



# Capability procedure

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# Capability Procedure

## 1. Statement

- 1.1 The University expects all employees to achieve and maintain required standards of performance. The majority of employees will meet or exceed the standards for their roles, but performance issues can arise. If an employee's performance falls below the standards required, action may be necessary under the Capability Procedure. The steps outlined in this procedure will ensure matters are always addressed and resolved in a prompt, fair, proportionate, and consistent way.
- 1.2 To ensure consistency of treatment, no formal capability action will be taken without prior discussion with People & Culture. Any potential conflict of interest must be raised with People & Culture. Further guidance for managers is available from People & Culture and line managers should seek advice at an early stage.
- 1.3 The University Capability Procedure is aligned with the expectations set out in the ACAS Code of Practice on Disciplinary and Grievance Procedures.

## 2. Scope and exclusions

- 2.1 The Capability Procedure applies to all permanent and fixed-term employees at the University of Essex regardless of service. Employees of the University of Essex Campus Services (UECS) or Wivenhoe House Hotel have their own specific policies and procedures. Academic employees may also use the processes under Ordinance 41 (.pdf). This policy does not form part of your contract of employment, and we reserve the right to amend or withdraw it at any time.
- 2.2 The University's Probation Policy and Procedures apply if the employee is on probation. Misconduct is dealt with under the Disciplinary procedure. However, if capability issues arise from a persistent or wilful failure to reach appropriate standards the Disciplinary Procedure may be invoked.
- 2.3 Incapacity due to ill health should normally be managed under the University Sickness Absence Management Policy. Where it has been established that no improvement in health or attendance can be expected, and all other avenues have been exhausted, the employee may be dismissed on grounds of capability (see section 13 below).
- 2.4 Normal performance standards apply to trade union representatives. However, no action under this procedure shall be taken against an employee who is a recognised trade union representative until the circumstances of the case have been discussed with a full time Trade

Union official. This is to ensure that representatives are treated with fairness and not victimised for their representational activities.

- 2.5. Response times may be extended in exceptional circumstances (e.g. out of term-time or due to an employee's annual leave).

### **3. Confidentiality**

- 3.1. All capability matters will be treated with sensitivity and respect for the privacy of any individuals involved. All individuals must treat any information communicated to them in connection with an investigation or capability matter with appropriate confidentiality. Any breaches of confidentiality will be managed in line with the disciplinary procedure.
- 3.2. Records will be kept and shared only with those involved in the case. Meetings will be recorded with permission and the recording will be shared with participants as agreed. The manager may arrange for a summary note to be taken at the meeting and shared if the meeting is not recorded.

### **4. Informal discussions**

- 4.1. If a manager has concerns about an employee's performance, they should discuss the matter informally with them. Appropriate action at this stage may include support and training, coaching, and advice. This is an informal discussion, but it is important that the employee is given a clear indication of the improvement required and that an informal verbal warning may be given as the next step.
- 4.2. If performance does not improve to a satisfactory standard, the line manager should raise the matter with the employee and give an informal verbal warning. The manager should make it clear that the next stage may be to take formal action through the Capability Procedure. The line manager will put in place a Performance Improvement Plan (PIP) and agree when it will be reviewed. The line manager should make a note of the discussion, and of the informal warning, but it will not be regarded as a sanction under the formal capability procedure outlined below.
- 4.3. Employees will not normally be dismissed for performance reasons without having received previous warnings. However, in serious cases of gross negligence, dismissal or summary dismissal without previous warnings may be appropriate.

### **5. Formal capability procedure**

- 5.1. Where informal action has failed to bring about the necessary improvement, it may be appropriate to take formal action through the Capability Procedure. The formal stages are as follows:

## **Stage 1 – First formal written warning (referred to as Oral Warning within Ordinance 41)**

- 5.2. If it is considered that there are grounds for taking formal action over alleged poor performance, the employee will be required to attend a capability hearing. The line manager will advise the employee that their performance is a matter of concern and arrange a hearing to take place giving at least five working days' notice of the hearing date. The University will notify the employee in writing of its concerns regarding the employee's performance, the reasons for those concerns, and the likely outcome if the University decides after the hearing that the employee's performance has been unsatisfactory.
- 5.3. 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 five 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.
- 5.4. At the hearing the line manager will explain the issues with the employee's performance, and they will be given the opportunity to respond and to provide an explanation. The employee will have a right to 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). A hearing may be adjourned if the University needs to gather any additional information or further consider matters discussed at the hearing. The employee will be given a reasonable opportunity to consider any new information obtained before the hearing is reconvened.
- 5.5. A capability hearing will usually involve:
- a) setting out the relevant required and expected standards of performance and explaining why it is considered that the employee has not met these standards, giving examples
  - b) allowing the employee to ask questions, present evidence and respond to the performance concerns
  - c) discussing any particular reasons for the employee's poor performance, including any reasons why any measures taken so far have not led to the required improvement
  - d) identifying whether there are further measures, such as additional training or supervision, which may improve the employee's performance
  - e) where appropriate, discussing targets for improvement and a timescale for review
- 5.6. Following a capability hearing, if the University decides that the employee's performance is unsatisfactory, the University will give a capability warning, setting out (as appropriate):

- a) the areas of work in which the employee has not met the required or expected performance standards
- b) targets and timescales for improvement
- c) any measures, such as additional training or supervision, which will be taken with a view to assist the employee to improve their performance
- d) the review period; and
- e) the consequences of failing to improve within the review period, or of further unsatisfactory performance (including dismissal)

A PIP will be put in place with a review period reflecting the above.

- 5.7. The line manager will write to the employee to let them know the outcome normally within 10 working days of the hearing. The formal written warning will outline the standards of performance expected and inform the employee that further action will be taken if there is no improvement which may lead to eventual dismissal. A PIP will be put in place and a reasonable review period agreed.
- 5.8. The outcome letter will cover the right to appeal the decision. The employee must make their appeal within 10 working days of receipt of the outcome letter.

## **Stage 2: Final formal written warning**

- 5.9. If an employee's performance has failed to improve to the required standard by the end of the review period, the line manager will arrange a further formal hearing to review performance, providing at least 5 working days' notice of the hearing date. At the meeting the line manager will explain the issues with the employee's performance, and they will be given the opportunity to respond and to provide an explanation.
- 5.10. The case will be heard by the line manager. For academic members or professional services employees covered by Ordinance 41, the case may be heard by the Executive Dean or Head of Section.
- 5.11. The line manager will write to the employee to let them know the outcome normally within 10 working days of the hearing. Following a second capability hearing, if the University decides that the employee's performance is unsatisfactory, the University will give a final written warning, setting out (as appropriate):
- a) the areas of work in which the employee has not met the required or expected performance standards
  - b) targets and timescales for improvement

- c) any measures, such as additional training or supervision, which will be taken with a view to assist the employee to improve their performance
- d) the review period; and
- e) the consequences of failing to improve within the review period, or of further unsatisfactory performance (including dismissal)

A PIP will be put in place with a review period reflecting the above.

- 5.12. The outcome letter will cover the right to appeal the decision. The employee must make their appeal within 10 working days of receipt of the outcome letter.
- 5.13. The following are also potential outcomes after the second capability hearing:
  - a) if the employee's line manager is satisfied with the employee's performance, no further action will be taken; or
  - b) if the employee's line manager considers that there has been a substantial but insufficient improvement, the previous warning and review period may be extended (as an alternative to a final written warning)
- 5.14. For those employees not covered by Ordinance 41, all stages of action, including dismissal, may be taken by the Vice-Chancellor, Registrar and Secretary, Executive Deans, Heads of Professional Services in consultation with the Employee Relations Advisory Team. The Director of People and Culture may authorise other named managers to take defined levels of action in accordance with this procedure.

### **Stage 3: Dismissal (excluding Ordinance 41)**

- 5.15. If the employee's performance has failed to improve to the required standard after a final written warning and subsequent review period, the employee may be dismissed. A case for dismissal should be considered by a Head of Department/Section with support from People & Culture.
- 5.16. The line manager will invite the employee to a dismissal hearing providing at least 5 working days' notice of the hearing date. The University may decide to hold a dismissal hearing if it has reason to believe:
  - the employee's performance has not improved sufficiently within the review period set out in a final written warning
  - the employee's performance is unsatisfactory while a final written warning is still active; or
  - the employee's performance has been grossly negligent such as to warrant dismissal without the need for previous warnings



- 5.17. The employee will be told in the hearing invite letter that the outcome of the hearing could be dismissal. Where an employee comes under the remit of Ordinance 41, any case for dismissal would be considered by a Tribunal as set out under paragraphs 15 – 19 of the Ordinance.
- 5.18. If the employee is dismissed, they will be dismissed with contractual notice, or with payment in lieu of notice, unless the employee's performance has been so negligent as to amount to gross negligence, in which case the employee may be dismissed without notice or pay in lieu of notice.

### **Stage 3: Dismissal under Ordinance 41**

- 5.19. Where an employee comes under the remit of [Ordinance 41](#) (.pdf) any case for dismissal would be considered by a Tribunal as set out under paragraphs 15 – 19 of the Ordinance. A complaint seeking the institution of charges to be heard by a Tribunal appointed under paragraph 16 may be made to the Registrar and Secretary who shall bring it to the attention of the Vice-Chancellor. The Vice-Chancellor may then request Council to appoint a Tribunal to consider the charges and determine whether the conduct constitutes good cause for dismissal. Where the Tribunal upholds the charges, the Vice-Chancellor would take the final decision on dismissal.

## **6. Redeployment and demotion**

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

## **7. Appeals**

- 7.1. An employee who has been subject to formal capability action (warning) is entitled to appeal. The right of appeal must be exercised within 10 working days of the letter of confirmation of a formal warning and should state the employee's full grounds of appeal.
- 7.2. It is in the interest of the appellant to make their points sufficiently clear and concise to enable the panel to fully understand the grounds for appeal. The panel will not usually need to review all the information considered at the original hearing.
- 7.3. The Chair of the appeal panel will review the letter of appeal to determine whether there are sufficient grounds for it to go to a full hearing. If they decide there are insufficient grounds the appeal will be dismissed. If there are sufficient grounds for appeal the case will proceed to an appeal hearing.

- 7.4. The appeal will not involve a full re-hearing of the case but a review of the decision already made in relation to the grounds for appeal i.e. to determine if the previous decision was fair, consider whether there were any factual or procedural errors and judge the reasonableness of the decision in relation to the policy.
- 7.5. The appeal should be addressed to the Director of People & Culture. For employees covered by Ordinance 41, appeals should be addressed to the Registrar and Secretary. A copy of the letter should be sent to People & Culture.
- 7.6. Appeals against capability action not including dismissal will be heard by a senior employee who has not been previously involved in the case. For employees covered by Ordinance 41, appeals will be heard by a Pro-Vice- Chancellor. Advice on procedure should be taken from People & Culture.
- 7.7. 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 witness statements were not produced at the capability hearing and/or that it is necessary in the interests of fairness for the evidence to be considered.
- 7.8. The appeal hearing should normally take place within 20 working days of the appeal being lodged. People & Culture must give notice (at least 5 working 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, trade union representative or an official of a trade union (if they are a member of a trade union).
- 7.9. All parties should make every effort to attend the appeal on the date scheduled. If there are exceptional circumstances, the appeal 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, including having regard to the availability of the senior employee hearing the appeal. It must be within five 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.
- 7.10. The response to the appeal may be to:
- Uphold the action taken

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

- 7.11. The University will inform the employee of the final decision as soon as possible, usually within 10 working days of the appeal hearing.
- 7.12. There will be no further right to appeal.

## **8. Appeals against dismissal (excluding Ordinance 41)**

- 8.1. Appeals against dismissal (excluding Ordinance 41) will be subject to the following procedure:
- 8.2. An employee who has been dismissed following a 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 10 working days of the date of the letter of confirmation of capability action.
- 8.3. The appeal should be addressed to the Director of People & Culture. The relevant People & Culture representative should also be sent a copy of the letter
- 8.4. Appeals against dismissal will be heard by a head of Department/Section who has had no previous involvement in the case. Advice on the procedure should be taken from People & Culture.
- 8.5. 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 capability hearing and/or that it is necessary in the interests of fairness.
- 8.6. The appeal hearing should normally take place within 20 working days of the appeal being lodged.
- 8.7. The response to the appeal may be to:
- Uphold the dismissal
  - Revoke the decision to dismiss
  - Reinstatement the employee with a lesser penalty
- 8.8. The University will inform the employee of the final decision as soon as possible, normally within 10 working days of the appeal hearing.

## 9. Appeals against dismissal (under Ordinance 41)

- 9.1. Appeals against dismissal under Ordinance 41 will be governed by Part V of that Ordinance. The appeal shall be made to the Registrar and Secretary within 28 days of the decision being communicated. The Registrar and Secretary will bring the appeal to the attention of the Council, which will appoint a person not employed by the University who holds or has held judicial office or is a barrister or solicitor of ten years standing to hear and determine the appeal.
- 9.2. An appeal hearing must take place where the employee bringing the appeal can bring witnesses and is entitled to be represented by another person. The individual hearing the appeal may refer it back to Council or for a re-hearing by a differently constituted tribunal.
- 9.3. The response to the appeal may be to:
- Uphold the dismissal;
  - Revoke the decision to dismiss
  - Reinstatement of the employee with a lesser penalty.

## 10. Right to be accompanied

- 10.1. The employee has the right to be accompanied at any formal hearing. Please see [Guidance for Workplace Representatives](#) for more information.

## 11. Performance improvement plan

- 11.1. Where a warning has been issued (informal or formal), the line manager will need to ensure a Performance Improvement Plan (PIP) and regular review meetings take place. The PIP will set out the improvement needed, the support to be provided, and when a review will take place. If specific training needs are identified, the line manager should ensure that this is arranged as soon as possible, and that advice is taken from [People & Culture](#). Regular review meetings should take place to ensure that guidance and support are provided, and improvement is monitored.

## 12. Capability warnings

- 12.1. Capability action (warnings) will remain active for 12 months but will be disregarded after this time unless further action is taken. This means that if the capability issue reoccurs during the 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 capability warning will be retained on file as part of the employee's overall record of employment but will not be taken into account when determining the level of any subsequent capability warning.

## 13. Prolonged ill health

- 13.1. 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 or required standards of performance (as supported by appropriate medical evidence) it may be appropriate to consider their continued employment of the individual, without having gone through all the above capability hearings and stages.
- 13.2. Before this stage is reached, there should be discussion about whether the individual can return to work with appropriate support in the form of reasonable adjustments, which might include a phased return to work, or whether there are adjustments which could assist in addressing the performance issues. In such circumstances, a written case will be submitted to the relevant head of department/section or their deputy where this has been properly delegated. Further information about reasonable adjustments is available on the Equality, Diversity and Inclusion webpages.
- 13.3. For employees not covered by Ordinance 41, Stage 3 (dismissal) of this procedure will be followed. A case for dismissal should be considered by a Head of Division, usually the Registrar and Secretary, with support from People & Culture.
- 13.4. For those employees covered by Ordinance 41, the case for dismissal should be considered by the Vice-Chancellor or an officer acting as his or her delegate. A case for dismissal should be heard by a Board comprising one person nominated by the Council, one person nominated by the employee concerned, and a medically qualified Chair jointly agreed by the Council and the employee concerned (if agreement cannot be reached, the Chair will be nominated by the President of the Royal College of Physicians).
- 13.5. The dismissing officer will ensure that the procedure for arranging a hearing is observed. The letter to the employee must make clear that the outcome of the hearing could be dismissal and will seek consent for an application to the employee's doctor for a medical report.
- 13.6. The hearing will consider the medical evidence and the employee will be invited to present any evidence. If there is a decision to dismiss, the dismissing officer will confirm, in writing, the dismissal to the employee and send it by recorded delivery. The decision will be communicated in writing to the employee within 5 working days, give reasons and the right to appeal. The appeal process will be that under section 8 of this procedure 'appeals against dismissal'.
- 13.7. Reasonable adjustments should always be considered but in some cases, these may not be possible or may not be sufficient to resolve the concerns.

13.8. Employees can appeal a dismissal on grounds of ill health.

## **14. Disability**

14.1. If an employee has particular requirements at any stage of the capability procedure as a result of a disability or wishes to inform the University of any medical condition which may be relevant, the individual should confirm this as early as possible during the process by contacting their line manager or a member of People & Culture.

## **15. Considering wellbeing**

15.1. When going through a capability procedure it is important to consider the wellbeing and mental health of all employees involved. Managers should signpost to support where required.

## **16. Equality impact assessment**

16.1. The University has conducted an Equality Impact Assessment on this policy and is satisfied that its application should not result in a differential and negative impact on any groups of employees identified under the Equality Act 2010.

## **17. Monitoring**

17.1 People, Culture and Inclusion Advisory Group (.pdf) will monitor the impact of this policy.

## **18. Related university policies and procedures**

- Equality and Diversity Policy and Strategy
- Zero Tolerance of Harassment and Bullying
- Health and Safety Policy
- Grievance Procedure
- Disciplinary Procedure
- Sickness Absence Policy and Procedure
- Stress Management Policy (.docx)
- Probation
- Flexible Working Policy

- [Whistleblowing Policy](#)
- [Special Leave Policy](#)
- [Social Media Policy](#)
- [Essential Training Policy](#)
- [Academic Freedom and Freedom of Speech](#)

## **20. University sources of support and information**

- [Health and Wellbeing](#)
- [Work-Related Stress](#)
- [Coaching Essentials for Line Managers](#)
- [Report and Support](#)
- [Mental Health First Aid](#)
- [Employee Assistance Programme](#)

# Appendix 1 – examples of incapability

The Employment Rights Act 1996 provides that the incapability of an employee to perform work of the kind they were 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 department but may also result in additional burdens on other employees. This in turn can cause frustration, resentment and low morale amongst those employees, 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. An employee who is incapable in role may lack the necessary skills, experience and/or knowledge to perform the duties of their post.



## Document Control Panel

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