

# Capability Procedures for Support Staff (covering longer-term absence through ill-health)

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## 1. Introduction

The aim of this procedure is to support members of staff who are unable to carry out the duties of their job due to lack of capability, where a long-term health condition results in prolonged or sporadic sickness absence or unsatisfactory performance.

The University aims to be a caring organisation and to treat members of staff with any genuine medical condition leading to absence or unsatisfactory performance as supportively and sympathetically as possible, whilst having regard to the operational needs of the University.

The purpose of this procedure is to ensure consistent and fair treatment. Action taken under this procedure will be conducted in an objective and factual, but sensitive, manner and all staff will be treated with dignity and respect.

For OU staff working in Wales, the University welcomes complaints submitted in Welsh or English, these staff may also choose to respond to complaints in Welsh or English.

This procedure complies with legislation and is based on good practice.

## 2. Scope

This procedure applies to all internal staff on Support Staff Terms and Conditions of Service who work in the United Kingdom <sup>1</sup>.

This procedure covers cases of long-term continuous sickness absence, sporadic sickness absences caused by a long-term health condition, and unsatisfactory performance due to a long-term health condition.

This procedure does not cover issues of a disciplinary nature, for which there is a separate Disciplinary Procedure (see References section).

## 3. Procedure for Managing Long-Term Continuous Sickness Absence and Sporadic Sickness Absence Caused by a Long-Term Health Condition

General advice and guidance for managers on dealing with sickness absence is available – see References section.

This procedure is appropriate for cases of longer-term continuous absence, and may also be used for staff who have a long-term condition which leads to sporadic sickness

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<sup>1</sup> In Northern Ireland there is a Code of Practice on Disciplinary and Grievance Procedures (effective April 2011). For further advice please contact the People Hub.

absence (where the manager, in consultation with the People Hub, considers this to be appropriate).

### General principles

Throughout this procedure the appropriate manager, member of the People Hub, and trade union representative (if applicable) should work together to resolve the problem in the most effective way possible in the best interests of the member of staff as well as the University.

In every case there will be different and individual circumstances. As such, this procedure must be applied flexibly and no specific time limits can be laid down for particular stages of the procedure.

The member of staff will be kept fully informed if there is any risk to employment (e.g. if they are at risk of being dismissed from their job).

As some of the following stages may not be appropriate in every case depending on the particular circumstances, advice on how to proceed should be sought from the People Hub.

### Keeping in touch

It is essential that members of staff with longer-term absence through ill-health are contacted periodically. The appropriate manager should attempt to keep in personal touch with the member of staff to see how they are progressing, and to give help and support where necessary. Home visits should be arranged either by the manager or the People Hub or Occupational Health in exceptional circumstances.

For further details see the *Sickness Absence Management: A Guide for Managers*.

### Medical assessment

An Occupational Health Referral will be made by the manager, where appropriate, to obtain medical advice on the health of the member of staff relating to their work and/or attendance, and inform as to what management action is required. For further details on the Referral process see the *Sickness Absence Management: A Guide for Managers*..

The member of staff may be asked by the independent Occupational Health provider for written permission to contact their GP. On the basis of the GP's report and advice from the Occupational Health provider, the situation should be discussed with the member of staff.

Where a member of staff refuses to co-operate in providing medical evidence, or to undergo an independent medical examination, it is important that they are made aware (in writing) that a decision will be taken on the basis of the information available, and that it could lead to termination of employment.

### Disability and reasonable adjustments

Under equality legislation, the University has a duty to make reasonable adjustments to accommodate the needs of a disabled employee where the University's working arrangements or the physical features of their premises place that person at a substantial disadvantage.

Consideration should be given to making reasonable adjustments to the role or working practices to help improve attendance levels. In some circumstances it may be appropriate to allow a slightly higher level of absence where it relates to a disability.

Further guidance on disability-related issues is available - see References section.

### **Alternative employment**

Where the staff member's job can no longer be held open, alternative employment (where appropriate) should be considered, investigated and discussed with the member of staff. A transfer to suitable alternative work may be considered a reasonable adjustment under equality legislation, where appropriate.

### **Retirement**

Retirement on the grounds of ill-health will be considered wherever appropriate, on the recommendation of the University's Medical Adviser, and in accordance with the appropriate pension regulations.

### **Sick pay**

It is the responsibility of the People Hub to keep members of staff informed about their sick pay.

In the case of serious or terminal illness, or genuine hardship, a case may be made to the People Hub for an extension of full sick pay.

### **Decision on termination of employment**

Where the staff member's job can no longer be held open, no reasonable adjustments would facilitate a return, suitable alternative work is not available, and an ill-health retirement is not considered appropriate, the member of staff should be informed of the likelihood of termination on the grounds of incapacity through ill-health. After consideration of all the facts, the Head of Unit will decide if and when it is appropriate to proceed to the next stage of the formal Capability Procedure (section 5).

## **4. Procedure for Managing Unsatisfactory Performance Due to a Long-Term Health Condition**

This procedure is appropriate where a medical assessment of the member of staff (via Occupational Health, usually in the informal discussion stage) has established that there is an underlying medical reason for the unsatisfactory performance. Where this is not the case (i.e. under-performance is either due to negligence or relates to lack of competency/skills) then the Disciplinary Procedure should be used. It will be for the manager (in consultation with the People Hub) to determine which procedure to use, after consideration of the circumstances and evidence available.

The primary aim under this procedure is to support the member of staff so that their performance may improve to a satisfactory level.

Under equality legislation, the University has a duty to make reasonable adjustments to accommodate the needs of a disabled employee where the University's working arrangements or the physical features of their premises place that person at a substantial disadvantage. As such, at appropriate points during this procedure consideration should be given to making reasonable adjustments to the role or working practices. In some circumstances it may be appropriate to allow a slightly higher level of absence where it relates to a disability. Further guidance on disability-related issues is available – see References section.

## Informal Discussion

The line manager will try to establish the underlying reasons for any lapse in performance in order to help identify the actions that should be taken to provide appropriate support to the member of staff and address the issue. Where health may be a contributory factor it is likely that this informal stage will include seeking medical advice through an Occupational Health referral (for details, see 'medical assessment' above).

Members of staff will be given reasonable help, encouragement, and an appropriate period of time to improve. Line managers are responsible for setting standards and ensuring that members of staff understand what is required of them. In some cases additional training, coaching and advice may be required. It may be appropriate to use a Performance Improvement Plan (see Helping to Manage under Performance: A Managers Guide in References section) as part of the informal process.

During any informal discussions about performance, the member of staff should have the opportunity to comment, offer an explanation or bring any mitigating circumstances to the attention of the line manager, where appropriate.

During informal discussions it is not normally necessary for a member of the People Hub or a union representative to be present. However, in exceptional circumstances and at the discretion of the line manager, the attendance of a member of the People Hub and a union representative may be deemed appropriate. Where this occurs it will have no impact on the status of the meeting and will not have the effect of creating a formal process.

Further guidance on the informal management of performance issues is available - see 'References' section.

Informal discussion does not form part of the formal capability procedure and will not necessarily result in any further action. Where an individual has been given reasonable support and time to meet the required standard and if this informal discussion stage does not result in the required improvement the formal Capability Procedure (section 5) may be used.

## 5. Formal Capability Procedure

The procedure outlined below follows section 3 or section 4, where it is deemed appropriate to move to a formal process.

### Investigation

It is important to carry out an investigation of potential capability matters without unreasonable delay to establish or gather the facts. Sometimes this will mean holding an investigatory meeting with the member of staff before proceeding to a formal hearing. In other cases it will involve the investigating officer collating evidence for use at the hearing. An investigatory meeting will not by itself result in any formal action.

Where formal action is being considered against a member of staff who is a trade union representative, the normal procedure applies. However, with the individual's agreement, the matter should be discussed at an early stage with an official employed by the union.

### Written notification

If it is decided that there is a case to answer, the member of staff should be given at least 5 working days notice in writing of a formal meeting.

This notification should include:

- The time and place of the formal meeting and who will chair it;

- Sufficient information about the alleged capability issue and its possible consequences to enable the member of staff to prepare to answer the case at the meeting;
- Details of the evidence supporting the allegations or the reasons why the University is considering dismissal. Copies of any written evidence (e.g. witness statements) may also be included.
- Reference to the member of staff's right to be accompanied at the meeting by a trade union representative or work colleague (see Section 7).

### Capability meeting

Meetings up to final written warning stage will normally be conducted by the line manager. Decisions to dismiss will normally be taken by a more senior manager (i.e. Head of Unit). A member of the People Hub should normally be in attendance at any formal meeting, and always at any meeting where dismissal is a potential outcome.

The manager will explain the complaint against the member of staff and go through the evidence that has been gathered. The member of staff will have the opportunity to set out their case, respond to any allegations that have been made, ask questions, present evidence, call relevant witnesses<sup>2</sup>, and outline any mitigating circumstances they wish to be considered.

The meeting will be adjourned to enable all relevant facts to be considered.

Members of staff have the right to be accompanied at the meeting by a trade union representative or work colleague (see section 7).

### Decision

After the meeting the manager will consider all relevant facts and decide whether formal action is justified, and if so what is appropriate (see section 6 for possible sanctions).

Where this formal procedure is being used as the final stage of the Procedure for Managing Long-Term Continuous Absence, the decision to be taken is whether or not to dismiss on the grounds of incapacity through ill-health (as the written or final written warning stages are not appropriate in these circumstances).

No member of staff will be dismissed for a first breach of performance under this procedure. As a guide, where unsatisfactory performance is confirmed, it is usual to give the member of staff a first written warning. Failure to improve performance within a set period would normally result in a final written warning. However, if a first occurrence of unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning.

The member of staff will be informed of the decision in writing within 5 working days of the meeting, unless further investigation is required (in which case notification of when the outcome will be known will be given to all parties). Section 6 gives details of the information to be included in the written decision notice.

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<sup>2</sup> where either party intends to call witnesses to the formal meeting they should give advance notice that they intend to do this.

## Appeal

A member of staff has the right to appeal against any formal sanction imposed (including any decision to dismiss) where he/she feels the action is wrong or unjust.

Any appeal must be made in writing to the Head of Unit (except where the appeal is against a decision to dismiss, in which case it should be made to the Group People Director) within 10 working days of receiving written confirmation of the decision, and must state the grounds on which the appeal is made.

An appeal hearing will normally be set up within 10 working days of receiving the written request, and the appeal will normally be heard by a more senior person in the University who has not directly been involved with the original procedure.

The member of staff will be notified in writing of the time, date and place of the appeal hearing and who will be in attendance, and informed of their right to be accompanied by a trade union representative or work colleague (see section 7).

The member of staff will be informed in writing of the outcome of the appeal hearing as soon as possible after the meeting. The outcome will be one of the following:

- The original decision is upheld and the penalty is therefore confirmed.
- The original decision is overruled and a new decision imposed.
- In all cases other than dismissal following long-term sickness absence: The original decision is upheld but the original sanction considered too severe and is therefore substituted for another one.

There is no further right of appeal to the University.

## 6. Sanctions

**In cases of long-term continuous sickness absence**, the decision to be taken is whether to dismiss on the grounds of incapacity through ill-health (the written or final written warning stages are not appropriate in these circumstances).

**In all other cases** (including sporadic sickness absence caused by a long-term health condition), where action is considered necessary following a formal capability meeting, the measures taken will depend on the seriousness of the matter and the particular circumstances (in most cases the following measures will occur sequentially but the procedure may be initiated at any stage as appropriate).

### Written warning

If following the formal meeting the individual's performance is not considered satisfactory, a first written warning will be given which includes:

- A description of the performance problem.
- A description of the improvement required (with timescale, including review dates), how the member of staff is to achieve this, and any other support to be provided or constructive steps that can be taken, where appropriate.
- The term of the warning, which will be for a period of up to 12 months.
- The possible consequences of failure to improve and maintain performance within the set period (i.e. a final written warning and ultimately dismissal).
- Notice of the right to appeal against the decision.

The member of staff should be informed that the written warning represents the first stage of the formal procedure. A record of this warning and related discussions will be placed on the personal file.

## Final written warning

For more serious matters or where the member of staff has failed to meet the required standards after receiving a written warning and following a subsequent meeting where performance is not considered satisfactory, a final written warning will be given. This final written warning will include the same information listed under 'written warning' above. A record of this warning and related discussions will be placed on the personal file.

## Dismissal

Where the member of staff has failed to meet the required standard after due warning(s) have been given (where appropriate) and a meeting has established that performance or attendance is not considered satisfactory, the member of staff may be dismissed.

The individual will receive pay in lieu of notice and any accrued but untaken holiday entitlement. He/she will be informed in writing as soon as possible of the reasons for the dismissal, the date of termination of employment, the appropriate period of notice and the right of appeal (see section 7).

## 7. Right to be Accompanied

At all stages of the formal Capability Procedure, including appeals, members of staff have a statutory right to be accompanied by a companion (a trade union representative or work colleague). The companion is allowed to address the hearing in order to put and sum up the worker's case, respond on behalf of the member of staff to any views expressed at the meeting and confer with him/her during the hearing. The companion does not have the right to answer questions on behalf of the member of staff, address the hearing if the member of staff does not wish it, or prevent the employer from explaining their case.

## 8. Delayed or Re-arranged Meetings

Where the member of staff (or their companion) is unable to attend an arranged meeting, an alternative date will be arranged following consultations. No further re-arrangement will be made unless the individual requesting the change is certified as medically unfit to attend the meeting. If the member of staff fails to attend the re-arranged meeting it can take place in their absence (in consultation with their trade union representative or work colleague if appropriate) and the manager will make a decision on the evidence available.

## 9. Overlapping Grievance and Capability cases

Any grievance raised during a capability process will normally be heard as part of the capability process. In certain exceptional situations it may be appropriate for the process to be temporarily suspended in order to deal with the grievance.

## 10. Confidentiality and Records

Details of any action under this procedure will remain confidential to the parties involved and their representatives. Any breach of confidentiality may result in disciplinary action.

Records should be kept no longer than necessary in accordance with data protection principles.

In the following circumstances records will be held for two years and then destroyed:

- Where a formal warning is issued in relation to unsatisfactory performance.

However, if performance is satisfactory for the term of the warning then such records will be disregarded once the warning is spent.



- Where an investigation results in no formal action because the allegations are found to be without substance.

Records of formal action will be held for 6 years following a dismissal.

## 11. References

Disciplinary Procedure for Support Staff (covering unsatisfactory performance and misconduct)

Sickness Absence Management: A Guide for Managers.

Disability Awareness Resource Pack

Disability and employment website

Helping to Manage under Performance: A Managers Guide

ACAS Code of Practice: Discipline and grievances at work: The ACAS guide

Labour Relations Agency Code of Practice on Disciplinary and Grievance Procedures (Northern Ireland)