



Transform Trust Capability Procedure Policy September 2018

Capability Procedure

It is acknowledged that employees are normally competent, effective and are able to develop through the range of opportunities provided by the school. There are, however, occasions when a significant gap may develop between the requirements of a job and the individual's performance and, if not appropriately addressed, the situation may affect pupils' education and the performance of the school.

No employee will be subject to any formal capability meeting under these procedures without a period of documented support as part of the Appraisal process.

The procedures will be managed in the case of the Head Teacher of a Trust school, Executive Head Teacher or Executive Leadership Team of the Trust by the CEO. There may be moderation by a Trustee/Chair of Governors from the relevant school or in the case of the CEO by the Chair of Directors of the Trust Board. In all other cases, the procedures will be managed by the Head Teacher or their appointed representative. Support will be provided in all cases by the Trust HR Lead and guidance must be sought before commencing these procedures from the CEO/HR Lead.

Application

This policy applies to all employees about whose performance there are serious concerns that the appraisal process has been unable to address.

This procedure does not apply to newly qualified teachers (NQTs) who are undergoing induction, or employees who are still subject to a probationary period.

The school has a separate process in place for staff appraisal.

Separate procedures exist for handling matters of misconduct or complaints made by parents or other persons.

Schools should contact the HR Lead for advice on the implementation and application of this policy.

This policy should be applied consistently and fairly so as not to discriminate against any particular group on the grounds of a protected characteristic under the Equality Act, e.g. age, disability, gender reassignment, marriage/civil partnership, pregnancy and maternity, race, religion and belief, sex and sexual orientation.

The right to representation by a representative of a recognised Trade Union or work colleague applies at the formal stages of this policy. However, the Trust recommends early engagement with the Union to ensure support is provided at the outset to maximise support.

When a member of staff is experiencing difficulties, support and guidance will be provided through the appraisal process. Where it appears a member of staff's personal circumstances are

leading to difficulties at work, appropriate support will be offered at the earliest opportunity. Employees may draw upon support available across the Trust and from their own Trade Union and related learning provisions. Within schools, staff may look to the advice, support and encouragement available from colleagues, particularly those with professional leadership roles, including members of the senior leadership team.

If a period of sickness absence appears to have been triggered by the commencement of monitoring or a formal capability procedure, the case will be dealt with in accordance with the school's absence policy. The manager should consider a referral to the school's Occupational Health Advisor. At this stage any considerations around support needed or reasonable adjustments necessary due to the considerations of the Equality Act should be made and actioned as soon as possible. Employees should also be reminded of the support that may be available to them from their Trade Union. It may be appropriate for an independent individual to be identified within or outside of the school, to provide confidential support. Monitoring and assessment under this policy should be based on evidence of performance at work and will normally require the employee to be present.

In cases where the employee attributes the concerns about their performance to a disability or other ill health, the manager should consider making an occupational health referral and should consider any advice before making a decision to proceed, including any provided about making reasonable adjustments for the employee.

Consideration must be given to the employee's work/life balance throughout the process, particularly with regard to setting a realistic timetable for improvement.

Informal Process

It is expected that the duration of the informal procedure will take account of the individual circumstances and nature of the improvement required. This should not normally exceed 6 weeks and should be agreed, where possible, at the commencement of the procedure. This period should be reviewed during the procedure should any extenuating circumstances arise. There may be strategic elements of a leadership role, which require a longer period than 6 weeks to achieve. Therefore, this should be considered when setting an appropriate timeline for improvement.

If the appraiser identifies through the appraisal process or through other sources of information, that the difficulties experienced by a staff member are such that, if not rectified could lead to the capability procedure. There will be a clear distinction between the appraiser (usually line manager) and the person determining an outcome (usually Chair or Head Teacher). The appraiser will, as part of the appraisal process, meet the member of staff to:

- give clear written feedback to the staff member about the nature and seriousness of the concerns;
- give the staff member the opportunity to comment on and discuss the concerns including

- any extenuating circumstances that have led to concerns being raised;
- give the staff member at least 10 days' notice that a meeting will be held to discuss targets for improvement alongside a programme of support and remind them that they have the right to be accompanied by a work colleague or Trade Union representative at any future meetings where capability will be discussed;
 - agree and establish, in consultation with the staff member, an action plan with support that will help to remedy specific concerns;
 - make clear, how progress will be monitored and when it will be reviewed; It may be appropriate to review and revise existing objectives/targets, allowing sufficient time for improvement; and
 - explain the implications and process if no, or insufficient, improvement is made. This may include reference to formal capability stages.

A record of all meetings should be taken and shared with the employee.

The member of staff's progress will continue to be monitored as part of the appraisal process and time given for their performance to improve. During this monitoring period, the member of staff will be given regular feedback on progress and arrangements will be made to modify the support programme if appropriate.

If sufficient progress is made, the member of staff should be informed that the capability process will cease, and the appraisal process will continue as normal.

If no, or insufficient improvement has been made, the manager should consider whether to commence formal capability proceedings. The employee should be advised to seek the support of their Trade Union.

As a final check and balance to invoking the formal capability process, line managers will ensure that the following have been put in place:

- The employee has undergone an appropriate period of induction to their role
- An up to date job description has been issued to the employee
- Professional standards and overall expectations of performance have been made clear
- The employee's performance has been monitored and feedback has been provided

Formal Capability Process

The principle purpose of a capability procedure is to support and ensure that staff are able to perform their duties and to deal with under-performance on a formal basis. The aim is to deal with those cases, where, despite appropriate management support (normally provided through the appraisal process), a member of staff is deficient in key areas of ability, skill, competence or knowledge and is consequently unable to carry out their required duties to an acceptable standard.

Under-performance will be managed in a way that ensures that the quality of teaching and learning is unaffected, and that the overall performance of the school/Trust is not compromised. The overall approach to capability will be supportive, constructive and helpful to the employee. This procedure complies with the provisions of the ACAS code of practice.

The capability procedure applies to staff only where there are serious concerns about their performance that are not able to be addressed by the appraisal procedure. The purpose of a capability meeting will be to establish the facts and will usually be chaired by either the Chair of Governors or the Head Teacher, with the expectation they have not been involved at any earlier stage. For Trust Centre staff, this will either be a member of the executive team or the CEO. The subject of the capability meeting will be able to respond to concerns about their performance and to present any relevant evidence.

Employees will be made aware that whilst they are and remain the subject of the capability procedure; the normal appraisal arrangements will be suspended. Employees are expected to cooperate constructively with arrangements that are put in place to address under-performance. Where an employee believes that they are being unfairly treated, they may raise an informal complaint or a formal grievance as appropriate.

As is the case in all formal procedures, the chair of each formal meeting (which would be the Head Teacher or Chair of Governors) should ensure that clear written records are kept, in particular, the management concerns about the employee's performance.

Formal capability meeting

At least 10 days' notice will be given of the formal capability meeting. The notification will contain sufficient information about performance concerns and the possible consequences to enable the employee to prepare to present their case at the meeting. The notification of a capability meeting will be accompanied by copies of written evidence, details of the date and time of the meeting and will confirm the employee's entitlement to be accompanied by a companion who may be a work colleague or a Trade Union representative.

Where maternity leave commences during the formal procedure, the process will be paused until the employee's return to work. In the case of long-term sickness and/or disability, medical advice will be sought, and a decision made appropriate to the individual case.

Employees are entitled to representation from the commencement of the formal process. If the employee is a Trade Union representative, the manager should contact the TU senior officer of the relevant Union.

During the meeting, the manager will present evidence to the Chair of the meeting. Present may be a performance advisor and/or the Trust HR Lead who will offer guidance to the Chair.

The chair of the capability meeting (who will be the Head Teacher or Chair of Governors) will aim to

- a) Identify clearly and document the areas and level of concern, for example, which of the standards expected of the employee are not being met;
- b) Identify the evidence used to reach this conclusion;
- c) Invite the employee to provide an explanation/response to the concerns raised, including any mitigation;
- d) Clarify the expected level of performance required and the improvements expected, identifying any success criteria that might be appropriate and that may assess whether or not the necessary improvement has been made;
- e) explain and document any support that will be available to help the employee to improve to a point where they can be removed from the capability procedure;
- f) set out the timetable for improvement and explain how performance will be monitored and reviewed;
- g) Clarify the consequences of failing to improve their performance; and
- h) Warn the employee formally that failure to improve within the set period could lead to dismissal (in very serious cases, the warning could be a final written warning).

At the end of the meeting, the person conducting the Formal Capability Meeting may conclude one of the following outcomes:

- (i) that there are insufficient grounds for pursuing the capability issue and that it would be more appropriate to continue to address the remaining concerns through the appraisal process;
- (ii) that the concerns are not those of capability, but misconduct and as such, the person conducting the meeting may consider referring the matters through the disciplinary procedure.

In i-ii. above, action under the Capability Policy would cease;

In cases where the person conducting the meeting believes that the formal capability procedure should continue, the person conducting the meeting will:

- (a) Remind the employee of the improved standard of performance expected, identifying any success criteria that might be appropriate and that may assess whether or not the necessary improvement will be made;
- (b) Discuss and agree any support that will be available to help the employee improve their performance and consider any requests from the employee for such support;
- (c) Set out the timetable for improvement and explain how performance will be monitored and reviewed. The timetable will depend on the nature and seriousness of the concerns and is anticipated to be between 4 and 8 weeks. It is for the manager to determine the set period in each case. It should be reasonable and proportionate, but not excessively long, and should provide sufficient opportunity for an improvement to take place. Allowance should be made to enable the employee to maintain a healthy work life balance; and

(d) Issue the employee with a warning (formal or final depending on the stage of procedure) and advise the employee that failure to improve within the set period could lead to a final warning or dismissal (depending on the stage of procedure). In very serious cases, this warning could be a final written warning.

The person conducting the meeting may adjourn the meeting at any time in order to seek advice, to arrange for further investigations, or because more time is needed in which to consider any additional information.

Any request for an adjournment by any party should not be unreasonably refused.

Notes will be taken of the Formal Capability Meeting and a copy provided to the employee.

A written outcome of the Formal Capability Meeting will be provided to the employee within 5 working days. The written outcome will include the matters covered above and give information about the timing of the review stage. The outcome will contain the procedure and time limits for appealing against the warning. If a final written warning has been issued, the employee will also be informed that failure to achieve an acceptable standard of performance within the set timescale, may result further action which could result in dismissal.

Monitoring and Review Period (from 6 - 8 weeks)

A performance monitoring and review period will be set during the formal capability meeting. Formal monitoring, evaluation, guidance and support will continue during this period.

If the employee was issued with a warning other than a final written warning, they will be invited to a Formal Review Meeting at the conclusion of the monitoring and review period. It is advisable that two individuals support this process; one to oversee support and one to undertake the monitoring activity.

If the employee was issued with a final written warning, they will be invited to a Decision Meeting at the conclusion of the monitoring and review period.

Formal Review Meeting

The Formal Review Meeting will have the same format as the first formal meeting. The manager will present evidence, the Chair of the meeting will be either the Head Teacher or Chair of Governors.

At least 10 days' written notice of a Formal Review Meeting will be provided, and the notification will contain details of the time, date and place of the meeting and will advise the employee of their right to be accompanied by a representative.

During the meeting, the manager may be accompanied by the Trust HR Lead.

If the person conducting the meeting is satisfied that the employee has made sufficient improvement, action under the Capability Policy will cease and the appraisal process will re-start.

In cases where the person conducting the meeting believes that there has been some progress/improvement and there is confidence that more is likely, it may be appropriate to extend the monitoring and review period further, as deemed appropriate; however, this will not normally be extended by more than the duration of the original monitoring and review period, unless specific circumstances apply. In such cases, a further Formal Review Meeting will take place at the conclusion of the monitoring and review period.

If the person conducting the meeting believes that there has been no or insufficient progress/improvement during the monitoring and review period, the employee will be issued with a final written warning and the monitoring and review period extended for a further period, expected to be between 4 to 8 weeks.

Notes will be taken of formal review meetings and a copy will be provided to the employee. The final written warning will mirror any previous warnings that have been issued.

The employee should also be provided with a written outcome of the meeting within 5 working days, which should provide details of any further monitoring and review period and the procedure and time limits for appealing against the final written warning. The outcome should also inform the employee that they will be invited to a Decision Meeting at the conclusion of the further monitoring period. Where a final written warning has been issued, the employee will be informed in writing that failure to achieve an acceptable standard of performance within the set timescale may result in a referral to the Governing Body for a Capability Hearing, with dismissal a possible outcome.

Decision Meeting

The Decision Meeting will be conducted by the manager.

At least 10 days' written notice of a Decision Meeting will be provided, and the notification will contain details of the time, date and place of the meeting and will advise the employee of their right to be accompanied by a representative.

During the meeting, the manager may be accompanied by the Trust HR Lead. A note-taker may also attend to clerk the meeting.

If an acceptable standard of progress/improvement has been achieved during the further monitoring and review period, action under the Capability Policy will end and the appraisal process will re-start.

If the employee's performance continues to be a cause for concern, a decision will be made to refer the matter to the Governing Body for a Capability Hearing, with a recommendation that the employee should be dismissed from their role within the school.

At the decision meeting, if an acceptable standard of performance has been achieved during the monitoring and review period, the capability procedure will end and the appraisal process will re-start.

If performance remains unsatisfactory (ie where sufficient improvement cannot be achieved despite comprehensive support or where performance concerns are of particular gravity), a decision, or recommendation to the governing body/CEO, will be made that the employee should be dismissed or required to cease working as soon as possible.

Capability Hearing

During a Capability Hearing, the Governing Body will be accompanied by the Trust's HR Lead.

At least 10 days' written notice of a Capability Hearing will be provided, and the notification will contain details of the time, date and place of the meeting and will advise the employee of their right to be accompanied by a representative. At the same time as the notification, the employee will also be provided with a copy of the report that is to be presented by the manager.

The employee has the right to present evidence to the Hearing and this should normally be provided in advance of the meeting. Requests to present additional evidence during the hearing will be considered by the Chair of the panel.

Employees may request witnesses of fact (i.e. not character references) to attend on their behalf where there is a discrepancy over the evidence. They should provide the chair of the panel with a minimum of 3 working days' advance notice of their intention.

The procedure to follow at a Capability Hearing is contained at Appendix 1.

Dismissal

In the event that a decision to dismiss is taken, the employee will receive due notice. Dismissal notice will be given by the Trust.

The notice period will commence from the date that the decision to dismiss is taken.

Appeal

If an employee wishes to appeal against any action taken by the manager or Governing Body under this policy (e.g. a warning, final written warning or dismissal), they should submit a written appeal within 10 working days of receipt of the written outcome, outlining the grounds for appeal.

Appeals against warnings issued under this procedure will be heard by the Appeal Committee of the school's Governing Body.

The Appeals Panel must consist of 3 governors previously uninvolved in the case. The panel could be advised by the Trust HR Lead.

The appeal will be heard without unreasonable delay. The same arrangements for notification (i.e. with 10 days) and right to be accompanied by a representative will apply, as with other meetings held under this policy.

Notes of any appeal hearing will be taken, and a copy provided to the employee.

The employee will be informed in writing of the outcome of the appeal hearing within 5 working days of the hearing. Notes will be taken of the formal meeting and a copy sent to the member of staff.

The decision of the appeals panel is final.

Management Guidance: Applying the Procedures

Role of Governors

Governors will not normally be involved with a capability procedure before the dismissal stage unless the Head Teacher is the subject of the capability procedure.

Role of the Head Teacher

The Head Teacher will be responsible for taking the decision to invoke the capability procedure unless they are the subject of the procedure.

Role of Advisers

Advisers may be invited to participate in the capability procedure or with the monitoring process or with providing support. These could be from the Trust or externally based advisers.

Employee Representation

If the employee's chosen companion is not available at the time proposed for the interview, meeting or hearing and the employee proposes an alternative date and time that is reasonable and falls within 5 working days of the original date, this should be given careful consideration and advice should be sought to ensure that revised arrangements can be made.

Monitoring Arrangements

Any monitoring undertaken will be across the range of principal job responsibilities so that a balanced view can be reached to support the evaluation of performance.

Written Records

Formal warning should be disregarded after a specified period of satisfactory performance.

First written warning - 12 months

Final written warning - 24 months

Grievances

Where an employee raises a grievance that relates to the capability procedure and its management and/or implementation, it may be appropriate to suspend the capability procedure until the grievance can be considered but such a delay should only be considered where there is a strong indication that the employee has been mistreated.

Appendix 1

Capability Hearing

The Capability Dismissal Panel will comprise three governors. The selection of governors must ensure that no conflict of interest may arise in hearing the case.

The date of the disciplinary hearing should be provided to the employee as soon as possible and at least 10 days before the due date. The employee should be given the opportunity to send any written submission or evidence to the panel prior to the hearing. A copy of any submission should also be made available to the Head Teacher or adviser. The Head Teacher or adviser should always submit the case in writing to the panel with a copy to the employee. This must be sent at least 10 days before the date of the hearing.

The date of the hearing should always be notified to the Trust HR Lead who should attend in order to advise the panel on any procedural aspects or matters of employment law.

At the hearing the Head Teacher (and/or advisor) will be responsible for presenting the evidence to the disciplinary panel in the presence of the employee and representative. Witnesses may be called individually by the Head Teacher in support of the case.

The Head Teacher and any witnesses may be asked questions by the employee or his/her representative.

The witnesses may then be asked further questions by the head teacher.

Members of the Staff Dismissal Committee may ask questions of the Head Teacher and witnesses on the evidence submitted.

Note: After completion of the stages the witnesses will be:

- a. Instructed not to discuss the case in any way until after the hearing has been determined.
- b. Asked to retire. Unless otherwise determined by the parties to the hearing, the witnesses may be subject to recall.
- c. The employee or representative will state his/her case in the presence of the Head Teacher. Witnesses may be called by the teacher in support of his/her case.
- d. The employee and any witnesses called may then be asked questions by the Head Teacher.
- e. The witnesses may then be asked further questions by the employee or representative.
- f. Members of the disciplinary panel may ask questions of the employee and his/her representative and any witnesses called.

Note: After completion of the stages the witnesses will be:

- a. Instructed not to discuss the case in any way until after the hearing has been determined.

- b. Asked to retire. Unless otherwise determined by the parties to the hearing, the witnesses may be subject to recall.
- c. The Head Teacher shall then have the opportunity to sum up the case against the employee.
- d. The employee or his/her representative shall have the opportunity to sum up on his/her behalf and offer the Staff Dismissal Committee details of any mitigating circumstances he/she considers should be taken into account.
- e. The employee, representative, Head Teacher and clerk/secretary for the hearing shall then withdraw.
- f. The Staff Dismissal Committee (together with the HR Lead and any other officer(s) acting as clerk/secretary to the panel) will then deliberate in private, only recalling the employee (and his/her representative) and the Head Teacher to clear points of uncertainty on evidence already given. If recall is necessary, both parties will return, notwithstanding that only one of them is concerned with the point giving rise to doubt.
- g. After deliberating, the Chair of the Staff Dismissal Committee will announce the decision to the employee, representative and Head Teacher personally. The right of appeal against the decision will also be explained. The panel will then formally write to the employee within three working days confirming the decision and appeal rights.
- h. The procedure outlined above will also be followed to hear any appeals against decisions of final warnings given by Head Teachers or decisions of Staff Dismissal Appeal Panel, save that there will be no further rights of appeal against the decision other than to an Employment Tribunal where employees have qualifying rights.

Appeals

An employee has a right to appeal against any decision and must be informed in writing that they have 10 working days from receipt of the letter confirming the decision in which to appeal and to whom they should appeal

The employee should be given notice in writing at least 5 working days in advance of the time and place of the hearing.

An appeal will be heard by the Staff Dismissal Appeals Committee, the members of which must have played no part in the disciplinary hearing itself. In cases where the Staff Dismissal Committee heard the initial hearing the appeal must be heard by at least the same number of governors as comprised the original disciplinary panel.

The case will be presented by the Head Teacher or Chair of Governors – whoever presented the initial case for dismissal.

The procedure for hearing an appeal will be the same as that for the disciplinary hearing itself. There is no further right of appeal other than to an Employment Tribunal.

The decision of the Staff Dismissal Appeals Committee will be communicated, in writing, within 3 working days of the appeal hearing.