

# **NHSScotland Workforce Capability Policy**

## 1. Capability

### 1.1 Aim

1.1.1 To provide a clear process to support and manage employees, in a fair, consistent and timely manner when they are required to improve their knowledge, skill and / or ability to undertake their role.

### 1.2 Scope

1.2.1 This policy applies to all employees with the exception of medical and dental staff, other than when a doctor or dentist has had their registration suspended by the regulator (General Medical Council) as the result of an interim orders panel (IOP) in which case the suspension of registration provisions in paragraph 1.2.4 below will apply. It also applies to workers i.e. bank, agency and sessional workers. References to employees should be taken to apply to workers unless otherwise stated.

1.2.2 It relates to concerns regarding an employee's knowledge, skills or ability to perform their role. This may arise from complaints or criticisms of the employee's work from colleagues, patients or visitors, factual evidence, the manager's own observations or the employee asking for help to overcome the problem. It also relates to performance which has been adversely affected by ill health. Where health is impacting on attendance please refer to the [NHSScotland Workforce Attendance policy](#)<sup>1</sup>.

1.2.3 Where regulatory or professional standards have not been followed, the employer should take advice at an early stage from the relevant professional adviser e.g. nursing or allied health professional (AHP), to determine whether a referral to the regulatory / professional body is appropriate. Read the [criteria for referral to external agencies](#)<sup>2</sup> for more information. Where a referral has taken place, the employer may be unable to determine the outcome of a capability process in advance of the regulator concluding the referral. Where the concern applies to both regulatory standards and the contract of employment, the employer may determine an outcome based on the contract of employment.

1.2.4 This policy will also be used to consider cases of employees' loss / suspension of registration, or other required qualifications such as a driving licence, where this is not considered a conduct matter or relates to matters out with the employer's scope to investigate. Such cases should be considered at a Stage 3 hearing. This would not apply to lapses of registration which is covered by existing policies. If a doctor or dentist is subject to suspension of registration during an ongoing investigation by the GMC this may be managed by a Stage 3 hearing. However in accordance with the [Medical Act 1983](#)<sup>3</sup> dismissal is not an appropriate sanction; therefore only alternatives to dismissal may be considered. Refer to local safer pre and post employment checks policies for more information.

1.2.5 This Policy is compliant with current legislation and will meet the aims of the [Public Sector Equality Duty](#)<sup>4</sup> of the [Equality Act 2010](#)<sup>5</sup>.

### 1.3 Definitions

1.3.1 **Capability** means the knowledge, skill or ability needed to carry out the required duties of the role to an acceptable standard.

1.3.2 A **Supported Improvement Plan** is a document which outlines areas for improvement with agreed timescales and support to achieve the required standard of performance.

## **1.4 Roles and responsibilities**

There is a range of standard expectations on all parties including HR, Trade Union representatives and Occupational Health which underpin all policies. Read more about standard [roles and responsibilities](#)<sup>6</sup>. In addition the following specific responsibilities apply to this policy:

### **1.4.1 Line manager**

The line manager should:

- ensure that good performance, and special effort by individuals and teams, is acknowledged, encouraged and reinforced
- communicate with employees to ensure they are aware of the performance standards expected of them in their role
- assess the seriousness of any capability issue and determine whether the matter can be addressed under early resolution
- monitor employee performance on an ongoing basis
- effectively support the appropriate personal development planning and review / appraisal process in respect of such employees to ensure that performance standards are met

### **1.4.2 Employee**

The employee should:

- be aware of the standards of performance expected of them, and discuss with their line manager if unclear
- actively participate in the process in an attempt to address the issue without delay
- try, to the best of their ability, to meet the expected standards and raise at the earliest opportunity if 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
- advise the appropriate manager if they have a concern that a colleague may not be performing to the expected standards

### **1.4.3 Occupational Health**

In cases where the performance issues are related to health

- provide expert, impartial and timely advice in relation to how an employee's health issues impact on their performance at work
- consider all relevant information concerning an employee's circumstances from a variety of sources e.g. GP's, other agencies, job role and provide advice to managers on the basis of that information
- advise on whether an employee may be considered as having a disability under the Equality Act 2010
- advise on whether reasonable adjustments or suitable alternative employment should be considered and, if so, any restrictions as to the type of role or reasonable adjustments to ensure suitability
- advise if ill health retirement is an option for consideration and support where appropriate.

## **1.5 Procedure**

1.5.1 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 any risk. In exceptional circumstances it may be necessary to place an employee on a short period of paid leave until such times as a Supported Improvement Plan can be

agreed and implemented. Paid leave will reflect pay as if at work. In the case of workers payment will be made for any booked shifts but no further shifts will be agreed.

1.5.2 The expectation is that in the majority of cases, the employee would progress through each stage of the process. However there will be exceptional circumstances where, due to the nature of the capability issue and / or the seriousness of the performance deficiency, it is considered necessary to bypass the Early Resolution stage and move straight to Stage 2 or 3 of the formal procedure. 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. In such circumstances, arrangements should be put in place to provide the necessary support.

1.5.2.1 In capability cases involving [Workers](#)<sup>7</sup>, consideration should be given to whether a supported improvement approach is possible and appropriate. Where this is not possible the case should be progressed to Stage 3 of the process.

### 1.5.3 **Early resolution**

1.5.3.1 The route for capability is shown in the [Capability policy flowchart](#)<sup>8</sup> which outlines the procedure through both the early resolution and formal stages.

1.5.3.2 Managers and employees are encouraged to deal with performance concerns with early resolution in the first instance. In many instances, conversations between the manager and an employee will be sufficient to ensure that performance improves. The Personal Development Planning process should also be considered as part of the early resolution approach to support employees to achieve the expected standard of performance.

1.5.3.3 The manager is expected to take action in a prompt and timely manner when the issue is initially raised.

### 1.5.4 **Initial meeting**

1.5.4.1 The aim of the initial meeting is to have a two-way open and honest discussion to seek ways to achieve the required improvements.

1.5.4.2 Employees must be encouraged to describe the situation from their perspective. It is crucial that as many aspects of the problem as possible, as perceived by the employee and the manager, are established.

1.5.4.3 Both managers and employees are responsible for ensuring that such discussions take place promptly when issues arise and that they are managed confidentially. A [Supported Improvement Plan](#)<sup>9</sup> should be completed and updated at each stage of the process.

1.5.4.4 The timescales for any follow up / review meetings will be by agreement by both parties.

### 1.5.5 **Review meeting(s)**

1.5.5.1 The follow up / final review meeting(s) will involve the manager meeting with the employee to review any Supported Improvement Plan and timescales.

1.5.5.2 Consideration will be given to any further support such as an Occupational Health referral or training that would be required to meet the performance standards.

1.5.5.3 At the end of the agreed timescales, if the required performance standard has been met, the manager will confirm that no further action will be taken. Where the required improvements are not met, the manager will advise the employee that the formal procedure will be initiated.

1.5.5.4 The outcome of these meetings will be confirmed by the manager in writing to the employee within 7 calendar days, using the [standard letter template](#)<sup>10</sup>.

### 1.5.6 Formal procedure

1.5.6.1 Where early resolution has not been successful or in more serious cases, a more formal approach will be initiated.

1.5.6.2 There may be circumstances where it is unclear what the causes of the performance issue are, or whether it is a conduct matter, and an investigation is required to determine this question. Find out more about the [NHSScotland Workforce Policies Investigation Process](#)<sup>11</sup>. If so, this investigation must take place in advance of any formal capability process.

### 1.5.7 Stage 1

1.5.7.1 A formal Stage 1 meeting will be arranged, consisting of the employee's manager, an HR representative, the employee and their representative.

1.5.7.2 The manager will be responsible for writing to the employee and their representative, using the [standard letter template](#)<sup>10</sup> no later than 14 calendar days in advance of the meeting, providing all relevant supporting documentation from the early resolution stage.

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

- the nature, extent and supporting evidence of the performance concerns and whether the employee accepts that there is a problem
- possible contributing factors
- whether an Occupational Health appointment is appropriate
- the employer's duties under the Equality Act 2010 with regard to employees who may be considered to have a disability
- a review of action taken to date
- possible solutions
- the Supported Improvement Plan
- the date on which the employee's performance will be reviewed again
- action which may follow if the required improvement in performance is not achieved and maintained

### 1.5.8 Outcome of Initial Stage 1 Meeting

1.5.8.1 The outcome of the meeting will be confirmed in writing to the employee within 7 calendar days, using the [standard letter template](#)<sup>10</sup>.

1.5.8.2 The manager will thereafter continue to be responsible for implementation of the agreed Supported Improvement Plan and ensuring regular interim reviews, prior to the Final Review meeting being convened.

### 1.5.9 Stage 1 Final Review Meeting

1.5.9.1 The manager will be responsible for writing to the employee and their representative no later than 14 calendar days in advance of the meeting, providing all relevant supporting documentation from Stage 1.

1.5.9.2 The purpose of the Final Review Meeting will be to examine progress to date and the appropriate next steps.

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

- the employee has met the required performance standards set and no further action is required
- the employee has not met the performance standards set due to extenuating circumstances and improved performance is anticipated, or would be achieved through the introduction of further support measures not previously identified. The review period is therefore extended
- the employee has not met the performance standards set, therefore the matter is progressed to Stage 2

1.5.9.4 Where the required improvement has not been achieved during the agreed timescale and the line manager has concluded that there is a need to progress to the next stage, the evidence and rationale for this decision will be discussed with the employee.

1.5.9.5 The outcome of the final review meeting and the rationale for the decision which has been made will be confirmed to the employee in writing within 7 calendar days, using the [Stage 1 final review meeting outcome letter](#) <sup>12</sup>. The right to appeal within 14 calendar days will also be advised. The [appeal hearing process](#) <sup>13</sup> section of this policy and [Formal hearing guide](#) <sup>14</sup> provide further information.

#### 1.5.10 **Stage 2**

1.5.10.1 A formal Stage 2 meeting will be arranged comprising a Chair who has had no previous involvement, the manager, the HR representative, the employee and their representative.

1.5.10.2 The Chair will be responsible for writing to all parties, no later than 14 calendar days in advance of the meeting providing all relevant documentation from Stage 1.

1.5.10.3 The format of the meeting will be as at Stage 1, with the support measures previously identified being reviewed and discussion as to whether they should continue or if additional support measures may be helpful, including any disability-related reasonable adjustments.

1.5.10.4 However, at Stage 2 it may be appropriate to discuss other options, for example career counselling or permanent redeployment if possible and / or appropriate. At this stage, any consideration of redeployment should only be progressed with the formal agreement of the employee.

1.5.10.5 In the case of redeployment, local redeployment policies will apply. Redeployment should only be considered where there is a likelihood of a suitable alternative role in which the employee can meet the job requirements within a reasonable time period. Redeployment to another post will only be an option where such a post exists. If redeployment is formally agreed at this stage consideration should be given to the requirement for a referral to the appropriate regulatory body and/or Disclosure Scotland if the employee is a registrant and / or undertakes regulated work and is no longer considered capable of undertaking such duties.

#### 1.5.11 **Outcome of Initial Stage 2 Meeting**

1.5.11.1 The outcome must be confirmed by the Chair in writing to the employee within 7 calendar days, using the [standard letter template](#) <sup>10</sup>.

1.5.11.2 Where the outcome of the meeting is to continue to utilise 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. This may result in consideration being given to redeployment, or if not appropriate, termination of contract on grounds of capability.

1.5.11.3 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 the timescale set out in Redeployment policy, the matter will be escalated to Stage 3, which may result in consideration of termination of contract on grounds of capability.

1.5.11.4 The employee's manager will thereafter be responsible for implementation of the agreed Supported Improvement Plan, and ensuring regular interim reviews, prior to the Final Review meeting being convened.

### 1.5.12 **Stage 2 Final Review Meeting**

1.5.12.1 The Chair will be responsible for writing to all parties no later than 14 calendar days in advance of the meeting and providing all relevant documentation from Stage 2.

1.5.12.2 Other persons in attendance will normally include:

- the employee
- a Trade Union Representative or work colleague
- the Stage 1 Hearing Chair
- the HR representative supporting Stage 1 Hearing chair
- any witnesses called by either party. Witnesses will have the right to be accompanied and will only be present when giving their own evidence

1.5.12.3 The outcome of the convened meeting will fall into one of the following categories:

- the employee has met the required performance standards set or has secured redeployment and no further action is required
- the employee has not met the performance standards set due to extenuating circumstances and improved performance is anticipated, or would be achieved through the introduction of further support measures not previously identified. The review period is therefore extended
- the employee has not met the performance standards set, therefore the matter is progressed to Stage 3
- suitable employment has not been secured through the redeployment process, therefore the matter is now being progressed to Stage 3

1.5.12.4 At the Final Review Meeting the outcome and next steps will be discussed. Where the required improvement has not been achieved during the agreed timescale and the Chair has concluded that there is a need to progress to the next stage, the evidence and rationale for this decision will be discussed with the employee.

1.5.12.5 The outcome of the Final Review Meeting will be confirmed to the employee in writing within 7 calendar days, using the [Stage 2 final review meeting outcome letter](#) <sup>15</sup>. The right to appeal within 14 calendar days will also be advised. The [appeal hearing process](#) <sup>13</sup> section of this policy and [Formal hearing guide](#) <sup>14</sup> provide further information.

### 1.5.13 **Stage 3**

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

1.5.13.1 The Formal Stage 3 hearing will comprise of a new Chair, according to the scheme of delegation and two other panel members one of whom will be an HR representative. All panel members will have had no prior involvement in the case.

1.5.13.2 Other persons in attendance will normally include:

- the employee
- a Trade Union Representative or work colleague
- the Stage 2 Chair
- an HR representative supporting the manager
- the line manager in a witness capacity

#### 1.5.14 **Process**

1.5.14.1 The new Chair will be responsible for writing to all parties, no later than 14 calendar days in advance of the hearing, providing all relevant documentation from Stage 2. Should the employee wish to provide a written statement of case, this should be submitted no later than 7 calendar days in advance of the hearing.

1.5.14.2 The purpose of the Hearing will be to discuss the following:

- the nature, extent and evidence of the performance concerns and whether such concerns are well-founded
- possible contributing factors
- what action has been taken by the manager and the individual with regard to the agreed Supported Improvement Plan
- whether there are any further considerations not previously explored which might result in the required improvement being achieved such that an extension is appropriate
- clear consideration of the employer's duties under the Equality Act 2010 with regard to employees who may be considered to have a disability

#### 1.5.15 **Outcome**

1.5.15.1 The outcome will be confirmed by the Chair in writing to the employee within 7 calendar days, using the [Stage 3 final hearing outcome letter](#)<sup>16</sup>. The right to appeal within 14 calendar days will also be advised. The [appeal hearing process](#)<sup>13</sup> section of this policy and [Formal hearing guide](#)<sup>14</sup> provide further information.

1.5.15.2 Potential outcomes at Stage 3 are:

**1.** It is 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 Hearing being adjourned until an agreed date for review.

**2.** Where it is considered that such improvement is not likely to be achieved and maintained, it may be considered that permanent redeployment would be appropriate as an alternative to dismissal, with the consent of the employee. Redeployment should only be considered where there is a likelihood of a suitable alternative role. Redeployment to another post will only be an option where such a post exists or is in the process of being created within a reasonable period. If such a decision is reached, the provisions of the



Redeployment Policy should be used, with the Stage 3 Hearing being reconvened should there be a failure to secure suitable alternative employment within timescale set out in Redeployment Policy.

3. It may be that, having considered both of the above options, termination of contract on the grounds of capability is the only remaining option.

1.5.15.3 In some cases the employee's capability to maintain the required standard of performance within their role may be directly related to an ongoing health issue. In such cases the employee may be eligible to apply for retirement on the grounds of ill-health. Further information is provided in the Guides for [Managers](#)<sup>17</sup> and [Employees](#)<sup>18</sup>.

1.5.15.4 If the outcome is redeployment or termination of contract, consideration should be given to the requirement for a referral to the appropriate regulatory body and / or Disclosure Scotland if the employee is a registrant and / or undertakes regulated work and is no longer considered capable of undertaking such duties.

1.5.15.5 In capability cases involving [Workers](#)<sup>7</sup>, if the required standard of performance is not met and continued engagement with the organisation is not appropriate the individual will be offered no further shifts / work.

#### 1.5.16 **Appeal Hearing Process**

1.5.16.1 Read the [Formal hearing guide](#)<sup>14</sup>.

1.5.16.2 All employees have a right to appeal against any decision taken during the final review meetings. When exercising this right, the employee must specify the reason for their appeal.

1.5.16.3 The appeal panel Chair, in accordance with the scheme of delegation, will be responsible for identifying membership of the appeal hearing panel.

1.5.16.4 The Chair will also be responsible for ensuring that all parties are advised in writing of the arrangements, no later than 14 calendar days prior to the hearing, using the [standard letter template](#)<sup>10</sup>.

1.5.16.5 The employee and Chair of relevant stage, are required to provide a written statement of their case. These should be submitted no later than 7 calendar days before the hearing and will be shared with all parties.

1.5.16.6 It is the responsibility of the party calling any witnesses to inform them of the arrangements for the appeal hearing.

#### 1.5.17 **Outcome**

1.5.17.1 Following the hearing the Chair will write with the outcome of the appeal hearing to the employee and their representative. This will include the rationale behind any decisions taken in response to the employee's grounds for appeal. The letter will be issued within 7 calendar days following the appeal hearing.

1.5.17.2 At Stage 3, the outcome of the appeal will be final, with no further internal right of recourse.

#### 1.5.18 **Grievances or bullying and harassment complaints**

1.5.18.1 Where an employee raises a grievance or bullying and harassment 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 be appropriate to deal with both issues concurrently.

## References

<sup>1</sup> NHSScotland Workforce Attendance Policy

<https://workforce.nhs.scot/policies/attendance-policy-overview/>

<sup>2</sup> Criteria for referral to external agencies

<https://workforce.nhs.scot/supporting-documents/guides/criteria-for-referral-to-external-agencies/>

<sup>3</sup> Medical Act 1983

<http://www.legislation.gov.uk/ukpga/1983/54/contents>

<sup>4</sup> Public Sector Equality Duty

<https://workforce.nhs.scot/about/principles-and-values/>

<sup>5</sup> Equality Act 2010

<https://www.legislation.gov.uk/ukpga/2010/15/contents>

<sup>6</sup> Roles and responsibilities

<https://workforce.nhs.scot/about/roles-and-responsibilities/>

<sup>7</sup> Guide to the application of NHSScotland Workforce Policies to workers

<https://workforce.nhs.scot/supporting-documents/guides/guide-to-the-application-of-nhsscotland-workforce-policies-to-workers/>

<sup>8</sup> Capability Policy : flowchart

<https://workforce.nhs.scot/media/liwkikak/nhsscotland-workforce-capability-policy-flowchart.pdf>

<sup>9</sup> Capability Policy : supported improvement plan form

<https://workforce.nhs.scot/supporting-documents/form/capability-policy-supported-improvement-plan-form/>

<sup>10</sup> Capability Policy : supporting documents

<https://workforce.nhs.scot/policies/capability-policy-overview/capability-policy/#supporting-documents>

<sup>11</sup> NHSScotland Workforce Policies Investigation Process

<https://workforce.nhs.scot/policies/workforce-policies-investigation-process-overview/>

<sup>12</sup> Capability Policy : Stage 1 final review meeting outcome letter

<https://workforce.nhs.scot/supporting-documents/letter-template/capability-policy-stage-1-final-review-meeting-outcome-letter/>

<sup>13</sup> Capability Policy: Appeal Hearing Process

<https://workforce.nhs.scot/policies/capability-policy-overview/capability-policy/#appealhearingprocess>

<sup>14</sup> Formal hearing guide

<https://workforce.nhs.scot/supporting-documents/guides/formal-hearing-guide/>

<sup>15</sup> Capability Policy : Stage 2 final review meeting outcome letter

<https://workforce.nhs.scot/supporting-documents/letter-template/capability-policy-stage-2-final-review-meeting-outcome-letter/>

<sup>16</sup> Capability Policy : Stage 3 final hearing outcome letter

<https://workforce.nhs.scot/supporting-documents/letter-template/capability-policy-stage-3-final-hearing-outcome-letter/>

<sup>17</sup> Capability Policy : guide for managers

<https://workforce.nhs.scot/supporting-documents/guides/capability-policy-guide-for-managers/>

<sup>18</sup> Capability Policy : guide for employees

<https://workforce.nhs.scot/supporting-documents/guides/capability-policy-guide-for-employees/>