

Capability Procedures

2015 -18

Personnel Committee Approval:	Person Responsible: Maureen Gimby	Reviewed: May 2015 Next Review: May 2018
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1. Introduction

- 1.1 River Clyde Homes (RCH) is committed to being a fair and reasonable employer and recognises that situations can arise where a member of staff underperforms in their work duties due to a genuine lack of capability that is not related to indiscipline or lack of compliance with reasonable management directions. In these circumstances RCH seeks to encourage and support staff achieve an acceptable standard of performance.
- 1.2 The basic principles of fairness set out in the ACAS Code of Practice 2015: Disciplinary and Grievance Procedures are reflected in these separate Capability Procedures designed specifically to address performance issues arising.
- 1.3 The aim of these Procedures is to ensure that a fair and consistent approach is taken where there are management concerns about an employee's performance. This is to ensure that the employee who is experiencing performance difficulties is supported and managed appropriately and has access to support, training and supervision to assist them achieve an acceptable standard of performance within a reasonable timeframe.
- 1.3 RCH wishes to reassure staff that the Capability Procedures will be used for the purpose intended i.e. to assist and ensure that staff are operating at an acceptable level and that management and unions will work together to ensure that the Capability Procedures are applied in the spirit intended. Where a member of staff believes that they have been treated unfairly under the Capability Procedures, they will be entitled to use the Grievance & Dignity at Work Procedures.
- 1.4 Before using the Capability Procedures, a manager should consider whether an employee's poor performance might be health and/or disability related and whether reasonable adjustments should be made in accordance with the Equality Act 2010. The advice of the OD Team should be sought at the earliest opportunity.
- 1.5 Capability is defined in Section 98(3) (a) of the Employment Rights Act 1996 by reference to "skill, aptitude, health or any other physical or mental quality". In cases where incapacity results from sickness or disability, these issues will be addressed through the Attendance & Absence Management Policy and Procedures and with reference to the Equality Act 2010.
- 1.6 While it is necessary to have formal procedures to address performance issues that have not been resolved, it should be recognised that an employee may find his/her situation uncomfortable or distressing. Personal support for employees is available from a range of sources including Trade Union Partners, Westfield Health counselling or RCH Occupational Health advisers.

2. Purpose of the Capability Procedures

- 2.1 The Capability Procedures apply in cases where an employee is not meeting the required standards of performance due to a lack of ability and where there is no evidence of deliberate misconduct by the employee. The issue is rather one of a lack of capability due to lack of skill, experience, knowledge or aptitude.
- 2.2 The purpose of the Capability Procedures is to set in place all reasonable training and support mechanisms to enable the member of staff to reach an acceptable standard of effectiveness,

within a reasonable timescale. The timescale will allow input from the member of staff and their representative and will take account of the complexity of work. A reasonable period of time to allow for the member of staff concerned to demonstrate improvement to the standard required. Input from the member of staff will be considered by the line manager when specifying the timescale for improvement and agreement sought.

- 2.3 In some cases there may be an element of culpability and therefore the Disciplinary Procedures are more appropriate, for example, a situation where a measure of personal blame is involved, arising from lack of motivation or inattention. A member of the OD will be involved in advising which procedure is more appropriate in each individual case.
- 2.4 Tact, honesty and clarity are essential. Depending on the individual circumstances it is important to keep an open mind in terms of alternative solutions. This could include considering whether it might be mutually beneficial for an employee to work in a different work area or in a less senior role, either through demotion (where there would be no salary protection) or redeployment (where the pay protection may apply). The overarching aim is to achieve satisfactory service delivery while, where reasonably practical, retaining the employee in employment.
- 2.5 During the formal stages of the Capability Procedure the employee has a right to be accompanied by a fellow worker, a trade union representative or an official employed by a trade union.
- 2.6 An employee has the right of appeal against any formal decision taken under these Procedures or related action.
- 2.7 An employee will be offered a copy of these Procedures before any meetings about his/her capability under these Procedures take place.
- 2.8 All matters relating to these Procedures must be treated as confidential by all parties.
- 2.9 The Capability Procedures offers two separate procedures: the Informal Procedure and the Formal Procedure. The Informal Procedure is outlined in Section 3, and the Formal Procedure in Sections 4 and 5.
- 2.10 The Formal Procedure should not be applied until the Informal Procedure has been exhausted, or has failed to bring about a satisfactory resolution where a member of staff has not responded adequately to the support provided and where dismissal is potentially an ultimate consequence of its continuance.

3. Informal Procedures

- 3.1 As soon as an employee's performance gives cause for concern, in the first instance the line manager will arrange an informal meeting with the employee to explain and discuss the matter, in a supportive manner. The line manager will:
 - give examples of poor work performance, provided in writing, so a good understanding is achieved of the matter arising;
 - specify the standards of performance expected;
 - ask the employee whether there are circumstances or issues which they wish to express as having an impact on the concerns raised over performance. The employee's work and personal circumstances should be taken into account;

- consider objectively any information brought forward by the employee and the content of the discussions with him/her. If such information is acceptable to meet the concerns over performance then a note to this effect should be included on file, and the Capability Procedure should be discontinued;
- discuss whether support, further training or supervision would assist the employee achieve a satisfactory standard of performance;
- establish with the employee how a satisfactory standard of performance can be achieved and agree a reasonable timescale.
- create a timetable for review taking account of input from the member of staff.

3.2 The employee is entitled to be supported or represented by their trade union representative or work colleague during the informal stage of the Capability Procedure.

3.3 A note of the meeting will be made and a copy provided to the employee. If the employee disagrees with the note of the meeting or with the line manager's assessment of his/her performance, they may indicate this and this will be added to the note.

3.4 The Informal Meeting will normally be between the line manager and the employee as the intention is to resolve the matter at as low a level as possible. However, a member of the OD Team and/or the employee's trade union representative or a work colleague may attend the meeting, if desired by either party.

3.5 If the performance problem is resolved as a result of dealing with it under the Informal Capability Procedure, the line manager should confirm this to the employee in a face-to-face meeting and confirm that there is no intention to proceed with the Formal Capability Procedures. A record stating there has been resolution of the issue should be kept on the employee's file and a copy provided to the member of staff for personal retention.

3.6 However, if suitable performance management techniques have been followed and there has been no significant improvement in the employee's performance, a formal capability hearing should be arranged.

4. Formal Procedures

4.1 The employee must be given at least 48 hour's written notice of a hearing. The notice must inform the employee of the allegations and their basis and the fact that they will have the right of appeal and a right to be accompanied at the capability hearing. In any event, it is important to hold the hearing as soon as reasonably possible. A copy of the evidence will be issued with the notification letter and to the employee's representative where appropriate.

4.2 In the written notice of the hearing the following will be made clear:

- That s/he is required to attend a capability hearing under the capability procedure
- The reasons for the hearing, including the specific issues to be addressed and all supporting evidence
- The time and place of the hearing
- The right to be represented or accompanied by a trade union representative, an official employed by a trade union or work colleague
- That reasonable adjustments will be made to the arrangements for the hearing on request for employees who require additional support.
- Similarly, the needs of the employee's representative or any witnesses should be accommodated where reasonably practical.
- That s/he will have the right to appeal against any decision made.

- 4.3 If either party intends to present written evidence at the hearing, this should be received in time to enable circulation of a copy to all interested parties so that they can consider it fully. The employee or his/her representative can request the hearing be delayed if additional time is needed to consider documentation. If any substantial new evidence appears at the hearing, an adjournment must be offered. All relevant papers must be given to all parties present.
- 4.4 The panel hearing the evidence will be a manager with no previous involvement with the case and a member of the OD Team to act on an advisory and/or note taking capacity. Where an employee or his/her representative wishes to object to the person named as the Capability Hearing Manager this is to be communicated to a member of the OD Team. The OD Manager or Head of Organisational Change will determine suitability. If the decision is made to proceed on the basis of the manager originally named, concerns will be noted.
- 4.5 At the hearing the employee must be reminded that it is part of the RCH Capability Procedures. In addition, the employee must be reminded of his/her rights under the procedure and the details of the reason for the hearing. The following should be discussed:
- the reasons why action under the capability procedures have been initiated, including evidence of poor performance
 - background to the performance problem
 - what was agreed in terms of an improvement plan, how satisfactory performance was measured and the timescales for improvement and review
- 4.6 The employee or his/her representative must be asked to give his/her views and suggestions and to explain any factors which affected performance.
- 4.7 The hearing will normally proceed in the following order: The Capability Hearing Manager will:
- Introduce those present at the meeting
 - Consider any evidence including witness statements
 - Invite comments or questions
 - Summarise evidence
 - Decide or advise that a decision will be communicated in writing within five days unless extended by mutual agreement
 - Advise of the right of appeal
- 4.8 The hearing is, of necessity, a formal meeting and therefore it is important to follow a sequence which allows all parties to participate fully and to gain a clear understanding of both the current position and what needs to happen in the future. However, the meeting should be conducted in a manner which supports and encourages the employee and reiterates the goal of achieving an effective improvement in performance.
- 4.9 Having listened to this input, the Manager will decide on the appropriate action or sanctions to be taken.

5. Actions Resulting from the Formal Procedures

- 5.1 After the deliberation at the conclusion of the hearing, the employee will be informed of the

outcome and of any action to be taken. The outcome should be given as soon as possible and in any case within no more than 5 working days. It will be confirmed in writing.

- 5.2 The employee will be reminded of the right of appeal which must be made within 5 working days of the written outcome. The notes taken by RCH at the hearing will be circulated to all parties with the written outcome. Any disagreement by the employee or his/her representative as to the accuracy of the record should be noted.
- 5.3 In concluding the capability hearing, the Manager will consider carefully whether any further action is necessary apart from any relating to the individual, such as whether there is a need to review or change any working practices as a result of what has been presented.
- 5.4 Where a First Written Warning is issued, the following should be made clear in writing:
- The expectations in terms of 'satisfactory performance' – this should be clearly described
 - The measures which will be put in place to support and assist the employee in achieving a satisfactory improvement
 - When review meetings will be held
 - Timescales
 - What will happen if the required improvement does not happen
- 5.5 A note of the outcome of the meeting should be agreed and signed by the Manager and the individual and copied to OD to be placed on the individual's personal file.
- 5.6 If an employee's performance does not improve in the stated period following a First Written Warning, a further hearing should be arranged after which, where appropriate, a Final Written Warning will normally be issued. A Final Written Warning may also be appropriate after the first meeting under this procedure where an employee's shortcomings are exceptionally serious.
- 5.7 A Final Written Warning will make it clear that any further failure to reach the required standards could result in dismissal. It is of course essential that any training or other support agreed as a means to assist the employee in achieving the desired outcome is delivered effectively and on time.
- 5.8 In addition to warnings under the procedure, action might include:
- No further action where there is no case to answer
 - Withholding increments or career grade progression if applicable until a satisfactory level of performance has been achieved
 - Redeployment to an alternative post
 - Demotion
 - Dismissal
- 5.9 In cases where the employee's performance remains unsatisfactory despite warnings and the agreed support given, a further hearing will take place and dismissal will normally result. In some cases of gross incapability with no real prospect of improvement, and where there is no practical alternative, dismissal may be appropriate without prior warnings. In all cases the decision to dismiss must not be taken before discussion with the OD Team.

6 Ongoing Monitoring

- 6.1 If a sanction or penalty is applied, the employee's Line Manager has the role of providing any reasonable support and for monitoring progress against desired improvement levels. This should be started immediately after the capability decision or penalty has been applied and, where improvement is not detected within a reasonable period, the Line Manager should consider whether further formal action is required. Whilst support and encouragement is to be available from RCH, it is ultimately the employee who has to achieve the desired level of improvement. It is not incumbent upon the Line Manager to provide unlimited levels of support. However, it is extremely bad practice to issue a warning and do nothing further until a short time before its expiry date and Line Managers must ensure ongoing monitoring is being conducted.

7 Insufficient Improvement and Consideration of Job Redesign or Redeployment

- 7.1 Where there has been insufficient improvement following formal action (action short of dismissal) as outlined in Section 5 above, the line manager will meet with the member of staff and convey this information. The member of staff may be accompanied by their trade union representative or work colleague and a member of the OD Team will be in attendance. At the meeting the parties will jointly consider whether there is an opportunity to:

- consider some adjustment to existing duties i.e. altering or modifying the existing duties
- seek potential redeployment opportunity if available and where the employee would be competent to fill. Where alternative positions are being sought in these circumstances, redeployment should be considered in favour of external advertising of a post.

Priority should be given to making all reasonable efforts to seek to redesign the post, if possible, to allow the member of staff to utilise their strengths, or identify alternative jobs, if available, suitable to the member of staff's capabilities. It should be noted that both options may have a consequential effect on grade and salary.

It should also be conveyed that dismissal may require to be considered as an option and this must be made clear to the member of staff.

- 7.2 Where alternative position(s) are available the member of staff will receive the details, in writing, including the grade and proposed salary level. The member of staff will be asked to make a decision about whether or not to accept within a specified timescale (no less than 14 days).
- 7.3 If the member of staff does not accept the alternative duties or post, then dismissal may have to be considered and the letter, providing the details of the alternative position(s) must make this clear.

8 Consideration of Dismissal

- 8.1 If no alternative positions are available that can accommodate the employee who has made insufficient improvement throughout the capability review period, or has rejected the alternative positions offered, the line manager may require to invoke the dismissal process below to consider dismissal of the member of staff as a last resort.
- 8.2 The full Capability documents that have been gathered throughout the Capability Procedure should be reviewed by the line manager and the OD Team to decide whether it is considered

reasonable to invoke dismissal proceedings.

8.3 If the decision is to invoke dismissal proceedings, a paper outlining the reasons for this should be prepared by the line manager for consideration by a member of the Senior Management Team (SMT). A copy of this document will be provided to the employee who may, if they wish, pass it to their trade union representative or work colleague.

8.4 The full Capability documentation considered throughout the Capability procedure that has been conducted will normally serve as the investigation into the matter to establish the facts.

8.5 The OD Team will arrange the SMT representation to hear the line manager's representations and to hear from the employee, who is entitled to be accompanied by his/her trade union representative, an official employed by a trade union or a work colleague, and to consider whether or not the employee should be dismissed.

8.6 Prior to the meeting of with the SMT member, the employee will be provided with a letter outlining:

- the issues that have led to the dismissal procedure being invoked
- the date, time and place of the meeting to consider dismissal
- notification that the employee may be accompanied by their trade union representative, an official employed by a trade union or work colleague
- identification of the panel members hearing the potential dismissal

Enclosed with the letter should be all the investigatory documents which are evidence in connection with the Capability Procedure and the reasons for invoking the dismissal procedure. Copies of all the documents should be enclosed with letter, even if previously provided to the employee.

The management case recommending dismissal will be presented by the line manager who managed the Capability Procedure. The employee will have the right to state his/her case, respond to the points raised by management and provide any additional information. The employee of staff is entitled to be accompanied to the meeting by their trade union representative, an official employed by a trade union or a work colleague.

8.7 The SMT member may:

- interview witnesses suggested by either party or receive written statements from them (to be available to the panel 5 working days prior to the meeting)
- interview any other person they believe would clarify any matter they are considering and/or request further information
- adjourn to collect more evidence, if necessary.

8.8 The employee and trade union representative or work colleague should make every effort to attend the meeting. If they are unable to attend, a date will be re-scheduled normally within 5 working days of the original date. However, If the employee continues to be unavailable to attend the meeting, the panel may decide to proceed with the meeting on the evidence available.

8.9 Any reasonable adjustments will be considered to accommodate the needs of a person with a disability: the employee, members of the panel or attendees.

8.10 The panel will decide whether the member of staff will be dismissed, or not. If not, the panel may decide to recommend any further action including development activities that they believe will address the situation.

9 Appeals

- 9.1 Where an employee raises an appeal against a capability decision, a further hearing needs to be arranged. The appeal will be heard by a member of Senior Management Team, the Chief Executive or the Personnel Committee Appeals Panel, whichever is relevant. The relevant person/ panel will be a higher level than the manager issuing the penalty. Written submissions must be lodged with the OD Team no later than 10 working days from the date the decision was received by the employee. Where this timescale for lodging an appeal is breached, RCH reserves the right to record this fact and notify the employee accordingly thus ending the process.
- 9.2 In the event that an appeal hearing does take place, the person(s) chairing the appeal is not expected to “re-try” the original matter in full. In any appeal, the employee may lodge grounds for appeal in advance or simply state these at the meeting. The person(s) hearing the appeal can then conduct any further enquiries felt necessary in examining the appeal grounds. An employee will have the right to representation by his/her trade union official or a fellow employee of his/her choice at any appeal hearing.
- 9.3 Capability appeals hearings shall be entitled to confirm capability decisions, dismiss capability decisions or substitute a lesser penalty. The decision of the appeal made by a member of the Senior Management Team, Chief Executive or the Personnel Committee Appeals Panel, whichever is relevant, will be final.

10 Capability Records

- 10.1 Employees subject to action under the capability procedure will have access to their personal records in accordance with Data Protection Act legislation. After the satisfactory completion of any actions resulting from a capability hearing all records will be removed from the employee's personal file. The specified period of retention will not normally be less than one month or longer than twelve months, other than in exceptional circumstances.