

# **Capability Procedure**

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## Introduction

The purpose of the capability procedure is to help and encourage members of staff to achieve and maintain required standards of performance. The aim of the procedure is to ensure that when action needs to be taken, it is applied consistently and fairly in every case.

The capability procedure is a staged process focusing on identifying the reasons for underperformance, working towards a resolution and providing support for the staff member at each stage.

The University has produced [guidance for managers](#) which is also relevant for UECS managers.

The Employment Rights Act 1996 provides that the incapability of an employee to perform work of the kind they are employed to do may justify dismissal.

‘Capability’ is defined by the Act as “capability assessed by reference to skill, aptitude, health or any other physical or mental quality”.

Incapability is best described as a failure to perform the duties of the post to the standard required by the employer. Left unmanaged, this not only affects the efficiency of a service area but may also result in additional burdens on other staff. This in turn can cause frustration, resentment and low morale amongst those staff, while also having a detrimental effect on the person who is not meeting expected standards of capability in delivering their role.

The following may indicate incapability in role:

- Work output is significantly less than that required for the post
- Errors or omissions are made repeatedly
- Failure to meet the deadlines required for the post
- Failure to produce work of a sufficient standard to meet the objectives of the post
- Failure to communicate, in person or in writing, to the standard required to meet the objectives of the post
- Failure to form satisfactory working relationships required to meet the objectives of the post.

This is not an exhaustive list and is provided as a guide only.

If you have a disability, you might need reasonable adjustments to support your capability. You should talk to your manager who will consider your specific

situation. Your manager may request a referral to [Occupational Health](#), to help decide what adjustments to make.

It may not always be possible to provide reasonable adjustments or adaptations to your work, due to practical or operational reasons, but there may be other ways in which you can be supported.

Further information and guidance about reasonable adjustments can be found here: <https://www.essex.ac.uk/staff/health-and-wellbeing/reasonable-adjustments>

Although the usual performance standards must apply to trade union representatives, no formal sanction will be applied in respect of a member of staff who is an accredited Trade Union representative until the circumstances of the case have been discussed with the local senior representative of the Union concerned or a full-time official.

UECS will endeavour to deal with matters under this procedure promptly and without undue delay and expects the member of staff concerned to co-operate to achieve that aim.

The UECS [Absence Policy](#) provides the framework for addressing unacceptable levels of absence. However, where there is no improvement in health or attendance following an absence target being set, absence will be managed from stage 2 of this procedure.

Misconduct is dealt with under the UECS [Disciplinary Procedure](#).

## **Probationary Period**

Employees who are on probation will be subject to regular reviews of progress. Should capability action become necessary, this will be addressed informally in the first instance. Should there be insufficient improvement in performance, the final stage of this procedure will be used. The employee will have a right of appeal if dismissed.

The first formal warning and final formal warning stages will not apply to capability action during the probationary period.

## Section 1: Informal Action

### 1.1 Stage 1

Managers are expected to regularly review the performance of the staff they manage, giving timely feedback, and providing support, training and resources as appropriate.

Where the required standards are not being maintained, the manager will meet with the employee in order to restore a satisfactory standard of performance. To achieve this objective, there are four main aims when undertaking capability meetings:

- To set the standard – to bring to the attention of the employee how they are failing to meet the required performance standards.
- To seek an explanation – to provide the employee with an opportunity to explain why they are not meeting the standard.
- To require improvement – to tell the employee what they are expected to do to bring about improvements in performance, outline any support and give a time period for review
- To warn of the consequences – to warn the employee about the consequences of failure to improve and meet and sustain the standard of performance required

The manager will arrange an interview with the employee regarding their capability. At least two days' notice should be given. The purpose of the meeting is to alert the employee to the concerns and to consider any factors that might be contributing, such as domestic difficulties or inadequate training. Managers should also discuss with the employee if any health or disability issues are a contributory factor, and consider what support is available or whether any reasonable adjustments should be made.

This meeting will be conducted in as informal and in a constructive way as possible, to encourage the employee to discuss matters openly. The manager should ensure that the employee:

- is aware of the concerns
- knows what is required to meet expected standards of performance
- is supported in trying to achieve the expected standards of performance
- is made aware of the timescale over which an improvement is required
- is made aware of the consequences of not achieving the required standard

A verbal warning may be given at the first informal meeting, or a subsequent informal meeting if insufficient improvement is being made.

Following the discussion, the manager and employee will agree a [performance improvement plan \(PiP\)](#). Every effort should be made to agree an improvement plan but if it is not possible to agree a plan, the manager will need to impose a plan that takes reasonable account of the discussions that have taken place. This will set out the improvement needed, the support to be provided, and when review will take place.

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 manager should ensure this is arranged as soon as possible. [People and Culture](#) can be contacted for advice.

The [PiP](#) is intended to help and encourage the employee to improve by setting a clear standard of expected performance and by supporting the delivery of the standard. Regular review meetings should take place to ensure that guidance and support are provided, and improvement monitored.

The manager should keep notes of any informal meetings and, where appropriate, should confirm the main points and outcomes of the meeting in writing. Where a [PiP](#) has been produced, this should be provided to the member of staff within one week of the meeting.

Review meetings should be scheduled and confirmed to the member of staff. A review period of between one and three months is considered a suitable timeframe to demonstrate improvement for most performance concerns.

## Section 2: Formal Stages

### 2.1 Authority to take formal action

A first written warning may be given by the line manager or service manager in consultation with the Senior Employee Relations Adviser.

A final written warning may be given by the Head of Service or their deputy in consultation with the Senior Employee Relations Adviser.

Action at stage 4, including dismissal, may be taken by the Director of Campus Services in consultation with the Senior Employee Relations Adviser.

The Director of Campus Services may delegate authority to another UECS Director to take action, including dismissal at Stage 4.

### 2.2 Stage 2

If, following informal action, the manager considers that there has been insufficient improvement in performance, action will be taken under the formal capability procedure.

When a formal warning is contemplated, the manager will discuss the issue with a Senior Employee Relations Adviser and arrange a hearing, giving the employee written notice of not less than 7 calendar days. The notice will include;

- the date, time and venue of the hearing
- the concerns about their performance
- any relevant documents
- the possible outcomes under the capability procedure
- the right to be accompanied at a hearing by a workplace colleague or trade union representative (if they are a member of a trade union).

A hearing is held where the shortcomings in performance are explained. The employee must be given an opportunity to respond and to provide any explanation.

Confirmation of the outcome of the hearing will be given in writing within 7 calendar days. Where, after due consideration of the evidence, it is decided that a

formal warning is necessary, the manager will issue a first formal written warning to the employee. This reminds them of the standard of performance expected and informs them that further action will be taken if there is no improvement which may lead to eventual dismissal.

The outcome letter should cover:

- The level of action taken (or that no further formal action was taken) and the reasons for that action
- The improvement required by the employee and the consequences of any failure to improve. [A performance improvement plan \(PiP\)](#) will be agreed along with regular dates for review
- That the employee has a right of appeal and how to exercise that right
- That the warning will be active for 12 months but will be disregarded after this time unless any further action is taken. This means that if the capability issue reoccurs during this period, the next stage of action may be taken. If an issue relating to capability reoccurs, it is not necessary to wait until the end of the 12 month period before taking further action. Once expired, the warning will remain on the file as part of the employee's overall record of employment

Where a first formal written warning has been issued, the manager will need to ensure that a [PiP](#) is in place and regular review meetings occur. A period of between one and three months should be sufficient to determine if the required improvements are being made and sustained, but this will depend on the specific issues to be addressed.

If there is insufficient improvement in the agreed timeframe, then the manager must move to the next stage of action under this procedure. As the warning will remain active for 12 months, if an initial improvement is made but the capability issue recurs, the next stage of action may be taken.

### **2.3 Stage 3**

Where an employee's performance has failed to improve to the required standard by the end of the review period set in Stage 2, the employee may be issued with a final written warning. The same procedure is followed as for a first formal written warning.

The employee will be informed in writing giving at least 7 calendar days' notice of a further hearing to review performance. At this stage, the case will be heard by



the Head of Service or their deputy.

Confirmation of the outcome of the hearing will be given in writing within 7 calendar days. Where, after due consideration of the evidence, it is decided that the employee is still failing to meet the required standard of performance, the Head of Service or their deputy will issue a final written warning to the employee. This reminds them of the standard of performance expected and informs them that further action will be taken if there is no improvement, in the form of dismissal.

The letter should cover:

- The level of action taken (or that no further formal action was taken) and the reasons for that action
- The improvement required from the employee, noting that the consequence of failure to improve will be dismissal. A [performance improvement plan \(PiP\)](#) will be agreed along with regular dates for review
- That the employee has a right of appeal, with information on how to exercise that right
- That the warning will be active for 12 months but will be disregarded after this time unless any further action is taken. This means that if the capability issue reoccurs during this period, the next stage of action may be taken. Once expired, the warning will remain on the file as part of the employee's overall record of employment

Where a final written warning has been issued, the manager will need to ensure that a [PiP](#) is in place and regular review meetings take place. A period of between one and three months should be sufficient to determine if the required improvements are being made and sustained, but this will depend on the specific issues to be addressed.

If there is insufficient improvement in the agreed timeframe, then the manager must move to the next stage of action under this procedure. As the warning will remain active for 12 months, if an initial improvement is made but the capability issue recurs, the next stage of action may be taken.

## **2.4 Stage 4**

Where an employee's performance has failed to improve to the required standard after a final written warning and subsequent review period, or in the case of probation, where the employee has had a stage 1 informal meeting and a PiP, the employee may be dismissed. A case for dismissal should be considered by the

Director of Campus Services (or their nominee) with support from a Senior Employee Relations Adviser.

In cases where dismissal is contemplated, the manager will send the employee written notice of a hearing and advise them to be represented. The employee will also be told in the letter that the outcome of the hearing could be dismissal. The letter will refer to the reasons for the hearing and the procedure for arranging the hearing will be the same as those for a final formal written warning.

If, in the opinion of the Director of Campus Services (or their nominee), any mitigating circumstances put forward at the hearing are not sufficient to warrant reconsideration, the employee will be informed that they have been dismissed with contractual notice or payment in lieu of notice.

[People & Culture](#) will confirm in writing, within 7 calendar days, the dismissal to the employee and send it by recorded delivery.

In exceptional circumstances, it may be possible to consider redeployment or demotion but only where a suitable opportunity exists at that time, and it is considered an appropriate alternative with clear reasons why.

## Section 3: Appeals

### 3.1 Right of appeal

An employee who has been subject to formal capability action is entitled to appeal. The right of appeal must be exercised within 14 calendar days of the date of the letter of confirmation of a formal warning.

The appeal should be addressed to the Senior Employee Relations Adviser. A copy of the letter should also be sent to the relevant manager. Appeals will be heard by a senior member of staff who has not been previously involved in the case.

The appeal hearing will review the decision taken at a previous stage. New evidence can only be presented at the appeal stage if there are exceptional reasons why such evidence or witnesses were not produced at the capability hearing and/or that it is necessary in the interests of fairness for the evidence to be considered.

The appeal hearing should take place within 28 calendar days of the appeal being lodged. [People and Culture](#) must give notice (of not less than 7 calendar days) of the appeal hearing in writing to the employee, covering:

- who will hear the appeal
- the date, time and venue of the hearing
- the possible outcomes under the capability procedure
- the right to be accompanied by a workplace colleague or trade union representative (if they are a member of a trade union).

The employee is entitled to offer an alternative time and date so long as it is reasonable, including having regard to the availability of the senior member of staff hearing the appeal. It must be within 7 calendar days of the date originally proposed.

The response to the appeal may be to:

- Uphold the action taken
- Withdraw the action taken
- Reduce the level of action taken

### 3.2 Appeals against dismissal

An employee who has been dismissed following a stage 4 capability hearing is

entitled to appeal on the grounds that new evidence has emerged or that the procedure which led to the decision to dismiss was so flawed that it rendered the decision unfair. The right of appeal must be exercised within 14 calendar days of the date of the letter of dismissal.

The appeal should be addressed to the Director of People and Culture. A copy of the letter should also be sent to the relevant Senior Employee Relations Adviser.

Appeals against dismissal will be heard by a UECS Director who has had no previous involvement in the case, or their nominee.

The appeal hearing will review the decision taken at the previous stage. New evidence can only be presented at the appeal stage if there are exceptional reasons why such evidence or witnesses were not produced at the disciplinary hearing and/or that it is necessary in the interests of fairness.

The appeal hearing should take place within 28 calendar days of the appeal being lodged.

The response to the appeal may be to:

- Uphold the dismissal
- Revoke the decision to dismiss
- Reinstatement the employee with a lesser penalty

### 3.3 Summary of stages in the capability procedure

Stage	Action	Reason
1 - Informal	Informal discussion followed by verbal warning	Underperformance or other capability issue
2 - Formal	Formal meeting followed by First written warning	No improvement following informal action
3 - Formal	Formal meeting followed by Final written warning	No improvement following first written warning
4 - Formal	Formal meeting followed by dismissal	No improvement following final written warning

Note: all stages must be followed consecutively beginning with informal action.

## Section 4: Prolonged Ill Health

### 4.1 Capability dismissals due to prolonged ill health

Where an individual has prolonged ill health without any realistic prospect of being able to return to work within a reasonable period or is unable to continue or maintain regular attendance (as supported by appropriate medical evidence) it may be appropriate to consider the future employment of the individual, without having gone through all the above capability hearings and stages.

Before this stage is reached, the [UECS Absence Policy](#) relating to management of absences (section 7) should be followed, which would include discussion about whether the individual can return to work with appropriate support in the form of reasonable adjustments, which might include a graduated return to work. Where this has not been possible, a written case will be submitted to the relevant UECS Director for consideration, with support from the Senior Employee Relations Adviser.

The UECS Director will arrange a hearing, giving the employee written notice of not less than 7 calendar days. The hearing will consider the medical evidence and the employee will be invited to present any evidence. In circumstances when the employee is too ill to attend a formal meeting, the member of staff, UECS Director and Senior Employee Relations Adviser will agree the preferred approach to be taken before any decision is made. For example, a home visit, electronic meeting, telephone discussion or a written statement from the employee.

If there is a decision to dismiss, [People & Culture](#) will confirm, in writing, the dismissal to the employee and send it by recorded delivery. Notice will be given in accordance with the contract and may run concurrently with Occupational Sick Pay (OSP) entitlement; the dismissal notice is not dependent on the exhaustion of OSP. The decision will be communicated in writing to the employee within 7 calendar days, give reasons and the right to appeal. The appeal process will be that under Section 3.2 of this procedure 'appeals against dismissal'.

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