



# CAPABILITY PROCEDURES FOR SCHOOL BASED EMPLOYEES

Education Human  
Resources

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**TORFAEN  
COUNTY  
BOROUGH**



**BWRDEISTREF  
SIROL  
TORFAEN**

## **CONTENTS**

<b><u>SECTION</u></b>	<b><u>PAGE</u></b>
Introduction	3
Purpose	3
General Principles	4
Exceptional Circumstances	6
Counselling Stage	7
Stage 1:	8
Stage 2:	9
Stage 3:	9
Stage 4:      Capability Hearing	10
Stage 5:      Capability Appeal Hearing	11
Dismissal of an Employee	12
Sickness of an Employee	12
Reporting Professional Incompetence	13
Summary of Capability Procedure	14

## **1 INTRODUCTION**

- 1.1 Torfaen is justly proud of the performance of the teaching and support staff who work in its schools. The majority of these staff work tirelessly to safeguard all pupils and produce good learning outcomes for them all. Torfaen recognises, however, that it has a duty to ensure that its schools deliver high quality teaching and learning to all their learners. In order to ensure this, school managers and governing bodies must recognise the importance of addressing performance issues in a fair, transparent and efficient manner.
- 1.2 The purpose of this procedure and the “Guidance on the Capability Procedure for School Based Employees” is to help schools deal with weaknesses in employee performance. It highlights the need for good management, clear expectations and appropriate support because they go a long way towards the desired aim of improving performance. It also recognises that early identification of problems and appropriate intervention and support through the performance review process will help to avoid the need for formal capability procedures later on. In many cases improvement may be achieved through embedded review processes often with a minimum of support and attention. In those instances where the more formal approach is required, however, the procedures detailed here will be necessary.
- 1.3 Incapability resulting from persistent ill-health or misconduct should not be dealt with under these procedures. These issues should be dealt with under the school’s sickness management and disciplinary procedures respectively.

## **2 PURPOSE**

- 2.1 The purpose of this procedure is to enable: -
- all employees to be effective by ensuring that they achieve, sustain and improve on the levels of skill, knowledge and aptitude required of them to improve standards and achieve better outcomes for pupils;
  - all employees to access an appropriate programme of monitoring, support, guidance and training to achieve and sustain the required standard of performance; and
  - school managers, Headteachers and/or governing bodies to respond to unsatisfactory performance by employees who may be appropriately warned or dismissed where they fail to achieve the level of performance required.
- 2.2 Sections (4) to (9) of this procedure represent a set of stages that will provide employees with opportunities to hear how or why their performance is considered unsatisfactory and to offer any explanation that they wish to put forward.

- 2.3 This procedure is written with the presumption that the Headteacher will have the lead role when dealing with performance issues involving other members of staff. This does not mean, however, that the Headteacher is expected to deal with all levels of the procedure because the initial stages can be delegated to senior and middle managers. Headteachers must become involved at Stage 3 of the Capability Procedure, however, because only they can issue a final written warning.
- 2.4 Where the Headteacher's performance is concerned the Chair of Governors should undertake the lead role and so where it says in the procedures what the Headteacher will do substitute "Chair of Governors" for "Headteacher." In undertaking his/her role the Chair of Governors will consult with the Chief Education Officer (CEO) who will provide an appropriately qualified and experienced officer of the Council to meet with the Headteacher to provide support and monitoring as appropriate.

### **3 GENERAL PRINCIPLES**

- 3.1 The main principles behind this procedure are that: -
- all employees should be treated with respect, justice, consistency and fairness;
  - all capability matters and investigations therefrom be treated in confidence by all parties involved throughout all stages of the process;
  - all meetings at the various stages of this procedure should be arranged as soon as possible within the time limits specified. If the time limits cannot be met for any justifiable reason they can be extended by agreement on both sides;
  - where reference is made in this procedure to "the required standard of performance" this means the standard of performance that is laid down in the job description and person specification;
  - employees subject to these procedures should be given at least five working days notice in writing of the time and place of any meeting or hearing set up to hear the capability matter or any appeal that may follow;
  - employees subject to these procedures will be advised of the performance concerns raised against them in advance of any interview, performance review or capability hearing and will be given the opportunity to state their case and present relevant evidence before any decision is made;
  - at all stages of the procedure employees have the right to be represented by a work colleague or their trade union;
  - appeals against written warnings will be allowed under this procedure but they must not delay the on-going nature of the process. Where such appeals are made they will be heard by the Staff Disciplinary and Dismissal Committee (SD&DC);

- where there is an appeal against a dismissal on grounds of incapability the matter will be heard by the Staff Disciplinary and Dismissal Appeals Committee (SD&DAC); and
  - all phases of this procedure should be fully recorded with the Headteacher keeping a record of all interviews and performance reviews with employees giving the date, time and explanation (if any) provided at all stages of the procedure. The meetings of the (SD&DC) and (SD&DAC) will be fully recorded by the Clerk to the Governing Body.
- 3.2 If at any stage during the procedure the employee consistently achieves the required standard and there is evidence to suggest that this improvement is sustainable these procedures will conclude. The Headteacher will inform the employee of this both verbally and in writing. The employee must also be encouraged to sustain and improve their performance in the future. If, however, following this successful conclusion the employee fails to sustain the required standard of performance at a later date the Headteacher will re – commence the procedure as follows: -
- at the Stage where the previous procedure concluded if the failure in performance occurs within six weeks of that conclusion i.e. if it concluded at Stage 2 the procedure will recommence at Stage 2; or
  - at Stage 1 if the failure in performance occurs from the seventh week after the conclusion of the procedure.
- 3.3 Where it is necessary to recommence this procedure on more than two occasions the Headteacher may consider that there is sufficient cumulative evidence indicating serious performance issues that require the procedures to start at Stage 4 immediately.
- 3.4 Where it emerges during this procedure that the issue causing concern is one of misconduct because the employee has failed to do something as a result of his or her own carelessness, conduct, negligence, idleness or by simply refusing to do it then the issue is not one of lack of capability and it must be dealt with under the “Disciplinary Procedure for School Based Employees.”
- 3.5 Where an employee feels that they have been treated unfairly or have been discriminated against during the capability procedure they may bring a grievance at any stage of this procedure that will be heard at the subsequent appeal and not separately to preserve the on - going nature of this procedure. Where the grievance is against the manager leading on the capability then another manager must be called in to deal with the capability whilst the grievance is being heard.
- 3.6 The advice and support of the (CEO) is available at all stages in the procedure to avoid claims for unfair dismissal. It should be noted that in normal circumstances the Council will bear the costs arising from

dismissal including any compensation that may result from unfair dismissal cases. Where the governing body fails to notify the (CEO) or chooses to ignore his/her advice the Council has the power to deduct some or all of the costs from the school's budget where it has good reason to do so.

- 3.7 The roles and responsibilities of governing bodies, Headteachers, Senior Leaders, middle managers, individual employees, the (CEO) and the (LA) Adviser are given in the "Guidance on the Capability Procedures for School Based Employees"
- 3.8 It is possible that either prior to or during the course of this procedure a Headteacher may become aware that an employee has, is perceived to have or is associated with someone who has or who is perceived to have, a "Protected Characteristic." The Equality Act 2010 lists the "Protected Characteristics" as: - age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation. In some circumstances where this may have significance relating to an employee's performance the Headteacher will need to make further enquiries of the member of staff about what assistance may help and seek advice as to any reasonable adjustments that may need to be considered.

#### **4 EXCEPTIONAL CIRCUMSTANCES (A PERIOD NOT EXCEEDING FOUR WEEKS)**

- 4.1 In general one failure in performance will not usually provide grounds for a school manager to have concerns in an employee's overall performance. There will be exceptional circumstances, however, where successive written warnings may not be appropriate requiring the capability procedure to be accelerated. In the exceptional case where the Headteacher has overwhelming evidence that the continued employment of the employee will jeopardise pupils' education or puts them or other staff at risk of harm it will be appropriate to issue a final written warning. If the employee does not achieve the required standard of performance after four weeks it will be appropriate to refer the matter to Stage 4 of these procedures. For this to occur the employee's performance must fall so far short of what is required that improvement to the required standard of performance may be deemed impossible or the employee's failure in performance has a seriously detrimental effect in the workplace.
- 4.2 The employee must be given written notice of the impending review meeting and advised that the agenda for the interview will be as detailed in paragraph (6.1) below but with the additional proviso that where pupil's education is in jeopardy school managers must consider shortening the assessment period to one of four weeks. The Headteacher may also consider suspending the employee where it appears to be necessary for the protection of pupils, staff or property.

## **5 COUNSELLING STAGE: (MAXIMUM PERIOD = SIX WEEKS)**

- 5.1 Where concerns regarding an employee's performance have reached a point where the employee is failing to respond to feedback which has been given to them, the employee should be advised that management now feels it necessary to counsel them that continued failure to improve performance could result in a need to address their performance issues via the Capability Procedure. For this reason the school manager must meet with the employee to ensure that there is complete clarity on where the performance issue lies and a plan devised to support the employee to improve their performance to the standard required.
- 5.2 The school manager will interview the employee (in the presence of a trade union representative if the employee so wishes) and provide evidence of the concerns regarding his/her performance and engender discussion and dialogue with the employee so that mutual understanding exists. If management is happy with the employee's response and is satisfied that the employee demonstrates a sustained performance level management may make the decision to conclude the Capability Procedure. However, if management believes that insufficient understanding is being shown by the employee of their failure in performance the school manager will issue the employee with a "Notice of Improvement" that will state the: -
- performance problem;
  - standard of performance that is required;
  - timescale (not more than six weeks); and
  - support that will be given.
- 5.3 The "Notice of Improvement " will also state that if the employee does not consistently achieve the required standard of performance during the prescribed timescale the procedure will move to Stage 1 where they may be given a Stage 1 written warning. The "Notice of Improvement" should also state the date when the review meeting is to take place i.e. following the prescribed timescale.
- 5.4 The Council's advisory officer will be able to provide the school manager with assistance in the monitoring and setting of targets. The school manager will: -
- specify the support for the employee in achieving the targets;
  - appoint a designated senior member of staff to monitor performance and progress following this first meeting;
  - ensure that the monitoring process includes periodic structured meetings, informal discussion and direct support;
  - ensure that the monitoring process is conducted in a sympathetic and non-threatening way with the objective of improving the employee's work performance; and

- ensure that throughout the monitoring process the employee is given the opportunity of commenting upon the proposed plan of support.

## **6 STAGE 1: (MAXIMUM TIMESCALE OF SIX WEEKS)**

6.1 Shortly before the review meeting takes place, the school manager should prepare for it by undertaking an assessment of the employee's performance during the agreed timescale for improvement. If sufficient progress has been made and the employee is now achieving the required standard of performance that is sustainable then the review meeting will reflect this and the employee commended for the improvement and the process is concluded. If, however, insufficient progress has been made and the employee is still not achieving the required standard of performance the review meeting must focus on this. The school manager will, therefore, need to give the employee written notice for the meeting and compile an agenda focussed on: -

- identifying the shortcomings in the employee's performance;
- providing an opportunity for the employee to respond and allow them to produce and use documentary evidence from earlier meetings or report monitoring;
- reviewing the targets set previously setting new ones if required;
- establishing clear guidance on the required standard of performance needed to end the capability procedure;
- establishing a timescale for assessment of not more than six weeks and agree a date for the next evaluation meeting;
- demonstrating the support that will be available and how performance will be monitored over the assessment period; and
- consider reasonable adjustments such as changing job tasks and/or relinquishing job roles where appropriate.

6.2 If management believes insufficient recognition is being shown by the employee of their failure in performance the school manager may issue the employee with a Stage 1 written warning setting out the: -

- performance problem;
- standard of performance that is required;
- timescale for improvement (not to exceed six weeks);
- support that will be given; and
- right to appeal (which should not stop the on-going capability procedure as the two processes can run concurrently).

6.3 In giving the Stage 1 written warning to improve performance the school manager must also make it clear to the employee both verbally and in writing that if they do not consistently achieve the required standard of performance by the end of the agreed assessment period the procedure will move to Stage 2. The Stage 1 written warning should state the date of the next review meeting.

## **7 STAGE 2 (MAXIMUM TIMESCALE OF SIX WEEKS)**

- 7.1 If after the assessment period outlined in Stage 1 (Section 6) above the employee's performance still gives cause for concern then their performance will be reviewed again. As in paragraph (6.1) the school manager should undertake an assessment of the employee's performance since the last meeting. If the employee is still not achieving the required standard of performance s/he should be given written notice of the impending review meeting and advised that the agenda for the interview will be as detailed in paragraph (6.1) above.
- 7.2 Where the school manager is not satisfied with the employee's explanation the interview may conclude with the school manager issuing the employee a Stage 2 written warning setting out the: -
- performance problem;
  - standard of performance that is required;
  - timescale for improvement (not to exceed six weeks);
  - support that will be given; and
  - right to appeal (which should not stop the on-going capability procedure as the two processes can run concurrently)
- 7.3 In giving the Stage 2 written warning to improve performance the school manager must also make it clear to the employee both verbally and in writing that if they do not consistently achieve the required standard of performance by the end of the agreed assessment period the procedure will move to Stage 3 where they may be given a final written warning. The Stage 2 written warning should state the date of the next review meeting.

## **8 STAGE 3: (MAXIMUM TIMESCALE SIX WEEKS)**

- 8.1 Stage 3 must involve the Headteacher (if s/he has not already conducted the initial stages) plus the school manager who has been involved in the earlier stages. If after the assessment period outlined in Stage 2 (Section 7) above the employee is still not achieving the required standard of performance s/he should be given written notice of the impending review meeting and advised that the agenda for the interview will be as detailed in paragraph (6.1) above.
- 8.2 Where the Headteacher is not satisfied with the employee's explanation the interview may conclude with the Headteacher issuing the employee a Stage 3 final written warning setting out the: -
- performance problem;
  - standard of performance that is required;
  - timescale for improvement (not to exceed six weeks);
  - support that will be given; and

- right to appeal (which should not stop the on-going capability procedure)
- 8.3 In giving the Stage 3 final written warning the Headteacher must also make it clear to the employee both verbally and in writing that if they fail to consistently achieve the required standard of performance by the end of the agreed assessment period the procedure will move to Stage 4 where a Capability Hearing will be convened before the (SD&DC) where the outcome could be dismissal. The Stage 3 final written warning should state the date of the next review meeting.

## **9 STAGE 4: CAPABILITY HEARING**

- 9.1 Where the procedures detailed in Sections (5), (6), (7) and (8) have been followed with a Stage 3 final written warning issued by the Headteacher and the employee has not achieved the required standard of performance within the agreed timescale for improvement it will be appropriate to inform the employee that a capability hearing will be held before the (SD&DC).
- 9.2 At this stage there may be circumstances where the Headteacher may consider suspending an employee from duty on full pay where s/he considers that it is necessary for the protection of children, staff or property or where the continued presence of the person at work would be an obstacle to proper investigation.
- 9.3 Where the Headteacher refers a capability matter to the (SD&DC) the (CEO) must be notified and provided with full details of the case. The (CEO) or his/her representative has a right to attend any meeting that might lead to dismissal in schools where the Council is the employer. In voluntary aided schools where the governing body is the employer governors are strongly urged to seek advice from the (CEO).
- 9.4 Paragraph (3.1) emphasises the need for time limits to be specified and the requirement that they be followed unless they cannot be met for any justifiable reason. At least five working days before the capability hearing the (SD&DC) should be sent: -
- written details of the arrangements for hearing the capability matter;
  - formal written notice of the capability matter and any supporting documentation such as witness statements, written reports prepared by the Headteacher/school managers at each stage of the capability procedure; and
  - written confirmation of the employee's response to the capability matter with any supporting documentation such as witness statements.
- 9.5 All evidence that will be used at the capability hearing is provided in confidence and this must remain so throughout the proceedings. No

new material should be introduced in the capability hearing above and beyond that previously issued to the (SD&DC).

- 9.6 At no time prior to the capability hearing will members of the (SD&DC) discuss the capability matter.
- 9.7 The (SD&DC) will follow the procedure outlined in the “Guidance on the Capability Procedure for School Based Employees.” If the (SD&DC) decides that the case is proven it may recommend to the Council that the employee be removed from the school and undertake dismissal proceedings (any dismissal proceedings to take place in accordance with Schedule 14 of the 1996 Act).
- 9.8 If, for whatever reason, the (SD&DC) does not recommend the dismissal of the employee but is still not satisfied with the employee’s performance it will agree a further assessment period of no more than six weeks to allow the employee to achieve the required standard of performance. Where this occurs the (SD&DC) must reconvene at the end of the further assessment period to review the progress of the employee and if the required standard of performance is still not met recommend dismissal with the right to appeal.
- 9.9 Where the member of staff is to be removed from the school the (SD&DC) will confirm its decision and reasons in writing to the employee and ask the Council to proceed accordingly. The (SD&DC) will also inform the employee that s/he has the right to appeal against the decision to dismiss them. The employee will be entitled to statutory notice of dismissal in accordance with their conditions of service and the Employment Rights Act 1996.

## **10 STAGE 5: CAPABILITY APPEAL HEARING**

- 10.1 Where the employee appeals against the dismissal decision of the (SD&DC) the appeal will be heard by the (SD&DAC). The appeal will take the form of a complete re-hearing of the case. The (SD&DAC) will follow the procedure outlined in the “Guidelines on the Capability Procedure for School Based Employees.”
- 10.2 Where an employee has been dismissed and given the right of appeal s/he must notify the Headteacher in writing that s/he intends to appeal within five working days of receiving written confirmation of the decision.
- 10.3 On receipt of the written request to appeal the decision of the (SD&DC) the Headteacher will arrange for the (SD&DAC) to hear the capability appeal. The guidance given in paragraphs (9.4 to 9.6) will still apply. The (SD&DAC) will completely re – hear the case unless there is agreement by both parties where, for example, the employee who wishes to appeal asks the appeal panel to consider the following apposite for the grounds of appeal: -

- the (SD&DC) did not consider all the facts of the case;
- new evidence has come to light that renders the decision of the (SD&DC) “unsafe”; or
- there are procedural failings in the way the capability procedure has been followed.

10.4 The (SD&DAC) will have three options open to it: -

- confirm the decision of the (SD&DC) to dismiss the employee;
- agree a further assessment period of no more than six weeks to allow the employee to achieve the required standard of performance. Where this occurs the (SD&DAC) must reconvene at the end of the further assessment period to review the progress of the employee and if the required standard of performance is still not met confirm the dismissal; or
- recommend that the employee be redeployed should suitable alternative employment be available.

## **11 DISMISSAL OF AN EMPLOYEE**

11.1 Whilst the management of school staff is wholly delegated to the governing body of a community school the Council is still the employer. The governing body, therefore, can only recommend to the Council that an employee be dismissed from the school following completion of the capability process i.e. after the (SD&DC) hearing or, if an appeal is lodged, after the appeal stage. It is for the Council to enact the dismissal.

11.2 Where the school is a voluntary aided school the governing body is the employer of the staff who work there. The governing body, therefore, can enact the decision to dismiss after the (SD&DC) have so decided whilst still giving the member of staff the right to appeal against the decision.

## **12 SICKNESS OF AN EMPLOYEE**

12.1 It is possible that an employee will become absent through ill health either before or during the capability procedure. Whilst it is reasonable for the Headteacher or governing body to wait for the employee’s recovery, the employee should immediately be referred to Occupational Health informing them that the capability procedure has been commenced with the employee concerned. The Occupational Health Adviser will then be able to give advice on whether the: -

- sickness absence is related to the employee’s performance issues; and
- Capability Procedure can continue where the body of evidence is sufficiently strong enough and the employee is afforded the

opportunity to present the case themselves or have it presented on their behalf.

12.2 Whilst it is difficult to continue to assess the performance of an absent member of staff if at any stage of the procedure the body of evidence is sufficiently strong enough to proceed and the employee is afforded the opportunity to offer an explanation or have it presented on their behalf the Headteacher may decide to: -

- conclude the proceedings on the basis that the employee has achieved the required standard of performance and that it is sustainable; or
- continue the procedure to the next stage on the basis that the evidence shows that the employee has not consistently achieved the required standard of performance. This decision should be made in consultation with Occupational Health who will be able to advise on whether the employee is well enough to present themselves or take part in the next assessment process. If the employee is not well enough the Headteacher may decide to suspend the process until they are.

12.3 Where the evidence is sufficiently strong enough to proceed to Stage 4 of the procedure where a Capability Hearing is held and the employee is absent through ill - health every effort should be made to ensure that the employee can attend the hearing to present themselves. If they are unable to attend the first hearing they must be advised that if they do not attend the re-arranged one the panel may decide to hear the case in their absence. Similarly, the same procedure will apply if an Appeal Hearing is required.

12.4 Throughout this procedure if it is the advice of Occupational Health that there is no likelihood of the employee returning to work in the foreseeable future then the Headteacher should consider dealing with the employee's sickness absence through the School's Sickness Absence policy and present a case to the Governing Body for dismissing the employee on the grounds of continuing ill – health.

### **13 REPORTING PROFESSIONAL INCOMPETENCE TO THE GENERAL TEACHING COUNCIL FOR WALES**

13.1 Employers are required to report cases of professional incompetence related to registered teachers directly to the General Teaching Council (Wales) where the employer: -

- has ceased to use the services of a registered teacher on a ground relating to his/her professional incompetence; or
- may have ceased to use the services of a registered teacher on that ground had s/he not ceased to provide these services.

## SUMMARY OF CAPABILITY PROCEDURE

