



FOR PUBLICATION

DERBYSHIRE COUNTY COUNCIL

APPOINTMENTS AND CONDITIONS OF SERVICE COMMITTEE

MONDAY, 26 FEBRUARY 2024

**Report of the Executive Director - Corporate Services and
Transformation**

Performance Capability Procedure

1. Purpose

1.1 The Performance Capability Procedure and associated manager guidance is scheduled for review and this report is submitted to ACOS to consider the updates and amendments which have been made to this procedure following consultation with the joint trade unions and stakeholders.

2. Information and Analysis

2.1 The Council's employment procedures are updated and reviewed on an ongoing basis to ensure they remain relevant and up to date to ensure the Council meets its commitments outlined in the Council Plan. Work has been undertaken to review and revise the Performance Capability Procedure, and the associated manager guidance.

2.2 The last major review of the Performance Capability Procedure was in November 2016. Minor updates were undertaken in December 2017 to reflect changes to the appeals process, in July 2019 to reflect further changes to the appeals process, and in July 2020 to reflect changes to terminology aligned to the current HR model.

2.3 The updated procedure is aligned to reflect the Council's Values and People Strategy.

2.4 Benchmarking has been carried out against other similar organisations with the aim of achieving best practice and is in line with current ACAS guidance.

2.5 The amendments to the Procedure for consideration by ACOS are detailed below:

- Technical changes / terminology to ensure links and dependencies and any references to current procedures (PDR / Performance Management / Induction / Probation / Attendance Management & Ill Health Capability) are accurate and up to date.
- Additional reference throughout to the Performance Management framework to ensure steps have been taken to address poor performance prior to moving into Performance Capability and how the HR Advice and Support team can advise on this.
- Strengthening of the guidance regarding the Performance Capability Procedure is intended to be supportive and improve performance and not a punitive measure.
- Confirmation that the employee may be accompanied by a colleague or trade union representative throughout the procedure.
- Confirmation of notice period required to attend meetings held throughout the process.
- Confirmation that additional review meetings can be held if this is appropriate to the process.
- Removal of the words 'issue a formal warning' (in relation to the fact that if a stage 3 Hearing is held it may result in dismissal) and amended to 'inform the employee of the potential consequences should they reach stage 3 of the procedure' which is a formal hearing.
- Throughout the process revised 'capability procedure' to 'Performance Management Capability Procedure' to differentiate between the Attendance management and Ill Health Capability Procedure.
- Appeals process amended to provide 14 days' notice in line with other employment relations policies.
- Additional information included in relation to probation and induction procedures to confirm that performance issues can also be considered under those procedures.
- Additional information included on what performance capability issues could include and how to support employees to reach an acceptable standard.
- A new section has been included on possible causes of underperformance to ensure these can be given adequate consideration.

- A new section has been included to consider when performance may be related to behaviour or conduct and whether performance capability or disciplinary action would be the most productive way of managing the situation.
- Clarification around redeployment – when it may be appropriate and related timescales.
- Clarification provided regarding employees who are absent due to sickness once in the Performance Capability procedure. (Employees cannot be expected to demonstrate improvement in performance whilst they are absent due to ill health, and therefore, review periods / meetings may have to be extended or rearranged appropriately)

3. Consultation

3.1 Consultation has been undertaken with the recognised trade unions, primarily via the Policy Forum and via a meeting convened specifically to discuss the procedure and any overlap / links with the Performance Management Procedure.

3.2 Initial comments were that performance issues must have been discussed throughout the Performance Management Framework and employees given the opportunity to improve prior to moving into Performance Capability.

3.3 These comments were incorporated into the revised procedure which was issued to trade unions on 13 November 2023.

3.4 The amended version of the Procedure was shared with joint trade unions at the beginning of November. There was limited trade union attendance at the November Policy Forum and therefore a separate document was circulated to the trade unions detailing proposed changes and the rationale behind them.

3.4 Further Policy Forum meetings have been held and although the trade unions had been unable to provide a response, comments have now been received. These related to minor points and some amendments have been made to the wording of the procedure.

4. Alternative Options Considered

4.1 One option is to not review the Performance Capability Procedure at this time. However, as it links so closely to the Performance Management

Framework, which has recently been substantially revised, it is timely to revise the Performance Capability procedure.

5. Implications

5.1 Appendix 1 sets out the relevant implications considered in the preparation of the report.

6. Background Papers

6.1 None

7. Appendices

7.1 Appendix 1 – Implications

7.2 Appendix 2 – Revised Performance Management Procedure and Manager Guidance

8. Recommendation(s)

That Committee:

a) Approves the changes to the Performance Capability Procedure.

9. Reasons for Recommendation(s)

9.1 It is recognised good employment practice to regularly review employment procedures to ensure they remain effective and up to date. Additionally, given the recent changes to the Performance Management Framework it is essential that the two procedures are aligned.

Report Author: Tracey Wall

Contact details: tracey.wall@derbyshire.gov.uk

Implications

Financial

1.1 No direct financial implications.

Legal

2.1 The Appointments and Conditions of Service Committee approve corporate employment policies which form the terms and conditions of Council employees, other than minor or technical changes to existing policies.

2.2 under Section 98 of the Employment Rights Act 1998, a reason 'which relates to the capability of the employee for performing work of the kind which he was employed by the employer to do' is recognised as being a fair reason for dismissal. However, legislation also requires that an employer demonstrate that any dismissal is not only for a fair reason, but depends on 'whether in the circumstances, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee'. Maintaining and following an up to date procedure regarding performance capability provides the basis for the Council to demonstrate that the dismissal was fair in all the circumstances.

Human Resources

3.1 This revised procedure is approved by ACOS, it is intended to implement with effect from 1 April 24, ensuring adequate time to issue relevant communications. This will comprise notification to employees via Our Derbyshire, and a 'Leading the way' bulletin for managers.

Information Technology

4.1 No IT implications.

Equalities Impact

5.1 TBC

Corporate objectives and priorities for change

6.1 None

Other (for example, Health and Safety, Environmental, Sustainability, Property and Asset Management, Risk Management and Safeguarding)

7.1 None

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