



# **Guidance on using the Capability Procedure**

## **For Heads of Departments/ Section and Line Managers**

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This practical guide provides an essential toolkit when dealing with capability matters.

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# Introduction

The aim of the Capability Procedure is to help and encourage employees to achieve and maintain required standards of performance. Where it is not possible to resolve performance problems informally (i.e. through additional and focused training, mentoring, coaching and other tailored activities aimed at providing opportunities to improve knowledge, competence, skill and experience so that the individual is able to reach the required standard), the procedure provides a formal process to help focus the individual's mind and/or, eventually dismiss the individual if the required standard fails to be reached

This guidance supplements the procedure by offering advice on how to manage different stages so that matters can be dealt with promptly and fairly while keeping stress to a minimum.

## Principles

Managing performance is an important aspect of the role for those who are responsible for others. Setting objectives, considering development, and reviewing progress are key day to day activities. Where there are difficulties in achieving the necessary standards, an informal but more structured approach may be taken. If this does not prove successful, then the formal capability procedure may be used.

Employees who are not meeting the expected requirements need to be given clear objectives and a timescale within which improvement is expected. If formal proceedings take place, they must be given the chance to hear the case against them and to be accompanied.

When would the capability procedure be used?

The capability procedure may be used wherever it has not been possible to improve performance through day-to-day management and a more structured approach is needed.

It is possible that some serious lapses in performance may require use of the formal procedure without recourse to informal discussion.

**IMPORTANT:** The capability procedure should be referred to at an early stage rather than when matters have become more serious. Using a more structured approach early on may help resolve matters quickly and before there are other effects, for example on health and stress levels.

A member of the ER Advisory team can advise on how to handle these discussions.

# Informal Action

Resolving matters informally requires prompt action by line managers. Where performance standards are not being maintained, line managers need to step in to highlight the standards required and to investigate why these are not being achieved.

It will be necessary to provide guidance, coaching and training aimed at providing opportunities to improve knowledge, competence, skill and experience. A member of the ER Advisory team can provide advice and support.

Although the discussion is informal, it is important that the individual understands what is required and how important it is that they meet the required standards. A written record of all discussions/ conversations relating to this should always be kept.

The capability procedure should be referred to at an early stage rather than waiting until problems are so serious that dismissal seems to be the only option.

**IMPORTANT:** Where someone is having difficulties with their performance, they will often be aware of it and may be suffering personal distress but reluctant to ask for support. Raising these issues should be presented as a supportive measure which should help them get back on track.

## How should problems with performance be addressed?

There are four main aims in conducting a meeting regarding capability:

- To set the standard: a clear indication of what is expected and an explanation of how they are not meeting this.
- To seek an explanation: why is the performance standard not being met: are there any training needs, health or personal problems that need to be addressed or taken into account?
- To require improvement: to tell the employee what they need to do to make improvements and over what time period, and what support they will get.
- To warn of the consequences: to warn the employee that further action will be taken if they do not improve. This should be done even where the discussion has gone well.

**IMPORTANT:** A written record should cover the date of the meeting, what was said in terms of the requirements, the response from the individual, the timescale for improvement, review meetings, and any support that will be provided. The note should also contain a reminder of potential consequences. It should be shared with the individual and placed on the personal file in People & Culture.

# How to approach an informal meeting to discuss capability

## Before the meeting, line managers should:

- Ensure there is evidence and examples of the problem ready to present to the individual.
- Be ready to explain exactly what is required in terms of performance and what review will be put in place (for example, weekly meetings).
- Read the Capability Procedure and this guidance so that they know what may happen next through the formal procedure – and be ready to explain that and to direct them to the procedure.

## At the meeting:

- Explain why the meeting has been arranged.
- Set out the performance problems with some specific examples.
- Invite the individual to explain why this has happened. Check whether there is something happening at home or in their personal life or with their health that maybe affecting them. Offer support – if there are health issues, advice should be taken as to whether this might constitute a disability where reasonable adjustments need to be made (see guidance).
- Issue an informal warning if necessary (see below).
- Tell the individual what they need to do to improve and over what timescale. Some improvements may be expected to happen immediately.
- Warn them what might happen if they do not improve – that action may be taken under the formal procedure.

## After the meeting:

- Make a note of the meeting and share it with the individual, giving them an opportunity to raise concerns or to check their understanding. Keep it as a record.
- If improvement is expected over time, put in place regular review meetings to ensure that progress is maintained.

## What if the individual is reluctant to engage?

It is not unusual for someone to be defensive, in denial or in an emotional state when performance issues are raised. It is important to remember that this is a natural response and not to take this personally or become defensive.

It can take time and support. It may be useful to give them time to reflect and meet again soon after.

If the individual is in denial, it is important to ensure that they receive evidence of their performance and the expectations for their role. If the individual still chooses

not to engage, it will be important to follow up the meeting in writing and it may be necessary to move to the formal stage more quickly.

**IMPORTANT:** Addressing capability issues is important for the individual and the University. The University has a responsibility to provide support and guidance to help employees be the best they can be, while the individual is responsible for delivering the requirements of their role.

## When to issue an informal warning?

An informal warning may be issued as part of the process of seeking improvement. It may be issued:

- During the first discussion, if the line manager feels that the individual is not taking the problem seriously or if it is necessary for quick improvement.
- After the first or a subsequent informal discussion if insufficient improvement is being made.

**IMPORTANT:** Raising issues about performance can be difficult for the employee and the Head of Department / line manager. It is important to be well prepared for the meeting, take advice from People & Culture, and remember that this will ultimately help and support the individual.

## What is a performance improvement plan (PIP)?

A performance improvement plan sets out the individual's objectives for improvement, what they need to do to meet standards, what support will be put in place, and how often review will take place.

This provides important guidance for the individual. Even if a meeting has gone well and it seems as if there is an understanding, it is important to ensure there is a written record so that there can be no misinterpretation.

## What if an employee refuses to engage with a PIP?

Ideally, a PIP should be agreed. If this is not possible, it will need to be provided to the employee by their line manager as a clear statement of what is expected and instruction to undertake certain activities, such as training, with which the individual must comply.

**IMPORTANT:** An example performance improvement plan can be found [here](#). A similar record of objectives, activities, support and review may be used.

How long should someone be given to improve their performance?

A reasonable review period would usually be between one and three months but this will depend on the specific issues to be addressed. If specific training needs are identified, the line manager should ensure this is arranged as soon as possible and that advice is taken from People & Culture.

## Formal Action

When to take formal action.

Formal action should be taken where informal action has not been successful. On some occasions, the lapse in performance may be so serious that formal action needs to be taken straight away, for example, failure to follow important financial procedures.

Advice should be sought from a member of the ER Advisory team before this stage is started.

**IMPORTANT:** Advice must be sought from a member of the ER Advisory team before formal capability action starts. A member of the ER Advisory team will be able to advise on when it is appropriate to take formal action and on the procedure itself.

## What is the process for formal capability action?

The process broadly runs as set out below. A member of the ER Advisory team can advise of appropriate letters to send to the individual at most of the stages.

## Process for Capability Action

- Ongoing management and review
- Informal action and PIP
- Ongoing capability problem
  - meet with a member of the ER Advisory team

- Set up capability hearing
- Hearing takes place
  - let individual know the outcome
- Ongoing management and review
- Any further problems
  - next stage of the process

## Capability hearings

The manager will advise the member of staff that their performance is a matter of concern and arrange a hearing to take place.

The invitation letter should set out the time and place of the hearing, who will be present and why, a brief statement of the problem to be considered, and that the individual is entitled to be represented. With the invitation letter, a capability hearing pack should be provided. This would usually comprise:

- Agenda
- Statement of case, which is a report outlining the problem, what steps have been taken to resolve it and confirmation that these have not been effective, with the following appended:
  - All relevant correspondence.
  - Copy of the University capability procedure.
  - Copy of Performance Improvement Plan.
  - Further evidence – emails, examples of work.
  - Job description.
  - Copies of PDRs / objectives.
  - Copies of any relevant policies or procedures.

If there is a disagreement about meeting notes or the performance improvement plan, then the original and amended versions can be included.

**IMPORTANT:** The pack must contain all evidence relevant to the case to ensure that the employee is given a fair hearing – anything that might be relevant should be included.

## Who attends a capability hearing?

Attendees at a capability hearing would normally be:

- The person hearing the case, usually the line manager (the Chair).
- Employee
- Employee's trade union representative or workplace colleague.
- A member of the ER Advisory team, supporting the Chair

## Who can accompany the employee to the hearing?

The employee can be accompanied by a workplace colleague, trade union representative or an official employed by a trade union (if they are a member of a trade union).

## What if the employee wants to rearrange the hearing but cannot find a suitable time?

Meetings should be rearranged to take account of authorised leave or absence e.g. attending a conference.

All parties should make every effort to attend the hearing on the date scheduled. If there are exceptional circumstances, the hearing may be re-arranged for a different date, but the appellant and respondent should be aware that this may cause delays in the process and undue anxiety in resolving the matter promptly. The employee is entitled to offer an alternative time and date so long as it is reasonable. It must be within 5 working days of the date originally proposed. Should either party not be able to attend the re-arranged date, decisions may be made in their absence on the basis of the information available.

## What if the employee fails to attend the hearing?

The reason must be ascertained if possible. If the circumstances were beyond the employee's control, e.g. illness, another meeting should be rearranged. If the meeting is rearranged and the employee fails to attend for a second time, without good reason, the case may be heard and a decision made in the employee's absence.

**IMPORTANT:** If the employee is persistently unwilling or unable to attend a hearing without good cause, a decision can be made in their absence and on the evidence available.

## **If the employee is unwell, is the capability hearing rearranged?**

Yes, the hearing should be rearranged. However, if the employee has been on sick leave for a number of weeks and there is uncertainty about when and whether they will return to work, the line manager may seek a medical opinion on whether the employee is fit to attend a hearing. This medical opinion should be sought through People & Culture and Occupational Health – and in the context of the sickness absence management policy and the capability procedure.

## **What happens at a capability hearing?**

A capability hearing would usually run as following but this will depend on the circumstances:

- Introductions
- Summary of the procedure
- Outline of how the hearing will be conducted
- Presentation of the evidence by the line manager. Questions from the employee and their representative.
- Employee response.
- Discussion
- Chair sums up and employee asked if they have anything further to say

Please see Annex 2 for a checklist.

## **Who presents the evidence?**

The line manager sets out the problem and the evidence.

## **How does the Chair decide on the appropriate level of penalty?**

Some assessment should already have been given to the level of penalty before the hearing, usually depending on whether there is another live capability warning in place. During the hearing, the Chair may have discovered that:

- The capability problem was not as serious as previously thought.

- Mitigating circumstances that make it appropriate to adjust the level of penalty e.g. deficiency in training, difficult personal circumstances, health issues.

**IMPORTANT:** Formal warnings will be live for 12 months, which means the next stage of action may be taken if further problems occur in this time. Further action can be taken before the end of the 12 months. 1-3 months is a reasonable amount of time to expect an improvement. After the 12 months, the warning will remain on the file as part of the overall record of employment.

## Dismissals

Dismissal may be considered where the employee has already been given a warning under Stage 2 (final formal written warning) and the performance has not improved.

Where dismissal is being considered, advice must be sought from a member of the ER Advisory team and this possible outcome must be mentioned in the letter inviting the individual to the hearing.

Where a dismissal hearing is to take place, the employee should be encouraged to have a [workplace representative](#) present.

Support while dismissal is considered.

A dismissal hearing is obviously more stressful for the individual than other stages so it is especially important that support is provided to the individual.

- Ensure that they are directed to the [Employee Assistance Programme](#).
- If they feel uncomfortable with their line manager providing support, another manager in the area could be asked to provide it.
- Strongly encourage them to have representation at the hearing.

**IMPORTANT:** Following the hearing, the pack and any correspondence must be placed on the employee's personal file in People & Culture.

## Ill Health

### When is it appropriate to use the capability procedure to manage sickness absence?

The capability procedure may be used alongside the Sickness Absence Management Policy to manage sickness absence:

- Where there are frequent short-term absences but no indication at the outset of a serious health issue that prevents them from working regularly. This would be managed as a performance issue using all stages of the Capability Procedure.
- Where there is no realistic prospect of the individual returning to work or is unable to continue or maintain regular attendance. In this case, it is appropriate on the basis of medical evidence to use the procedure to consider their future employment using only the final dismissal stage of the procedure.

The procedure should not be used for dismissal on grounds of ill health without first having a discussion with the individual about reasonable adjustments.

## **How to manage a dismissal meeting where the issue is ill health.**

Where the dismissal meeting relates to ill health, it is important that the medical evidence is considered. The employee must be informed in writing if an approach is being made to their doctor and they must give their consent in writing.

Otherwise, the hearing will take place in the same way as other capability hearings.

**IMPORTANT:** Where ill health is the focus of the capability procedure, line managers must take a sympathetic and considerate approach. It is particularly important to ensure that regular contact is made with the individual and that records are kept of this.

## **Getting back to work after a capability process.**

Once an employee has been informed of the results of the hearing and where dismissal is not the outcome, it is important that all parties get back to a good working relationship.

Line managers should:

- Ensure the employee knows what is expected of them.
- Schedule regular review meetings to ensure they are keeping on track, especially where there has been a warning.
- Adopt a supportive and friendly approach – the warning has been given (or not given) and it is now time to move on and make a fresh start.

Employees that have gone through a capability process should:

- Ensure they understand what is expected of them – and ask questions where they do not.
- Seek support and guidance where they need it.

- Accept that their line manager was performing their role in taking forward the capability process – it is important not to hold a grudge in the future.

**IMPORTANT:** Once a formal capability process has concluded, it is important to continue to support the individual and to make a fresh start.

# Annex 1: How to approach an informal meeting to discuss capability

## Before the meeting, line managers should:

- Ensure there is evidence and examples of the problem ready to present to the individual.
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- Offer support – if there are health issues, advice should be taken as to whether this might constitute a disability where reasonable adjustments need to be made (see guidance).
- Issue an informal warning if necessary.
- Tell the individual what they need to do to improve and over what timescale. Some improvements may be expected to happen immediately.
- Warn them what might happen if they do not improve – that action may be taken under the formal procedure.

## After the meeting:

- Make a note of the meeting and share it with the individual, giving them an opportunity to raise concerns or to check their understanding. Keep it as a record.
- If improvement is expected over time, put in place regular review meetings to ensure that progress is maintained.

# Annex 2: Checklist for those chairing capability hearings

## Introductions

- Welcome attendees
- Invite those present to introduce themselves and their role at the hearing.
- Representation of employee – if accompanied, confirm the role of the [workplace representative](#), i.e. that they will be able to address the hearing in order to:
  - Put the employee's case forward; sum up the case; respond on the employee's behalf to any view expressed at the hearing; and confer with the employee. However, the representative will not usually answer questions on behalf of the employee.
- If not accompanied, note that the employee has been advised of their right to be accompanied but has chosen to attend unaccompanied.
- Confirm with the employee that they have received the letter notifying them of the hearing and the associated documentation providing advanced disclosure of the case.
- Confirm with the employee that they understand that it is a formal capability hearing which will be conducted in line with the University of Essex's capability procedure.
- Set out what the outcome of the hearing could be e.g. first (written) warning.

## Procedure

- Advise of the procedure or if appropriate invite a member of the ER Advisory team to outline the procedure.
- Confirm documentation provided.
- Confirm how notes or recordings will be taken and shared.
- Respond to any procedural concerns/queries that may arise.

## Main hearing

- The Chair/line manager will set out the capability problem with examples.
- The employee and their representative, if applicable, will be given the opportunity to ask questions of the Chair/line manager and to query the evidence provided.

- The employee and their representative are then invited to present their case.
- The Chair/line manager may ask questions of the employee.
- The employee will be asked to provide a brief concluding statement.
- When closing the hearing, ensure that everyone understands what is going to happen.
- Advise that the outcome of the hearing should be confirmed to the employee in writing,

# Further information and contacts

Support and advice can be obtained from a member of the ER Advisory team

[Capability procedure](#)

[Grievance procedure and guidance](#)

[Disciplinary procedure and guidance](#)

[Sickness absence management policy](#)

[ACAS code of practice](#)

[ACAS Guide to discipline and grievances at work](#)

[Employee Assistance Programme \(EAP\)](#)

[Workplace representatives](#)