

CAPABILITY/PERFORMANCE PROCEDURE

The current version of the Capability/Performance Procedure was approved by the Council of the University, July 2018.

In response to the Coronavirus health pandemic, to enable the University to focus on critical organisational priorities whilst safeguarding the health, safety and wellbeing of students and staff, the University has agreed some temporary modifications to the Capability/Performance Procedure. These changes, which are intended to be for the overall benefit and wellbeing of employees, are subject to the following principles: (a) there should be no long-term detriment to employees; (b) the University will ensure variations to standard practice are reasonable; and (c) the University's practice should remain compliant with legislation.

On 19 October 2020, the Joint Committee for Consultation and Negotiation agreed that these temporary provisions will expire on **31 July 2021** unless otherwise agreed between the University and trade unions.

The following principles and definitions apply:

1. **Review:** all existing cases will be reviewed by the Director of Human Resources in conjunction with the HR Casework Manager & Solicitor and assessed on a case by case basis using criteria such as employee wellbeing, organisational reputation, employee detriment, employment law and potential for dismissal. Following such review, existing cases may be paused in accordance with (4) below or progressed in accordance with (6) below.
2. **Existing Cases:** are cases where the formal stages of the applicable procedure (Disciplinary, Capability/Performance Procedure, Grievance and non-confirmation of probation) had commenced (including an investigation having been commissioned where applicable) prior to 23 March 2020.
3. **New Cases:** are cases which are referred to the HR casework team for progression under the formal stage of the applicable procedure (Disciplinary, Capability/Performance Procedure, Grievance and non-confirmation of probation) on or after 23 March 2020.
4. **Pause:** based on the Review at (3) above, existing cases may be paused, the status quo maintained and the 'clock stopped'. The employee will be notified when the clock will restart (This period is currently undetermined due to uncertainty around the global health crisis; however this is likely to be when normal working practices/business as usual for the University are resumed.)
5. **Delay:** any new cases may, at the discretion of the Director of Human Resources, be delayed, unless it is considered essential that the matter be addressed as soon as possible in accordance with (6) below - e.g. for employee wellbeing, potential cases of gross misconduct, gross professional negligence etc.
6. **Reasonable:** where the decision is taken that the matter should be progressed and that formal action needs to be taken, there will be reasonable extensions to timescales under the University's procedures and reasonable changes to membership of hearing (including appeal) panels, to enable a wider pool of management and HR representatives. Greater use of technology will be made in conducting hearings where possible, including use of Microsoft Teams, which enables all participants to 'meet' online. All University staff with access to a computer should be able to download Teams, see <http://www.exeter.ac.uk/it/teams/>
7. **Modified Procedure:** Greater use of technology will be made in conducting hearings where possible, including use of Microsoft Teams, which enables all participants to 'meet' online. All University staff with access to a computer should be able to download Teams, see <http://www.exeter.ac.uk/it/teams/> Where it is not possible to proceed with a meeting on teams, for example where the staff member does not have access to teams or where it is recommended

that a meeting take place face to face due to a medical condition, then from 1 July 2020 a modified procedure will be followed with a hearing to take place 'partially in person' in a building on campus which has been risk assessed and open with sufficient space for social distancing requirements to be met. The chair and staff member will attend in person. The second panel member (where applicable) and companion may attend in person or via Teams (to be assessed on a case by case basis). All other parties, including supporting HR Representative, note taker and witnesses will attend via Teams.

Temporary Amendments

The relevant temporary amendments to the Capability/Performance Procedure are outlined in the below sections of this document:

3.0 *Informal Action*

6.0 *Formal Capability Procedure*

9.0 *Appeal*

References to the Director of Human Resources include their designate.

For avoidance of doubt, references to notification in writing include e-mail.

Date of this document: 28 March 2021

CAPABILITY/PERFORMANCE PROCEDURE

1. Policy, Purpose and Principles

- 1.1 The primary aim of this procedure is to provide a framework within which managers can work with employees to maintain satisfactory performance standards and to encourage improvement where necessary.
- 1.2 The purpose of the capability/performance procedure is to help and encourage employees to achieve and maintain required standards of performance. The aim of the procedure is also to ensure that when action needs to be taken, it is applied consistently and fairly in every case.
- 1.3 This procedure applies to all members of staff except those engaged on a claims basis (including casual staff and staff on the temporary staff bank), Postgraduate Teaching Assistants, or staff in their probation period.
- 1.4 This procedure is intended to be used as a guide and does not form part of the contract of employment. The application of this procedure may be modified by the Director of Human Resources or his/her designate at their discretion if appropriate in specific cases (for example where a member of staff employed by the University works in, or is managed by employees of, a third party organization, including in cases of secondment).
- 1.5 Managers are expected to regularly review the performance of the staff they manage, giving timely feedback, identifying any concerns over performance at the earliest opportunity and providing appropriate support and training.
- 1.6 Before any formal sanction is applied under this procedure, an employee will be advised of the concerns over their performance and given an opportunity to respond at a hearing.
- 1.7 There may be occasions when, depending on the seriousness of the alleged shortfalls in performance, it will be appropriate to enter the procedure at the stage of a final warning or, in cases of gross negligence, at the dismissal stage which may include dismissal without notice.
- 1.8 If action under this procedure is being considered against an employee who is a trade union representative, the normal capability/performance will be followed. An appropriate trade union official will be informed before any formal hearing (under section 5) with the employee's consent.
- 1.9 The University will endeavour to deal with matters under this procedure promptly and without undue delay, and expects the member of staff concerned to co-operate to achieve that aim.
- 1.10 Time limits (other than those for prior notification of hearings) are indicative – there may be circumstances, particularly in the case of complex cases, where these are not realistic. If it is not possible to respond or take action within the time limits referred to in this Procedure, the employee should be given an explanation for the delay and told when a response can be expected. The time limits may be varied by mutual agreement in individual cases.
- 1.11 Where an employee has received a warning under this procedure or is subject to the application of the preliminary stages prior to a warning then the University reserves the right to withhold a pay increment.
- 1.12 Where there is an issue as to the meaning of 'academic freedom' in any proceedings under these Ordinances, regard shall be had to the agreement with the University and College Union regarding the definition of academic freedom dated 31 July 2009.
- 1.13 This procedure has been implemented following consultation with the University and College Union (UCU), Unison and Unite. The Procedure may be amended at any time by the University following procedures set out in its Statutes and Ordinances.

2. Right to be accompanied at hearings

- 2.1 An employee may bring a companion to any hearing under the formal stages of this

procedure. The companion may be either a trade union representative or a work colleague. The employee must tell the HR Casework Team who their chosen companion is, in good time before the hearing.

- 2.2 The companion may make representations, ask questions, and sum up the employee's case, but will not be allowed to answer questions on their behalf. The employee may confer privately with their companion at any time during the hearing.
- 2.3 If the companion is unavailable at the time the hearing is scheduled then the employee can ask for the hearing to be postponed for up to one week, on one occasion only. Following such a postponement, the University reserves the right to proceed with the meeting in the employee's absence.
- 2.4 Whilst there is no right to be accompanied to meetings under the informal stage of this procedure, the University will not object to any reasonable request to be accompanied by a work colleague or trade union representative to an informal meeting, but the university will not postpone/delay the informal procedure due to unavailability.

3. Informal action

- 3.1 In the first instance, performance issues should normally be dealt with informally between the employee and their line manager as part of day-to-day management. The formal procedure should be used for more serious cases, or in any case where an earlier informal discussion has not resulted in a satisfactory improvement. Informal discussions can help to:
 - clarify the required standards;
 - identify where the employee is not meeting the required standards;
 - establish the likely causes of poor performance and identify any need for support or training; and/or
 - set targets for improvement and a time-scale for review.
 - The employee will also be made aware of the consequences of not achieving the required standard.
- 3.2 This is not a stage under the formal procedure, however informal discussions and the outcome will be confirmed in writing.
- 3.3 Should the employee fail to achieve or maintain the required standards within a reasonable timeframe following the informal discussion then this is likely to result in the formal capability procedure being commenced (see section 6 below).

Temporary Amendment: Given the potential absence of employees and managers, the informal actions may take longer to be put in place and reviewed. It is likely that longer periods of time will need to be allowed; specifically it is likely there will be a delay in the line manager raising concerns with the employee at an informal meeting.

4 Disabilities

- 4.1 Consideration will be given to whether poor performance may be related to a disability and, if so, whether there are reasonable adjustments that could be made to an employee's working arrangements, including changing their duties or providing additional equipment or training.
- 4.2 If an employee has any medical condition which may impact on their performance, they should contact their line manager or a member of their Human Resources Team.

5 Confidentiality

- 5.1 Our aim is to deal with performance matters sensitively and with due respect for the privacy of any individuals involved. All employees must treat as confidential any information communicated to them in connection with a matter which is subject to this procedure. This is not intended to prevent the employee from discussing the matter with their

companion (paragraph 2) in confidence.

- 5.2 The University does not make audio/visual recordings of hearings and employees and anyone accompanying them (including witnesses) must not make electronic recordings of any meetings or hearings conducted under this procedure. The University will arrange for notes to be taken of all meetings or hearings, and a copy of meeting notes will be sent to the employee and agreed where possible. Where not agreed, the employee can add an addendum to the notes. Notes of hearings under the formal procedure will be sent to the employee on request.

6 Formal Capability Procedure

- 6.1 Where the employee has failed to achieve or maintain the required standards within a reasonable timeframe following the informal discussion, or where the shortfalls are more serious, the employee will be required to attend a capability hearing. A letter will be sent to the employee at least seven days before the date of the hearing, setting out the following:

- that there will be a meeting under the Capability/Performance procedure;
- of the date, time and venue of the meeting;
- details of persons attending the meeting and their role;
- of the concerns about their performance;
- of the possible outcomes under the Capability/Performance procedure;
- enclosing a copy of any statements from witnesses and other relevant evidence;
- of their right to be accompanied by a fellow worker or trade union representative.

- 6.2 An employee must make every effort to attend the hearing. Failure to attend without good reason may be treated as misconduct. If the employee is unable to attend then they should inform the HR Casework team immediately and the hearing will be rearranged on one occasion only. If the employee is persistently unable or unwilling to attend without good reason then the University reserves the right to take a decision based on the available evidence, including any written representations made by the employee. Where the employee commences sickness absence after commencement of this procedure then advice will be sought from Occupational Health on the employee's fitness to participate.

- 6.3 The purpose of the hearing is to give the employee an opportunity to state their case and to answer the allegations that have been made.

- 6.4 The manager conducting the hearing may hear evidence from witnesses and the employee may arrange for witnesses to attend and give evidence. The manager conducting the meeting may question any witnesses. The employee or their companion (see section 2) may also question witnesses, although the manager conducting the meeting may determine that all questions are directed through him/her.

- 6.5 Following the hearing, the manager conducting the hearing may take one of the following courses of action, according to the circumstances of the case:

- take no formal action.
- give a formal written warning if performance is unsatisfactory. This will normally remain active for a period of six months from the end of the review period (see 6.7).
- give a final written warning if there has been an insufficient response to a previous warning and performance is still unsatisfactory, or if there are serious shortfalls in performance. This will normally remain active for a period of twelve months from the end of the review period (see 6.7).
- give the employee notice of dismissal if, following a final written warning, performance remains unsatisfactory and the employee still fails to reach or maintain the prescribed standards.
- to dismiss the employee summarily without notice and without there having been

any previous warnings under this procedure in cases of gross negligence.

- 6.6 The employee will be informed in writing of the decision and the reasons for it, usually within one week of the capability hearing. The letter will set out the consequences of any recurrence of unsatisfactory performance. The letter will also inform the employee of their right to appeal.
- 6.7 A formal written warning or final written warning will also set out the following:
- The areas in which the employee has not met the required performance standards.
 - Targets for improvement.
 - Any measures, such as additional training or supervision, which will be taken with a view to improving performance.
 - A period for review.
 - The consequences of failing to improve within the review period, or of further unsatisfactory performance.

This will normally be managed by way of a Performance Improvement Plan (PIP).

Temporary Amendment: The HRD will determine whether to proceed with the formal stages of the procedure, or whether to delay enacting the formal procedure in accordance with **3.1.5** above. In taking this decision consideration will be given to whether the employee has a current live warning, how far the proceedings have already progressed (e.g. has the employee already been provided with notification of a formal hearing), the impact on the employee of any delay and whether a modified procedure can reasonably be followed, i.e. by Microsoft Teams or partially in person. In practice this means that new formal cases may be delayed, or existing cases could be paused. Where it is considered appropriate to continue with the formal procedure then the employee (and their representative) will be informed of this in writing, and the method of 'hearing the case' (i.e. by Teams or partially in person) agreed. A temporary variation may be made to the level of HR support for the panel. Timescales for the meeting to be held by, paperwork to be received by and outcomes to be agreed by will be agreed as reasonable. This will not affect an employee's right of appeal and the period for raising an appeal will be set out in the outcome letter.

7. Review periods following a capability hearing

- 7.1 The employee's performance will be monitored during the review period (see 6.7 above) and the University will write to inform the employee of the outcome:
- if the employee's line manager is satisfied with their performance, no further action will be taken;
 - if the employee's line manager is not satisfied, the matter will be progressed to a further capability hearing (stage 2 or stage 3); or
 - if the employee's line manager considers that there has been a substantial but insufficient improvement, the review period may be extended.

8 Alternatives to dismissal

- 8.1 The University may at its discretion consider one or more of the following sanctions as an alternative to dismissal:
- demotion, which may include demotion to a lower grade, with resulting reduction in salary
 - remain on the same grade but reduction in spine point on the University of Exeter pay scale as applicable from time to time
 - a period of unpaid suspension of no longer than one month
 - transfer to a different role, college, service or site.
 - Extending an active final written warning and setting a further review period (in

exceptional cases where we believe a substantial improvement is likely within the review period).

- 8.2 Where such alternative sanction(s) are deemed appropriate, they will be applied in addition to a final written warning, to remain current for 18 months from the date of hearing.

9 Appeals

- 9.1 An employee has a right of appeal against any sanction under the formal Capability/Performance Procedure.
- 9.2 The right of appeal must be exercised within two weeks of the date of the outcome letter at 6.6 above.
- 9.3 The appeal, stating the grounds on which it is made, must be in writing addressed to the Director of Human Resources.
- 9.4 An appeal will be heard by a panel comprising two senior managers who have had no previous involvement in the case. In the case of an appeal against a final warning or against dismissal, the panel will be drawn from members of a different College/Service.
- 9.5 The University will aim for an appeal to be heard within four weeks of the appeal being lodged, unless otherwise agreed between the parties.
- 9.6 The appeal panel may:
- uphold the action taken; or
 - withdraw the action taken; or
 - reduce the level of action taken.
- 9.7 The appeal will be a review of the decision taken by the manager conducting the hearing under paragraph 6 above. No new evidence may be presented to the Appeal Panel, nor any witnesses called, unless the Appeal Panel are satisfied that there are exceptional reasons why such evidence or witnesses were not produced at the formal hearing under paragraph 6 above, and/or that it is necessary in the interests of fairness, in reviewing the manager's decision, for the Appeal Panel to consider this evidence or hear from the witnesses concerned.
- 9.8 The decision of the appeal panel (communicated in writing to the employee) shall be final within the procedures of the University.
- 9.9 The procedure to be followed at appeal meetings is detailed in Ordinance 35.

Temporary Amendment: All employees subject to formal action continue to have a right to appeal. There may be a delay in the University being able to hear an appeal, and the employee will be informed of the likely timeframe in writing as soon as possible following receipt of their appeal. However, except in the case of dismissal, appeals may be paused during this period.

10. Relationship with other procedures

- 10.1 This procedure applies where there has been a failure to achieve or maintain adequate standards of performance. There are separate procedures which apply where there are concerns over an employee's conduct and/or absences due to ill health. However there may be occasions where it is appropriate to transfer to a different procedure. If at any stage after commencing this procedure, the commissioning manager in conjunction with HR Services, considers that the matter should be dealt with under an alternative procedure the capability procedure will be ceased (or in certain circumstances, suspended) and the issue will be transferred to the relevant procedure at the appropriate stage. The employee will be notified of this decision and the reason.
- 10.2 Investigations that have been undertaken in one procedure may be used as and where appropriate to inform another procedure.

- 10.3 If an employee raises a grievance during the capability process the capability procedure may, if appropriate, be temporarily suspended in order to address the grievance; however if the performance and grievance issues are related it may be appropriate to deal with both cases concurrently under a single investigation and hearing. Each case will be considered on an individual basis.
- 10.4 An employee who is the subject of any action under this Procedure may not raise a grievance about the decision to apply the Capability/Performance Procedure, the conduct of an investigation or a capability hearing or decisions taken under the Capability/Performance Procedure. Complaints about these matters should be considered at hearings under this procedure.

Approved by Council, July 2018