the normal retirement age of 65 and will prevent them from undertaking their post. In such cases they will recommend retirement because of permanent ill health. In other situations the decision may be that the condition is not permanent but will prevent the employee from undertaking his or her post within a reasonable period of time. If reasonable adjustment or redeployment (with reasonable adjustment) are not feasible options or are rejected by the employee, then a management decision whether to dismiss because of medical capability will be made.

## 8 Supervision

- 8.1 In a minor case of unsatisfactory performance, a line manager will meet the employee and agree with him or her the scale of the problems that need to be addressed as well as the measures that will be put in place to facilitate this e.g. additional training, coaching, supervision, adjustments to the workplace or working practices, etc, where appropriate.
- 8.2 The employee will be informed of the work standard expected to be **achieved within a specified time scale** and warned that if there is insufficient improvement or a further lapse in performance, the formal stage of the Capability Procedure will apply.
- 8.3 A brief note of these discussions will be kept for reference purposes. The line manager will also write to the employee to confirm their discussions and will place a copy of the advice provided on the employee's personal file.

## 9 Representation

### 9.1

When an employee is required to attend a formal meeting, he or she has the right to be accompanied or represented by a companion (i.e. work colleague, or represented by a staff side representative or full time trade union representative.)

The chosen companion is permitted to address the formal meeting (but not answer questions on behalf of the employee) and is permitted to confer with the employee during the meeting. (NB If an employee is accompanied by a work colleague for personal support, rather than the colleague representing them - i.e. putting their case - then the colleague will not normally be permitted to address the meeting, or ask questions on behalf of the employee concerned.)

If the chosen representative is not available at the time proposed for the formal meeting, then it must be postponed and a new date set by mutual agreement.

When an employee needs a signer or translator during the course of a meeting, this person will attend in addition to the representative.

It is the employee's responsibility to arrange representation.

## 10. Overview of Formal Capability Procedure

10.1 The following procedure describes actions that can be taken under the capability procedure

- Initial Formal Meeting
- Formal Review Meeting
- Dismissal

Formal stages of the procedure will usually be implemented sequentially. However, where the standard of performance is considerably below that which is required, or the consequences of the performance have or may have a significant adverse effect, it may be decided to take action under the latter stages of the process in the first instance.

10.2 **Stage 1 - Initial Formal Meeting**

10.2.1 When a line manager considers that an employee is not performing to the appropriate standard and informal discussions and support mechanisms put in place (see 8.1) have not solved the issue or not been felt to be appropriate in the circumstances, a senior manager (who in many cases will be the line manager) will hold a meeting with the employee.

10.2.2 The employee will be informed of his or her perceived shortcomings and will be given an opportunity to respond. The employee will be given a specified review period to demonstrate improvements in performance required. Any measures to support this improvement will be agreed at this stage. Normally, during this review period, interim meetings will be planned to review progression at appropriate intervals. The outcome of these meetings will be confirmed to the individual in writing, within five working days of the outcome being determined. Where the required improvements in performance are achieved during the review period, the process will be deemed to have been satisfactorily concluded and the issues resolved. Confirmation that this is the case will be given in writing to the individual.

10.2.3 The individual and the manager may agree that an improvement is not going to be achievable by the individual over a reasonable time scale and redeployment is the only possible option. In such cases, the meeting should be adjourned and reconvened as a Formal Review Meeting. (See below)

### 10.3 **Stage 2 - Formal Review Meeting**

10.3.1 At the end of the specified review period (or earlier if there is good reason) where the required improvement has not been achieved the manager will hold a Formal Review Meeting.

10.3.2 The possible outcomes of this meeting could be:

- To agree a further period over which the required improvements can be achieved (after which the issue may be resolved, or the meeting reconvened and the options set-out below considered), or
- To agree redeployment to another post where appropriate and subject to availability, in which case the meeting should be adjourned for a specified period to allow this proposed course of action to be explored. (The employee should be informed at this stage that if no suitable alternative employment is secured during the agreed redeployment period, their contract of employment could be terminated on the grounds of capability – see 10.4.), or
- To determine that dismissal for incapability is appropriate where there has been a failure to meet the standards required (including following a failure to find a redeployment opportunity or refusal to take up such a position by the individual concerned.) A decision to dismiss can only be taken with the agreement of the Chief Executive (or Deputy). The action to dismiss can only be taken by the relevant dismissing officer for the individual concerned. Dismissal can only occur when it is clear that:
  - The standards expected of the employee are clear
  - The employee knew or should have known of the standards required of them
  - The employee has fallen short of the standards or continues to fall short of the standards and it is not appropriate to allow further time or support to enable the employee to reach the required standard (as the required improvement would not be achieved).

N.B. Dismissal should only be the outcome of the formal review meeting where:

- appropriate support and time for improvement has been made available to the employee concerned and the required improvement has not been achieved
- redeployment has not proved possible or has been refused by the employee

### 10.4 *Dismissal*

If the employee's performance is confirmed as unacceptable and the alternative courses of action have been exhausted, refused by the employee or are inappropriate, the decision to dismiss the employee will be on the grounds of '**capability**'.

The employee will be entitled to formal notice in accordance with their contract of employment or payment in lieu of notice. The letter or termination will confirm the effective date of termination and state the reason for dismissal.

### 10.5 **Dissatisfaction with process or outcome**

Where an employee is dissatisfied with the use of the procedure (or how it is being

applied) in their particular case, they may attempt to resolve their dissatisfaction by using the DRH Grievance and Disputes procedure.

Where an employee is dissatisfied with the outcome of the formal review (stage 2) they may use the appeals procedure contained within the DRH Disciplinary Policy and Procedures to seek resolution.

## **11. Confidential Support**

- 11.1 Employees involved in the Capability Procedure may need support through a stressful time. They may contact the confidential counselling service based in Occupational Health.

## **12. Revision of the Capability Procedure**

- 12.1 From time to time this procedure will be jointly reviewed by management and staff representatives in the light of experience, good employment relations practice and developments in employment law. The aim is to ensure its continuing relevance and effectiveness.

## **13. Redeployment Procedure for capability situations**

- 13.1 General principles:

- The opportunities for redeployment depend on whether there is a suitable vacancy. DRH is not obliged to create a post to achieve redeployment. It is recognised that opportunities for redeployment within the organization are very limited
- Redeployment cannot be imposed on unwilling employees. However, they (and their representative) must be fully aware of the consequences (i.e. possible dismissal) of not exploring all the possibilities with an open mind.
- Employees who are to be redeployed and who meet the minimum criteria will be given priority for appointment – not just for interview. This is to say that they will be appointed to the vacant post if they found to match the person specification for the post.
- With employees who are disabled, there is a legal responsibility to make reasonable adjustments to enable them to undertake the duties of the new post on redeployment, and this will be taken into account when applying the paragraph above.

- 13.2 Consultation

Home/Departmental Managers in consultation with the Chief Executive(or Deputy) will consider the best way to help the employee. They will highlight areas worth considering, such as permanent, temporary or short-term employment, part-time or full-time employment, training or secondments. They will be responsible for making an assessment of the employee's needs and abilities.

The appropriate manager will meet the employee to explain the redeployment procedure and what everyone, including the employee, has to do to ensure it is successful.

Some or all the following issues and techniques will be explored and utilised:

- Details of skills and aptitudes, using various techniques such as exercises to determine practical skills, self-assessment questionnaires, psychometric tests.

- Areas of the current job specification and job description where current performance is effective.
- Details of previous experience and deciding which skills used in the past are still valid.
- Specific areas of interest for alternative employment.
- Hobbies and interests outside work that use skills and abilities not previously exploited at work.
- Any geographical limitations on redeployment.
- Specifying what reasonable adaptations may be required and which are available.
- Personal circumstances, such as those affecting hours of work.
- A training needs assessment against vacant posts.
- Availability of appropriate training.

### 13.3 Re-training and secondment

Managers will consider the options of re-training and secondments.

In some cases an employee will agree to re-training to develop new skills for a change in career. Re-training should be relevant, appropriate to aptitude and circumstances and geared towards future employment within DRH.

An alternative may be to provide on-the-job experience or secondment on a short-term basis, where there is an identified project or task to be carried out. This arrangement may be supported by coaching and mentoring and supplemented where necessary by short skills courses.

The employee will be interviewed and assessed by the selection panel for the post before other candidates are considered. Only if the employee is judged unable to fulfil the minimum requirements above will other candidates be considered by the selection panel.

### **13.4 Feedback**

If an employee is not shortlisted for a vacancy the selection panel or a representative of the panel will inform the individual as soon as possible and give feedback to the employee, which may be oral or written, as to why their application was unsuccessful.

If an employee is interviewed but not selected for appointment, a member of the interviewing panel will offer feedback to the employee within 7 working days so that areas for future development can be identified.

### **13.5 Offer of alternative employment**

Any offer of alternative employment or alternative contract conditions, such as reduced hours, will be made in writing and will set out the terms and conditions of employment, which will be those relevant for the post in question

A 4-week trial period can be included with a possible extension of up to 12 weeks in exceptional circumstances where further time is needed to make an assessment of the success of the redeployment.

### **13.6 Induction to a new post**

To help the employee settle into the new job, care should be taken over the induction process. To develop a supportive environment for the employee, the new line manager should tactfully explain to the new work group the reasons for the redeployment. Appropriate support mechanisms will be put into place to enable the employee to settle successfully into the new post.

NB. Employees will not be able to use this process as mechanism to inappropriately gain preference to be appointed to a particular vacancy to the detriment of other candidates. Therefore, there must be sound and justifiable reasons for an individual to be granted 'redeployee' status rather than to be given the opportunity to properly perform their existing employment for themselves through the normal channels.

SG May 2008