

NHS Education for Scotland

Management of Employee Capability

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1. Introduction

It is the aim of NHS Education for Scotland (NES) to ensure that all employees are treated in a fair and equitable manner. Employees are required to perform the duties of their post to an acceptable standard. Where such standards are not met, a formal process should only be followed where there is no other alternative. In all cases, the primary objective must be to assist and support the employee to improve to the required standard.

2. Policy Statement

This policy is not intended to prevent the normal process of supervisory control whereby managers allocate work, monitor performance, draw attention to errors and poor quality and, as importantly, highlight work done well. This ongoing process may include informal assistance in achieving improvement to the required standard of work for the particular post. Such discussions are not part of the formal procedure outlined in this policy, with formal interviews and representation not being appropriate to this everyday ongoing process.

When performance concerns become apparent, action is required in the interests of both NES and the employee. A failure to deal with it may adversely affect colleagues and as a result other staff may become

disillusioned and dissatisfied. Some may even look elsewhere for employment.

Performance concerns in relation to supervisors and managers require immediate attention from senior management. The temptation to ignore such concerns, just because an individual is a manager, may have adverse consequences for NES. Employees managed by an ineffective line manager may perceive that raising such concerns with senior management will have repercussions for them. These individuals may become frustrated and there exists the potential for them to leave or become demotivated.

This policy has been developed in partnership with trade unions/professional organisations. It reflects the best practice identified in, and meets the minimum standards set out in, the Management of Employee Capability Partnership Information Network (PIN) Policy. The policy also reflects relevant current employment legislation.

A separate Managers Toolkit is being developed to provide comprehensive practical advice and guidance on the management of employee capability. In addition to advice and guidance the toolkit will include a guide to conducting a formal capability meeting, standard letters and flowcharts for ease of reference.

NES is committed to promoting equality, valuing diversity and to ensuring that all employees are treated fairly.

3. Scope

This policy applies to all directly employed staff, including bank/temporary staff and NES staff on secondment.

This policy does not apply in the case of issues of capability related to ill health impacting on attendance. Such issues would be managed under the Management of Sickness Absence policy

4. Definition

This policy applies in the case of issues of capability (i.e. where an employee is lacking in some area of knowledge, skill or ability, resulting in a failure to be able to carry out the required duties of the post to an acceptable standard). It does not apply in the case of issues of conduct. A distinction must be drawn between a genuine lack of capability and unsatisfactory performance that is attributable to a wilful refusal on the part of the employee to perform to the standards of which they are capable. This would be a question of “won’t do” rather than “can’t do” and, as a matter of conduct, should be dealt with under the NES Disciplinary Policy and Procedures. However, it is recognised that it may not be clear at the outset whether a matter is one of conduct or capability, and therefore it may be that the approach to be followed requires to be changed in the course of managing such matters.

The Employment Rights Act 1996 states that “capability” is “assessed by reference to skill, aptitude, health or any other physical or mental quality”. It also indicates that, where an employee is dismissed on grounds of capability, it must relate to: “capability ... for performing work of the kind which he was employed by the employer to do”. The “work of the kind which he was employed by the employer to do” must be determined in accordance with employee’s current contractual obligations and job description.

5. Aims of Policy

This policy will ensure that capability issues are dealt with in a fair and consistent manner. The policy provides:

- Assistance to employees to improve wherever possible when such issues arise;
- Firm but fair and consistent means of dealing with capability issues without recourse to the Disciplinary Policy and Procedures; and
- A means of resolving capability issues where improvement in the current job is unachievable.

6. Principles and Values

In order to achieve these aims, the following principles and values apply:

- This policy will be the sole route for dealing with issues of capability other than for matters of ill health related to attendance;
- This policy will be appropriately communicated to all employees and will be made readily accessible to them;
- The Recruitment and Selection Policy will be applied effectively so as to ensure that only suitable candidates are appointed to posts and therefore prevent potentially avoidable capability issues from arising;
- All employees will be made aware of the standards of performance required, and of the need to perform acceptably to those standards;
- Good performance, and special effort by individuals and teams, will be acknowledged, encouraged and reinforced;
- Issues of capability will be addressed at the earliest opportunity and (except in more serious cases) on an informal basis in the first instance before resorting to the formal procedure;

- Issues of capability will be addressed fairly, consistently and confidentially, irrespective of the position/level within NES of employees with whom such matters arise;
- Issues of capability will be addressed in a supportive manner, with every opportunity to improve within the current role being offered, and where such improvement is not achievable and sustainable, considering exploration of suitable alternative employment opportunities. Termination of employment on grounds of capability will only ever be as a last resort;
- Specialist HR advice will be available to managers involved in implementing the process;
- At all stages of the formal procedure, an employee will be entitled to be accompanied by a trade union/professional organisation representative or work colleague, not acting in a legal capacity, (recognising that, by agreement of all parties, it may be helpful to additionally allow an individual to be accompanied during the informal stage);
- A different manager, from the same Directorate wherever possible, will be involved at each stage to ensure greater fairness within the procedure and to enable the identification of additional support measures not previously considered at an earlier stage of the process (unless it is specifically requested that a different Directorate be approached). This will help to ensure that all potential support measures have been identified and exhausted before any decision is taken to progress to the final stage of the procedure;
- The employee's immediate line manager will be involved throughout the procedure in order to ensure consistency. Beyond the informal stages their role will be to support and monitor progress against the identified supported improvement plan and to advise on such progress at any subsequent formal stage of the procedure; and
- This policy will be subject to ongoing monitoring to ensure that it is being fairly and consistently applied and that the stated principles and values are being met. The policy will be subject to regular review, in partnership, to ensure that any new standards and/or structures are incorporated when necessary and that it remains fit for purpose.

7. Roles & Responsibilities

The Board will:

- Ensure that the policy is appropriately communicated to all employees and made readily accessible to them;

- Ensure that effective recruitment and selection policies are applied in order that only suitable candidates are appointed to posts, thereby preventing potentially avoidable capability issues from arising;
- Ensure that all employees are made aware of the standards of performance required, and of the need to perform acceptably to such standards. Such standards should be clearly articulated through induction and orientation processes, personal development planning and review discussions, and through effective communication strategies;
- Promote a culture in which good performance, and special effort by individuals and teams, is acknowledged, encouraged and reinforced. Personal development planning and review/appraisal processes, for example, should be used to promote positive performance;
- Ensure that all relevant staff are sufficiently skilled and competent in implementing the policy.
- Ensure that specialist HR advice is available to managers involved in implementing the policy

Employees will:

- Ensure that they are aware of the standards of performance expected of them, and that they seek further guidance if unclear;
- Try, to the best of their ability, to meet the expected standards;
- Approach their manager at the earliest opportunity when they are having difficulties meeting the expected standards of performance;
- Work with managers on any agreed supported improvement plan;
- Comply with any support/monitoring mechanisms put in place; and
- Raise concerns with the appropriate manager where they perceive others not to be performing to the expected standards.

Managers will:

- Ensure that they fully comply with the provisions of the Recruitment and Selection Policy;
- Ensure that all employees for whom they are responsible are made aware of the standards of performance required;
- Ensure that such employees are made aware of and have access to this policy;

- Ensure that they monitor employee performance on an ongoing basis;
- Ensure that they effectively apply the appropriate personal development planning and review/appraisal process in respect of such employees;
- Ensure that good performance, and special effort by individuals and teams, is acknowledged, encouraged and reinforced;
- Ensure that they are fully aware of and comply with the provisions of this policy, identifying and dealing with issues which arise in a fair, consistent, confidential, timely and supportive manner; and
- Ensure that they seek HR advice where necessary and appropriate when dealing with capability issues.

Trade union/professional organisation representatives will:

- Work in partnership with NES to raise awareness of the benefits of, and the approach to, the management of employee capability as outlined in this policy
- Support their members, including providing representation throughout the formal stages of the procedure (and participating at the informal stages where agreement is reached in individual cases to do so), ensuring that their members are aware of their rights and responsibilities under this and other relevant policies
- Participate in partnership monitoring, evaluation and review of this policy.

Human Resources will:

- Develop a Line Managers Toolkit for managers and trade union/professional organisation representatives;
- Advise managers on the correct implementation of this policy
- Support employees by providing advice on this policy.

Occupational Health will:

- Provide timely and comprehensive guidance to managers and support to employees following any referral which requires to be made in the course of managing capability issues

- Specifically in the case of capability issues relating to ill health which are impacting on performance, advise on whether an employee may be considered as having a disability under the Equality Act 2010 and on all potential reasonable adjustments which should be considered (seeking advice from external organisations where necessary).

Advice on reasonable adjustments will include advice regarding adjustments to the existing job role; or whether suitable alternative employment should be considered and, if so, any restrictions as to the type of role, or adjustments which would require to be made to a role, in order to ensure suitability (and thereby avoid similar capability issues arising in future). Reference should be made to the NES Disability Policy

8. Procedure

It is usually best for managers to deal with performance concerns informally in the first instance. In many cases an informal conversation between the manager and an employee will be sufficient to ensure that performance improves.

Formal action will be appropriate where the initial approach has not led to the necessary improvement in performance, although, in more serious cases, a formal approach may need to be adopted from the outset.

8.1 Is There a Performance Issue?

Indications that an employee is not performing to the required standards of the job may arise in a variety of different ways:

- There may be complaints about, or criticisms of, the employee's work from colleagues or visitors;
- There may be factual grounds to indicate unsatisfactory performance, such as poor results;
- The manager's own observations of the employee's performance may give rise to concerns; or
- The employee may have requested help to overcome a problem.

It may often be necessary to undertake an investigation as part of the procedure, in order to determine the nature and extent of the performance concerns, whether the matter is one of capability or conduct and why such concerns have arisen.

Such investigation, which should be conducted according to the principles contained within the Disciplinary Policy and Procedures, may involve

examining work records and/or interviewing other individuals with whom the employee works (such as key internal/external customers or other team members).

8.2 Informal Approach

The employee's manager should meet with the employee, informally in the first instance to discuss the following:

- The particular performance concerns and whether the employee accepts that there is a problem:
 - It may be necessary at this stage to undertake a formal investigation if the nature and extent of the unsatisfactory performance is unclear or if the employee does not accept that there is a problem.
 - A written rationale of the nature and extent of the unsatisfactory performance must be provided to the employee without censure and they must be given reasonable time to consider this information in order to allow them to respond.
 - The employee may still express doubt or deny the existence of the problem. They must be encouraged to offer an explanation as to why they do not agree that there is a problem and the manager must listen to and consider what is said. However, where evidence supports that there is a problem, the employee's response does not prevent the manager from setting out the need to improve nor reduce the need to provide the employee with the requisite support and encouragement to do so.
- Possible contributing factors. Further details regarding these will be included in the Managers Toolkit. These include:
 - Lack of awareness/understanding of the standards of performance required;
 - Ill health (while capability issues relating to ill health impacting on attendance should be managed under the Management of Sickness Absence Policy, capability issues relating to ill health impacting on performance should be addressed under this policy) Where ill health is related to a disability, reference should be made to the Disability Policy;
 - Difficulties in personal circumstances;
 - Organisational change;
 - Bullying or harassment;
 - Inappropriate or ineffective recruitment and selection processes; or

○ A combination of more than one of the above factors.

- Possible solutions. The possible solutions as outlined in Appendix A should be discussed as this will ensure that all avenues are being explored at the outset. This list is not exhaustive and there may be other solutions that can be identified to support the employee.
- Agree a supported improvement plan with specified time limits. The outcome of the meeting should be confirmed by the manager in writing to the employee. The letter should give details of the issues discussed, the agreements reached, the date of interim and final reviews, and include any supported improvement plan and timescales agreed. The employee should be advised of the possibility of progression to the formal stages of the procedure should there be inadequate improvement within the agreed timescales.

8.3 Supported Improvement Plans

A Supported Improvement Plan (Appendix C) should be discussed, prepared and agreed at the outset at the Informal Stage and then completed and updated at each formal stage of the procedure. It should detail

- the nature and extent of the unsatisfactory performance
- the standards of performance required
- how reaching and maintaining such standards are expected to be evidenced,
- what support mechanisms have been put in place (whether solely for the duration of the supported improvement plan or as permanent supports)
- the timescales within which satisfactory improvement is expected to be reached and sustained.

There may be circumstances where, due to the nature of the issues of concern, there is a requirement to remove an employee from certain duties or to put in place additional supervision in order to mitigate risk during the supported improvement plan period. It may similarly be necessary to amend their duties during the course of the supported improvement plan, to enable a focus on the particular areas of concern or through a need to introduce greater levels of supervision.

It should always be made clear, however, that successful completion of the supported improvement plan will ultimately require the employee to be able to reach and sustain the required performance standards across their full range of job duties and without the need for any such increased level of work supervision. That said, a distinction should be drawn with those supports which would be considered sustainable beyond completion of the supported improvement plan, or those introduced by way of reasonable adjustment in the case of employees who may be considered to have a disability.

The supported improvement plan should be signed and dated by both the manager and the employee to confirm agreement. It should be noted, however, that a failure by the employee to agree to the contents of a supported improvement plan will not prevent its implementation.

The employee's line manager should meet with the employee to undertake regular reviews within the agreed timescale in order to discuss progress and provide additional support as necessary. The manager must complete a written note of such review meetings, which the employee will also be invited to comment against. Again, such written notes should be signed and dated by both parties to confirm agreement.

8.4 Preliminary Precautionary Measures

It may be necessary, due to the nature of the issues of concern, to remove an employee from certain duties or to put in place additional supervision in order to mitigate risk, whilst any necessary investigation is undertaken and in advance of agreeing a supported improvement plan. It may ultimately be necessary, in such cases, to place an employee on a short period of paid leave until such times as a supported improvement plan can be agreed and implemented. However, this should be as a last resort and for as short a period as possible, all effort being made to identify alternatives which will allow the employee to remain at work (e.g. through the use of alternative duties or additional supervision).

8.5 Formal Procedure

Where there has been inadequate improvement and the employee is continuing to fail to perform to an acceptable standard despite having been given initial, informal guidance and support, or in more serious cases, a more formal approach will be required. Where evidence exists that there is a genuine factor which renders an employee incapable of carrying out their current role, and all parties are in agreement that redeployment is the only option, there is scope to move straight to the formal process at Stage 2. Matters should not, however, be progressed to the formal stages if it is established that the employee has not had the necessary training, guidance and support required to undertake the job.

8.5.1 Right to be Accompanied

Employees have a right to be accompanied by a trade union/professional organisation representative or a work colleague, not acting in a legal capacity, at any investigatory meeting or meeting being held under the formal stages of this policy (including appeals).

While there is no right to be accompanied at a meeting to confirm any preliminary precautionary measures, employees should (where practicable) be given reasonable notice to organise representation.

Specific to any meeting being held under the formal stages (including appeals), the role of such a representative is as follows:

- To prepare, present and sum up the employee's case on their behalf
- To provide further information after the employee's response or to respond on behalf of the employee to any views expressed, with a view to providing additional clarity to the case.
- The representative is not permitted to answer questions on the employee's behalf, with the employee being required to personally respond to any specific questions directly.

Where the employee is a trade union/professional organisation representative, no formal action should be taken without discussion with a full-time official of the appropriate organisation. If the representative chosen by the employee is not available at the time proposed for any investigatory meeting or meeting being held under the formal stages (including appeals), the meeting must be postponed to an alternative time suggested by the employee, provided that such alternative time is reasonable and falls before the end of five working days after the original date proposed.

8.5.2 Scheme of Delegation

The authority levels to take action under the Management of Employee Capability Policy will follow the Scheme of Delegation which forms part of NES Disciplinary Policy and Procedures and is included as Appendix B

A different manager, from the same Directorate wherever possible, will be involved at each stage to ensure greater fairness within the procedure and to enable the identification of additional support measures not previously considered at an earlier stage of the process (unless it is specifically requested that a different Directorate be approached). This will help to ensure that all potential support measures have been identified and exhausted before any decision is taken to progress to the final stage of the procedure.

8.5.3 Attendance at Meetings Under the Formal Stages (Including Appeals)

As outlined in Section 8.5.2 above a different manager, from the same Directorate wherever possible, will be appointed as Panel Chair. As the employees Line Manager is responsible for implementation of the agreed

Supported Improvement Plan and ensuring regular interim reviews take place prior to the formal meeting, the employees Line Manager will also be in attendance at formal meetings

Formal Stage 1 meetings will comprise the Panel Chair, the employee and their representative. The employee's line manager will also be in attendance.

Formal Stage 2 meetings will comprise the Panel Chair, the employee and their representative. The employee's line manager and the Stage 1 Panel Chair will also be in attendance.

A member of HR & OD will normally be present at all formal meetings.

The panel make-up and similarly the format, in the case of formal Stage 3 meetings and appeals, mirrors that contained within the Disciplinary Policy and Procedures

8.5.4 Stage 1

Where the informal approach has not resulted in the required improvement in performance, or in more serious cases, the matter will be escalated to Stage 1 of the formal procedure (except where evidence exists that there is a genuine factor which renders an employee incapable of carrying out their current role, and all parties are in agreement that redeployment is the only option, in which case there is scope to move straight to Stage 2).

The identified Chair will write to the employee and their representative no later than 5 working days in advance of the meeting, advising as follows:

- The date, time and location of the meeting;
- The procedure and stage being used;
- Clear details of the performance concerns;
- All necessary supporting documentation (including details of any informal approach already undertaken);
- Who will be attending the meeting;
- The right to be accompanied;
- An indication of the possible outcomes of the meeting; and
- A copy of the policy.

The purpose of the meeting at Stage 1 will be to discuss and agree the following:

- The nature and extent of the performance concerns and whether such concerns are well-founded;
- Possible contributing factors (including whether indeed the matter is one of capability and whether the employee accepts that there is a problem);
- A review of action taken to date;
- Possible solutions (Appendix A);
- A supported improvement plan, detailing the improvement in performance required, how it will be achieved, how achievement will be measured/evidenced and the identified timescales for improvement;
- Whether timeframes previously applied should be extended, with clear consideration of NES's duties under the Equality Act 2010 with regard to employees who may be considered to have a disability.
- The date on which the employee's performance will be reviewed again; and
- Action which may follow if the required improvement in performance is not achieved and maintained.

During the meeting, the employee will be told clearly and precisely the areas identified in which their performance is unsatisfactory and the improvement in work standard which is required (with the possible consequences of not doing so). There must be an opportunity for the employee to answer these points and to explain any difficulties which they may be having. There should also be a discussion about the ways and means by which the desired improvement may be achieved.

The outcome will be formally recorded in a letter to the employee and their representative issued within 5 working days following the meeting. The letter will include:

- Clear details of the performance concerns;
- The improvement(s) required;
- An agreed supported improvement plan to achieve improvement, underpinned by regular monitoring meetings;
- Timescales for improvement, with a date for overall review;
- The possible consequences if the necessary improvement is not achieved; and
- Details of the right of appeal.

The employee's line manager will thereafter be responsible for implementation of the agreed supported improvement plan, and ensuring regular interim review, prior to the meeting being reconvened at the overall review date to examine progress to date and the appropriate next steps.

The outcome of this reconvened meeting will fall into one of the following categories:

- The employee has improved to the required standard and maintained their performance to the extent that unsatisfactory performance is no longer an issue. This will be confirmed in writing to the employee and their representative, and application of the procedure will cease. Normal management support arrangements will thereafter apply;
- The required improvement has not been satisfactorily achieved and maintained, but it is agreed that this is likely to be the case following an extension to the supported improvement plan timescale for a reasonable period or through the introduction of further support measures not previously identified. In such cases, the process should remain at the current stage and this should be confirmed in writing to the employee and their representative; or
- The required improvement has not been satisfactorily achieved and maintained; it is agreed that this is unlikely to be the case following an extension to the supported improvement plan timescale for a reasonable period; and no further support measures have been able to be identified. In such cases, the matter should be progressed to the next stage of the procedure and this should be confirmed in writing to the employee and their representative by the HR representative supporting the process.

8.5.5 Stage 2

Upon being advised that the matter is being escalated to Stage 2 of the procedure, the identified Chair will write to the employee and their representative no later than 5 working days in advance of the meeting, advising as per Stage 1.

The format of the meeting will also be as per Stage 1, with the support measures previously identified being reviewed and discussion as to whether they should continue or if additional support measures might be helpful.

However, at Stage 2 it may be felt appropriate to discuss other options, for example formal career counselling, or whether permanent redeployment would be possible, and, if so, is an agreeable option for the employee.

In the case of redeployment, the NES Organisational Change Policy and Procedures which includes the NES Redeployment Policy and Guidance will

apply. In the event of redeployment on the grounds of a disability, reference should be made to the NES Disability Policy. Redeployment should only be considered where there is a likelihood of a suitable alternative role (i.e. which is likely to be performed to the required standard and not present a continuing capability concern) arising within NES within a reasonable period of time. It should be noted that there is no legal requirement to create a post for an employee who can no longer carry out the job they were employed to do. Redeployment to another post will only be an option where such a post exists. A post will not be created to facilitate such a move.

The outcome will be formally recorded in a letter to the employee and their representative within 5 working days following the meeting. Where the outcome of the meeting is to continue to pursue a supported improvement plan, the letter will be as per Stage 1, but will additionally note that, should the necessary improvement not be achieved, the matter may be escalated to Stage 3, which may result in consideration being given to redeployment, or if not appropriate, termination of employment on grounds of capability.

Where the outcome of the meeting is to pursue redeployment, this should be confirmed in writing to the employee and their representative, advising that if suitable alternative employment is not secured within a reasonable timescale, the matter will be escalated to Stage 3, which may result in consideration of termination of employment on grounds of capability.

As per Stage 1, the employee's line manager will thereafter be responsible for implementation of the agreed supported improvement plan, and ensuring regular interim review, prior to the meeting being reconvened at the overall review date to examine progress to date and the appropriate next steps. This presents a further opportunity to consider whether permanent redeployment would be possible, and, if so, is an agreeable option for the employee.

Where as a result of a reconvening of the above meeting, it is determined that there has been a failure to secure suitable alternative employment within a reasonable timescale, consideration will be given to escalating the matter to Stage 3, and, if so, this will be confirmed in writing to the employee and their representative by the HR representative supporting the process.

8.5.6 Stage 3

If, despite all the measures outlined above, the desired improvement has still not been achieved (or redeployment has already been exhausted or dismissed by one of the parties as a reasonable option), a Stage 3 meeting must be convened by the manager with the authority to dismiss.

The identified Chair will write to the employee and their representative no later than 15 working days in advance of the meeting, advising as per Stage 1, but additionally confirming that consideration may be given to redeployment, or if not appropriate, termination of employment on grounds of capability.

As the outcome of this meeting may involve termination of employment on the grounds of capability, the manager involved at Stage 2 will be required to submit a written case no later than 10 working days in advance of the meeting, which will be shared with all parties in advance of the meeting. Similarly, following receipt of the manager's case, the employee, if they wish, may submit a written case in response, no later than 5 working days in advance of the meeting, and, again, this will be shared with all parties in advance of the meeting. As such, notification of the meeting must include arrangements for the exchange of cases.

The purpose of the meeting will be to discuss the following:

- The nature and extent of the performance concerns and whether such concerns are well-founded;
- Possible contributing factors (including whether indeed the matter is one of capability and whether the employee accepts that there is a problem);
- The improvement in performance which was required and the extent of such improvement achieved;
- What action has been taken by NES and the individual with regard to the agreed supported improvement plan (including any reasonable adjustments and other support mechanisms put in place to address the performance concerns); and
- Whether there are any further considerations, not previously explored, which might result in the required improvement being achieved or whether timeframes previously applied should be extended, with clear consideration of NES's duties under the Equality Act 2010 with regard to employees who may be considered to have a disability.

There are three potential outcomes:

- It may be considered that the employee will be able to achieve and maintain the required standard of performance within their current role within a reasonable period of time, in which case a supported Improvement plan should be agreed and implemented as per the earlier stages, with the Stage 3 meeting being adjourned until an agreed review date;
- Where it is considered that such improvement is not likely to be achieved and maintained, it may be considered that permanent redeployment (at the same or lower pay level) would be possible.

Redeployment should only be considered where there is a likelihood of a suitable alternative role (i.e. which is likely to be performed to the required standard and not present a continuing capability concern) arising within NES within a reasonable period of time. It should be

noted that there is no legal requirement to create a post for an employee who can no longer carry out the job they were employed to do. Redeployment to another post will only be an option where such a post exists. A post will not be created to facilitate such a move. If such a decision is reached, the provisions of NES's Redeployment Policy should be used, with the Stage 3 meeting being reconvened should there be a failure to secure suitable alternative employment within a reasonable timescale; or

- It may be that, having considered both of the above options, termination of employment on the grounds of capability is the only option. The employee and their representative will be advised in writing within 5 working days following the meeting, of the outcome. If the outcome is to adjourn the Stage 3 meeting following pursuit of redeployment or further implementation of a supported improvement plan, then this should be confirmed in writing as per the above. If the outcome is dismissal, the letter will include:

- Details of who was present at the meeting;
- Clear details of the performance concerns;
- Confirmation of the decision to dismiss and the reason such a decision was taken;
- The date on which employment will terminate (recognising the employee's contractual notice);
- Any necessary administrative or financial arrangements;
- Details of the right of appeal.

8.5.7 Appeals

The right to an appeal exists at all stages of the formal procedure. There will not be a delay in implementing management decisions pending an appeal, but they may subsequently be amended or reversed as a result of an appeal meeting. However, an appeal cannot result in a higher level of sanction on the employee than the action being appealed.

Stage 1

An employee, who is aggrieved at a decision made at Stage 1, has the right to appeal. This appeal would be heard in line with the authority levels at Appendix B. Any appeal should be made in writing and should be received within 10 working days of the date of the confirmation letter, clearly stating the reasons for the appeal.

Stage 2

An employee who is aggrieved at a decision made at Stage 2, has the right to appeal. This appeal would be heard in line with the authority levels at Appendix B. Any appeal should be in writing and should be received within 10 working days of the date of the confirmation letter, clearly stating the reasons for the appeal.

Stage 3/Dismissal

An employee who is aggrieved at the decision made at Stage 3/being dismissed has the right to appeal to the Chief Executive. Any appeal, which should be in writing, should be received within 10 working days of the date of the letter of dismissal, clearly stating the reasons for the appeal.

The organisation will convene a panel to hear the appeal against dismissal. No member of the panel will have had any previous knowledge of the case

Arrangements for Appeals against Dismissal

- A senior member of HR & OD will be responsible for co-ordinating all arrangements on behalf of the Chief Executive;
- The appeal hearing will be held within one month of receipt of the appeal;
- The employee and their trade union/professional organisation representative or work colleague will be informed in writing of the date, venue and time of the appeal hearing. They will also be advised of the names of those who will hear the appeal. The employee will be advised of their right to be accompanied by their trade union/professional organisation representative or work colleague, not acting in a legal capacity;
- The employee and the dismissing manager will be asked to submit a written case at least ten working days prior to the appeal hearing. This will clearly outline the reason for the appeal, ie the outcome, the process etc. They will also be required to submit the names of any witnesses to be called;
- It will be the responsibility of the employee and the dismissing manager to inform any witness of the arrangements for the appeal hearing;
- At least seven working days before the appeal hearing copies of the written case along with the names of any witnesses to be called will be circulated to the panel, the employee and the dismissing manager.

9. Grievances/Dignity at Work Complaints

Where an employee raises a grievance or dignity at work complaint during implementation of the formal capability process, the capability process may be temporarily suspended in order to deal with the grievance/complaint. Where the grievance/complaint and capability case are related, however, it may equally be appropriate to deal with both issues concurrently.

10. Failure to Engage

There may be occasions when an employee is repeatedly unable or unwilling to attend an investigatory meeting or meeting being held under the formal stages (including appeals). This may be for various reasons, including illness or a refusal to face up to the issue. In such cases, consideration will require to be given to all the facts before coming to a reasonable decision on how to proceed. Considerations will include:

- The seriousness of the issue under consideration
- The employee's general work record, work experience, position and length of service
- Medical opinion on whether the employee is fit to attend the meeting
- How similar cases in the past have been dealt with
- Whether appropriate reasonable adjustments for disabled employees in the arrangements for meetings have been implemented.
- Whether, therefore, it is considered fair and reasonable in the particular circumstances to proceed in the absence of the employee.

Where an employee continues to be unavailable to attend a meeting, it may be concluded that a decision in their absence will need to be made based on the evidence available. The employee must be informed where this is to be the case.

11. Debrief & Reintegration

Regardless of whether or not a matter progresses to the formal stages, it may be appropriate to undertake a debrief in order to review the case, any lessons learned and agree any further general organisational improvement actions identified during the process. Involvement in such a discussion will be determined on a case-by-case basis.

In addition to the duty of care, referred to below, it is also critical to ensure that, where the outcome does not involve dismissal, the employee is supported in being reintegrated back into their job role and within their team (or within any new job role/team into which they are redeployed). Managers

should liaise with HR and staff-side representatives to discuss measures which might help to support reintegration.

12. Duty of Care

In line with current health and safety legislation NES has a duty of care to its employees. This means that NES needs to be mindful of the potential risks to health and safety associated with individuals who are involved in the process (primarily the individual who is the subject of the case and any witnesses).

Where it is suspected that an individual's health and safety may be at risk, at any stage of the procedure, contact should be made with Occupational Health as a matter of priority. Trade union/professional organisation representatives, where they perceive any potential concerns in this regard should advise their member to seek Occupational Health support, as well as advising management accordingly.

Particular consideration needs to be given in circumstances where a decision is reached following a Stage 3 meeting to dismiss an employee (or where such a decision has been upheld following appeal). Where concerns around the individual's health and safety exist, it may be helpful to arrange for the individual to meet with Occupational Health following verbal confirmation of the outcome or, where the outcome is to be conveyed solely in writing, invite the employee to attend to receive the written confirmation, with Occupational Health on-hand for immediate support.

13. Review

This policy will be subject to ongoing monitoring and evaluation to ensure that it is being implemented fairly, consistently, effectively and in line with the policy's stated principles and values. The policy will be subject to regular review, in partnership, to ensure that any new standards and/ or structures are incorporated when necessary and that it remains fit for purpose.

Appendix A

Possible Solutions

There are many potential solutions to issues of capability. These may include but are not limited to:

- Provision of learning and development opportunities;
- Flexible working;
- Referral to Occupational Health;
- Relocation;
- Support in the workplace;
- Access to independent counselling services; or
- Redeployment.

Provision of Learning and Development Opportunities

The provision of learning and development opportunities to assist an employee to improve their performance should be considered. The decision as to what constitutes appropriate learning and development and its delivery should be discussed and agreed with the employee in each case.

Flexible Working

There are many variations around the theme of flexible working and it may be that a change of working hours or moving to part-time employment may assist in improving performance. Such a change may be temporary or permanent. Any changes would have to be agreed between the manager and employee, and every effort must be made to accommodate such requests when capability issues are being addressed. Details of flexible working practices which might be considered are contained within the Flexible Working Practices – Policy and Procedure.

Referral to Occupational Health

Occupational Health will, in many instances, have a key role in assessing and addressing certain aspects of capability issues. Managers may refer employees to Occupational Health or individuals may self-refer. Employees are assured that confidentiality will be maintained.

- Provide timely and comprehensive guidance to managers and support to employees following any referral which requires to be made in the course of managing capability issues; and
- Specifically in the case of capability issues relating to ill health which are impacting on performance, advise on whether an employee may be

considered as having a disability under the Equality Act 2010 and on all potential reasonable adjustments which should be considered (seeking advice from external organisations where necessary). Advice on reasonable adjustments will include advice regarding adjustments to the existing job role; or whether suitable alternative employment should be considered and, if so, any restrictions as to the type of role, or adjustments which would require to be made to a role, in order to ensure suitability (and thereby avoid similar capability issues arising in future).

Relocation

In supporting an individual to improve performance, it may be beneficial to offer either temporary or permanent relocation. The nature and duration of any relocation must be agreed between the individual and the manager. The employee would normally be doing the same job in the new location.

Support in the Workplace

It is good practice to provide an employee who is underperforming with support from a skilled colleague. This promotes awareness of the demands of the job and an example against which to measure their own performance. The selection of the colleague will need to be carefully thought through by management and agreed with both of the individuals concerned. It is important to recognise that poor selection of the supporting colleague could result in further de-motivation of the under-performing employee.

Access to Independent Counselling Services

Some employees may benefit from access to independent counselling services. Managers should ensure that employees are made aware of these services and how they may be accessed.

Redeployment

Where redeployment is considered this should be managed in accordance with the Organisational Change Policy and Procedures which includes the NES Redeployment Policy and Guidance. In the event of redeployment on the grounds of a disability, reference should be made to the NES Disability Policy.

Appendix B

Authority to take disciplinary action under the procedure

Category/Grade of Employee	First Written Warning	Appeal	First and Final written Warning and Final Warning	Appeal	Dismissal	Appeal
Chief Executive	Chair	3 Non Executive Board Members appointed by the Board	Chair	3 Non Executive Board Members appointed by the Board	Chair plus 2 Non Executive Board Members appointed by the Board	3 Non Executive Board Members appointed by the Board not previously involved
Direct reports to Chief Executive including Executive Directors	Chief Executive	Chair	Chief Executive	Chair	Chief Executive plus 2 Non Executive Board Members appointed by the Board	Chair plus 2 Non Executive Board members appointed by the Board not previously involved
Senior Manager reporting to Executive Director	Executive Director	Chief Executive or Nominated Deputy plus 1 Executive Director not previously involved	Executive Director	Chief Executive or Nominated Deputy plus 1 Executive Director not previously involved	Executive Director	Chief Executive or Nominated Deputy plus 1 Executive Director not previously involved
All other employees	Immediate Line Manager	Immediate Line Managers Line Manager	Immediate Line Manager	Immediate Line Managers Line Manager	Direct report to Chief Executive/Postgraduate Dean	Chief Executive or Nominated Deputy plus 1 direct report to the Chief Executive/postgraduate Dean not previously involved

- Panel Members should not have been previously involved in the case
- An HR representative will be present in an advisory capacity at all meetings
- The scope exists to link with other NHS Boards in exceptional circumstances

Appendix C

Supported Improvement Plan Template

Area identified for Improvement	Standard of Performance Expected	Evidence of achievement	Support measures	Review Date
			(O) Ongoing (T) Temporary	

Additional Comments

Employee Signature: Date:

Line Manager Signature: Date:

