



# **FALKIRK COUNCIL**

## **CAPABILITY POLICY & PROCEDURE**

**(For all employees including teachers)**



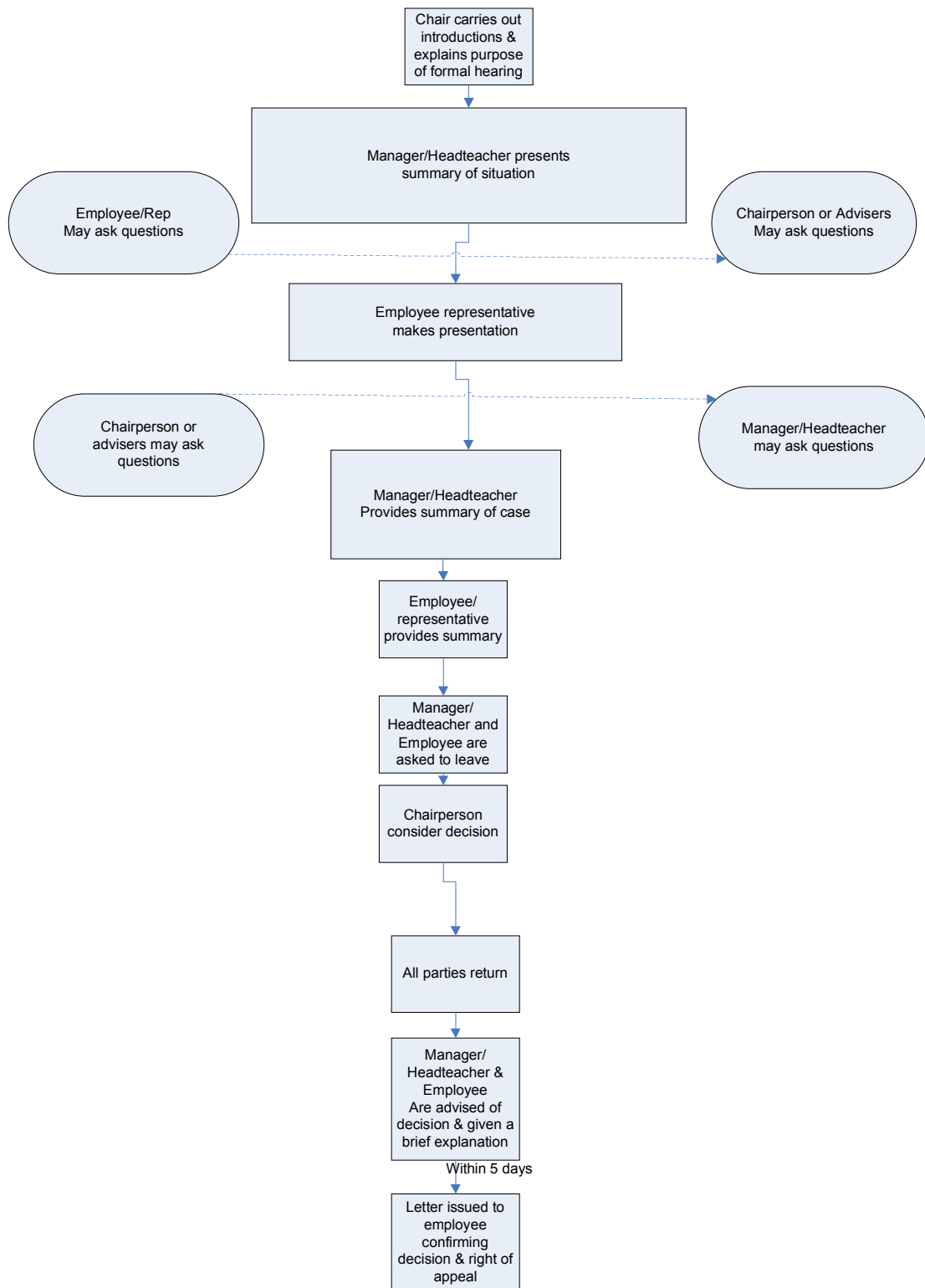
**Human Resources  
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# FORMAL CAPABILITY HEARING PROCESS



## **PART 1 INTRODUCTION**

### **1.1 INTRODUCTION**

The Capability Policy aims to promote fairness, equity and consistency in the management of performance of individuals. Implementation of this policy helps Falkirk Council to operate effectively and to set realistic and measurable standards of performance at work, helping to ensure employees are aware of, and encouraged and supported to meet these standards.

The policy covers situations where an employee fails to perform the duties of his/her post to the minimum requirements and standards due to:

- Performance related capability
- Health related capability
- Lack of necessary qualifications, appropriate professional registration or other genuine occupational requirement

The policy relates to all employees and incorporates requirements of the Code of Practice on Teacher Competence. For individuals on transitional employment programmes contact Human Resources for advice on the appropriate procedure to follow.

### **2.1 IMPLEMENTATION**

Managers, Chief Officers and Elected Members of Falkirk Council have responsibility for ensuring that employees are aware of what is expected of them in terms of job performance and for ensuring that the policy is implemented in a fair and consistent manner in all situations.

## PART 3 PERFORMANCE RELATED CAPABILITY

### 3.1 INTRODUCTION

All employees should have a clear understanding of the job they are required to undertake, this begins with the expected standards being clearly explained during the induction process.

All employees are expected to possess the skills and ability to perform the duties of the post for which they are employed. It is however recognised that continuous development is essential in ensuring maximum efficiency and effectiveness. Where appropriate, employees should be given the on-going opportunity to develop the ability, skills, knowledge and qualifications necessary to perform the duties and responsibilities of their posts effectively. Such training may be formal or informal and may include on-the-job training. In any respect, there should be overall standards and objectives identified and communicated.

It is recognised, however, that occasions may occur when the performance of an employee falls below an acceptable level.

Poor performance may occur at any time during employment, some examples of such situations are:

- a recently recruited employee does not perform to the required level;
- an employee is promoted to a post which is beyond their level of competence;
- development in job demands over the years or changes brought about by outside influences, such as new technology, new work methods or legislation.

Poor performance may manifest itself in different ways including:

- Failure to meet a specific standard or level of performance or work output;
- Failure to meet pre-set targets or deadlines;
- Failure to meet specified core competencies for the post;
- A manager's observation of instances of unsatisfactory performance;
- Complaint(s) or criticism(s) of the employee's work.

Where this poor performance is not health related, it may be categorised into four areas:

- the employee does not possess the necessary skill(s) to undertake the post successfully;
- the employee does not have the ability needed to undertake the job successfully;
- the employee is unwilling to undertake duties, even though they possess the necessary skills/ability;
- the employee is negligent in undertaking his/her duties.

Where an employee is failing to meet the standards of his/her post for one of the first two reasons above, the emphasis should be on providing assistance, training, coaching, setting goals and monitoring progress, rather than issuing sanctions. Specific examples of support mechanisms can be found in Appendix A. Where there is no improvement in performance however, the employee's case should be managed in accordance with Section 3.3.

Where the employee is unwilling to undertake duties, or appears negligent in undertaking his/her duties, this may be dealt with under the Council's Disciplinary Policy.

For some professions (e.g., Teachers and Social Workers), it is necessary for the professional body to be informed of any action which has been taken in respect of a member's capability. This also applies to employees who require to be registered with the Scottish Social Services Council (SSSC). It is the manager's or Headteacher's responsibility to keep the Service Director/ Chief Officer informed of on-going capability issues to enable them to ensure that any relevant information is passed to the appropriate body.

Advice may be sought from Human Resources at any time during this process.

The employee must be offered the right of representation at all formal meetings.

### **3.2 MEASURING PERFORMANCE**

In considering an employee's competence, the manager should objectively compare the requirements of the post against the abilities of the employee. The following information will be useful in measuring work performance:

- job description (including relevant occupational standards)
- person specification - outlines the minimum standards of the post
- personal history of employee
- comparison with post competencies – these may be competencies which have been developed locally within Falkirk Council in conjunction with employees, or may be nationally developed and agreed competencies (as in the case of teaching staff)
- feedback and/or complaints from customers
- failure to meet deadlines/targets
- poor standards of work e.g. frequent mistakes.

The manager should also:

- check past performance - has the employee's performance only recently changed?
- measure the performance against the requirements of the specific post rather than other people - one employee should not be compared against another employee
- be aware of any personal prejudices
- ensure the standards expected are reasonable and the minimum required to undertake the job - unreasonable standards may make any subsequent dismissal unfair.

### **3.3 PROCEDURE FOR DEALING WITH LACK OF ABILITY OR SKILL**

In general, the procedure to be followed will take account of the following principles:

- concerns relating to unsatisfactory performance should be dealt with informally and timeously in the first instance;
- a careful and thorough appraisal of the employee's performance will be carried out;

- these concerns will be discussed constructively with the employee, and
- the employee will then be advised of the consequences of there being no improvement and provided with a reasonable opportunity to improve;

In order to uphold these principles, it will normally be necessary to follow all of the stages outlined below, but depending on the capability issues raised, it may, on occasion, be acceptable to proceed more quickly and not to undertake each step, for example, where the consequence of error is likely to have a serious impact on the Council. Where it is considered that such action may be appropriate, Human Resources should be consulted as to how best to proceed.

Headteachers may delegate responsibility for managing the performance of a teacher to an appropriate manager.

Given the wide variety of situations which may be dealt with in accordance with this procedure, it is not possible to attach timescales to the individual stages. Instead, reasonable time should be given at each stage in order to ensure fairness to the employee while balancing this with the effect on service delivery.

If, at any stage, the employee's performance reaches the accepted standard, no further action will be taken under these procedures, but the employee should be advised that any future performance concerns will be managed in line with the Council's Capability Policy & Procedure.

A positive and constructive approach should be taken while dealing with capability issues. This should alleviate the possibility of any unnecessary stress being caused by the situation. The employee should also be given adequate opportunity to improve performance and individual circumstances taken into account.

If at any time during the formal procedure it becomes apparent that referral to a capability hearing and subsequent termination of employment may be a potential outcome, it is important that the employee is informed that this is a possible consequence. This information should not, under any circumstances be used as a threat to an employee and should only be discussed with them if it is a genuine, potential outcome of the capability process.

Where all the relevant support has been offered to the employee and the employee has provided no underlying reasons as to why their performance has not improved and/or they are unwilling to engage in the process or is negligent in carrying out their duties it may be relevant to refer the employee to the Council's Disciplinary Policy. This may be considered appropriate at either the informal or formal stage depending on the circumstances. Where it is considered that such action may be appropriate, Human Resources should be consulted as to how best to proceed.

### **3.4 STAGE 1 - INFORMAL DISCUSSION**

The aim of this stage of the procedure is to make the employee aware of issues which have arisen in respect of their performance on an informal basis, to discuss ways in which improvements can be made and to explore any assistance required to facilitate this process.



No formal action will be taken at this stage, and in order to keep the process as informal as possible, it will not normally be necessary for the employee to be represented at any informal meetings. If, however, the employee feels that the presence of a representative is necessary, the manager should discuss this with them and it would normally be expected that agreement would be reached for a representative to be present. In such cases the manager may request the support of a Human Resources representative.

Where the performance of the employee raises concerns and falls below the level required for the post, the manager should hold a confidential, informal meeting with them. Points to be covered in relation to this meeting include:

- The manager should raise concerns regarding poor job performance and, in particular, discuss any shortfalls in skills and/or abilities in a constructive manner. Where possible, examples of poor workmanship, mistakes etc. should be produced. In all instances, details of the standards expected and the shortfall in performance on which concerns are based must be explained to the employee. Unless the employee is made aware of their poor performance, he/she cannot be expected to improve. Reference to professional standards, such as the Standard for Full Registration, in the case of teachers, should be made in this regard;
- there should be a two-way discussion to try and identify any underlying causes for the poor job performance. Consideration should be given to all circumstances surrounding performance i.e. any personal problems which may affect performance; change in management or supervision of the person concerned; problems with the management or supervision of the person; health issues; safety issues; working procedures;
- the emphasis of the meeting should be on finding ways for the employee to improve and to agree reasonable measurable targets within the scope of the job description and personal specification for the post with the employee;
- offer/agree any suitable training, coaching to assist the employee in improving his/her skills and abilities;
- identify any health issues which may be causing poor performance with a resultant referral to Occupational Health if appropriate;
- ensure adequate supervision is provided to ensure that any improvements are sustained;
- at the end of the informal meeting, a suitable period should be agreed in which to review the performance. The timescales agreed should allow adequate time for improvement, taking into account the nature of the concerns raised and the support mechanisms which have been agreed. Depending on the circumstances, it may be appropriate to hold more than one such meeting at appropriate intervals. The employee should be made aware that failure to demonstrate an improvement in their performance within this period is likely to result in the situation being dealt with on a formal basis and provided with a copy of the Capability Policy and Procedure;

A performance target template document, and guidance on use of this document, can be found in Appendix B. This document should be used to record targets agreed, and progress made towards these, during the capability process. A note of the discussions held at the meeting should also be kept. The meeting note and template should be agreed, dated and signed, and a copy kept by both parties. If the employee indicates their disagreement with the comments made regarding their performance, the notes should reflect this but they should be made aware that the process will continue unless the manager is satisfied, having considered the content of the discussion, that an alternative approach is appropriate. A full

discussion containing specific examples of shortfalls in performance should assist in reaching agreement.

Thereafter a review meeting should be held to ascertain if the required standards have been met. The outcome of this meeting should be recorded/performance target template updated as above. If the employee's performance has improved to satisfactory levels, this should be confirmed to them and the manager should continue to monitor the situation in order to consider whether further informal review meetings should be held. If there is little or no improvement, the employee should be informed that it is necessary to move to the formal process and of their right to be represented at this stage. In the case of teachers, the Headteacher should be made aware of the view that the employee's case should progress to the formal process and any concerns they may in this regard taken into account before moving to the formal stage.

### **3.5 STAGE 2 - FORMAL DISCUSSION**

Where the informal meetings have proved unsuccessful in improving performance and where the performance of the employee continues to cause concern and falls below the level required for the post, a formal meeting should be arranged with them.

The manager should write to the employee, advising him/her of the meeting, giving 5 working days notice. They should be reminded of their right to be represented and the reasons for holding the meeting should be outlined. A HR representative is usually present at any formal meetings for advice and guidance. An employee should make every attempt to attend the meeting. The letter sent should follow the example given in Appendix C.

The meeting will allow the manager to:

- confirm previous informal discussions relating to poor performance and how/why requirements for improvements discussed at this stage have not been met, making reference to the performance target template documents completed previously;
- raise concerns regarding poor job performance and, in particular, discuss any shortfalls in skills and/or abilities. Where possible, examples of poor workmanship, mistakes etc. should be produced. The manager should always have clearly defined standards expected and provide specific examples of the poor performance on which the concerns are based. Unless the employee is made aware of their poor performance, he/she cannot be expected to improve. Reference to professional standards, such as the Standard for Full Registration, in the case of teachers, should be made in this regard;
- discuss any underlying causes for the poor job performance. Consideration should be given to all circumstances surrounding the lack of performance i.e. any personal problems which may affect performance, change in management or supervision of the person concerned, problems with the management or supervision of the person, health issues, safety issues or working procedures;
- agree reasonable measurable targets within the scope of the job description for the post with the employee;
- offer/agree any suitable training/coaching to assist the employee in improving his/her skills and abilities;
- ensure adequate supervision is provided;
- advise employee that continued poor performance may result in a capability hearing being convened.

At the end of the formal discussion meeting, a follow up review meeting should be arranged within a reasonable timescale (e.g. this may be 4 working weeks but will depend on the circumstances such as the tasks or standards to be met and the type and level of support required) to discuss progress made on any agreed targets and performance.

It is necessary that written confirmation is given to the employee on standards required and evidence of where these are not met or where improvements are made and on agreements made at all meetings during the formal stage. This provides the employee with unambiguous information as to what is required of them, as well as being a valuable record of discussions. (A performance target template can be found in Appendix B together with an example letter - Appendix D).

**Redeployment may be raised as a possible option by either the employee or the manager at any stage of the formal process and a redeployment search implemented in accordance with the Redeployment Policy as appropriate.**

### **3.6 STAGE 3 – REVIEW MEETING/S**

At this meeting previous targets set and recent work performance are reviewed and discussed. Depending on the circumstances, it may be appropriate to hold more than one such meeting at appropriate intervals.

The review meeting is an important step in resolving any capability issue. This step ensures that the matter has been fully investigated and consideration has been given to any mitigating circumstances surrounding the poor performance, and ensures that adequate opportunity is given for improvement.

The manager should again discuss and agree the following with the employee:

- recent performance, including any improvement and any continued concerns regarding this; in particular, any targets and goals that have not been met. This should include giving specific examples of areas where improvement is still required and how it has been assessed that the required standard has not been met.
- any underlying causes for the improved/poor job performance. Consideration should be given to all circumstances surrounding the performance i.e. any personal problems which may have had an effect. The manager should ensure that the employee has adequate opportunity to explain the reasons for not meeting agreed targets

#### **3.6.1 Improvement in Performance**

Where performance has improved to acceptable levels and no further action is considered necessary, the manager should write to confirm satisfaction with the employee's performance and confirm the need to maintain this level. The manager should also agree to continue to review performance as with any other employee.

If performance subsequently falls below acceptable levels within short time scales, depending on the circumstances, it may be appropriate to deal with this lapse by continuing the formal process rather than starting at the beginning of the procedure. In deciding the most appropriate way to proceed, consideration should be given to whether the circumstances surrounding the current fall in performance are similar to those identified previously.

If the employee's performance continues to lapse despite being provided with the appropriate support as detailed above, it may be reasonable to consider redeployment or referral to a capability hearing rather than commencing the process again. It is important that there is documentation to support this decision.

### **3.6.2 Improvement But Not To Acceptable Levels/Standards**

Where there is an improvement but acceptable levels/standards are not being met, it may be necessary to continue to review progress. At this stage, the manager should explore the reasons why sufficient improvement has not been made and agree:

- further measurable targets within the scope of the job description for the post
- further suitable training/coaching to assist the employee in improving their skills and abilities to the required level.

In such circumstances, a suitable date should be agreed for a further review meeting to review performance. Following this, the manager should continue to monitor the situation in order to consider whether further review meetings or a capability hearing/redeployment should be considered.

The manager should confirm the targets set and future arrangements in writing to the employee (performance target template can be found in Appendix B together with a template letter in appendix D).

There may be occasions where, despite the fact that there is some improvement, the circumstances are such that the manager considers further opportunity to improve will not lead to the attainment of acceptable standards. In such circumstances, the manager may make the decision to proceed to redeployment if this has not already been considered, or to a Capability Hearing (See Part 6).

### **3.6.3 No Improvement In Performance**

If there has been no improvement in performance, the employee should be advised of the seriousness of the situation and of the potential implications of continued poor performance, ie, search for redeployment to an alternative post if not previously considered or progression to a Capability Hearing (See Part 6).

## **PART 4 HEALTH RELATED CAPABILITY**

### **4.1 INTRODUCTION**

It is recognised that, on occasion, employees may be unable to perform their duties due to ill health. It is the policy of the Council as an employer to deal with such situations in a sensitive and compassionate manner, providing support and information as required. A distinction should be made between absence on the grounds of ill health or injury and absence for no good reason which may require reference to the Council's Disciplinary Policy.

In general, incapacity due to ill health can fall into three categories:

- long term absence (see Section 4.2)
- persistent short-term absences (see Section 4.3)

- poor performance due to ill health (see Section 4.4)

Normally health related issues will be managed in accordance with Falkirk Council's Managing Sickness Absence Policy in the first instance, progressing to the Capability Policy & Procedure thereafter if there is no improvement in the employee's performance/ attendance.

In general terms when managing health related capability, the following points should be taken into account:

- The employee must be kept fully informed if there is any risk to employment.
- Information on the employee's estimated pension benefits can be obtained at any point during this process. This can be requested by the employee either directly from the Pensions Section or through the Service Human Resources Adviser. Teaching employees may request this information directly from the Scottish Public Pensions Agency.
- Particular pension conditions are relevant if the employee is terminally ill. Advice regarding this can be provided from the Pensions Section.
- The employee is entitled to representation of their choice at all formal meetings.
- If Occupational Health indicate that there is no apparent medical reason for the employee's absence, guidance should be sought from Human Resources.

## **4.2 LONG TERM ABSENCE**

Falkirk Council's Managing Sickness Absence Policy identifies a long term absence to be any absence in excess of 4 weeks, however, the individual circumstances of each case should be considered.

### **4.2.1 Moving to Capability Procedure – Factors to Consider**

Factors to consider in determining whether it is appropriate to manage an employee's long term absence in accordance with the Capability Policy & Procedure are noted below. These are given as guidance only and normally no one factor would be considered in isolation:

#### **Length of the absence/ anticipated return**

Holding regular meetings with an employee on long term absence in accordance with the Managing Sickness Absence Policy will enable the manager to keep up to date with an employee's situation and with the employee's view on when they may be in a position to return. If a return appears to be unlikely within reasonable timescales and/ or if the employee has been off for several months, it may be appropriate to consider referral to the capability process.

#### **Impact on service delivery**

The absence of some employees may have a more significant impact on service delivery than others so their cases may need to be progressed more quickly to the capability process. It is necessary however to be mindful of the need to take a fair and consistent approach to managing capability.

#### **Disability provisions of Equality Act 2010**

The Equality Act places the onus on the employer to consider adaptations which could be made to an employee's substantive post in order to allow their return to work or assessing the possibility of the employee being re-deployed to a more suitable post. Further guidance is given at Appendix J. Consideration should be given to reasonable adjustments which could be made to enable an employee to remain working in their own post before progressing to the capability process and should continue to be reviewed in accordance with Occupational Health advice/changes in the employee's circumstances as required throughout the process.

### **Industrial injury/potential insurance claim**

If the absence is due an industrial injury which has the potential to result in an insurance claim, guidance should be sought from the Insurance Section before progressing to the capability process.

### **Pregnancy related absence**

The manager must consult Human Resources to discuss the situation before taking any action if the employee's absence is pregnancy related or linked to post natal issues.

### **Drug and Alcohol Policy**

Where this policy applies, the employee's absence can still be managed in accordance with the Capability Policy & Procedure but there would need to be evidence that the requirements of the Drug & Alcohol Policy in terms of supporting the employee have been followed as appropriate.

### **Occupational sick pay allowance**

This may be particularly relevant if the employee has only a short period of allowance, since the timescales of the process may need to be altered in order to take account of any hardship which could result.

Entitlement to a particular amount of occupational sick pay does not mean that the employee can insist upon sick pay for that period. There remains an onus on the employer to assess the employee's capability to continue in employment. For example, if a Certificate of Permanent Ill Health is issued after one month's illness, this will normally result in termination of employment. Occupational sick pay can only be paid while an individual remains in employment.

### **Occupational Health advice**

Occupational Health advice will always be sought when managing long term sickness absence under the Managing Sickness Absence Policy. This advice will inform many of the factors to be considered when determining whether it is appropriate to proceed to the capability process. For example, guidance may be given on: length of absence/ anticipated return, Equality Act provisions, reason for absence. Normally the decision to progress to the Capability Policy & Procedure will be made on the basis of up to date Occupational Health advice, eg, where there is no indication that the employee will be in a position to return to work within a reasonable timeframe or that the employee is eligible for ill health retirement.

#### **4.2.2 Moving to Capability Procedure – Advising the Employee**

When it is considered appropriate to progress to managing an employee's case using the Capability Policy & Procedure, a meeting should be arranged with the employee to advise them that this is the case. As noted previously, often the meeting will be combined with a

review of recently received Occupational Health advice. A template letter for invitation to a formal capability meeting is at Appendix E.

At all meetings, the employee should be advised that a potential outcome of implementing the Capability Policy & Procedure could be termination of employment. The outcome of the discussions, including the next step to be taken should be confirmed in writing to the employee.

Options for action to be discussed at the meeting may include:

#### **Further review meeting**

In some cases, it may be considered appropriate to hold a further review meeting within a reasonable timescale before deciding on any further action to be taken, eg, to allow further time for an employee's health to improve or for further medical information to be provided.

#### **Redeployment search**

A search may be implemented in accordance with the Redeployment Policy, taking account of Occupational Health advice.

#### **Special leave request**

An application can be made by the employee to Head of Service/Chief Officer for period of special leave up to 6 months in cases of sensitive/long-term illness (see Managing Sickness Absence Policy for further guidance).

#### **Capability hearing**

The employee's case being referred to a capability hearing/informal meeting with the potential outcome being termination of employment on the grounds of ill health (see Part 6). This may be the case if it is considered an employee will be permanently unfit for employment (ie Certificate of Permanent Ill Health is issued by Occupational Health), see Section 4.2.3, or is unlikely to return to work in the near future.

Discussions held at the meeting(s) must be confirmed in writing to the employee and they should be asked to confirm if they consider the record accurately reflects discussions.

### **4.2.3 Certificate of Permanent Ill Health**

Where a Certificate of Permanent Ill Health is issued by the Occupational Health Unit, then employment with Falkirk Council may be terminated via an informal or formal hearing and, where appropriate, pension benefits paid. Two levels of ill health retirement may be awarded:

Level 1 - where there is no reasonable prospect of the employee being able to undertake gainful employment before the age of 65 with the pension award based on service enhanced to the age of 65.

Level 2 - where there is some reasonable prospect of the employee being able to undertake gainful employment before the age of 65, with the pension award based on service enhanced by 25% of the difference between the employee's current age and the age of 65.

A Level 2 award will not provide full pension entitlements. The employee therefore has the right to appeal against the medical decision to award the lower level of ill health retirement.

Employees who are not issued with any Certificate of Permanent Ill Health can also submit an appeal against this decision.

Any such appeal should be made in writing to the Head of Human Resources and Customer First and should be lodged within 6 months of the date of the letter advising of the decision regarding the pension award.

If the employee is dissatisfied with the outcome of this appeal [Stage One], they have the right to refer the matter to the Scottish Ministers for their determination. This is known as a Stage Two appeal, and must be lodged within 6 months of the Stage One decision.

A sample letter advising employees of a level 1 award is at Appendix G, and a letter notifying an employee of a level 2 award is at Appendix H. Refer to Part 6, Capability Outcomes for guidance on the process to follow and how to proceed. A sample letter confirming discussions with an employee who following OH assessment does not meet criteria for ill health retirement is at Appendix I.

#### **4.2.4 Returning To Work**

If, during the capability process, an employee is considered by their GP to be fit to return to work, and this advice is consistent with Occupational Health advice, there may be a need to meet with them prior to this date in order to discuss what assistance may be required e.g. a phased return although any assistance will probably be referred to in the Occupational Health report. The employee's opinion about his/her capabilities e.g. whether the employee is confident that he/she is capable of full job performance or only partial performance should be discussed. If no such meeting is required, the normal return to work process, as detailed in the Managing Sickness Absence Policy & Procedure, should be followed.

### **4.3 PERSISTENT SHORT TERM ABSENCE**

Employees who are incapable of performing the duties required of them due to frequent, short term sickness absences should in the first instance have their absence monitored in accordance with the informal monitoring process as noted in the Managing Sickness Absence Policy & Procedure. Records showing the duration of, and reasons for, all spells of absence should be kept to help monitor absence levels. This enables management to check levels of absence so that problems can be spotted and addressed at an early stage.

#### **4.3.1 Initiating the Capability Process**

Where there is no satisfactory improvement in an employee's attendance following informal monitoring under the Managing Sickness Absence Policy & Procedure, they will progress to formal monitoring under the Capability Policy & Procedure.

#### **4.3.2 Formal Absence Monitoring**

The employee should be advised in advance of the first formal absence monitoring meeting that, as they have been on sick leave during the period of informal monitoring, their case is now to be considered under the Capability Policy & Procedure. Details of the employee's absence record should be enclosed with the letter and they should also be notified of their right to five working days' notice of any meeting and to be represented (see Appendix C) for invite to meeting letter)



The outcomes of monitoring meetings, including details of the level of improvement required and the timescales agreed for this, should be confirmed in writing to the employee advising of the likely consequences if this does not happen (see Appendix D for the formal monitoring meeting template letter).

#### **4.3.3 Formal Absence Monitoring Meeting - Format**

This meeting should be a constructive discussion with a view to encouraging an improvement in the employee's attendance record. At the meeting the following points should be covered:

- Refer to discussions held during informal monitoring process and explain the move to formal monitoring.
- The manager should confirm that the employee's level of attendance is unacceptable (referring to absence record and trigger levels met).
- Any underlying issues relevant to this absence pattern should be discussed, e.g., personal problems, work-related issues, health issues and any assistance which the manager could provide in order to over-come these problems.
- The impact of any conditions which may be covered by the disability provisions of the Equality Act should be discussed with the employee, taking into account advice obtained from Occupational Health and any other agencies as appropriate. The manager should discuss any reasonable adjustments which they consider could be implemented to assist the employee improving their attendance at work and seek the employee's views on these. (See Appendix I for further guidance on the Equality Act)
- All the points raised by the employee should be noted and considered by the manager and appropriate support provided where necessary.
- The employee should be advised that his/her absence will be closely monitored and reviewed at regular intervals and given a clear target for improvement. The formal review period will be driven by service needs, but should be up to a maximum of 3 months.
- If it is considered that further Occupational Health advice is necessary, this should be discussed with the employee and arrangements made to meet again once this advice has been obtained.
- The employee should be advised that continued persistent absence could lead to referral to a capability hearing and possible termination of their employment.

**Redeployment may be raised as a possible option by the employee, the manager or Occupational Health at any stage of the formal process and a redeployment search implemented in accordance with the Redeployment Policy as appropriate.**

#### **4.3.4 Formal Monitoring - outcomes**

##### **Improvement in attendance**

If at the end of the formal monitoring period the employee's attendance has improved, the manager should express satisfaction both in writing and at a meeting, and if considered appropriate, end the monitoring. The employee should be made aware that if their sickness absence in the 6 months after being removed from the formal stage exceeds the trigger levels again then they will automatically be put back on the monitoring procedure at the formal

stage. If this happens, a meeting should be convened with the manager, employee and their representative to discuss and set new targets.

### **Failure to achieve improvement in attendance**

If the employee has failed to achieve or maintain the required attendance levels during the formal review period, this should be discussed at a further formal absence review meeting, along with the reasons for the absences during the review period.

Managers should note that they do not have to wait until the end of a review period to proceed to the next stage of the monitoring procedure if a trigger continues to be met and the absence level remains above the agreed target.

Options available to the manager at this stage may include:

- Seek further Occupational Health advice if considered appropriate, eg if an underlying health problem has been suggested, or if the employee provides further information on their health.
- Extend formal monitoring if appropriate, eg until outcome of Occupational Health referral is known/ in cases where there has been some improvement in attendance but this has not yet reached a satisfactory level.
- If not implemented previously, a redeployment search may be implemented in accordance with the Redeployment Policy & Procedure, taking account of Occupational Health advice as appropriate.
- Referral to a capability hearing - if attendance is considered to be unacceptable and has not improved/ shows no likely sign of improvement and it is considered that no further reasonable support/ adjustments can be put in place to assist the employee. (See Section 6 – Capability Outcomes).

The manager should write to the employee after each meeting confirming all the points raised and actions or timescales agreed.

## **PART 5 LACK OF NECESSARY QUALIFICATIONS/ REGISTRATION**

### **5.1 INTRODUCTION**

Specific posts within the Council may require individuals to hold relevant qualifications or an appropriate professional registration that is a prerequisite to the job. Managers/Head Teachers are responsible for ensuring that successful candidates have the essential qualifications etc for the post to which they are being recruited prior to commencement of employment.

Should an unfair dismissal claim be lodged with an Employment Tribunal, it would be Falkirk Council's responsibility to prove that a qualification or professional registration is an essential prerequisite of the post.

This procedure is not appropriate for training contracts, eg, Modern Apprenticeships. In such cases reference should be made to Human Resources as appropriate.

### **5.2 OFFERS OF EMPLOYMENT – SUBJECT TO GAINING RELEVANT QUALIFICATION**

It is acknowledged that there may be exceptional circumstances where an appointment is made subject to the employee gaining the essential qualification for the post within an agreed timescale. Where appropriate, successful candidates should be made aware of this requirement at the verbal offer stage, and this clause should be included in any letter of appointment and statement of particulars issued to the employee e.g. - "This appointment is subject to you successfully gaining ....., within ..... years, of commencement". The consequences of not doing so should be clearly explained, ie, that this could result in termination of their employment.

### **5.2.1 Unsuccessful Results**

If the employee is subsequently unsuccessful in gaining the relevant qualification within the specified timescale, it may be necessary to consider dismissal.

Human Resources should be consulted prior to taking any action.

The employee should be given the opportunity to complete the course of study and be allowed one opportunity to take the appropriate resit examination. In exceptional circumstances, where the examining body allows, it may be considered appropriate to allow more than one opportunity to undertake the resit examination. For example this action may be considered to be appropriate where the employee's performance has been affected by personal problems or circumstances relating to their employment. Consideration should also be given the impact on service delivery of allowing a further resit examination.

The manager should agree with the employee any essential work experience, assistance and coaching they may require, and ensure that arrangements are put in place to accommodate this requirement.

As soon as possible, following the release of the initial results, but prior to the resit examinations taking place, the manager should arrange to meet with the employee. The employee must be offered the right of representation at all subsequent meetings.

The meeting should be to:

- discuss the need for the employee to hold the relevant qualification to undertake the duties of the post successfully
- explore the reasons for the employee not attaining the qualification, (e.g., health issues; work/ time related pressures)
- offer appropriate assistance and support to the employee
- confirm the terms of the offer of appointment and the consequences of further unsuccessful examination results, i.e., that this could result in termination of their employment

A sympathetic approach should be taken while dealing with these situations.

All discussions should be documented and confirmed to the individual in writing.

If the employee is successful in obtaining the qualification, their employment position in respect of this result should be confirmed to them in person, and then confirmed in writing.

If the employee is unsuccessful in obtaining the qualification and there is no further opportunity for them to re-sit the examination, a hearing should be arranged as detailed in Part 6.

### **5.3 OFFERS OF EMPLOYMENT – SUBJECT TO EVIDENCING APPROPRIATE PROFESSIONAL REGISTRATION**

The Council does not make offers of employment to a post subject to the applicant being able to evidence their registration with an appropriate professional body unless the professional body operates a qualifying period for employees new to working in a particular area, eg in the case of some levels of SSSC registration. In the circumstances that an applicant is unable to evidence the required professional registration either in application or at interview no offer of employment should be made until the appropriate evidence has been submitted for verification.

### **5.4 DE-REGISTRATION/FAILURE TO EVIDENCE REQUIRED REGISTRATION WITH A PROFESSIONAL BODY OR FAILURE TO OBTAIN ESSENTIAL QUALIFICATIONS WHILE IN EMPLOYMENT**

In the circumstances whereby an individual employee is either de-registered by a professional body or fails to evidence, upon request, their registration with a professional body, consideration must be given to the appropriateness of the individual continuing to undertake the duties of the role, without registration. This also applies to employees already in post who may not have required to be registered with a professional body or to hold an essential qualification at the time they were appointed but where there is now a legal requirement to do so and who, despite appropriate support having been given, have failed to meet the new requirements. Where redeployment on a temporary basis is not considered to be appropriate or possible, suspension of the employee on full pay, pending resolution of the situation, may need to be considered.

Consideration may also need to be given to the possibility of conducting a separate disciplinary investigation into the circumstances surrounding potential de-registration, dependant on individual circumstances.

As soon as possible, following notification of de-registration/failure to evidence registration or lack of essential qualifications the manager should arrange to meet with the employee.

The employee should be offered the right of representation at all subsequent meetings.

The meeting should be to:

- Discuss the need for the employee to hold and evidence the relevant professional registration/qualification to undertake the duties of the post successfully
- Explore the reasons for the employee being de-registered/failing to evidence registration upon request or not gaining the essential qualification
- Offer appropriate assistance and support to the employee, for example is a resit of the qualification appropriate in the circumstances?
- Confirm the terms of the offer of appointment/legal requirements and the consequences of failure to hold and/or maintain professional registration/qualification, i.e. that this could result in termination of their employment.

A sympathetic approach should be taken while dealing with these situations.

All discussions should be documented and confirmed to the individual in writing.

If the employee is successful in their appeal against de-registration, or can subsequently evidence their registration/achievement of the required qualification, their employment position in respect of this outcome should be confirmed to them in person, and then confirmed in writing.

If the employee is unsuccessful in their appeal against de-registration or is unable to evidence registration/qualification within an appropriate time scale, a meeting should be arranged as detailed in Part 6.

## **5.5 DE-REGISTRATION FROM PROFESSIONAL BODY OR LOSS OF ESSENTIAL QUALIFICATION DUE TO CRIMINAL CHARGE/CONVICTION**

Where an employee is de-registered from a Professional Body or loses an essential qualification due to a charge/conviction, advice should be sought from Human Resources as this may be dealt with under the Council's Disciplinary Policy.

## **PART 6 CAPABILITY OUTCOMES**

### **6.0 INTRODUCTION**

An employee will only normally be referred to a capability hearing when one of the foregoing procedures has been fully implemented and the employee is given reasonable opportunity to improve/recover. There may however be circumstances when demonstration of the capability of the employee is such that investigation of the initial facts of the case or where the employee fails to engage in the process, may lead the manager to consider that a capability hearing is appropriate at an earlier stage.

The employee has the right to be represented at the meetings detailed in this section.

The outcome of the meeting/hearing must be confirmed to the employee in writing within five working days.

The employee has the right to appeal against termination of their employment on the grounds of capability, as detailed in Section 6.6.

If the employee has been issued with a Certificate of Permanent Ill Health and is entitled to pension benefits, information regarding estimated entitlements should be requested from the Pensions Section of Finance Services prior to any meeting.

### **6.1 LACK OF NECESSARY QUALIFICATIONS/REGISTRATION**

If the procedure outlined in Part 5 has been followed and fully documented, a Capability Hearing is not generally required in order to terminate employment due to failure to obtain a qualification / registration necessary to undertake the duties of their post where the employee is not in dispute of this decision. In this case a meeting should be arranged with the employee at which the steps taken to assist them to obtain their qualification/ registration should be confirmed and termination of the employee should be confirmed verbally and in writing (Template letter available from HR). At such a meeting the manager should be accompanied by a representative from Human Resources.

If the employee is likely to dispute the facts of the case, the manager may consider it appropriate to refer them to a formal capability hearing.

### **6.2 HEALTH RELATED CAPABILITY**

#### **6.2.1 Informal Meeting**

In circumstances where a Level 1 or Level 2 Certificate of Permanent Ill Health has been issued, and the employee agrees with the decision, with the approval of the relevant Head of Service/Chief Officer it is possible to meet with the employee on an informal basis to confirm that their employment is to be terminated on a given date and of entitlements they are due to receive. If the employee prefers, this meeting can be held at their home (See Appendices G or H for letter to confirm level of award, and Appendix K for invite letter). This is also an option which can be taken when Occupational Health advise that the employee is not expected to return to work in the foreseeable future, but a Certificate of Permanent Ill Health has not been issued,(eg, because the employee is not a member of the Local

Government Pension Scheme, or is over 65 years old) and the employee has indicated their agreement with the decision to terminate their employment (See Appendix L for letter confirming option of informal hearing and Appendix N for invite to meeting letter).

If during the course of this meeting, it becomes apparent that the employee disputes the termination of their employment, this should be discussed with them. If there is no agreement, the manager may consider it is appropriate to refer the employee to a formal capability hearing (See Section 6.3).

In exceptional circumstances, the employee may be too unwell to participate at this meeting, even if it were to be held in their home. In such circumstances, it may be acceptable for the employee to nominate a representative to attend on their behalf. If this is not possible, a letter should be sent to the employee confirming the termination of their employment. Every effort should be made to advise the employee's representative before sending such a letter.

Where the employee is dismissed their line manager must complete a 'Termination of Employment' form on-line as soon as possible (to stop any future payment of salary/wages) and, where applicable, ensure that the Pension Section are provided with a copy of the Certificate of Permanent Ill Health and notified of the termination date

## **6.3 FORMAL CAPABILITY HEARING**

Prior to a hearing the manager who has managed the employee through the capability process will submit a capability report outlining the circumstances for consideration (Report Template can be found in Appendix O). The manager should ensure that up to date Occupational Health advice has been sought and is reflected in the report.

If, on considering the report presented to them, the hearing Chairperson considers that the capability process has not been managed to the point that a capability hearing is appropriate they may ask that the employee's case be managed further and an updated capability report be provided if appropriate once this has been done. An example of such a case could be where a redeployment search has not been implemented and there is no apparent reason for this not having been done.

Before convening a hearing which may lead to dismissal in cases involving performance issues relating to a Teacher, the Director of Education must ensure that the Code of Practice on Competence has been followed. Where a dismissal of a Teacher is being considered, the Teacher must be informed in writing that he/she may ask for his/her professional association to be formally notified.

### **6.3.1 Setting up the Hearing**

**In setting up a hearing the following should be noted:**

- The hearing should be convened by a Director or Head of Service/Chief Officer who has had no involvement at any previous stage of the procedure;
- The employee should be given 5 days' written notice of the date of the hearing and informed of their right to provide supporting papers (See Appendix P);
- The Chairperson should arrange the hearing and ensure that a Human Resources representative and a Legal representative are in attendance;
- The chairperson should ensure the manager is available to present management's case;

- Any paperwork being referred to at the hearing (eg capability report) should be circulated to all parties in advance of the hearing;
- The employee has the right to representation;
- Employees should be encouraged to make every effort to attend the hearing if however they or their chosen companion are unable to attend arrangements should be made for the hearing to be convened within five days of the original date. If the hearing is being rescheduled because their chosen companion is still unavailable, unless there are exceptional circumstances, the employee will be expected to make alternative arrangements to be accompanied at the rescheduled hearing.
- In exceptional circumstances, the employee may be too unwell to participate at this meeting. In such circumstances, it may be acceptable for the employee to nominate a representative to attend on their behalf. Where this is not possible, the Chairperson may conclude that a decision will be made on the evidence available. The employee should be written to and advised of this. Guidelines on the Capability Hearing format and process can be found in Appendix P.

## **6.4 OUTCOMES OF CAPABILITY HEARING**

The main options open to the Chairperson on consideration of the facts of the case are:

- redeployment
- seek further information
- allow additional time for improvement
- dismissal

### **6.4.1 Redeployment**

In most cases redeployment will have been considered, and the appropriate process undertaken, prior to the capability hearing. If this has not been the case (eg, if the employee was previously unwilling to participate in a search but has since change their mind), the Chairperson should make an assessment as to whether it is appropriate to allow a search to be undertaken.

If the Chairperson considers it appropriate to allow time for redeployment opportunities to be sought, he/she should make this clear to all parties present and explain the process which will be followed in order to undertake a redeployment search in accordance with Falkirk Council's Redeployment Policy & Procedure.

In these circumstances, the Chairperson should adjourn the hearing in order to allow redeployment search to be undertaken.

If a suitable redeployment opportunity is found arrangements should be made for the employee to commence this post in accordance with the Council's Redeployment Policy & Procedure.

Where no redeployment opportunity is identified, the Chairperson should reconvene the hearing.

### **6.4.2 Seek further information/allow additional time for improvement**



If the Chairperson considers that the facts presented do not warrant the employee being dismissed on the grounds of capability, it is open to them to adjourn the hearing for a period of time in order to:

- give the employee an additional opportunity to improve their performance/attendance in order to meet further reasonable agreed targets within defined time scales, or,
- allow for additional information/clarification to be obtained in respect of points raised at the hearing, or,
- Trial/assess reasonable adjustments agreed by the Chairperson.

In any of the above circumstances the Chairperson should confirm the reasons for the adjournment clearly to those present and confirm these in writing to the employee. The letter issued should note: the purpose of this adjournment, any targets which require to be met, how these will be measured and the time scales which have been agreed for review. Details of the support to be provided to the employee should also be documented.

The Chairperson should confirm the date when the hearing will be reconvened to all parties present. This should allow reasonable time for either a further investigation to be concluded for the required improvement in performance to have been achieved or for a redeployment search to be undertaken.

On reconvening the hearing, the Chairperson should assess the additional information obtained, or the details of the performance of the employee during the period of adjournment and take a decision as to the most appropriate course of action.

It may be the case that there is an improvement in performance, or additional information is obtained which leads the Chairperson to the conclusion that dismissal is not appropriate. In such circumstances the Chairperson should confirm their decision in writing to the employee, detailing the reasons for coming to this conclusion. They should also confirm the required level of performance expected in future.

If no additional evidence is provided to the contrary, or the required improvement in the employee's performance has not been attained during the monitoring, the reconvened hearing will normally result in the employee being dismissed on the grounds of capability.

## **6.5 DISMISSAL**

### **6.5.1 Process**

If the Chairperson decides that dismissal is appropriate, this must be clearly stated in the letter confirming the outcome of the capability hearing, together with the effective date for the dismissal. Normally employees dismissed on the grounds of capability will receive payment in lieu of notice and outstanding holiday pay.

The employee's line manager must complete a 'Termination of Employment' form on-line as soon as possible (to stop any future payment of salary/wages) and, where applicable, ensure that the Pension Section are provided with a copy of the Certificate of Permanent Ill Health and notified of the termination date.

Where the employee is a member or registered with another professional body e.g. SSSC, consideration should be given to whether it is relevant to advise them of this decision. Any such formal notification should be issued by the relevant Director/ Chief Officer.

#### **6.5.2 Points to consider**

Should a tribunal claim be made in respect of a capability dismissal, Falkirk Council would have to be in a position to demonstrate the employee's unsuitability and the actions which have been taken to improve their performance. It is important therefore that the Chairperson of the hearing is satisfied that the decision to dismiss is a reasonable one which can be supported by the evidence provided.

The decision to dismiss on this basis should not be contradicted by providing a misleading reference on or following dismissal. Managers should therefore seek advice from Human Resources before providing the employee with any reference in such situations.

If a dismissal on the grounds of capability becomes the subject of a complaint to an employment tribunal, the tribunal will consider whether Falkirk Council have complied with the Advisory, Conciliation and Arbitration Service (ACAS) Discipline and Grievance Code of Practice, the requirements of which are reflected in this policy.

### **6.6 APPEALS**

#### **6.6.1 Right to Appeal**

Every employee has the right to appeal against dismissal on the grounds of capability. This appeal should be made in writing to the Chief Governance Officer within 10 working days of receipt of the letter confirming the decision to dismiss.

The Chairperson should advise the employee of this right at the end of the capability hearing and in the letter subsequently issued.

#### **6.6.2 Process**

Appeals against dismissal will be heard by the Appeals Committee of the Council.

The appeal should be lodged with the Chief Governance Officer and will normally be heard within 30 working days of the submission of the appeal. The employee has no further internal right of appeal beyond this hearing.

## **PART 7      ROLES AND RESPONSIBILITIES**

### **Line Managers/ Head Teachers**

Every Manager/ Head Teacher is expected to:

- ensure that the standards expected of the employee are reasonable
- ensure that the employee is made aware of and understands the standards expected of them
- ensure that the employee is made aware of the poor performance at the earliest opportunity available
- provide the employee with adequate opportunity, training, assistance and resources to improve his/her performance
- agree targets and review periods within reasonable timescale
- Promote the health, safety and wellbeing of all employees, including use of risk assessments to identify and manage hazards impacting on both physical and mental health in the workplace;
- Ensure employees are aware of their responsibilities, and the consequences of not complying;
- Monitor levels of sickness absence for individuals and teams, applying triggers where necessary;
- Fairly and consistently apply procedures to support and manage staff absences, whilst dealing with unauthorised and/or high levels of sickness absence;
- Maintain a positive and preventive approach rather than a punitive approach;
- Be sensitive and supportive to those suffering the effects of ill health;
- Maintain regular communication with employees who are absent on long term sick leave;
- Ensure that all recording of sickness absence is maintained with respect for confidentiality, and that relevant certificates are passed promptly to Payroll to enable the payment of Sickness Allowance and Statutory Sick Pay;
- Be aware of how the Equality Act could impact on managing sickness absence and manage employees accordingly.

### **Employees**

Every employee is expected to:

- keep up to date with the skills and knowledge required to undertake the duties of their post
- meet any updating requirements of their professional body, maintaining records as appropriate for e.g. Social Workers require to comply with codes of Scottish Social Services Council
- seek advice from their manager regarding any concerns held about their own capacity to undertake the duties of their post
- inform their manager of any factors which may prevent them from carrying out the duties of their post effectively
- engage in the process by undertaking any recommended actions that will support/aid them to improve their performance;
- Attend work unless unfit to do so;
- Report sickness absences promptly to their manager and ensure that the appropriate certification is provided in accordance with the procedure;

- Maintain contact with their manager during periods of sickness absence and communicate effectively about their sickness absence;
- Co-operate fully with the Occupational Health Unit and other organisations that provide support to the Council and its employees;
- Ensure that medical advice and treatment, where appropriate, is received and followed as quickly as possible in order to facilitate a return to work;
- Not participate in any extra-mural or sporting activities which may be detrimental to their health or recovery;
- Not abuse the sickness absence procedures or sick pay scheme.

## **PART 8 REVIEW OF THE CAPABILITY PROCEDURE**

Corporate & Neighbourhood Services (Human Resources) will undertake a review of this procedure as required. However, either the employer or trades unions may propose amendments at any time, by giving notice in writing to the Head of Human Resources and Customer First.

**SUPPORT MECHANISMS**

Central to the Capability Procedure is drawing up a programme of action and support. Listed below are examples of support strategies, please note that not all are appropriate in every case.

**a) REGULAR PLANNING MEETINGS WITH MANAGER**

Regular meetings allow discussions of problems, solutions to be identified and for progress to be discussed and monitored. It allows for the early identification and resolution of difficulties

**b) MENTOR**

A member of staff, other than the employee's line manager, who has expertise in the particular area(s) of concern may be assigned as a mentor providing advice to the employee. Discussions between the employee and the mentor are confidential although a summary of the advice provided by the mentor will be provided to the manager as evidence of the support provided.

**c) VISITS**

Arrangements may be made to observe the work of others within or outside the Council. This may include both brief visits to seek advice or a period of work shadowing.

**d) TRAINING**

This includes long and short courses, reading, distance learning resources and on the job training. Please refer to the Council's Learning & Development Policy and Procedure.

**e) TECHNOLOGY**

The technology available to employees may be revised, as may the employee's use of such technology in performing her/his duties. If the line manager or other appropriate person feels it is necessary the employee may receive training or re-training in the use of technology. Managers will carefully consider whether the introduction of new technology is likely to assist an employee in the performance of her/his duties. If so then appropriate training will be given.

**f) COUNSELLING**

If any employee is experiencing personal difficulties The Employee Counselling Services provides a free confidential counselling service. This information should be provided to employees where applicable and involves self-referral.

## Appendix B

### Performance Target Template

#### Guidance

This template should be used to record, set and review targets agreed in managing an employee's performance related capability as follows:

1. The 'Target Setting section' should be completed and agreed with the employee at each meeting and any learning and development needs should also be agreed and recorded. The relevant part of the signature section should be signed by both the employee and manager and the employee issued with a copy of the form together with a note of the meeting.
2. By an agreed date in advance of the next scheduled meeting the employee, having noted their comments in relation to each target set in the relevant box in the review section of the form, should sign the relevant part of the signature section and pass to the manager.
3. This should then be used as a basis for discussion at the next meeting. The manager should add their comments on the review section based on discussions at the review meeting. The employee should be issued with a copy of the completed form together with the note of the meeting.
4. A new form should be used to record targets at each meeting. Completed forms, together with associated evidence, should be retained by the manager and referred to if a capability report is to be completed.

**NB: Electronic copies of this form are available from Human Resources and on the Underground.**

## Performance Target Template

Post Title  
Job Purpose:

TARGET SETTING						REVIEW	
	Key Responsibilities/ Tasks	Current experience/knowledge	Observed practice	Standards required/How measured	Timescales	Employee Comments	Manager Comments
1.							
2.							
3.							
4.							
5.							

TARGET SETTING						REVIEW	
	Key Responsibilities/ Tasks	Current experience/knowledge	Observed practice	Standards required/How measured	Timescales	Employee Comments	Manager Comments
6.							
7.							
8.							
9.							
10.							



**Learning and development support needs**

Identified needs	Links to key objectives, professional competencies (as appropriate)	How these will be met	Timescale	Progress/ needs met

**Additional Comments:****SIGNATURE SECTION****TARGETS SET****Manager signature:****Date:****Employee signature:****Date:****TARGETS REVIEW DATE:****Manager signature:****Date:****Employee signature:****Date:**

**Performance Related Capability/ Persistent Short Term Absence - Letter Inviting Employee to Formal Discussion**

Dear

I refer to our previous informal discussions regarding your performance at work. In accordance with the Capability Policy & Procedure and as previously agreed, I have arranged a formal meeting in order for us to further review your performance/ *discuss your persistent short term absence. A copy of your absence record is enclosed for information.*

This meeting will take place in my office on.... (five working days notice should be given), at..... (HR Representative, Jobtitle) will be present at this meeting to provide any necessary advice. Please confirm your attendance at this meeting by contacting me on the above number.

If you require any assistance to enable you to participate in the meeting (eg an accessible venue; interpreter), please let me know your requirements in order that appropriate arrangements can be put in place.

In accordance with Falkirk Council's Capability Policy & Procedure, you have the right to be accompanied by a representative of your choice.

If you have any queries or concerns regarding this letter, please contact me on the extension given.

Yours sincerely.

**Performance Related Capability/Persistent Short Term Absence - Letter Confirming Outcome of Formal Discussion**

Dear

I am writing to confirm the discussions which took place at our meeting on ....., at which you were accompanied by....., and ..... was also present. As advised this meeting was held under the Council's Capability Policy & Procedure.

As I explained, the purpose of this meeting was to discuss *my concerns regarding your performance in your post as ..... , within..... My main areas for concern are... (include specific examples used to illustrate your concerns at the meeting). / my concerns regarding your persistent absence from work, ie.....*

We discussed the reasons for this deficit in performance / poor attendance, which can be summarised as follows:

We went on to agree suitable targets for improvement in your performance/attendance, these being.....

(measurable targets with appropriate time scales).

We also agreed support which can be put in place to assist you, ie:

*However as advised should there be a failure to meet the required standards this may result in a Capability Hearing as per the Council's Capability Policy and Procedure where your employment could be terminated on the grounds of performance/ capability due to ill health.*

As agreed, we will meet again on...., in order to review your progress. In the meantime, should you have any queries regarding the contents of this letter or require any additional support, please feel free to contact me.

Yours sincerely

### **Health Related Capability – Invitation to Formal Capability Meeting**

Dear

I am writing regarding your continued absence from work due to ill health and to our previous telephone discussions/meetings regarding this.

At this stage it would be beneficial to arrange a meeting to discuss your on-going absence, to ascertain if you require any further assistance and to discuss your most recent Occupational Health Report dated (date).

I propose that we meet on (date) and would be grateful if you could call me to arrange a mutually convenient time. We can meet either at ( ) or your home, whichever is more convenient to you.

If you require any assistance to enable you to participate in the meeting (eg an accessible venue; interpreter), please let me know your requirements in order that appropriate arrangements can be put in place.

This meeting will be held under the Council's Capability Policy & Procedure. You may, if you wish, be accompanied by a representative of your choice. (HR representative name), (Job title) will also be present to advise me. If you have any queries or concerns regarding this letter, please feel free to contact me on the extension given.

Yours sincerely

**Health Related Capability - Letter Confirming Outcome of Formal Discussion**

Dear

I am writing to confirm the discussions which took place at our meeting on ....., at which you were accompanied by....., and ..... was also present. As advised this meeting was held under the Council's Capability Policy & Procedure.

As I explained, the purpose of this meeting was to discuss your ongoing absence from your post of ..... and the Occupational Health report dated .....

Our discussions can be summarised as follows:

We also agreed support which can be put in place to assist you.....

*You will recall that it was explained to you that should your absence continue there may be a requirement for your position to be considered at a Capability Hearing as per the Council's Capability Policy and Procedure where your employment could be terminated on the grounds of capability due to ill health.*

As agreed, we will meet again on....., in order to review your progress. In the meantime, should you have any queries regarding the contents of this letter or require any additional support, please feel free to contact me.

Yours sincerely

**NOTIFICATION OF CERTIFICATE OF PERMANENT ILL HEALTH - LEVEL ONE**

Dear

**Ill Health Retiral**

Following your recent referral to Occupational Health, and the resulting request for ill health retiral, I have now received a Certificate of Permanent Ill Health from the independent OH Physician confirming Level One retirement.

Level One means that the OH Physician considers that you have no reasonable prospect of being able to undertake gainful employment before the age of 65, and that your pension award will be based on service enhanced to the age of 65.

In terms of the Council's Capability Procedure, now that we have this Certificate the next step is to proceed to a Capability Hearing. However if you accept this outcome, an Informal Meeting can be held instead. If you are not satisfied, or have any concerns about the outcome of the application for ill health retiral, then a formal Capability Hearing will be held.

I am sending you two copies of this letter, and I should be grateful if you would complete the box below to confirm whether or not you are willing to proceed with an Informal Meeting, and then return one copy to me. Once I have received your response, you will be contacted again to make arrangements as appropriate.

In the meantime, if you require any further information please do not hesitate to contact me.

Yours sincerely

[Line Manager Name and Job Title]

Please complete [\*delete as appropriate], sign and date the form, and return one copy to line manager.

I have been advised that I have been awarded Level One Ill Health Retirement.

\*I confirm that I understand and accept this outcome, and wish to proceed to an Informal Meeting.

\*I confirm that I am not satisfied with this outcome, and wish to proceed to a Formal Capability Hearing.

Signature:..... Date:.....

Name in Block Capitals: .....

## NOTIFICATION OF CERTIFICATE OF PERMANENT ILL HEALTH - LEVEL TWO

Dear

### Ill Health Retiral

Following your recent referral to Occupational Health, and the resulting request for ill health retiral, I have now received a Certificate of Permanent Ill Health from the independent OH Physician confirming Level Two retirement.

Level Two means that the OH Physician considers that you have some reasonable prospect of being able to undertake gainful employment before the age of 65, and that your pension award will be based on service enhanced by 25% of the difference between your current age and the age of 65. If you were a member of the scheme before 1<sup>st</sup> April 2009, the period of enhancement will not be less than the period you would have been entitled to under the pre April 2009 rules.

You have the right to appeal against the medical decision to award you the lower level of ill health retirement. Such an appeal would be considered by the Council's Head of Human Resources & Customer First. If you wish to proceed with the appeal, you should request an Appeal Application Form from the Council's Pensions Section and send it to the Head of Human Resources & Customer First, Falkirk Council, Municipal Buildings, West Bridge Street, Falkirk, FK1 5RS.

This appeal should be lodged within 6 months of the date of this letter.

If you are dissatisfied with the outcome of this appeal [Stage One], you have the right to refer the matter to the Scottish Ministers for their determination. This is known as a Stage Two appeal, and must be lodged within 6 months of the Stage One decision.

You can also contact the Pensions Advisory Service on 0845 601 2923 prior to or at any stage during the appeal proceedings.

In terms of the Council's Capability Procedure, now that we have this Certificate the next step is to proceed to a Capability Hearing. However if you accept this outcome, then an Informal Meeting can be held instead. If you are not satisfied, or have any concerns about the outcome of the application for ill health retiral, then a formal Capability Hearing will be held.

I am sending you two copies of this letter, and I should be grateful if you would complete the box below to confirm whether or not you are willing to proceed with an Informal Meeting, and then return one copy to me. Once I have received your response, you will be contacted again to make arrangements as appropriate.

In the meantime, if you require any further information please do not hesitate to contact me.

Yours sincerely

[Line Manager Name and Job Title]

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Please complete [\*delete as appropriate], sign and date the form, and return one copy to line manager.

I have been advised that I have been awarded Level Two Ill Health Retirement.

\*I confirm that I understand and accept this outcome, and wish to proceed to an Informal Meeting.

\*I confirm that I am not satisfied with this outcome, and wish to proceed to a Formal Capability Hearing.

Signature:..... Date:.....

Name in Block Capitals: .....



**ILL HEALTH RETIRAL – SCHEME MEMBER DOES NOT MEET ILL HEALTH RETIRAL CRITERIA**

Dear

**Request for Ill Health Retiral**

I am writing to confirm the details of the meeting held on [date] at [venue] at which [HR Adviser] was also present. You were accompanied by [TU or other rep] *[OR You confirmed at the beginning of the meeting that you were aware of your right to be represented but advised that you were happy to proceed without representation]*.

I have now received notification from the Occupational Health Physician, [Doctor's name], that you do not meet the criteria for ill health retiral because [provide details from report, e.g.: *it is likely that you will recover sufficiently to work again before the age of 65*].

In the circumstances [provide details, eg: *given that, despite extended sick leave, you are still not well enough to return to work OR given that we have already tried unsuccessfully to enable you to return to work, OR given that you had rejected the opportunity of redeployment*], I must now refer your case to a Capability Hearing. As I explained at our last meeting, this could result in your dismissal on capability grounds.

[If employee is a member of the pension scheme, add all the following paragraphs – if not, add only the last paragraph.]

I must advise that you have the right to appeal against the medical opinion that you are not permanently unfit for your duties. Such an appeal would be considered by the Council's Head of Human Resources & Customer First. If you wish to proceed with the appeal, you should request an Appeal Application Form from the Council's Pensions Section and send it to the Head of Human Resources & Customer First, Falkirk Council, Municipal Buildings, West Bridge Street, Falkirk, FK1 5RS.

This appeal should be lodged within 6 months of the date of this letter.

If you are dissatisfied with the outcome of this appeal [Stage One], you have the right to refer the matter to the Scottish Ministers for their determination. This is known as a Stage Two appeal, and must be lodged within 6 months of the Stage One decision.

You can also contact the Pensions Advisory Service on 0845 601 2923 prior to or at any stage during the appeal proceedings.

In the meantime, if your circumstances change in any way, or if you change your mind about the redeployment process, or require any further information, please do not hesitate to contact me.

Yours sincerely

## EQUALITY ACT 2010 SUMMARY

- **RELEVANCE OF THE ACT TO EMPLOYEES**

The Act protects disabled people from discrimination in the field of employment. As part of this protection, employers require to consider 'reasonable adjustments' if their employment arrangements or premises place disabled people at a substantial disadvantage compared with non-disabled people.

The Act includes a protection from discrimination arising from disability. This states that it is discrimination to treat a disabled person unfavourably because of something connected with their disability (eg a tendency to make spelling mistakes arising from dyslexia). This type of discrimination is unlawful where the employer or other person acting for the employer knows, or could reasonably be expected to know, that the person has a disability. This type of discrimination is only justifiable if an employer can show that it is a proportionate means of achieving a legitimate aim.

- **DEFINITION OF A DISABLED PERSON**

Under the Act, a person is disabled if they have a physical or mental impairment which has a substantial and long term adverse effect on their ability to carry out normal day-to-day activities, for instance, using a telephone, reading a book or using public transport.

- **EQUALITY ACT IN PRACTICE**

A wide variety of medical conditions could be relevant. An employee may not be considered to have a disability when they commence employment, but subsequent illness may result in the Act becoming relevant to them during the course of their employment.

Failure to comply with the requirements of the Act can lead to a claim being made against Falkirk Council and the relevant manager being required to defend their position in an Employment Tribunal. It is important therefore to ensure that all reasonable steps are taken to comply with the Act.

In order to avoid discriminating against an employee or potential employee, it is necessary to have regard to the Equality Act and to consider all of the facts of any individual case in order to take appropriate action. Expert advice can be obtained from Human Resources, Governance and the Council's Occupational Health Adviser. It is also important to discuss individual requirements with the employee themselves.

Advice regarding external financial support available in the form of funding assistance for reasonable adjustments and supported employment placements is available from Human Resources.

- **ADJUSTMENTS**

Consideration must always be given to whether adjustments to the workplace might reasonably be made and so facilitate a return to work from long term sickness absence, address short term absence issues and or performance/capability issues. Examples of adjustments that could be considered are as follows;

- Adjustment to premises – structural or physical e.g. widening of doorways, providing ramps, relocating light switches, door handles and shelves, providing appropriate contrast in decorations.
- Allocating duties to another person – minor duties could be allocated to another person, e.g. if a job occasionally involves going on to an open roof of a building an employer might have to transfer work away from an employee whose disability involves vertigo
- Transferring a person to fill an existing vacancy –
- Altering work hours – this could include flexible hours to enable additional breaks or changing hours to fit treatment and care programmes
- Changing the workplace – when buildings or part of a building become inaccessible the employer should always consider transferring the person and their work station to a place with access
- Paid and/or unpaid absence for rehabilitation, assessment or treatment – time off during work may be needed for treatment
- Training – this could be training in the use of a piece of equipment unique to the disabled person or general training that needs to be adapted
- Acquiring or modifying equipment – this involves providing specialist equipment needed to do the job, e.g. providing an adapted telephone for someone with a hearing impairment or providing an adapted keyboard for someone who is visually impaired
- Modifying instructions and manuals – the format of instructions and manuals may need to be modified e.g. produced in Braille or on audio tape or instructions for people with learning difficulties conveyed orally.
- Providing a reader or an interpreter – this could involve reading mail to a person with a visual impairment or hiring a sign language interpreter.
- Providing supervision – where someone's disability leads to uncertainty or a lack of confidence.

Most adjustments require little change to the workplace and are easy to arrange in consultation with the individual.

### **Health Related Capability - Invitation to Informal Meeting**

Dear

Following your recent medical assessment, I understand that Dr..... has issued your manager with a Certificate of Permanent Ill Health confirming [Level One/ Level Two] retirement and you have indicated that you are happy to discuss this on an informal basis. As a result, I am writing to arrange a meeting in order that we can discuss how this impacts on your employment with Falkirk Council.

I would be grateful, therefore, if you could attend a meeting at..... on .....  
at ..... for this purpose.

The meeting will be held in accordance with Falkirk Council's Capability Policy & Procedure and you should be aware that it may result in termination of your employment with Falkirk Council. It is your right to be accompanied to this meeting by a trade union or other representative of your choice.

If you require any assistance to enable you to participate in the meeting (eg an accessible venue; interpreter), please let me know your requirements in order that appropriate arrangements can be put in place.

If, for any reason, this appointment is unsuitable for you, please contact me in order that an alternative arrangement can be made.

Yours sincerely

**Informal Hearing Option –Following OH Advice Regarding Level of Fitness for Post –  
Not Eligible for Ill Health Retirement**

Dear

I refer to our meeting on (date) to discuss your most recent Occupational Health (OH) report (dated), where I was supported by (name, Job title) and you were represented by (Name).

*As outlined OH consider that you are considered permanently unfit for the role of (job title)/it is unlikely you will be fit to return to the role of (Job Title) before (date). As you are not a member of the Pension Scheme/ are aged 65 years or over/ have not had the required term of Pension Scheme membership an assessment for ill-health retiral is not applicable. In addition redeployment is also not considered applicable/your redeployment search has been concluded and been unsuccessful.*

As explained in terms of the Council's Capability Procedure the next step is to proceed to a Capability Hearing. If you are satisfied that you are unable to continue in Falkirk Council's employment then an Informal Meeting can be arranged instead. If you do not agree that you are unable to continue in Falkirk Council's employment or have any concerns about the capability process then a formal Capability Hearing will be held.

I am sending you two copies of this letter, and I should be grateful if you would complete the box below to confirm whether or not you are willing to proceed with an informal Capability Meeting, and then return one copy to me. Once I have received your response, you will be contacted again to make arrangements as appropriate.

In the meantime, if you require any further information please do not hesitate to contact me.

Yours sincerely

[Line Manager Name and Job Title]

Please complete [**\*delete as appropriate**], sign and date the form, and return one copy to line manager.

I have been advised that I am **\*permanently unfit/\*unlikely** to be fit for a significant period of time to undertake my role as ..... I understand that I am not eligible to be considered for ill health retirement through the Local Government Pension Scheme. In addition in this circumstance redeployment **\*is not applicable/\*has been concluded and was unsuccessful/\*was offered and refused by me.**

**\*I confirm that I understand and accept this outcome, and wish to proceed to an Informal Capability Meeting.**

**\*I confirm that I am not satisfied with this outcome, and wish to proceed to a Formal Capability Hearing.**

Signature:..... Date:.....

Name in Block Capitals: .....

**Health Related Capability - Invitation to Informal Meeting (Not Eligible for Ill Health Retirement)**

Dear

Following your recent assessment at Occupational Health (OH), I understand that OH have advised that you are *permanently unfit for your role as (Job title)/ Unlikely to be fit to return to your role as (job Title) for (period of time)*. As you are not a member of the Pension Scheme/ are aged 65 years or over/ have not had the required term of Pension Scheme membership an assessment for ill-health retirement is not applicable in this circumstance redeployment is not applicable/ has not been successful in this circumstance/ has been offered but you have opted not to undertake this option.

You previously advised that you were happy to meet on an informal basis to discuss this matter. I am therefore writing to advise you of arrangements for an Informal Meeting to be held in accordance with Falkirk Council's Capability Policy & Procedure in order that we can discuss the options pertaining to your employment with Falkirk Council

I should be pleased, therefore, if you could attend a meeting at..... on ..... at ..... for this purpose.

You should be aware that this meeting may result in termination of your employment with Falkirk Council and that it is your right to be accompanied to this meeting by a trade union or other representative of your choice.

If you require any assistance to enable you to participate in the meeting (eg an accessible venue; interpreter), please let me know your requirements in order that appropriate arrangements can be put in place.

If, for any reason, this appointment is unsuitable for you, please contact me in order that an alternative arrangement can be made.

Yours sincerely

[Line Manager Name and Job Title]

cc Human Resources Adviser

## Invitation to Formal Capability Hearing

Dear

I refer to your previous meetings with (manager) in respect of your (*performance-related capability/persistent short-term absences/poor performance due to ill health/lack of necessary qualifications/capability due to ill health*).

I am now writing to advise you that I will convene a Capability Hearing in ....on....in order to consider the issues raised in respect of your capability to perform your duties of (post) due to *performance-related capability/persistent short-term absences/poor performance due to ill health/lack of necessary qualifications/capability due to ill health*.

*\*Teachers only – You may ask for your professional association to be formally notified that this hearing is being scheduled. Please notify (name) on (number) if you wish this notification to be arranged.*

(Manager) will attend in order to represent management's case. (HR Adviser) and a legal representative will also be present to assist me in an advisory capacity.

The hearing will be convened in accordance with Falkirk Council's Capability Policy & Procedure. You should be aware that this hearing may result in termination of your employment with Falkirk Council and that it is your right to be accompanied to this meeting by a Trade Union Representative or representative of your choice.

If you require any assistance to enable you to participate in the hearing (eg an accessible venue; interpreter), please let me know your requirements in order that appropriate arrangements can be put in place.

Please find enclosed papers to be referred to in support of management's case. You also have the right should you so wish to submit supporting information. If you wish to refer to such papers at the hearing I would be grateful if you could provide me with a copy of this information by (date).

I would be grateful if you could confirm your attendance at this hearing by contacting me on the above number.

Yours sincerely

HEAD OF SERVICE

cc      Management representative  
         Legal representative  
         Human Resources Adviser

CAPABILITY REPORT	
BACKGROUND INFORMATION	
A brief summary of the circumstances surrounding the case.	
SUMMARY OF STANDARDS NOT BEING MET AND ACTIONS TAKEN TO IMPROVE PERFORMANCE/ ABSENCE HISTORY	
Refer to supporting evidence as appropriate e.g. performance target templates, job description highlighting areas not demonstrated by employee concerned; examples of work not performed to acceptable standard; notes/letters of meetings held as part of Capability Process/ Occupational Health advice/ any mitigating factors referred to by the employee/ explain impact on service delivery. For teachers, refer to standards described in the Standard for Full Registration. Attach relevant documents as appendices. <b>(NB Where health is a factor in the employee's capability to perform their duties current Occupational Health advice must be obtained before referral to a capability hearing)</b>	
SUMMARY OF REDEPLOYMENT SEARCH	
Summarise search and attach Redeployment Co-ordinator's report as an appendix	
CONCLUSION/ RECOMMENDATION	
Brief Summary of why you have concluded that a capability hearing is appropriate	
Having reviewed the management of (name of employee's) case, it is my opinion it is appropriate for his/ her case to be referred for consideration at a capability hearing. In reaching this view I have taken account of the following:	



**GUIDELINE ON FORMAL CAPABILITY HEARING PROCESS**

**Preparation for a Formal Hearing**

The employee concerned should be given at least five working days notice in writing of the hearing and the venue, and will also be informed in the same letter of:-

- the fact it will be a formal capability hearing;
- the nature of the capability with sufficient details, including a copy of the Capability Hearing Report and any appendices;
- the potential outcomes and that dismissal is a possibility;
- the composition of the hearing panel, Chairperson, HR representation, legal representative and who will present Management's case;
- the right to submit documentation in response at least 3 working days in advance to the chairperson of the hearing; and
- their right to be accompanied at the hearing by a companion of their choice.

The Chairperson is responsible for ensuring that the management representative and Legal and HR advisers are available to attend the hearing.

It is also the Chairperson's responsibility to ensure that papers to be referred to in support of Management's case are provided to the employee and hearing advisers in advance of the hearing and to distribute any papers submitted by the employee to the Management Representative and hearing advisers in advance of the hearing.

The hearing should be arranged as soon as possible after the conclusion of the capability process. If key parties are unavailable on the arranged date, timescales can be revised with the agreement of both management and employee.

The Chairperson of the hearing is responsible for writing to the employee. In advance of the date of the hearing, make sure that a room is available which is large enough to accommodate everyone in comfort and without interruption, make sure any phones are diverted. Separate rooms should also be designated for the employee and the Management Representative. These should be available both before and during the hearing in case of any adjournment.

**THE FORMAL CAPABILITY HEARING**

**Hearing Procedure**

Both the employee (and their companion) and the Management Representative should be invited into the room at the same time.

Welcome everyone. Introduce yourself and others, explaining everyone's role - particularly with reference to the Human Resources and Legal advisers, that they are there in an advisory capacity.

If the employee is not accompanied, ensure they are aware of the right in this regard they wish to be accompanied before the hearing begins. If they choose not to be accompanied this should be recorded and proceed with the hearing.

If the employee advises that they want to be accompanied, the hearing should be adjourned and the employee advised that the hearing may be rescheduled to another time which falls within five working days of the original date in order to allow the companion to attend.

If the employee is accompanied, check who will be presenting their case – i.e. the employee or their companion.

Once the hearing proceeds, the format should be clearly explained along with the details of the capability.

The hearing can proceed as follows:

### **Management Representative presents their case**

Management should refer to the capability report completed and provide a summary of management of the employee's case.

The employee or their companion will then be given the opportunity to ask questions.

Don't allow long rambling statements to be made before the question is asked. Don't allow both the employee and the representative to ask questions – it should normally be one or other. You must, however, ensure fairness and consistency throughout the hearing.

Once the employee has finished asking questions, you are entitled to ask questions. Remember you are going to make the final decision, so make sure you are clear about what is being said. Your decision is going to be based solely upon what is said during the course of the hearing and upon any written evidence provided.

Advisers will then be provided with the opportunity to ask questions for the purpose of seeking clarity.

### **Employee/their companion presents their case**

Once the Management Representative has fully explained their case, it is the turn of the employee or their companion to present their case.

The Management Rep will then be afforded the opportunity to ask questions as will the Chairperson.

### **Summaries**

Once everyone has been given an adequate opportunity to state their case, the hearing is concluded by asking first the Management Representative and then the employee/ their companion to offer a brief summary of their respective cases. There should be no new evidence at this stage.

### **Conclusion**

Ask the employee if they believe they have been given a fair and reasonable opportunity to present their case. If the response is "no" then you have to ask for a further explanation and take the stated concern into account when considering the your decision. If the procedures have been followed this is unlikely to happen. If it does, deal with the point if possible, there is normally no opportunity to

rehear the case or allow new/further information to be stated unless in exceptional cases. The position should be noted in case further action is necessary at a later stage.

The hearing is then adjourned to allow you to come to your decision.

If further information is required then it may be appropriate for you to advise that you will notify of the your decision in writing rather than reconvene for this purpose.

#### Reconvening the Hearing

Clearly advise the employee of your decision e.g dismissal, extended timescales for improvement, additional redeployment search, etc. Advise the employee of the reasons why you have come to your decision and, where appropriate, what changes in behaviour are expected of them and timescales associated with this. It must be advised that if the standards are not met within the specified timescales then a further hearing will be convened with the possibility of dismissal considered.

Where you are taking a decision to dismiss the employee they must be advised that termination will take effect from the date of the hearing and that they will be entitled to receive payment in lieu of notice and any outstanding annual leave payments.

Where the dismissal is being taken on grounds of ill health retirement then the employee must be advised of their entitlement and advised that the Pensions Section will contact them to progress payment of their pension.

Ensure that the employee is aware of their right to appeal against your decision and that this must be made to the Chief Governance Officer within 10 working days of receiving the written confirmation of your decision.

As a final point thank everyone for their attendance.

Where the employee is dismissed the Chairperson must ensure that their line manager completes a 'Termination of Employment' form on-line as soon as possible (to stop any future payment of salary/wages) and, where applicable, ensure that the Pension Section are provided with a copy of the Certificate of Permanent Ill Health and notified of the termination date.