

## VALE OF WHITE HORSE DC

### CAPABILITY POLICY AND PROCEDURE

#### 1. Introduction and Policy Aims

For the Council to function effectively it requires employees who are capable of performing what is expected of them as laid out in their Job Description Questionnaire (JDQ). Unfortunately there are occasions when employees do not perform to the required levels of competence for their job. This lack of performance may manifest itself through unacceptable levels of performance, failing to carry out duties in a satisfactory manner, through persistent or long-term absence from work due to ill health or any other reason not connected to misconduct.

This policy sets out how capability issues will be dealt with. This policy aims to provide a fair and consistent method of resolving capability issues. This policy and procedure comply with the Employment Act (Disputes Resolutions) Regulations 2004 and applies to all employees except for the Chief Executive, Directors, Deputy and Assistant Directors (who are subject to a specified procedure under the Council's Standing Orders). It does not apply to Casual Workers or employees who have not completed their probationary period.

In dealing with cases of poor performance, the Council will distinguish between those where the reason is within the employee's control and those where it is not. If the reason is within the employee's control, the disciplinary policy applies. If the reason is outside of their control, this capability policy applies. Employees should note that the ultimate sanction in this policy is dismissal, but this will not happen without other options being fully explored first.

#### 2. Principles

The principles of the policy are to ensure that:

- *managers* use capability procedures primarily to help and encourage staff to improve
- whenever possible, *managers* use informal and low-key methods in resolving difficulties related to unsatisfactory performance
- whenever possible, *managers* make reasonable adjustments to cater for staff who have a disability

#### 3 Responsibilities of the Council as Employer

The Council will endeavour to minimise the need to deal with unsatisfactory performance by:

- ensuring the recruitment process is robust and fairly reflects the job being recruited for

- using accurate JDQ's, person specifications and competencies
- staff training and development to ensure the employee can perform the duties of their post
- Use of probationary periods.
- Use of the Personal Development Plan (PDP). and service planning as a structured way of managing performance.
- Through informal management coaching and counselling.
- Ensuring managers are giving the appropriate support to employees.
- Providing welfare support and advice.
- providing a professional in-house HR consultancy service to provide support to managers in dealing with unsatisfactory performance.

The Council understands that most employees are competent, effective and able to develop through the PDP.

Where standards change because of a Council or Management decision, the employee should be properly informed, trained as required and made fully aware of their new obligations and the required standards.

If the main cause of lack of performance is the changing nature of the work, it should be considered whether the situation might properly be treated as a redundancy issue rather than capability issue.

The Council commits to treating all employees fairly and expects its managers to provide support to employees as appropriate. No formal action will take place unless there has been prior discussion with HR.

#### **4 Responsibilities of Human Resources**

Production and implementation of a workforce development plan to ensure the work force are skilled and developed to deliver the Vale's objectives.

Ensure Managers and staff are aware and trained in respect of this policy.

Keep the policy updated and maintained.

Ensure the policy is adhered to and managers supported in respect of this policy.

Develop and implement competency framework.

Provide welfare support and advice.

Provide a professional in-house HR consultancy service to provide support to managers in dealing with unsatisfactory performance.

Advise formal hearings as appropriate.

HR will ensure that all the applicable legislation is adhered to when following this policy.

## **5 Manager Responsibilities**

Managers should use the capability procedure primarily to help and encourage employees to improve.

Managers should use the PDP and service planning process to ensure employees know what is expected of them.

Whenever possible, managers should use informal methods to resolve difficulties relating to poor performance such as informal advice, coaching and counselling.

Managers should ensure the appropriate training is given to help the employee in their current job.

Whenever possible, managers should make reasonable adjustments to cater for employees who have a disability.

Whenever possible, managers should make reasonable adjustments to cater for employees returning from long term sickness absence.

Managers should ensure they consider whether there are any factors outside of the working environment that could be affecting performance.

Managers should be aware and understand this policy.

Chair formal hearings as appropriate.

Managers have the responsibility of recording actions taken and incidents that could be viewed as evidence.

Managers should advise HR of any formal action they intend to take.

## **6 Unacceptable Performance**

In general terms unacceptable performance is repeated failure over time to carry out the duties associated with a particular job in a satisfactory manner and to the level of competence as laid out in the JDQ. Although none of these failures need be individually significant, cumulatively they may cause a manager to conclude that the employee is not capable of performing to the level of competence required for their post. Unacceptable performance may include unacceptable attendance levels.

### **Informal Action**

When it is first identified that an employee is not carrying out their duties satisfactorily the manager must hold an informal discussion with the employee to try to establish the reasons for poor performance. The discussion should look at:

- Identifying problems and providing supporting information and examples.

- The standards of performance and competencies required for the job, the gap between the employees performance and the above standards required and the reasons for the gap.
- Reaching agreement on how and when acceptable performance might be achieved and by what means, including referral to HR (or Welfare Officer) or Occupational Health if appropriate.

Any or all of the following outcomes and actions are possible:

- The manager decides that the current performance targets are unreasonable and so they are adjusted.
- If there is a change of duties further training and support will be given as soon as possible.
- If the problems experienced are related to the employee's personal life the manager will encourage the employee to talk to HR/Welfare.
- If the manager considers poor performance to be within the employee's control the issue would need to be dealt with under the disciplinary procedure.
- If the employee's problems are a result of ill health, the manager will deal with the issue using the ill-health process (as detailed later)

The Manager will then arrange subsequent meetings to monitor the employee's performance (usually every 2 weeks) for a period of time (up to 3 months). The manager will keep records of each meeting and a copy will be given to the employee and one placed on their personnel file.

### **Formal Action**

Should the employee fail to show adequate improvement in performance the next stage is for the employee to be told that a formal process will be entered into.

The stages outlined focus on the manager's and Council's role in offering support and training as well as the employee's performance. The primary objective of this policy is to improve performance. Although in most cases the stages will be sequential, some cases may be more complex and require longer periods of time, particularly where there has been improvement but this has lapsed. Cases of a more serious nature and where the consequences of less speedy action could be severe may need to move directly to the latter stages in the first instance. In such cases it may be appropriate to consider suspension of the employee in line with the principles outlined in the disciplinary procedure.

At all stages employees have the right to be represented by their Trade Union or a colleague of their choice. In all the early stages a time limit for performance to improve should be given and a review date set to assess whether the expected improvements have been achieved.

At all stages of the process employees will be able to state their case before any decision is reached.

No action should be taken against a trade union representative until the circumstances of the case have been discussed with Human Resources.

Managers should ensure that they are adhering to the Disability Discrimination Act (DDA). For further advice please contact HR.

The procedures refer to the role of Chief Executive, Strategic Directors and Deputy Directors. Where these senior staff are the subject of actions under this policy it may be necessary to involve higher levels of management (for the informal stages), or an elected Member body or an independent investigating person. Particular regulations apply to these senior staff.

## 6.1 Stage 1:

### **Initial Meeting with Employee**

The Manager should arrange, in writing, a formal meeting between the employee and their Deputy Director. The manager will:

- Inform the employee of the purpose of the meeting and give them enough notice to prepare.
- Ensure that the employee is aware that they have the right to be accompanied by a TU representative or colleague of their choice.
- Ensure that the manager and an HR representative are present. The HR representative will be responsible for taking notes of the meeting and ensuring that this Policy is applied appropriately and consistently.

The aim of the meeting is to:

- Identify clearly and fairly the ways in which an employee is considered to be underperforming/achieving.
- Identify the cause or causes of the continuing poor performance and to determine what, if any support the manager and Council can give in order to improve performance.
- Determine if the main cause of poor performance is a medical one. The employee may be required to attend an appointment with the Council's Occupational Health Advisors (failure to attend may lead to disciplinary action being taken). The Council will take advice from the OH Advisors as to whether the employee is disabled within the meaning of the DDA. If this is the case, appropriate action will be considered, including making reasonable adjustments to the post.
- By mutual agreement, an earlier referral to Occupational Health can take place.

- Ensure the employee is aware of the concerns, standards required and shortfalls in standards achieved.
- Give the employee the opportunity to challenge and put forward any facts or evidence for consideration. This may include the need to review what standards are required or in some instances a review of the manager's approach in their interactions with the employee.
- Obtain the employee's commitment to reaching the standard by setting and agreeing realistic targets.
- Set a reasonable review period for the employee to reach the required standard and agree how performance will be monitored during that period.
- Consider means to improve performance including: Counselling, coaching, retraining or further training, changes to hours and/or duties if feasible.
- Explain to the employee what will happen if they do not reach the required standard. If necessary, an informal or formal warning may be issued.

The Deputy Director will chair the meeting. HR will take notes and copy the notes to the employee, the Deputy Director, the manager and to the individual's personnel file within 5 working days of the meeting.

### **Review Period**

Ongoing feedback should be given to the employee during the review period by the manager in regular progress meetings.

At the end of the review period HR will arrange for a further formal meeting including the individual's right to be accompanied.

If in the manager's opinion, the employee has improved their performance to the required standard the meeting will involve those who attended the original hearing.

Any issues that have further arisen can be addressed but if the performance has improved to an acceptable level the meeting will be seen as an opportunity to encourage the employee to continue their improvement in performance. HR will confirm the outcome of the meeting within 5 working days to the individual. A copy will be kept on the employee's file for 12 months. If the employee's performance becomes unacceptable again within this period a further meeting will be arranged (see below).

## **6.2 Stage 2:**

### **Second Meeting with Employee**

If the employee's performance has not improved during the review period a second formal meeting with the Deputy Director will be arranged in writing by the manager.

At the meeting, the employee will be informed of the continuing concerns that are considered to exist regarding their performance, taking into account any areas of mitigation. They should be reminded of any steps previously taken to encourage them to improve and told the possible consequences of no improvement. At this stage (2) the employee and/or their representative will be invited to give their views on the alleged lack of improvement in performance before the Stage 2 formal meeting is adjourned for a maximum period of 5 days whilst the final decision about what action is to be taken, is made.

In the adjournment period the appropriate Deputy Director (in collaboration with the manager and HR representative) will consider whether there is an ongoing problem. If so, they will

- investigate whether there are any vacant posts that would be suitable for the employee based on their current level of competence. If one or more posts exist information will be provided at the reconvened meeting. The employee will then have five working days to decide to accept the post.
- consider whether to offer an extended period to improve performance.
- Explain to the employee what will happen if they do not reach the required standard. If necessary, an informal or formal warning may be issued.
- consider whether to terminate the employment of the employee giving the required notice under their employment contract.

The purpose of the Stage 2 meeting will be to inform the employee of the decision of the Strategic Director and any action that will be taken. There will be no further debate at the stage. HR will confirm the decision in writing within 5 working days. HR will also inform the employee of their right to appeal to the Chief Executive against any decision to terminate their employment.

## **7 Ill health**

In order that the Council can function effectively employees need to be available to work. Absence from work causes disruption to services and puts undue pressure on colleagues. Whilst the Council is sympathetic to employees with illness or injury a policy needs to be in place to deal with unacceptable absence from work due to ill health.

The Council has introduced the Bradford Factor (BF) (please see Absence Policy and Procedure). This calculates an absence 'score' based on the individual absences on a 12 month rolling basis.

Due to the nature of the BF score, instances of frequent absences are identified as well as those which continues for a considerable length of time. This policy deals with frequent absences and long term absences separately as detailed below.

No formal action should be taken against a trade union representative until the circumstances of the case have been discussed with Human Resources.

Managers should ensure that they are adhering to the Disability Discrimination Act. For further advice please contact HR.

## **7.1 Frequent Absences**

As outlined in the Absence Policy and Procedure, once an employee's BF score reaches a certain level, different actions are taken. Informal action as explained in the Absence Policy and Procedure must be taken in accordance with that policy prior to any formal action being taken under this policy. Please refer to the Absence Policy for BF scores.

### **Formal Action**

If the employee has not met the agreed targets to improve their performance the manager will arrange a formal meeting with the employee, themselves, their Deputy Director and an HR representative. The role of the HR representative will be to take notes. The employee will have the right to be accompanied by a colleague or TU representative.

The aim of the meeting is to:

- Identify clearly and fairly the ways in which an employee is considered to be underperforming/achieving.
- Discuss reasons for absence and ensure that the employee is aware their absence record is causing concern.
- Inform the employee that frequent absence is unacceptable and if attendance does not improve their continued employment is at risk (ie a formal warning).
- Advise the employee to seek proper medical attention where there is evidence of a medical problem, if they have not already done so. HR will refer the employee to their Occupational Health advisors if appropriate. (Refusal to attend may mean the employee is subject to disciplinary action).
- Provide an opportunity for the employee to explain any personal problems affecting attendance so appropriate support can be considered. This includes referral to the Welfare Officer.
- Consider if there is a case for making reasonable adjustments to the employee's role, responsibilities or working arrangements to accommodate their short or long term requirements.
- Set a target for improved attendance if appropriate and review date. Progress will be monitored through the review period.
- Explain what will happen if the targets are not met.
- Decide whether a medical certificate will be required for all absences due to sickness regardless of duration. The Council will reimburse the full, reasonable cost of obtaining these certificates.



The meeting will adjourn for a short period at which time the employee will be informed if any action will be taken against them. At this stage the formal action would initially take the form of an informal or formal warning. HR will give the employee a copy of the meeting notes within 5 working days confirming the facts and action to be taken, copying in the manager.

At the end of the review period or if the BF score reaches the next level of action HR will arrange a further formal meeting with the employee, who will again have the right to be accompanied, and the Deputy Director.

If there has been an improvement this will be noted and the outcome of the meeting will be confirmed in writing to the employee.

If there has been no improvement or the BF score has risen to the next level or higher within the improvement timescale the appropriate Deputy Director will inform the employee of this fact. Further formal meetings will take place involving the employee, manager, Deputy Director (as appropriate) and an HR Representative following the above procedure.

If the employee continues to show no signs of improvement or the BF score continues to increase, in line with the absence policy, further formal meetings will take place under this policy until the potential outcome of employee dismissal is reached. HR will inform the employee of their right to appeal to the Chief Executive against dismissal.

## **7.2 Long term absences**

### **Informal Action**

Action will be taken in line with the BF scoring system as laid out in the table above or within the Absence Policy and Procedure. When the score reaches the Capability Policy Level a meeting will be requested with the employee.

Initially If the employee is too unwell to come to the office it may be required that the meeting takes place at the employee's home or any other venue that is mutually acceptable. If a meeting is refused, disciplinary action may be taken, up to and including dismissal.

An initial meeting will include the employee, a representative (either a colleague or TU rep), their manager and an HR Representative.

The reason for the meeting will be to:

- Establish reasons for the absence and likely duration
- Establish whether the employee should be referred to our OH advisors (refusal to attend could result in disciplinary action being taken). The referral should give an indication of the length of time the employee is likely to be absent, the long term effect on their capability to do their job at the required level of performance, and their attendance at work. Referral may also seek to

establish whether the DDA comes in to play, so reasonable adjustments should be considered.

- Establish whether offering alternative employment or adjustments to the job would facilitate an earlier return to work.

In appropriate circumstances the meeting will be used to:

- Inform the employee that long term absence due to ill health may put their employment at risk
- Arrange further meetings to review the situation, establish a return to work date and return to work plan.
- Set a date for dismissal will be considered on grounds of capability if the employee is still unable to return to work. (This would usually be at the end of their entitlement to Occupational Sick Pay.)

The manager will keep records of each meeting and a copy will be given to the employee and one placed on their personnel file.

## **Formal Action**

At the specified date (as above), a formal meeting will be arranged with the employee who will have the right to be accompanied by a colleague or TU rep. The role of HR will be to take notes.

Unless there are reasonable grounds to believe that the employee will be able to return to work in the foreseeable future, it will be explained to the employee that the Council is considering terminating their contract of employment on grounds of capability. The employee and/or their TU representative or work colleague will be invited to give their views on this before adjourning the hearing to make a final decision, which will be within five working days.

HR will write to the employee immediately following the hearing advising them that dismissal is a potential outcome at the reconvened hearing.

The sole purpose of the reconvened hearing will be for the Deputy Director or their representative to inform the employee of the action he/she has decided upon. There will be no debate. HR will confirm the decision in writing to the employee within five working days of the hearing. HR will also advise the employee of their right of appeal to the Chief Executive.

## **8 Appeal against Dismissal**

In the event of a dismissal the employee will have the right to appeal. The appeal should be made in writing within ten working days of receipt of the decision letter stating the ground(s) for the appeal, which can only be because:

- they think the action is unfair, and/or
- they think that procedures were not used correctly.

The Chief Executive will hear any appeal in accordance with our disciplinary appeals policy and procedure

## **9 Grievance**

If an employee feels he or she has been treated unfairly in the operation of this Policy and Procedure, he or she has the right to raise the matter under the Council's Procedure for Settling Individual Grievances.

**Policy considered by Council May 2007.**

### **Appendix 1 - Ensuring there is no discrimination**

#### **Legislation**

These laws make it unlawful to discriminate against an individual when considering matters relating to underperformance:

- Sex Discrimination Act 1975
- Race Relations Act 1976
- Disability Discrimination Act 1995
- Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 SI 2000/1551
- Race Relations (Amendment) Act 2000
- EU Employment Framework Directive 2000/78
- Directive 2002/73 amending the Equal Treatment Directive 76/207
- Employment Act 2002
- Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 SI 2002/3236
- Employment Equality (Sexual Orientation) Regulations 2003 SI 2003/1661
- Employment Equality (Religion or Belief) Regulations 2003 SI 2003/1660
- Employment Equality (Age) Regulations 2006 SI 2006/1031
- Equality Act 2006

#### **Pregnancy**

Pregnancy is not ill health or a matter of capability and cannot, alone, be grounds for invoking this Procedure. Whilst it is not unlawful to take capability action against a pregnant woman for some work performance reason unconnected with her pregnancy, it is unlawful sex discrimination and automatically unfair to dismiss a woman on grounds of her pregnancy. Managers are strongly advised to seek advice from Human Resources prior to taking any action against a pregnant employee.

#### **Disability**

The Disability Discrimination Regulations make it unlawful to discriminate against disabled people.

Unlike the other discrimination regulations, an employer may take account of an employee's disability when considering capability providing the reason for any less favourable treatment is:

- Justifiable
- Material and substantial
- Relates directly to the individual circumstances in question

If the performance of a disabled employee including acquired disability is less than satisfactory managers must examine any reasonable adjustment which could be made to improve performance with the employee.