

Capability Procedure

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This procedure will be used to handle new capability issues from 18th November 2015.

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Change History

Version	Date	Description	Change ID
2.0	November 2015	New policy and procedure replacing previous Performance Capability Procedure December 2009, advice for managers, advice for employees and advice for managers ' ' Handling Capability due to Ill Health	
2.1	December 2015	Minor amendment to clarify withholding of increment where the employee is subject to formal capability proceedings.	
3	November 2019	Scheduled review and replace 'dismissal hearing' with 'decision hearing', update authority to act in line with new management structure and the redeployment process to reflect the current practice following changes to the process for advertising vacancies..	

Related Documents

Reference	Title	Tier

NB: Any reference in this document to the Head of Human Resources (HR) will apply to a manager acting in the capacity of Service Lead for HR from 1st December 2019.



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1. Purpose

- 1.1. Employees are expected to achieve and maintain acceptable standards of performance. This procedure will be used to manage performance that falls below the required standard due to lack of aptitude, skill or ability.
- 1.2. This procedure is designed to ensure fairness and consistency in the management of under performance.
- 1.3. Personnel Committee has approved this procedure.

2. Applicability

- 2.1. This Procedure applies to permanent and temporary employees of West Berkshire Council.
- 2.2. This procedure does not apply to;
 - 2.2.1. The Chief Executive, the Section 151 Officer or the Monitoring Officer who are subject to Statutory Regulations (Seek further advice from Human Resources).
 - 2.2.2. Employees within their probationary periods. For further details see the Council's [Induction and Probation Policy, Procedure and Guidance](#).
 - 2.2.3. School based staff. These employees are covered by a separate procedure.
- 2.3. Where an investigation at stage one of the procedure finds that the issue is due to misconduct, action under this procedure will stop and further action will be taken under the Council's Disciplinary Procedure.
- 2.4. This procedure will not be used to manage attendance issues. These will normally be handled using the Council's [Sickness Absence- reporting and management - policy, procedure and guidance](#). However, the Capability Procedure may be used to manage underperformance due to disability or ill health where the employee is attending work. In these circumstances additional action detailed in section 11 will be taken to ensure the Council meets its obligations under the Equality Act.

3. Roles and Responsibilities

- 3.1. Line managers are responsible for the day-to-day management of performance including taking action under this procedure to address under performance.
- 3.2. Human Resources are responsible for providing managers with advice on implementing this procedure.
- 3.3. All staff (except those listed at 2.2 above) are responsible for familiarising themselves with, and ensuring that they comply with this procedure.

4. Principles

- 4.1. The employee will be advised of the deficiencies in his/her performance and given the opportunity to state his/her case and present relevant information at a capability hearing before any decision is made.

- 4.2. The employee will normally be given at least 10 working days' notice of all formal meetings and hearings under this procedure.
- 4.3. The employee will have the right to be accompanied by a work colleague or trade union representative during all meetings and hearings within the formal procedure.
- 4.4. No formal action will be taken against a trade union representative until, having consulted with the employee, the circumstances of the case have been notified to a regional officer of the trade union concerned.
- 4.5. If there are any disability or language issues affecting the employee or his/her representative, these will be reasonably addressed so that any formal proceedings can take place fairly.
- 4.6. Written confirmation of the outcome of meetings/hearings held under the formal procedure will normally be sent within five working days of the meeting/hearing.
- 4.7. Information relating to formal proceedings will be kept confidential as appropriate.
- 4.8. The time-scales within this procedure may be amended by mutual consent.

5. Authority to act under the Capability Procedure

Action concerning	Informal handling	Formal stages one and two	Appeal against a warning issued at stage two	<u>Decision Hearing</u>	Appeal against decision to dismiss
Corporate/ <u>E</u> <u>xecutive</u> Director	The Chief Executive	The Chief Executive	An elected member	A panel of three members not previously involved in the case	A panel of three members not previously involved in the case
Head of Service/ <u>Ser</u> <u>vice</u> <u>Director</u>	An <u>Executive/</u> Corporate Director	An <u>Executive/</u> Corporate Director	An <u>Executive/</u> Corporate Director not previously involved in the case	The Chief Executive or an <u>Executive/</u> Corporate Director not previously involved in the case	A panel of three members
All other employees	The line manager	The line manager, or where not appropriate; another officer at the level of the line manager, authorised by the Head of	The Head of Service/ <u>Service</u> <u>Director</u>	The Head of Service/ <u>Service</u> <u>Director</u> , unless <u>she/he</u> heard an appeal against a stage two warning; in which case another Head of Service/ <u>Service</u>	A panel comprising a Head of Service/ <u>Service</u> <u>Director</u> not previously involved in the case, an <u>Executive/</u> Corporate

		<u>Service/Service Director</u>		<u>Director</u> , authorised by the <u>Executive/Corporate Director</u>	Director and a member.
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6. Informal handling of capability issues

- 6.1. Managers will normally try to resolve issues of minor performance informally. Where this approach has been tried and has not succeeded in improving performance, where the underperformance is more serious or where formal action has been taken against the employee under the Capability Procedure in the previous 12 months, formal action should be taken.

7. Formal stage one – investigation

- 7.1. To start the formal procedure the line manager will write to the employee to explain his/her concerns about the employee's performance and that he/she will investigate the matter formally under the procedure. The letter will invite the employee to a formal investigation meeting.
- 7.2. The investigation will be sufficient to establish whether failure to perform at a satisfactory level is attributable to a lack of capability, skill or aptitude, or to sickness or disability, misconduct or other factors outside the employee's control. It will include at least one meeting with the employee.
- 7.3. On completion of the investigation the line manager will write to the employee to inform him/her of the outcome of the investigation and what, if any, further action will be taken. A copy of the manager's investigation report should be included with the letter.
- 7.4. The line manager may decide to:
- 7.4.1. Drop the matter; or
 - 7.4.2. Continue to handle the matter informally; or
 - 7.4.3. Call a meeting at formal stage two of the procedure to decide whether to instigate a period of formal support and supervision and issue a warning.
- 7.5. Where appropriate the investigation outcome letter will invite the employee to a formal stage two meeting to consider the findings of the investigation and whether it is appropriate to instigate a formal period of support and supervision and issue a warning. It will explain that the employee will be invited to make representations before the manager reaches a decision.

8. Formal stage two

- 8.1. At the stage two meeting the line manager will explain the findings of his/her investigation and invite the employee to make representations.

- 8.2. The manager will consider the employee's representations before deciding what action to take. He/she may adjourn the meeting briefly to consider an appropriate course of action.
- 8.3. The manager may decide to:
 - 8.3.1. Drop the matter; or
 - 8.3.2. Continue to handle the matter informally; or
 - 8.3.3. Implement a formal period of support and supervision and issue a warning that the employee's continued employment may be at risk if he/she fails to reach the required standards of performance within a specified period of time.
- 8.4. Where the manager decides to instigate a formal period of support and supervision and issue a warning, the meeting will continue to set out a plan to help the employee reach the required standards of performance. The employee will be asked to suggest any reasonable areas of support or training that could be considered to assist him/her.
- 8.5. The employee will be informed that pay increments will be withheld until the required level of performance has been attained and he/she is no longer subject to formal capability proceedings.
- 8.6. The period of support and supervision will not normally be of more than 13 weeks duration.
- 8.7. Following the meeting the manager will confirm the outcome in writing. Where formal action will continue the letter will include;
 - Details of the standards of performance required;
 - The duration and details of the period of support and supervision;
 - How progress will be reviewed during this period
 - The date on which the formal meeting will be reconvened to review whether the employee has reached the required standards
 - The warning
 - That pay increments will be withheld until the employee achieves the required standard of performance and is no longer subject to the formal capability procedure.
 - The right of appeal
- 8.8. An employee who is subject to formal support under the Capability Procedure will normally be excluded from working at home.
- 8.9. The stage two meeting will be reconvened at the end of the specified period of support and supervision to formally review whether the employee has met the required standards. The employee will be informed in writing of arrangements for the meeting and that he/she will be able to make representations at the meeting.
- 8.10. At the reconvened meeting the manager will explain his/her assessment of the period of support and supervision, whether the employee has achieved the required standards and what, if any, further action he/she believes to be appropriate. The employee will be invited to make representations.

- 8.11. The manager may adjourn the meeting briefly to consider the employee's representations before reconvening the meeting and informing the employee of his/her decision.
- 8.12. The manager may decide:
- 8.12.1. That no further action is required under the procedure. In this case the employee will be informed that he/she is expected to maintain the required level of performance, and that the details and duration of the previous period of support and supervision may be taken into account in any further action under the procedure if performance issues reoccur within 12 months of the date the review meeting; or
 - 8.12.2. To extend the period of support and supervision (where the employee has made good progress and the manager believes a further period would enable the employee to reach the required standards, or where the manager believes exceptional circumstances have prevented the employee from reaching the required standards during the support and supervision period). This would normally be for a maximum of six weeks. Details of any additional support or training will be discussed. The meeting will be adjourned for the further period specified, and reconvened at the end to make a decision; or
 - 8.12.3. That the employee has not reached a satisfactory standard of performance but the manager believes that the employee could do so if he/she found alternative employment within the Council. The manager will discuss whether the employee would be prepared to consider seeking alternative employment. (Follow section 12 below as a continuation of this meeting); or
 - 8.12.4. That insufficient progress has been made, that alternative employment within the Council is not appropriate and that the matter should be considered at a [decision hearing](#) at stage three of the procedure.
- 8.13. The outcome of the meeting will be confirmed to the employee in writing.

9. Formal stage three – [decision hearing](#)

- 9.1. A [decision hearing](#) will be arranged where:
- 9.1.1. The employee did not reach a satisfactory standard of performance during the improvement period, and seeking alternative employment was not appropriate or the employee did not agree to seek alternative employment; or
 - 9.1.2. Alternative employment was sought but not found within the specified period.
- 9.2. The employee will be notified in writing, at least 10 working days before the hearing of:
- 9.2.1. The deficiencies in his/her performance and the reasons for [holding a decision hearing](#)
 - 9.2.2. The date, time and location of the hearing
 - 9.2.3. The name of the person chairing the hearing
 - 9.2.4. The right to be accompanied and/or represented by a trade union representative or work colleague

9.2.5. The requirement to provide the manager/chair hearing the case with a copy of the documents that he/she will be relying upon and the names of any witnesses that he/she will be calling at the hearing at least 5 working days before the hearing.

9.2.6. The fact that the hearing could result in his/her employment being terminated

9.3. Copies of documents that the presenting manager will refer to at the hearing, and names of any witnesses that he/she will call will be included with the notification.

9.4. At the hearing both the presenting manager and the employee will be given the opportunity to state his/her case, call witness and ask questions.

9.5. The employee will be notified in writing of the outcome, normally within five working days of the decision.

10. Appeals

10.1. An employee is entitled to appeal against either a warning given at stage two or the decision at stage three to dismiss.

10.2. The appeal must be made in writing, addressed to the Head of Human Resources, stating the grounds for the appeal, within five working days of being notified of the warning or dismissal.

10.3. The appeal will be heard as soon as possible and not normally later than six weeks after being received.

10.4. Both parties must indicate at least five working days in advance of the appeal hearing which, if any, witnesses they wish to call and provide copies of any documentation that will be relied upon at the hearing. In exceptional circumstances an alternative time-scale may be agreed.

10.5. The hearing will review the earlier decision, taking into account the grounds of appeal. The appeal can overturn the earlier decision, confirm it or impose a lesser sanction.

10.6. The employee will be informed of the appeal decision in writing normally within five working days of the hearing.

10.7. The appeal decision is final within the Council.

11. Additional action where the employee's performance is affected by ill health or disability

11.1. Managers **must** comply with the requirements of the Equality Act. This includes making reasonable adjustments to enable disabled (as defined by the Act) employees to perform their duties to a satisfactory standard. Where there are no reasonable adjustments that will facilitate this, redeployment to a suitable alternative vacancy within the Council (where the employee is in agreement to seeking redeployment) should be sought. Further information about reasonable adjustments can be found in section 14 of the guidance.

11.2. Where the employee's performance is affected by ill health that does not meet the definition of a disability under the Equality Act, the manager may decide to make reasonable adjustments or to seek redeployment.

12. Consideration for alternative employment/redeployment

12.1. If point 8.12.3 above applies and the employee is willing to seek alternative employment, this will be sought for a specified period, normally of no longer than six weeks (unless the employee has a disability as defined by the Equality Act in which case redeployment will be sought for a period of between eight to 12 weeks)

12.2. The manager will ensure that the employee [knows how to access the internal jobs page and set up alerts](#).

12.3. During the search period the employee will be able to apply for suitable vacancies that arise and will be considered along with other applicants. The employee does not have the right to prior consideration and will have to demonstrate that he/she can meet the requirements of the job. **Note:** where the employee's under performance is due to a disability as defined by the Equality Act the employee will have the right to prior consideration and reasonable adjustments must be made where these will enable the employee to perform the role satisfactorily.

12.4. The employee will not be entitled to salary protection where the vacancy is at a lower salary than the employee's current salary.

12.5. The employee will be informed that if he/she does not find alternative employment within the specified period a [decision](#) hearing at stage three of the procedure will be held.

12.6. Where the employee is successful in finding alternative employment he/she will be informed that no further action is required under the capability procedure.

12.7. Where the employee has applied for a vacancy before the end of the search period but a decision about the employee's suitability for the role has not been made, the stage three [hearing](#) will not be held until the decision has been made.

Sections 1 to 12 are the procedure for handling under performance. Sections 13 onwards are guidance to help managers implement the procedure.

Guidance:

13. Guidance on informal handling

13.1. Managers should explain the standards of performance required to employees during their induction, through day to day management, one to one meetings and appraisals. They should encourage employees to raise any queries that they have about their duties and standards of performance expected.

13.2. If a manager has minor concerns about an employee's performance he/she should normally try to handle these informally (as stated in section six of the procedure) in the first instance during the employee's one to one meetings. The manager should:

13.2.1. Explain what the deficiencies in performance are

- 13.2.2. Ask the employee to explain the reasons for these deficiencies. Encourage the employee to talk openly about any problems that he/she may be experiencing and ask further questions to try to establish whether there are underlying issues causing the poor performance, and the likely duration of these.
- 13.2.3. If the manager has a genuine belief that the employee's underperformance is due to health problems or a disability, but the employee does not mention this, the manager should raise this tactfully and supportively.
- 13.2.4. Where the employee states/agrees that his/her performance may be affected by ill health or disability, the manager should refer him/her to Occupational Health to seek advice about how to support the employee returning to a satisfactory standard of performance. The manager should discuss this with the employee and [make a referral](#). The manager may decide to adjourn the meeting whilst advice from Occupational Health is sought, or may decide to make interim arrangements and review these once he/she has received a report from Occupational Health. [Further advice can be sought from Human Resources.](#)
- 13.2.5. In all cases explain the standards that are required.
- 13.2.6. Where appropriate set targets and discuss whether there is any further support and training that can help the employee to achieve the required standard of performance.
- 13.2.7. Where underperformance is due to ill health or disability the manager should assess whether there are any reasonable adjustments (see section 14 below) that will support the employee returning to and maintaining satisfactory performance. The manager should review this once advice from Occupational Health has been received. The manager should agree with the employee what the rest of the team will be told about any adjustments and support given.
- 13.2.1. Record key points in one to one records.
- 13.2.2. Review progress on a regular basis.

14. The Equality Act and using the Capability Procedure

- 14.1. The Equality Act places responsibilities upon employers where an employee has a disability as defined by the Act. Section 6(1) of the Act defines someone as disabled if he/she has a physical or mental impairment and the impairment has a substantial and long term adverse effect upon his/her ability to carry out normal day to day activities.
- 14.2. In this context substantial means more than minor or trivial, and long term means that it has lasted or is expected to last for 12 months or more. Terminal illness is classed as long term, even if the person is not expected to live for 12 months.
- 14.3. Some conditions such as cancer, HIV and multiple sclerosis are defined as disabilities from the point of diagnosis, even when there is no adverse effect upon the ability to carry out day to day activities.
- 14.4. Under the Equality Act employers have a duty to make reasonable adjustments to enable disabled employees to perform their role. Where an employee is under performing due to a disability the manager should explore whether there are any reasonable adjustments that can be made to support the employee in reaching and maintaining a satisfactory standard of performance. This may include:

- Making adjustments to the workplace
- Allocating some of the disabled person's duties to another person
- Altering the employee's working hours
- Assigning the employee to a different place of work
- Additional supervision
- Allowing the employee time off for rehabilitation, assessment and/or treatment
- Additional training or mentoring
- Modifying instructions or reference manuals
- Modifying methods or content of work
- Acquiring or modifying equipment
- Adjusting trigger points for formal action under the procedure for managing sickness absence-
- Redeploying the employee to a suitable existing vacancy

14.5. When managing a case of under performance due to ill health the manager should discuss making reasonable adjustments with the employee both at the informal and formal stages. Managers can seek further advice from Human Resources about this and it may be appropriate to seek advice, via HR, from Occupational Health or other specialists.

14.6. The manager should ensure that letters to the employee confirming the outcome of formal meetings contain all relevant points including details of reasonable adjustments considered, those implemented and reasons of why any were considered but not implemented. Further advice can be sought from HR.

15. Taking formal action under the Capability Procedure

15.1. Where an informal approach does not work, previous formal action has been taken against the employee under the Capability Procedure in the past 12 months, or where the underperformance is more serious, the manager may decide to take formal action. He/she should contact HR for advice. HR will attend formal meetings to advise the manager, and will advise on the content of letters sent to the employee.

16. Notifying the employee of formal meetings

16.1. The employee will normally be given 10 working days notice in writing of formal meetings. The notification will inform the employee of:

16.1.1. The date, time and location of the meeting

16.1.2. The name of the person chairing the meeting

16.1.3. The purpose of the meeting

16.1.4. The deficiencies in the employee's performance

16.1.5. The employee's right to be accompanied at the meeting by a trade union representative or work colleague

17. Formal stage one – investigation

- 17.1. The purpose of the investigation is to establish the reasons for underperformance. It should be sufficient to establish whether underperformance is due to a lack of capability, sickness or disability, misconduct or some other reason.
- 17.2. The line manager will normally carry out the investigation.
- 17.3. The line manager should contact HR to seek advice and to check details of any other formal action has been taken under the Capability Procedure in respect of the employee in the last 12 months.
- 17.4. The line manager should hold at least one formal investigation meeting with the employee. At the meeting the manager should:
 - 17.4.1. Explain the deficiencies in the employee's performance
 - 17.4.2. Ask the employee to respond to this and explain the reason(s) for his/her underperformance
 - 17.4.3. Where appropriate; ask further questions to clarify the reasons
- 17.5. The manager may need to adjourn the meeting to allow further investigation to verify the employee's explanation (for example; to seek advice from Occupational Health where underperformance may be due to ill health or disability where such advice has not previously been sought, or where further advice is required).
- 17.6. The manager should write an investigation report and consider what, if any, further action is required. He/she should write to the employee the end of the investigation to inform the employee of the outcome of the investigation as specified in section seven of the procedure.
- 17.7. Where the manager concludes as a result of the investigation that no further formal action should be taken under the Capability Procedure it is good practice for the manager to meet **informally** with the employee to discuss the findings of the investigation and to make arrangements for any further support/training/reasonable adjustments required.

18. Formal stage two

- 18.1. At the stage two meeting the manager should follow section eight of the procedure. He/she should state the deficiencies in the employee's performance and summarise the findings of his/her investigation.
- 18.2. The manager should explain the findings of the investigation and why he/she believes further action under the Capability Procedure is appropriate. The manager should invite the employee to make representations before he/she reaches a decision about what further action should be taken.
- 18.3. Where the employee wishes to make representations he/she should clearly explain his/her case; including any mitigating circumstances that should be taken into account.

- 18.4. The manager should listen to the employee/his/her representative and may decide to adjourn the meeting briefly to consider the matter before reaching a decision.
- 18.5. Following the adjournment the manager should inform the employee of his/her decision.
- 18.6. Where the manager has decided to continue to handle the matter informally he/she should explain the reasons for this and explain what will happen next.
- 18.7. If the manager decides to implement a formal period of support and supervision and to issue a warning the meeting should continue and identify reasonable ways of supporting the employee to reach and maintain a satisfactory standard of performance and specify the duration of the period of support and supervision. The employee should be asked to suggest reasonable support or training. The manager should try to accommodate any reasonable requests. Where the employee's underperformance is due to a disability the manager must also follow the guidance in section 14 above.
- 18.8. Where action has been taken against the employee under the Capability Procedure within the past 12 months the manager may wish to take this into consideration when deciding upon the type of support that is appropriate and the length of the period of support and supervision. The manager should seek further advice from HR.
- 18.9. The period of support and supervision will not normally exceed 13 weeks; however there may be times where the manager believes that a longer period is appropriate; for example where the employee only works for a few hours per week and it would be difficult to provide the required support and/or training and to make a fair assessment of performance in 13 weeks.
- 18.10. Following the meeting the manager should confirm the outcome in writing, normally within five working days as specified in point 8.7 of the procedure.
- 18.11. During the period of support and supervision the manager should hold at least one informal progress meeting with the employee. At this meeting the manager should assess the employee's performance against targets set. The manager should ask the employee how he/she feels he/she is progressing and any concerns that he/she has. Further reasonable support and /or training (and reasonable adjustments where disability is affecting performance) should be implemented if appropriate.
- 18.12. Where an employee is subject to formal support arrangements under the Capability Procedure, he/she may be excluded from working at home (see the Mobile and Flexible Working Procedure).
- 18.13. The stage two meeting should be reconvened on the specified date to formally review whether the employee has met the required standards as specified in sections 8.9 to 8.13 of the procedure.
- 19. Consideration for alternative employment (where performance is NOT affected by disability):**
 - 19.1. Where the employee is to seek alternative employment within the Council the manager should support him/her by discussing his/her skills and experience and the types of roles that might be suitable. Consider what the employee does well and

any experience that he/she has gained from previous roles both inside and outside of the Council, and/or any activities outside of work.

- 19.2. The manager will specify the period of time in which alternative employment will be sought. This will normally be no longer than six weeks, however the manager may extend this in certain circumstances; for example where the employee has already booked annual leave within the six week period.
 - 19.3. The manager should explain that there is no obligation to create an alternative role for the employee, but that the search period allows the employee a period in which to apply for vacancies that arise whilst still employed by the Council.
 - 19.4. During the search period the manager will ensure that the employee [knows how to access the internal jobs page and set up alerts](#).
 - 19.5. Where the employee accepts a role at a lower salary he/she **will not** be entitled to salary protection.
 - 19.6. If the employee is shortlisted for interview for a vacancy within the Council he/she should be allowed paid time off work to attend.
 - 19.7. Where the manager is approached for a reference by the recruiting manager he/she should ensure that the information provided is factual. The manager may wish to discuss the reference with the employee so that he/she can explain why he/she is/isn't supporting the employee's application.
 - 19.8. Where the employee is not successful in finding alternative employment within the specified period, the manager should arrange a [decision](#) hearing at stage three of the procedure.
 - 19.9. Where the employee has applied for a vacancy within the agreed period, but a decision about his/her suitability for the role has not been made, the stage three hearing should not be held until the decision has been made.
- 20. Additional advice on seeking redeployment (where performance is affected by a disability)**
- 20.1. Where underperformance is due to a disability and making reasonable adjustments has/will not enable the employee to reach a satisfactory standard of employment **there is a requirement** that you consider redeployment with the employee. This is one of the key differences between using the Capability Procedure to manage a case of underperformance due to ill health or disability rather than due to a lack of skill, aptitude or ability.
 - 20.2. The manager should discuss the employee's skills and experience with the employee, and the types of work that may be suitable. They should consider what the employee does well and any experience that he/she has gained both at and outside of work. The manager should consider the circumstances of the case and the types of roles that could enable the employee to maintain a satisfactory standard of performance.
 - 20.3. The manager should specify the period of time in which redeployment will be sought; this will normally be between eight to twelve weeks.

- 20.4. The manager should inform HR that the employee's continued employment can be recorded as at risk so that the employee can discuss with their HR contact any vacancies that are advertised that he/she would like to express an interest in-.
- 20.5. The manager should explain to the employee that whilst there is no requirement to create a special role for him/her, he/she will be entitled to prior consideration for any suitable vacancies that arise. This means that he/she may normally express an interest in a vacancy as soon as possible after it is advertised.
- 20.6. The manager should ensure that the employee knows how to access the internal jobs page and set up alerts. The employee along with their manager should check the vacancy page regularly for suitable roles. The manager should support the employee and encourage them to apply for roles that may be suitable following the discussion described in 20.2.
- 20.5-20.7. Where the employee expresses an interest in a role he/she will need to complete an employment summary form (provided by the HR contact). A copy of this form should be sent to the recruiting manager. HR will put the vacancy on hold once the employee expresses an interest to allow time for the recruiting manager to meet with the employee and made a decision about their likely suitability.
- 20.6-20.8. The recruiting manager will assess the employee's skills, knowledge and experience in relation to the requirements of the vacancy. Where the employee has a condition that is defined as a disability under the Equality Act, the recruiting manager must consider whether there are any reasonable adjustments or training that would enable the employee to fulfil the requirements of the role.
- 20.7-20.9. The employee and the recruiting manager may decide upon a trial period or a period of shadowing to help assess suitability for the role. This should be discussed with the HR contact.
- 20.8-20.10. The line manager may be approached for a reference by the recruiting manager. He/she should bear in mind that information relating to ill health or disability is classified as 'sensitive' under the Data Protection Act and that the employee's permission must be obtained before disclosing information to the recruiting manager. The line manager should ensure that the reference is factual and he/she may wish to discuss it with the employee to explain why the manager is/isn't supporting the employee's application. Further advice can be sought from HR.
- 20.9-20.11. If the employee is asked to meet a recruiting manager within the Council he/she should be allowed paid time off to attend.
- 20.10-20.12. Where the employee is not successful in finding alternative employment within the specified period, the manager should arrange a decision hearing at stage three of the procedure.
- 20.11-20.13. Where the employee has applied for a vacancy within the agreed period, but a decision about his/her suitability for the role has not been made, the stage three hearing should not be held until the decision has been made.

21. Formal Stage Three – [decision](#) hearing

- 21.1. A [decision](#) hearing is held to determine whether there are any further options to consider for a return to satisfactory performance or whether employment will terminate on grounds of capability.
- 21.2. The manager who has handled the earlier stages of the procedure will attend the [decision](#) hearing to present the management case.
- 21.3. At the hearing options already explored and/or tested will be reviewed and any remaining options will be considered.
- 21.4. The hearing will normally be adjourned whilst the chair/panel hearing the case reaches a decision.
- 21.5. If the manager chairing the hearing believes that there are no reasonable alternatives he/she will dismiss the employee, with due notice, on grounds of capability.
- 21.6. Further information about hearings can be found in '[Chairing a hearing - advice for managers](#)'.

22. Appeals

- 22.1. The employee is entitled to appeal against a warning given at stage two, or a decision at stage three to dismiss. Details of how the employee can appeal are found in section 10 of the procedure.
- 22.2. The Chair of the [decision](#) hearing will attend the appeal to present the evidence. He/she may be accompanied by a representative of HR.
- 22.3. At the appeal the employee will be asked to explain his/her grounds for appeal and to present evidence. The Chair of the [decision](#) hearing will be given the opportunity to respond. Both sides will have the opportunity to question any witnesses called.
- 22.4. The Chair of the appeal, panel members and the representative of HR may ask questions throughout the appeal hearing.
- 22.5. The hearing will review the earlier decision, taking into account the grounds of appeal. The appeal panel can overturn the earlier decision, confirm it or impose a lesser sanction.
- 22.6. The appeal decision is final within the Council.

23. Management of absence during action under the capability procedure

- 23.1. If the employee has a high level of absence whilst he/she is subject to action under the capability procedure the line manager should manage this as for other employees, but will also need to consider whether to extend the period of support and supervision and/or period for seeking redeployment. Advice should be sought from HR.
- 23.2. The manager should discuss the reasons for absence with the employee and, whilst remaining sensitive to genuine reasons for absence, explain the impact the

absence is having on the support and supervision or search for alternative employment/ redeployment period. Where the employee has an extended period of absence the manager should explain that this will be managed under the sickness absence procedure, but that when the employee returns to work action will continue under the capability procedure.

- 23.3. In deciding whether to extend the support and supervision/ redeployment search period the manager should consider the length of absence and the impact upon the support, training and assessment of performance required/ability to seek redeployment and whether absence is due to a disability as defined in the Equality Act. If the manager decides to extend the period he/she should discuss this with the employee and specify the duration of the extended period. This should be confirmed in writing.

24. Temporary suspension where performance is affected by ill health/disability

- 24.1. Where a manager has a reasonable belief that an employee is attending work when he/she is not fit to do so and may be putting his/her own or others health and safety at risk he/she should talk privately to the employee and ask him/her whether he/she is fit enough to be at work. The manager should explain his/her concerns and allow the employee to respond to these.
- 24.2. Where the employee agrees that he/she should not be at work he/she should be sent home and recorded as being on sick leave until he/she is fit to return. The manager should ensure that the employee is safe to return home.
- 24.3. Where the employee does not accept that he/she is not fit to work the manager should send him/her home on full pay. The employee should be advised to visit his/her GP or should be referred to Occupational Health and required to remain away from work until the report is received. Further advice should be sought from HR.

25. The employee's representative

- 25.1. The employee has the right to be accompanied by a trade union representative or work colleague at all formal meetings and hearings. In exceptional circumstances the employee may be allowed to be accompanied by an alternative representative; for example where he/she has particular language support or other special needs.
- 25.2. The employee's representative may confer with him/her during meetings and hearings, explain his/her case, ask questions, sum up and respond to views expressed at the [meeting/hearing](#) so long as the employee is happy for him/her to do so. However the representative cannot answer questions on behalf of the employee, except in exceptional circumstances where the Chair of the meeting/hearing allows him/her to do so.

26. Written records

- 26.1. Managers should keep written records of all stages of the procedure that they handle. These should be sent to HR. Records will be treated as confidential as appropriate and kept in accordance with the Data Protection Act.

27. References

- 27.1. If a manager is approached for reference for an employee/ex-employee who has been subject to formal action under the capability procedure he/she should seek advice from HR before giving the reference.

28. Referral requirements to external bodies in cases of lack of capability

- 28.1. In certain circumstances the Council has a statutory obligation to report cases to specific professional bodies or government bodies where an employee is suspended or dismissed on grounds of misconduct or poor performance.
- 28.2. This may, for example, apply where disciplinary or capability proceedings are taken against employees in the following categories:
- 28.2.1. Employees working with children or vulnerable adults
 - 28.2.2. Teachers
 - 28.2.3. Employees registered with the Health Care Professions Council (HCPC)
- 28.3. Managers undertaking action where there may be an obligation to refer the case to an external body must contact HR for advice.