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CAPABILITY PROCEDURE

[1] INTRODUCTION:

Southwark Council recognises that its employees need to be equipped with appropriate skills, aptitudes, levels of efficiency and health in order to undertake the duties required of them in order to deliver efficient and effective services. This procedure is based on the ACAS Code of Practice on Disciplinary and Grievance Procedures (which also covers issue relating to capability) and is to be used for dealing with issues of work performance (including attendance at work). The procedure is designed to help and encourage all employees to achieve and maintain standards of capability, efficiency, attendance and work performance. Business Managers have discretion to decide whether an issue touching upon work performance should be more properly dealt with under the [Disciplinary Procedure](#).

This procedure applies to all Council employees, with the exception of those employed in schools with delegated budgets. In the absence of any formal probationary procedure, this capability procedure should be used to manage work performance and attendance concerns about new employees.

Normal standards of work performance and attendance apply to trade union officials but where an accredited trade union official is subject to capability action, the appropriate full time trade union official and the relevant Branch Secretary should normally be notified before any action is taken.

The purpose of a capability interview is to:

- consider fairly work performance and attendance concerns about an employee;
- decide whether the facts support those concerns; and
- decide what action should be taken to address those concerns with the objective of assisting the employee to achieve acceptable standards of performance in carrying out their duties.

The fundamental principles of good management practice must apply in all cases and it must be remembered that an employer's failure to follow a fair procedure is likely to result in an employment tribunal finding the outcome of the capability process unfair.

If the outcome of a capability interview is dismissal and the matter is put before an employment tribunal, the employer is required to demonstrate:

- the reason, or principal reason, for dismissing the employee;
- that the reason for dismissal is a potentially fair reason (capability of an employee is a potentially fair reason); and
- that they have acted reasonably and consistently in treating the reason as a fair reason to dismiss.

This procedure provides a structured yet flexible process for managers to ensure that employees are treated in a fair, reasonable and consistent manner.

[2] PROCEDURE:

(Note: This procedure is supported by a series of short [guidance notes](#). Text printed in ***bold and italics*** within the procedure indicates that a guidance note is available on

that topic.)

[a] Preliminary procedure –

When concern arises about work performance or attendance, the line manager must satisfy him/herself that there is substance to the concern. If the line manager is satisfied that there are genuine grounds for concern and that the concern is not insignificant, the matter will be dealt with by way of a [guidance interview](#). Guidance interviews do not constitute formal capability action.

If appropriate, the line manager will consider [referral to the Council's Occupational Health Service](#). Such a referral may be made at any stage in the process if the circumstances show it to be appropriate. Following careful consideration of the Occupational Health Physician's report, the line manager will reach a decision on whether or not the employee has an underlying medical condition which causes or contributes to the concern about work performance or attendance.

The line manager will provide [opportunities for improvement](#) by exploring appropriate options. These options may vary depending upon whether or not the employee has an underlying medical condition. Whatever action is pursued in relation to opportunities for improvement, the line manager will confirm it in writing to the employee.

Where the line manager is satisfied that more than a guidance interview is appropriate or where any options that have been pursued to obtain improvement have not achieved the improvement required, appropriate formal capability action will commence.

[b] Formal procedure ¹ –

Departmental schemes of management (formerly, schemes of delegation) specify the levels of management that have the authority to take the various forms of action provided for in this procedure. Managers who have been directly involved in the events leading up to the formal capability action may not sit on nor advise capability or capability appeal panels, although they may appear as a witness.

In every case, the cause of concern will already have been raised with the employee (usually through a guidance interview) and opportunities for improvement will have been provided before formal capability action is started.

The line manager will notify the employee in writing of the concern about his/her work performance or attendance and copies of any relevant documents will be provided. The letter will indicate the formal capability action being recommended if the concern about the employee's work performance or attendance is confirmed. The letter will include details of the arrangements for the capability interview (date, time and location) and contain an invitation for the employee to attend and respond to the concern and the recommended capability action. The letter will also advise the employee about his/her rights to [representation](#). Finally, the letter will advise the employee that failure to attend the capability interview without providing a reason acceptable to the Chair may result in the capability panel proceeding to determine the issues in their absence, having first been advised of the details of the concern by the line manager.

1. Disciplinary investigation and disciplinary action relating to the head of paid service, monitoring officer and chief finance officer are subject to the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 ("the 2015 Regulations") and as set out in section 4 of the Council's Constitution; Officer Employment Procedure Rules. This would cover areas that would be deemed as capability.

The employee and their representative are obliged to make every effort to attend the interview. Where an employee is persistently unable or unwilling to attend, without good cause, the panel may proceed in their absence.

The [capability interview](#) will comprise two distinct parts:

- part 1 – the [panel](#) hears evidence and decides whether the concern is confirmed; and
- part 2 – the panel considers mitigation and decides whether to confirm or amend the recommended formal capability action (if the concern is confirmed).

The panel Chair will ensure that the employee receives a fair and impartial hearing, is encouraged to be represented or accompanied at the interview, is allowed to respond to the concern raised by the line manager, is allowed to call witnesses and to question the line manager and any management witnesses and is allowed to submit documents in support of his/her case.

The panel may adjourn the interview in order to seek further information (including requesting the attendance of additional witnesses), but once they are satisfied that they have heard all the relevant evidence the panel must [reach a decision](#) at the end of part 1 of the interview and convey that decision to the employee or his/her representative.

Before deciding whether to confirm or amend the recommended formal capability action, if appropriate, the panel must allow the employee or his/her representative to make a statement of mitigation. The line manager will also be invited to comment on the mitigation offered by or on behalf of the employee.

The possible [formal capability actions](#) arising from a capability interview are:

- no further action; and

(where there is an underlying medical condition) –

- **temporary adjustment to duties or workload;**
- **job redesign;**
- **medical transfer;**
- **termination with notice; and**
- **medical retirement.**

(where there is no underlying medical condition) –

- **guidance and/or training;**
- **non-medical transfer on efficiency grounds (by mutual agreement where possible);**
- **written warning;**
- **final written warning; and**
- **termination with notice; and**
- **early retirement on efficiency grounds.** (NB: before considering this action, professional advice should be sought from Human Resources).

In addition, a number of supplementary sanctions may be applied.

Having decided upon the appropriate formal capability action to be applied, the panel will inform the employee or his/her representative and confirm their decision in writing.

This letter will include:

- the precise nature of the work performance or attendance concern confirmed;
- the period of time given for improvement, if appropriate, and the standard of improvement expected;
- the formal capability action being applied;
- the basis of the panel's decision;
- where appropriate, how long the formal capability action will last;
- an indication of the likely consequences of any further confirmed work performance or attendance concern; and
- information about the employee's right of [appeal](#), including how an appeal should be made, by when and to whom.

For posts at Deputy Chief Officer level and above, confirmation of termination can only be given where no well founded and material objection has been received from any Member of the Executive. Where this is a potential outcome of capability action for posts at this level advice must be sought from The Human Resources Team. Disciplinary investigation and disciplinary action relating to the head of paid service, monitoring officer and chief finance officer are subject to the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 ("the 2015 Regulations") and as set out in section 4 of the Council's Constitution; Officer Employment Procedure Rules. This would cover areas that would be deemed as capability.

[c] Appeals -

Employees may appeal against any formal capability action more severe than guidance and/or training.

Appeals against all sanctions will be heard by a panel of independent senior managers. For appeals against dismissal the panel will be chaired by a Head of Service or above.

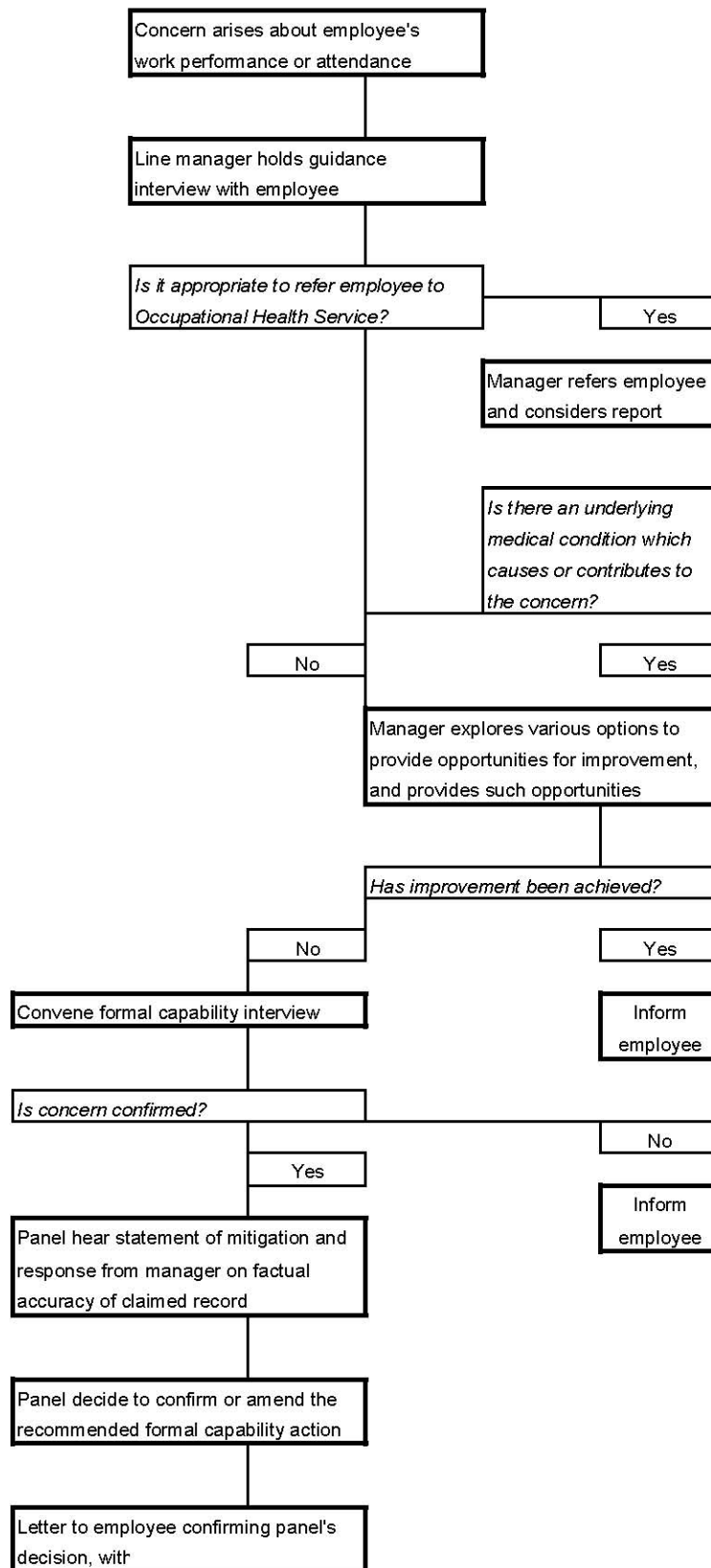
In cases where an employee has been dismissed, the dismissal will stand (i.e. the employee will remain off the payroll) pending an appeal. If the appeal is successful and the employee is re-instated, in accordance with the panel's decisions.

[3] GUIDANCE NOTES:

The following guidance notes have been prepared to accompany and support the Capability Procedure:

- [01 Principles of capability procedure](#)
- [02 Legal implications of capability action](#)
- [03 Guidance interviews](#)
- [04 Referral to the Occupational Health Service](#)
- [05 Opportunities for improvement](#)
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[4] FLOWCHART



1: PRINCIPLES OF THE CAPABILITY PROCEDURE

The following principles underpin the Council's capability procedure and accord with the ACAS Code of Practice on Disciplinary and Grievance Procedures, relevant case law and best practice.

- No capability action will be taken against an employee unless and until the issue has been carefully investigated.
- Capability action in cases of poor work performance or attendance which are caused or contributed to by an underlying medical reason should not be pursued until any relevant action under the Council's [Sickness Absence Management procedure](#) has been explored.
- In all cases the cause of the poor work performance or attendance should already have been raised with the employee, usually through a guidance interview and opportunities for improvement should have been provided before the formal provisions of the capability procedure are applied to the employee.
- At all stages, the employee will have the right to be represented by a trade union official or a work colleague.
- Managers will ensure that decisions are taken objectively, are non-discriminatory and taken on the facts of the case.
- Matters will be dealt with quickly and accord with the principles of natural justice and the need to act reasonably.
- The employee will be given an explanation for any capability action imposed.
- The employee will have the right to appeal against any capability action imposed above a guidance interview.

2: LEGAL IMPLICATIONS OF CAPABILITY INVESTIGATION AND ACTION

There is a legal requirement to provide employees with a statement of their terms and conditions of employment, including disciplinary and capability procedures, within two months of joining an organisation.

The Council's capability procedure has been drafted in consultation with the constituent trade unions and is incorporated into the contracts of employment of individual employees.

The ACAS Code of Practice on Disciplinary and Grievance Procedures provides practical guidance on the operation of disciplinary (including capability) procedures. It states that disciplinary action should not be taken until the case has been carefully investigated to establish the facts.

Case law has identified the importance of an employer generally satisfying the test of reasonableness and fairness in handling matters of capability, particularly in terms of adherence to procedures, of investigation and of natural justice and the provision of a fair hearing.

A capability investigation may result in a variety of outcomes, including a finding that there is no substance to the concern. Where there is substance to the concern and the matter progresses to a capability hearing, various sanctions may be imposed. There will be situations where dismissal will be appropriate and the Business Manager may as a result be faced with an unfair dismissal claim at the employment tribunal. It is important, therefore, that all those involved in managing the capability process are aware of the scrutiny under which their actions may be placed if the matter does go to an employment tribunal.

If the claim is simply one of unfair dismissal, the Council needs to show that the reason for the dismissal was one of the five potentially fair reasons (capability is one of those reasons).

An Employment Tribunal will take the ACAS Code of Practice on Disciplinary and Grievance Procedures into account when considering relevant cases.

Where there is a factual issue to be determined, the employer will not normally act reasonably unless and until a concern is fully and fairly investigated and the employee's explanation or mitigation is heard.

While a disciplinary case is determined on the balance of probabilities, capability action is pursued on the basis of fact. In terms of dismissal for incapability, therefore, an employment tribunal would be looking to see whether or not the employer established that:

- there was sufficient factual information presented to the capability panel to allow a genuine belief at the time that the incapability had been established;
- that there were reasonable grounds upon which to sustain that belief; and
- that the employer, at the final stage at which s/he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

Even where there is no real dispute as to the facts of a case and an employee is admitting the incapability; there still needs to be reasonable investigation and the importance of following the [Council's capability procedure](#) cannot be overstated.

3: GUIDANCE INTERVIEWS

Although not part of the capability process, a guidance interview is nevertheless a formal interview held with an employee. One manager would normally undertake the interview and can be accompanied, if required, by a Human Resources practitioner. The employee must be advised that either an official of a trade union or a work colleague may accompany him/her at a guidance interview.

The guidance interview should follow the following format:

- outline the areas of concern to the employee and explain why their work performance or attendance is not acceptable;
- ask the employee for an explanation for the area of concern;
- discuss ways of resolving or overcoming the concern, e.g. guidance or training, and consider if other assistance is required;
- confirm the standards of capability required and/or any targets to be reached; and
- review any arrangements made at a further interview, if necessary.

The manager must keep a detailed written record of the guidance interview and any agreed outcomes.

4: REFERRAL TO THE OCCUPATIONAL HEALTH SERVICE

Reports from the Occupational Health Service provide valuable and independent information for managers to consider in determining an appropriate response to concerns about an employee's work performance or attendance.

An external provider, currently OH Assist, provides the Council's Occupational Health Service, based at Keats House, 24-26 St Thomas Street, London, SE1 9RS

Professional advice should always be sought if there is reason to believe that an employee may have an underlying medical condition, or if the level of sickness absence is calling into question his/her ability to work effectively. It is important to note that the Occupational Health Service can advise on both physical and mental/emotional conditions and can, if appropriate, refer the employee to a specialist medical adviser (e.g. in cases of suspected psychiatric illness like depression).

A referral to the Occupational Health Service must be made properly and with good reason. It should not be used as a form of threat or punishment. The employee must be advised that a medical referral is being made and the reason for it.

The Occupational Health Service requires particular information to proceed effectively and a pro-forma has been produced for managers to use for referrals. Copies of the pro-forma are available from the Human Resources Team.

In addition to the information provided on the pro-forma, in many cases the manager may want to ask the Occupational Health Service a number of specific questions in relation to the employee's health/sickness absence. The most common questions could include:

- Does the employee have an underlying medical condition that affects their performance or attendance at work?
- Is the employee fit to undertake the full range of duties associated with their post?
- When is the employee likely to be able to return to work?
- What is the anticipated level of sickness absence in the future?
- How long is the current sickness absence/medical condition likely to continue?
- Does the employee's medical condition constitute a disability under the Equality Act?
- What forms of practical assistance or support can be offered to facilitate an effective return to work?
- If the employee is unable to undertake the duties of their current post, please advise what duties/types of work can be undertaken; and
- Is medical retirement an option?

5: OPPORTUNITIES FOR IMPROVEMENT

When a concern arises about an employee's work performance or attendance and the line manager is satisfied that there are genuine grounds for concern and that the concern is not insignificant, s/he will provide opportunities for improvement by exploring appropriate options at a guidance interview. These options may vary depending upon whether there is a medical reason causing or contributing to the poor work performance or attendance.

In all cases, the opportunities for improvement will be confirmed in writing to the employee by the line manager.

The options available include:

- *Temporary adjustment to duties/workload:*
 - needs to have timescales for review
 - has limited scope for flexibility
 - more appropriate where there are underlying medical reasons causing or contributing to the poor work performance or attendance
- *Job redesign:*
 - limited potential
 - more appropriate where there are underlying medical reasons causing or contributing to the poor work performance or attendance
- *Provision of guidance, target setting and training:*
 - purpose and time limits need to be stipulated
- *Transfer (efficiency or medical):*
 - has limited scope
 - must be by mutual agreement
 - requires a suitable post to be identified
 - grade, pay and other terms and conditions of employment may not be preserved, but any trial period agreed will be on existing pay and terms and conditions of employment
 - medical transfer option is more appropriate where there are underlying medical reasons causing or contributing to the poor work performance or attendance

6: REPRESENTATION

At all stages of the capability process employees have the right to be represented or accompanied by an accredited official of a trade union or a work colleague, and should be so advised. The representative or work colleague may address the meeting and/or interview and confer with the employee but may not answer questions on their behalf.

The Employment Act 2008 contains a statutory right for workers to be accompanied at hearings which could result in the administration of a formal warning, the taking of some other action or the confirmation of a warning or some other action taken.

Employees are free to choose an official from any trade union regardless of whether the union is recognised by the Council or not, so long as they have been certified in writing by their union as being competent to accompany a worker. It is good practice, however, where a trade union is recognised by the Council, for an official from that union to accompany or represent the employee at a capability hearing.

Every endeavour should be made to release representatives and work colleagues to enable them to attend meetings and/or interviews but securing a representative or work colleague and informing them of the time and place of the meeting and/or interview remains the responsibility of the employee concerned.

Where the employee's chosen work colleague or trade union representative is not available at the time proposed by the manager or panel Chair, the employee may propose an alternative time. If the alternative time is reasonable (to management) and falls within five working days after the original date proposed, the manager or panel Chair must postpone the meeting or interview to that time. This is an employee's statutory right.

Although every endeavour will be made to facilitate the attendance of the representative or work colleague, including if appropriate rearranging the meeting or interview date, the manager or panel Chair has the ultimate right to commence and continue with a meeting or interview, even when a particular representative or work colleague is not available, so long as the employee's statutory right (above) has been complied with.

The employee is also entitled to have another trade union official or work colleague attend the meeting or interview for the purpose of taking notes only.

Employees are entitled to reasonable time off work to consult their trade union representative or work colleague about the capability meeting or interview. Prior permission must be sought and obtained from their line manager, however, before they absent themselves from the workplace.

It is important that the status of all representatives or work colleagues is confirmed at the start of meetings or interviews and any request by an employee to have external legal representation or accompaniment must be refused by the manager or panel Chair.

Where an accredited trade union official is subject to capability action, the appropriate full time trade union official and the relevant Branch Secretary should be notified before any action is taken.

7: CAPABILITY INTERVIEWS

Capability interviews should only take place where the line manager is satisfied that more than a guidance interview is appropriate or where any options that have been pursued to obtain improvement (see separate [Guidance Note of Opportunities for Improvement](#)) have not achieved the improvement required.

Capability interviews comprise two distinct parts:

- part 1: during which the panel hears evidence and decides whether the concern is confirmed; and
- part 2: during which the panel considers mitigation and decides whether to confirm or amend the recommended formal capability action (if the concern is confirmed).

At the start of a capability interview the panel Chair should ask those present to introduce themselves, establish the status of anyone wishing to represent or accompany the employee (see separate [Guidance Note on Representation](#)) and advise how s/he intends to structure the interview. An opportunity should then be given to both parties for questions or further clarification on the procedure prior to the process commencing. The Chair should then read out the concern and capability action recommended and ask the employee whether s/he accepts them.

The Chair should advise the employee and his/her representative that notes of the interview will be taken for the panel and that these notes will not be made available to the employee and/or his/her representative, unless the Council is formally required to do so by, for example, an employment tribunal, or unless the matter subsequently progresses to appeal. The employee has the facility to have a note-taker present for the purpose of taking notes of the interview.

The Chair should maintain a structure to the interview but should avoid unnecessary formality.

The Chair must ensure that the interview follows a fair and reasonable structure and must allow both parties (i.e. the employee and the line manager) to:

- attend and present their case fully;
- call witnesses and submit relevant documentation and supporting evidence; and
- put questions to the other party and to any witnesses called to the interview.

Panel members may ask questions of both parties and any witnesses called to the interview and the Chair may also require additional witnesses to be called to the interview if this appears necessary or desirable. If the witnesses are Council employees, the Chair may instruct them to attend.

The Chair may adjourn the interview at any stage if this appears necessary or desirable. If adjourning for the purposes of enabling further information or clarification to be obtained, the Chair will specify the nature of that information and the expected duration of the adjournment.

The panel must only consider written or oral evidence presented at the interview and are required to reach a decision on the basis of fact (i.e. not on the balance of probabilities).

The normal structure of a capability interview is as follows:

- introductions, procedure and questions/clarification;
- concern and recommended capability action read out and employee asked whether s/he accepts them;
- line manager outlines concern and reason for recommended capability action,

- including presentation of relevant documentation and calling relevant witnesses;
- employee or representative questions line manager (and any witnesses called by him/her);
- panel question line manager (and any witnesses called by him/her);
- employee responds to line manager's presentation, including presenting relevant documentation and calling relevant witnesses;
- line manager questions employee (and any witnesses called by employee);
- panel question employee (and any witnesses called by employee);
- line manager sums up;
- employee or representative sums up;
- final questions from panel to either party;
- adjournment to consider whether concern is confirmed;
- reconvene to announce panel's decision;
- employee or representative statement in mitigation (if required);
- line manager comments on mitigation statement;
- adjournment to consider recommended capability action;
- reconvene to announce whether recommended capability action is confirmed or amended and to advise that decisions will be confirmed in writing, including any appeal rights, normally within 5 working days.

Where the panel suspect that there may be an underlying medical reason causing or contributing to the work performance or attendance concern and the employee has not been referred to the Council's Occupational Health Service, the capability interview should be suspended and a referral be required as a matter of urgency. Upon receipt of the Occupational Health Physician's report, the capability interview should be reconvened as soon as possible thereafter.

8: CAPABILITY PANELS

In all cases, capability panels¹ should comprise at least two members, including a designated Chair. The Chair must have sufficient delegated authority under the department's scheme of administration (formally scheme of delegation), will normally be senior in grade to the manager who raised the concern and is responsible for determining the structure of the hearing. The Chair must be competent through appropriate training or experience. Competency to chair the capability process will be included in the induction training for new managers.

Managers directly involved in the investigation or who have been in any other way directly involved in the case or the matters leading up to the case may present to the panel the management concern about the employee or give evidence, but may not under any circumstances sit on the capability panel.

A Human Resources practitioner may also be invited to attend a capability interview, either as a full member of the panel or to provide advice on procedural and other relevant matters. The presence of a HR practitioner is particularly important in capability cases that may, if the concern is confirmed, result in dismissal.

The Chair must arrange for a note-taker to attend capability interviews for the purpose of recording proceedings.

Wherever practicable, capability panels should be balanced in terms of gender and ethnicity. It may also be appropriate in certain cases for consideration to be given to the inclusion on the panel of a manager from outside the business unit or a manager who has specialised knowledge or appreciation of the service area.

1. Disciplinary investigation and disciplinary action relating to the head of paid service, monitoring officer and chief finance officer are subject to the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 ("the 2015 Regulations") and as set out in section 4 of the Council's Constitution; Officer Employment Procedure Rules. This would covers areas that would be deemed as capability

9: EMPLOYEE'S ABSENCE AT CAPABILITY INTERVIEWS

Should an employee fail to attend a capability interview, the panel will have to consider whether or not to proceed in his/her absence. In doing so, the panel should take into account:

- any reasons given by the employee or his/her representative for non-attendance;
- whether the employee had received sufficient and adequate notice of the interview; and
- whether the employee had been informed that the interview may proceed in his/her absence.

In most cases, particularly when the individual has not attended due to sickness, it is advisable to allow at least one postponement. The length of the postponement may need to take account of the need for the employee to arrange representation, prepare his/her response to the concern raised and capability action recommended and the general circumstances surrounding the case. The individual should be informed in writing that the interview will proceed on the new date and advised that if unable to attend in person, s/he should brief a representative or submit written representations.

In cases where there are grounds for believing that the employee is deliberately and unreasonably delaying the capability process by refusing to attend a hearing, human resources advice should be sought.

(See also the [Guidance Note on Representation](#) for details of the statutory right and time limits of an employee to postpone capability meetings and/or interviews).

When neither the employee nor their representative attends and the proceedings continue, it is recommended that the process be adjourned after the line manager's presentation is completed. The employee should then be sent a copy of the notes of the interview thus far and any new documentary evidence presented, and offered the opportunity to submit a statement in response (including mitigation). This statement can be given in person at the reconvened interview or in writing if the employee remains unable or unwilling to attend.

Where an employee is represented in his/her absence, it is recommended that the representative is asked to obtain a note signed by the employee authorising him/her to speak and act on his/her behalf.

10: PRESENTATION OF EVIDENCE TO CAPABILITY INTERVIEWS

Evidence presented during a capability interview is likely to consist of written material and evidence given in person by witnesses (including the employee whose work performance has given cause for concern). The panel Chair is responsible for ensuring that:

the panel is adequately informed about the circumstances surrounding the evidence; the employee or his/her representative has the opportunity to challenge what is presented about the concern and recommended capability action. (This includes the opportunity to question any witnesses presenting evidence in person); and the employee has the opportunity to put his/her own side of the story, submit documentary evidence and call witnesses in support of his/her case.

Clearly, it is preferable for all witnesses to present their evidence in person to a capability interview and the panel Chair is responsible for ensuring that all reasonable steps are taken to facilitate this. Employees of the Council will, if necessary, be instructed to attend and provide evidence and be available for questioning and cross questioning.

There may be occasions where it is inappropriate for third parties to attend, in which case written evidence rather than witness evidence may be submitted and such evidence will need to be treated by the panel Chair in that light. There will, however, need to be a genuine justification for the acceptance that third parties need not attend.

In all but exceptional circumstances, the employee should be provided with copies of written material in advance. If not provided in advance, the employee or his/her representative should be allowed sufficient opportunity to read and consider the material. If appropriate, an adjournment for this purpose should be offered before the employee or his/her representative is required to respond to the material.

Service users should not normally be called upon to give evidence in capability interviews, except in very limited circumstances. Where relevant and considered absolutely appropriate by the panel Chair, witness evidence from service users may be given by Key Workers or other suitably qualified professionals.

11: REACHING A DECISION

Part one of the capability interview -

At the end of the first part of a capability interview the panel must decide whether the concern is confirmed (on the basis of fact).

Before announcing their decision, the panel are strongly advised to adjourn for a while to consider their position, even in apparently clear cut cases. This will ensure fairness by allowing suitable time for consideration and reflection on all the evidence presented and the process by which a decision is reached. This decision will be taken based solely on the evidence presented at the interview.

The Chair will advise both parties of the panel's decision. If the concern is not confirmed, the capability process is concluded and the employee will be notified accordingly, followed up by written confirmation. If the concern is confirmed, the interview will proceed to the second part of the capability interview.

If the panel believe that they have not received sufficient information to allow them to reach a decision, or that further matters have come to light during the interview that require further investigation, it is appropriate for an adjournment to be called.

In reaching their decision, a capability panel must act with objectivity and fairness. The interests of fairness to the employee must be balanced with the interests of the Council and service users. The following questions are suggested to assist a capability panel to reach its decision:

- Has there been as much investigation as is reasonable in the circumstances?
- Has the capability procedure been properly complied with?
- Has the panel paid sufficient regard to the explanations put forward by or on behalf of the employee?
- Does the panel genuinely believe that the line manager's concern is justified?
- Does the panel have reasonable grounds to sustain that belief on the grounds of fact?

A "yes" response to each of these questions will mean finding that the concern should be confirmed.

Part two of the capability interview –

If the panel reaches a decision that the concern is confirmed, the employee or his/her representative will be given an opportunity to make a statement in mitigation and the line manager will be invited to comment on the mitigation statement. After the statement of mitigation and the manager's comments, it is again recommended that the panel adjourns to consider all the issues raised before a decision regarding whether to confirm or vary the recommended capability action.

Before deciding on what capability action is appropriate, the panel should consider:

- the employee's capability record and whether s/he was aware of the standards required;
- the employee's age, position, length of service and previous general performance;
- any circumstances which make it appropriate to lessen the severity of the capability action (e.g. domestic problems);
- whether there are any codes of conduct that indicate the likely capability action which employees could expect to result from particular incapability;

- capability action applied by management in similar cases elsewhere in the Council in the past (to maintain consistency); and
- whether the proposed capability is reasonable in all the circumstances.

Four additional questions may assist the panel in considering whether to confirm or vary the recommended capability action:

- Is the concern sufficiently serious to justify the capability action being considered?
- Have the mitigating circumstances presented by or on behalf of the employee been properly considered?
- Has the line manager's response and any previous capability record been properly considered?
- Is the capability action being considered within the band of reasonable responses of a reasonable employer?

In addition to providing focus to the decision making process, the consideration and documentation of these four questions, together with the five questions posed by the panel at the end of part one of the capability interview, will provide strong evidence to an appeal panel or an employment tribunal (if necessary) that the panel has acted fairly and reasonably in reaching its decision and will enable the Chair of the panel to undertake his/her potential ongoing responsibilities in those forums by being better able to justify and stand by the panel's decisions.

For posts at Deputy Chief Officer level and above, confirmation of termination can only be given where no well founded and material objection has been received from any Member of the Executive. Where this is a potential outcome of capability action for posts at this level advice must be sought from the HR Director. Disciplinary investigation and disciplinary action relating to the head of paid service, monitoring officer and chief finance officer are subject to the Local Authorities (Standing Orders) (England) (Amendment) Regulations 2015 ("the 2015 Regulations") and as set out in section 4 of the Council's Constitution; Officer Employment Procedure Rules. This would cover areas that would be deemed as capability.

12: FORMAL CAPABILITY ACTIONS

The level of formal capability action imposed is determined by the seriousness of the concern, taking into account any mitigating circumstances. (See also separate [Guidance Note on Reaching a Decision](#)).

There is a range of formal capability actions that a capability panel may impose:

- no further action;
- guidance and/or training – this cannot be open-ended;

and where there are underlying medical reasons:

- temporary adjustment to duties or workload – this cannot, however, be open-ended and Best Value reviews, etc, may well limit scope for flexibility;
- explore job redesign – again, this may have limited potential due to Best Value reviews, etc;
- medical transfer – this requires the support of the Council's Occupational Health Practitioner and also requires that a suitable alternative post is available into which to transfer. Preservation of grade, pay and other terms and conditions of employment may not apply and this action should therefore only be taken in consultation with and with the agreement of the employee. Any trial period agreed, however, will be on existing pay and terms and conditions of employment;
- termination (early retirement on ill-health grounds) – this requires the joint agreement of the Council's Occupational Health Practitioner and the employee's General Practitioner. In the event of a difference of medical opinion, the matter will be submitted to an independent medical adviser. Once the decision is given to the employee following consideration of the medical advice, that decision is non-negotiable with the employee;
- termination with notice – this may apply where attendance is unacceptable and unlikely to improve to an acceptable standard but where the medical report does not support early retirement on ill-health grounds;

and where there are non-medical reasons for the concerns:

- efficiency transfer – this requires that a suitable alternative post is available into which to transfer. Preservation of grade, pay and other terms and conditions of employment may not apply and this action should therefore only be taken in consultation with and with the agreement of the employee. Any trial period agreed, however, will be on existing pay and terms and conditions of employment;
- written warning – appropriate for concerns of a more serious nature or where there is an accumulation of poor work performance or attendance. Written warnings will remain live for nine months;
- final written warning – appropriate where the nature of the concern is considered to be insufficiently serious to justify dismissal but sufficiently serious to warrant only one warning, or where the concern is considered to be serious enough to justify dismissal but where a lesser sanction is appropriate in the particular circumstances (e.g. where there are exceptional mitigating circumstances). A final written warning may be the first and last warning, even if there is no previous record of capability action against the employee and it must draw the employee's attention to the fact that his/her job is at risk if s/he does not improve. Final written warnings will remain live for nine months;
- termination (early retirement on efficiency grounds) – this action should be used in exceptional cases only after full consultation with the local human resources

practitioner and managers should be aware of the Council's policy and procedure for early retirement;

- termination (with notice) – where the above options are either not appropriate or have been exhausted. Examples would include where guidance interviews and warnings are making no progress, where a transfer is not possible because no suitable post is available, where early retirement is not appropriate or where an employee loses his/her formal qualifications to undertake their duties.

In addition, where appropriate, there are a number of supplementary sanctions that a panel may consider to accompany a written warning, a final written warning or transfer, including demotion. Generally, transfers and demotion should only be considered with the agreement of the employee. Advice should be sought from the local human resources practitioner if any supplementary sanctions are being considered.

There are no circumstances under which termination of employment can be administered for poor work performance or attendance summarily without the provisions of the capability procedure being undertaken.

Where the employee challenges the medical opinion or advice received from the Council's Occupational Health Physician, the opinion of the employee's General Practitioner will be sought. In the event of a difference of medical opinion between the Council's Occupational Health Physician and the employee's General Practitioner, the matter will be submitted to a suitably qualified and independent medical adviser on an approved list.

Capability warnings

The objective of a warning is to give the employee a chance to make amends and to put him/her on notice that further poor work performance or attendance may eventually lead to termination.

Any warning given should be specific and leave the employee in no doubt about:

- what work performance or attendance has been found to be unacceptable;
- what the employee must do in the future;
- the consequences of not heeding the warning; and
- the length of time the warning is to be regarded as "live".

Capability panels may take into account unexpired warnings which have been given for different types of poor work performance or attendance to that currently being considered because, taken together, they add up to an overall (negative) profile of the employee.

In all but exceptional circumstances, capability warnings will not count against an employee indefinitely and will be disregarded for capability purposes once the relevant timescale has elapsed (nine months for a written warning or final written warning). Managers must ensure that appropriate arrangements are made to remove documentation from employees' personal files in accordance with these timescales.

Employment tribunals have established that there may be exceptional circumstances where it is not appropriate for capability warnings to be disregarded, even though they have expired. Examples of where expired warnings may still have some relevance in future capability action and should therefore remain live would be:

- where an employee's capability record shows that the employee maintains a satisfactory level of work performance or attendance only for as long as warnings are active and a definite pattern can be shown to have built up; and
- where an employee is claiming to have an exemplary capability record since his/her first day of employment.

In those rare circumstances where it is considered that an expired warning may have some relevance, it is suggested that this is best dealt with by the line manager when responding to the

employee's statement of mitigation.

Oral warnings do not constitute formal capability action and may be given by a manager to an employee whom they manage without reference to the capability procedure. Employees are not entitled to be represented or accompanied by a work colleague or trade union representative when receiving an oral warning, although managers may choose to allow this. Oral warnings cannot be considered in any subsequent capability action.

13: CAPABILITY APPEALS

Employees may appeal against panel decisions and imposed capability actions arising from capability interviews where the capability actions are:

- written warnings;
- transfers;
- termination; and
- supplementary sanctions.

Employees' rights of appeal, including to whom the appeal must be addressed and by when, must be included in the letter advising them of the outcome of a capability interview.

Notice of appeal against written warnings, transfers or supplementary sanctions must be received by the Chief Officer of the employing department within ten working days of receipt of the decision letter.

Notice of appeal against termination must be received by the HR Director within ten working days of receipt of the decision letter.

Appeals against all sanctions will be heard by a panel of independent senior managers. For appeals against dismissal the panel will be chaired by a Head of Service or above.

Special arrangements exist to hear appeals from staff who have been dismissed as a result of disciplinary or capability action brought on the basis of abuse, neglect, incapability, or professional conduct, where such actions relate to either a child(ren), or a vulnerable adult(s) In these cases appeals are heard by a panel of independent senior managers, but chaired by an Independent Person, as described below.

In cases where termination is the capability action applied, that action will be implemented and the employee will be removed from the payroll pending any appeal. If the appeal is successful and the employee is reinstated, full reimbursement of remuneration will be made, i.e. a return to the financial position as if the dismissal never happened.

The conduct of a capability appeal differs significantly from the conduct of a disciplinary appeal. Whereas the latter is determined on the balance of probabilities, a capability appeal is pursued on the basis of fact. The panel should therefore expect sufficient factual information to be provided by the manager at the appeal to justify the manager's decision to recommend a specific formal capability action. In the light of this, it is likely that a capability appeal will focus more on matters of procedure and level of action. The principles listed in [Guidance Note 1](#) must still be followed, however.

Appeals against Termination on the Grounds of Disciplinary and Capability Matters

The HR Director will acknowledge receipt of the employee's notice of appeal and provide a further ten working days (2 weeks) for the appellant to submit a written statement. This statement must detail the grounds for the appeal and the names of any witnesses to be called by the appellant.

If there are exceptional reasons why this timescale cannot be complied with, the employee or his/her representative must notify the HR Director of the fact as soon as it is known, detail the reasons and offer a date by which the written statement will be submitted. Consideration will

then be given to whether it is reasonable to grant an extension of time and the employee or his/her representative will be advised of the HR Director's decision in writing.

Since the decision to terminate the employee's contract of employment will have been made based on facts that can be established beyond reasonable doubt (e.g. the number of days' sickness absence, how many guidance interviews took place, what targets were set and whether or not they were met) rather than the panel having to form an opinion based on the balance of probability of the likelihood that an event was more likely to have taken place than not (as is often the case with disciplinary hearings), under the grounds for appeal s/he can only challenge the severity of the sanction.

The HR Director will forward a copy of the appellant's statement to the Business Manager, who will be given ten working days in which to submit a written response. The Business Manager will also send copies of relevant documents to the HR Director, including the capability letter, the dismissal letter, the notes of the capability interview and investigation and any witness statements.

These documents, together with the two statements will be included in the agenda papers for the appeal hearing.

Appeals against Termination on the Grounds of Disciplinary and Capability Matters- Special arrangements for Safeguarding Children & Vulnerable Adults.

The process of appeal is unchanged from the standard process, see above. Where the dismissal is deemed to be a matter related to safeguarding, the appeal will however be chaired by an Independent Person who is a recognised expert in the field of child care or the care of dependent adults. Other panel members will be two senior managers (one of whom has safeguarding knowledge), plus HR advisor, quorum of three – one of whom must be the external chair.

The nature of the charges against an employee may mean that the Panel are asked to consider highly sensitive and personal information to clients. Appeal packs will therefore be cleared by HR with Director of Children's Services or the Director of Adults to deal with any issues over client confidentiality. Disciplinary material may include previous complaints, which are relevant, against an employee of abuse, wilful neglect, or professional misconduct, even if on investigation these did not lead to proven disciplinary action.

Where necessary HR will gain a legal view on the submission of data and how this may be handled by the Panel. In certain circumstances material may be withdrawn from appeals packs, but made available to the appellant prior to the appeal hearing through supervised access.

Appeals heard by management panel

It is recommended that the same procedure and format that operates for appeals against termination is adopted, with the substitution of the relevant Chief Officer for the HR Director.

Chief Officers will be responsible for setting up management panels to hear appeals from employees in their departments, ensuring that the principles outlined in the separate Guidance Note on "Capability Panels" are followed, and that appeals are heard promptly. If it is likely that a delay will occur before the appeal can be heard, the employee and his/her representative must be kept informed. This should only be necessary in exceptional circumstances, for example, where a key witness is not available due to extended sickness absence or prolonged annual leave.

14: TIMESCALES

Once a concern arises about an employee's work performance or attendance, the line manager should establish whether there is substance to the concern speedily and with the minimum of delay. Managers have discretion over the timing of each stage of the preliminary procedure (e.g. guidance interviews, referral to the Occupational Health Service, offering opportunities for improvement) but at all times, must act within an appropriate timescale commensurate with thoroughness, fairness and reasonableness in all the circumstances.

Whilst there are no strict timescales, the manager should aim to notify the employee of the concern about his/her work performance or attendance and invite him/her to a capability interview as soon as s/he is satisfied that formal capability action is appropriate.

The employee must be given at least 10 working days' written notice of when and where the capability interview is to be held. (See also [Guidance Note on Representation](#) for details of the statutory right and time limits of an employee to postpone capability meetings and/or interviews).

Confirmation of the capability panel's decision in respect of the outcome of the capability interview and any resulting capability action should normally be given to the employee in writing within five working days of the interview.

Managers must make every effort to comply with these principles and timescales and to keep the employee informed of any likely delay.

15: RECORDS

Every stage of the capability process should be recorded and the file kept securely and confidentially for a period of not less than two years. This period may be extended if an employment tribunal or other legal claim arises within the two-year period.

Detailed notes should be kept on the file, including:

1. all correspondence to and from the employee and his/her representative;
2. notes of meetings;
3. notes of interviews;
4. witness statements;
5. requests for postponements and responses to such requests;
6. reasons for lateness and/or non-attendance;
7. problems with representatives' availability; and
8. employee requests for information and witnesses.

An accurate record of all matters considered by the panel in reaching their decisions should also be retained on the file.

It should be noted that all records of capability interviews should be retained after the proceedings have been concluded internally in case the matter is referred to an employment tribunal where the records may be required to be produced.

Adequate records must be maintained to enable the Council to monitor the frequency and outcome of capability action against employees, the profile of those subjected to the action and the profile of the panels that considered the cases.

Capability sanctions expire and should normally be disregarded for capability purposes after specified periods, nine months for written and final written warnings, but see also the separate [Guidance Note on Capability Sanctions](#).

Business Managers must ensure that appropriate arrangements are made to remove documentation from employees' personal files in accordance with these timescales.

16: MEDICAL RETIREMENT

The decision whether to retire an employee on medical grounds is a management decision, albeit informed by appropriate medical opinion. The process and guidance on [ill health retirements](#) are contained in the Business Manager's Handbook on Retirement

Before considering medical retirement, the relevant manager must take into account the condition and prognosis of the employee. In all such cases the advice of the [Council's Occupational Health Service](#) should be sought.

In the case of possible ill health retirement the Council's Occupational Health Physician must agree that the employee is incapable of discharging efficiently the duties of his/her employment on medical grounds specifying the relevant tier (see the [Business Manager's Handbook on Retirement](#) for definitions). This judgement must be based on current medical evidence and medical knowledge and on the balance of probabilities. It cannot take into account assumptions about developments that might take place in medical science or knowledge between the anticipated date of retirement and the employee's sixty-fifth birthday.

Unlike early retirement cases not resulting from ill health (where a strict business case justifying such decisions is required), in cases of ill health retirement a well thought through and argued decision is required (e.g. a record of the decisions taken, details of alternative posts/arrangements/working practices considered, etc.). This action may be a statutory requirement under the Equality Act in any case (see separate [Guidance Note](#)). Medical retirement in all cases should therefore be the last resort when all other options have been exhausted. A pro-forma containing this information, available from the human resources team, must be completed and attached to the Council's Occupational Health Physician's certificate of ill health retirement and sent to the Pensions Manager before any medical retirement can be actioned.

Under the Local Government Pension Scheme Regulations, up to 10 added years may be included in the calculation of lump sum and pension benefits. Further details are available from the human resources team. Staff who are medically retired are also entitled to pay in lieu of notice, which is not subject to income tax or National Insurance deductions.

The pension fund is refunded by business units for the full revenue and pension fund costs for all early retirements (including ill health retirements) based on actuarial calculations as lump sum payments. In ill health retirements the maximum period of repayment is five years.

17: DISABILITY DISCRIMINATION

The Equality Act makes it unlawful for employers to discriminate against employees because of the protected characteristics, which includes Disability. It impacts on sickness absence management in two key ways:

- Under the Equality Act, an employer unlawfully discriminates against a disabled person where, for a reason “related” to their having a disability, they receive unjustified less favourable treatment than they would otherwise receive; and
- An employer also unlawfully discriminates if they fail unjustifiably to meet any duty to make a “reasonable adjustment” in relation to a disabled person. (Employers are required to take “reasonable steps” to counteract the effects of their employment arrangements (e.g. sickness absence management policies and procedures) where they pose a “substantial” (i.e. not minor or trivial) disadvantage to a disabled person).

Under the Equality Act a disabled person is defined as a person with:

“A physical or mental impairment which has a substantial and long term adverse effect on their ability to carry out normal day-to-day activities.”

There is no requirement for managers to become experts on disability any more than is the case with other medical conditions – this should be left to advice from relevant medical personnel (general practitioners, consultants and the Occupational Health Service).

Under sickness absence management, the management concern is with the implications of the employee’s absence. Under the Equality Act, the concern should be to avoid discriminatory treatment whilst at the same time managing the disabled employee in terms of sickness absence management objectives. In both cases, managers need to consider the effect of the person’s illness/disability in terms of their employment. They then need to respond appropriately within the context of the individual and particular circumstances of, or surrounding, the post involved.

Disability and Sickness (Related) Absence

It is important to distinguish between general sickness and disability-related sickness absence.

Disability should not be automatically associated with sickness. Unfortunately, the term “disability” is often confused wrongly with the concept of illness/poor health and consequently “sickness”. It is important for managers to realise this, as confusion could cause an affront to many disabled employees who quite rightly do not consider being disabled a “sickness”. This is not to say, however, that someone may not have a disability which is in practice associated with some level of sickness absence due to incapacity. For example, an employee with severe asthma or epilepsy – covered under the Disability provisions of the Equality Act – who is unable to attend work due to an attack, will be absent due to disability-related sickness.

(In practice, however, it is important to stress that many such disabilities will in fact be “controlled” by medication or treatment negating the need for sickness absence.) The same disabled employee could nevertheless also be absent due to an upset stomach, flu, a sprained ankle or broken leg.

The key issue in relation to sickness absence management is that, where the effects of an employee’s disability result in a need to be absent from work due to illness which is directly

associated with their disability this will need to be accommodated within the terms of the Equality Act. A failure on the part of the Council to acknowledge these needs could amount to a failure to make a “reasonable adjustment”.

General sickness absence – which can apply to disabled and non-disabled employees alike – is unaffected by the Disability provisions of the Equality Act and the Council's normal sickness absence management procedures will apply.

Less favourable treatment

Under the Equality Act, disability discrimination is unlawful. Managers may inadvertently discriminate in the way that the Council's “standard” procedures are applied to a disabled employee or in the way that a disabled employee is selected or dismissed for redundancy.

The withholding of increments may in some circumstances also be a relevant example of discrimination. A relevant example of such discrimination would include the dismissal of a disabled employee on grounds of a poor sickness record where in practice their general sickness absence level is no greater than other employees. Under the Equality Act it may be unlawful discrimination if a disabled employee is dismissed, even on the basis that they have a greater level of sickness absence than other employees, where this is disability-related and the manager cannot show that this is justifiable.

It would be necessary for the manager to demonstrate that any less favourable treatment under the Equality Act is justifiable. Under the Equality Act less favourable treatment may be justifiable where the reason for the treatment was both material to the circumstances and substantial. Business Units' working arrangements should not therefore subject disabled employees generally or individuals to less favourable treatment per se when compared to the treatment of non-disabled employees or employees with different disabilities.

Reasonable adjustments

Under the Equality Act the Council has a positive duty to make “reasonable adjustments” where any aspects of working arrangements (including premises) place a disabled employee at a substantial disadvantage.

This key obligation under the Act is likely to arise in two respects within the sickness absence context:

- Firstly the job itself may need to be adjusted in order that the employee may return to work following a period of sickness absence; and
- Secondly, it may be deemed a “reasonable adjustment” to accept that a disabled employee will need some level of absence from their work.

The Disability provisions of the Equality Act sets out a range of specific types of “reasonable adjustments” that an employer may need to make. These include:
Making adjustments to premises;

- Allocating some of the disabled employee's duties to another person;
- Transferring the employee to fill an existing vacancy;
- Altering the employee's working hours or work pattern;
- Assigning the employee to a different place of work;
- Allowing the employee to be absent during working hours for rehabilitation, assessment or treatment;
- Giving the employee, or arranging for them to be given, training;
- Acquiring or modifying equipment;
- Modifying instructions or reference manuals;
- Modifying procedures for assessment or testing;
- Providing a reader or interpreter;
- Providing an auxiliary aid, and

- Providing additional supervision.

The basis of the requirement to make a reasonable adjustment is to prevent the disabled employee from facing a “substantial disadvantage” compared to employees who do not have their disability. This is to give the disabled employee a fairer opportunity to be assessed on their true merits and not purely from the perspective of their disability.

Where even after an adjustment is considered or made the employee still cannot fulfil the requirements of the job, however, or where the adjustment is not reasonable for the employer to make, then in these circumstances it need not be carried out by the employer.

The assessment of “reasonableness” will be based on all the relevant circumstances including effectiveness, practicability and financial consequences. (An adverse reaction from other employees will not be a justifiable reason for not making an otherwise reasonable adjustment). The Council, being a large employer, is likely to face a higher burden of proof in this regard.

Business Managers should be aware that their local human resources practitioners are able to advise and support them in respect of the capability procedure in relation to disabled employees.