



Public – To be published on the Trust external website

Title: Managing Concerns of Potential Poor Performance (Capability) Procedure

Ref: HR-0003-v5

Status: Approved

Document type: Procedure

Contents

1	Introduction	3
2	Purpose	4
3	Who this procedure applies to	4
4	Related documents	4
5	Identifying concerns	5
5.1	Staff Support	5
5.2	Informal process	5
5.3	Formal Capability Process.....	6
5.4	First Formal Meeting	7
5.5	Formal review meeting	9
5.6	Outcome of Formal Review meeting	10
5.6.1	If the employee has achieved the standard of performance/competence required (the employee needs to be):-	10
5.6.2	If the employee has failed to achieve the standard of performance/competence required:-	10
5.7	Final capability meeting	11
5.7.1	Before any decision is made (the following should be considered).....	11
5.7.2	The options available at this stage (include)	12
5.7.3	Outcome of the Final Capability Meeting	12
5.8	Reporting Capability/Poor Performance issues to Professional Bodies ..	12
6	Terms and definitions	13
7	How this procedure will be implemented	13
7.1	Training needs analysis.....	13
8	How the implementation of this procedure will be monitored	14
9	References	14
10	Document control (external).....	14
	Appendix 1 - Equality Analysis Screening Form	16
	Appendix 2 – Approval checklist	19

1 Introduction

This procedure is to make staff aware of the informal and formal stages of managing any lapse in performance and the potential outcomes of each stage

Our strategic goals as outlined in the Trust Strategic Framework 2021 – 2025 are:

To co-create a great experience for our patients, carers and families, so you will experience:

- **Outstanding** and compassionate care, all of the time.
- **Access** to the care that is right for you.
- **Support** to achieve your goals.
- **Choice** and control.

To co-create a great experience for our colleagues, so you will be:

- **Proud**, because your work is meaningful.
- **Involved** in decisions that affect you.
- **Well led** and managed.
- That your workplace is **fit for purpose**.

To be a great partner, so we will:

- Have a **shared understanding** of the needs and the strengths of our communities
- Be **working innovatively** across organisational boundaries to improve services.
- Be **widely recognised** for what we have achieved together.

The Trust’s Journey To Change Launched in 2021 outlines the Trust’s new set of Values

The Trust is committed to co-creating safe and personalised care that improves the lives of people by involving them as equal partners. The most important way we will get there is by living our values, all of the time.



Respect

- Listening
- Inclusive
- Working in partnership



Compassion

- Kind
- Supportive
- Recognising and Celebrating



Responsibility

- Honest
- Learning
- Ambitious

2 Purpose

Following this procedure will help the Trust to:-

- ensure that where employees are having difficulties in fulfilling their role that there are mechanisms and support in place to help them improve to a satisfactory level.
- ensure that staff are aware of what constitutes poor performance and provides managers with the necessary tools to address such cases.
- ensure that when employees behaviour or performance falls short of what is expected and when identified contributing factors may be as a result of a health condition, stress related reaction, previous trauma or personal experience/circumstances, mechanisms are in place to understand and consider the potential impact prior to any decision being made about instigating a formal process.
- Ensure acceptable standards of performance within the Trust are maintained

3 Who this procedure applies to

This procedure applies to all employees employed by Tees, Esk and Wear Valleys NHS Foundation Trust with the exception of medical staff. Concerns relating to capability for medical staff will be dealt with in line with the [Medical Remediation and Disciplinary Policy](#).

4 Related documents

This procedure describes how to manage and support staff when there is a lapse in their performance and should be read in conjunction with the Trust's During Employment Policy.

This procedure also refers to:-

- ✓ [Managing Concerns of Potential Conduct](#)
- ✓ [Guidance on Managing Concerns of Potential Conduct](#)
- ✓ [Grievance Procedure](#)
- ✓ [Freedom to Speak Up – Raising Concerns policy](#)
- ✓ [Trust Values](#)

- ✓ [Our Journey To Change](#)
- ✓ [Leavers Procedure](#)
- ✓ [Clinical Supervision Policy](#)
- ✓ [Staff Development Policy](#)
- ✓ [Partnership Agreement](#)

5 Identifying concerns



Capability is the ability to perform or achieve certain actions or outcomes to the required standard as outlined in an individual's Job Description

When a lapse in performance is identified your manager will meet with you at the earliest opportunity to try and understand the reasons, identify any mitigating factors and ensure that appropriate support and advice is provided to aid an improvement in your performance, this would normally be the informal stage of this procedure.

There may be occasions, that due to the seriousness of the concerns, or where it has been identified because of another Trust process e.g as a result of a disciplinary outcome, safeguarding or SI Investigation, it may be appropriate to instigate the formal stage of this procedure. Where this is the case, you will be invited to meeting to discuss the formal stage of this procedure.

5.1 Staff Support

It is recognised that when you are experiencing difficulties in fulfilling your role and this has been raised either informally or formally by your line manager, this may be a stressful experience for you.

The Trust has in place a number of support mechanisms including support from Staffside Representatives, management support, Employee Support Services, Occupational Health and Counselling Services. Full details on staff support can be found in the on the Trust Intranet [Staff Wellbeing and support information | TEWV Intranet](#).

5.2 Informal process



Managers must address issues or a lapse in performance at an early stage to try and remedy any problems at the earliest opportunity. This would normally be done in a supervision session with the individual and the manager

The Manager will:

- Discuss with you (in supervision) any concerns relating to the lapse in performance. In order for the concerns to be discussed at the earliest opportunity extra supervision may be required.
- Inform you why an additional supervision session is to take place, this should happen prior to the supervision meeting (you will not have the right to be accompanied)
- During the supervision meeting, fully explain the areas of concern and discuss any circumstances that may be contributing to the lapse in performance.
- Need to explore if there are any factors which are impacting on performance for example cultural implications, long or short term health conditions / disabilities or any other protected characteristics which may not be immediately obvious. When exploring this the manager should ensure they carry out these conversations as sensitively as possible.
- Where it is identified that contributing factors may be as a result of a health condition, stress related reaction, previous trauma or personal experience/circumstance, make a referral to Occupational Health along with the completion of a stress risk assessment if required. Advice can be sought from the People and Culture, Operational and or EDHR Team on completion of the referral.
- Ensure that all meetings are held and conducted in line with the Trust Values by all parties.
- Using the job description ensure that the objectives for the role are clear and the competencies required and ensure that you fully understand these.
- Where Occupational Advice has been sought, ensure consideration is given to any advice or recommendations received.
- Identify a monitoring period for an improvement in performance; this would usually be for a period of no longer than one month.
- Where necessary put in place additional supervision.
- Ensure that the appraisal is completed and up-to-date for the employee and any training is considered in order to improve their performance.
- Ensure that all discussions are clearly documented, with clear outcomes and expectations and that these are signed by the individual, a copy is provided to the employee, and a copy retained on personal file.



Where informal monitoring has not led to an improvement in performance, the manager should liaise with a HR representative to discuss the areas of job performance that do not meet the required standard. If the decision is to follow the formal capability process, the individual must be advised of this, including the right to be accompanied by a colleague or staffside representative and the discussions followed up in writing.

5.3 Formal Capability Process



When developing or reviewing an action plan advice may be required from the relevant professional lead.

5.4 First Formal Meeting

Who	What	When
Line Manager	<p>Formally invites the staff member to a meeting together with a representative from the Operational HR Team. The letter will:</p> <ul style="list-style-type: none"> • Give the employee the opportunity to be accompanied to the review meeting(s) by a companion - colleague or staff side representative. • Include details of the documentation to be reviewed. • Enclose a copy of this Procedure. 	If the staff member has not met the required improvement
Line manager	<p>Highlight the aspects of work performance which do not meet the required standards using the following documentary evidence:-</p> <ul style="list-style-type: none"> • Supervision records • Job description & person specification • Trust Values • Occupational Health report/stress risk assessment • Other supporting documents or evidence to demonstrate performance issues • Ensuring that the meeting is conducted in line with the Trust Values 	During the meeting
Line manager	<p>Establish whether the employee realises and accepts that there is a problem with their performance and give them an opportunity to explain any mitigating circumstances relating to their unsatisfactory work performance.</p>	During the meeting
Line manager	<p>Explore again if there are any contributing factors such as a health condition, stress related reaction, previous trauma or personal experience/circumstance which may be impacting on individual's ability to perform their duties. Where Occupational Health advice has been sought or a stress risk assessment is carried out, those reports should be discussed with the individual. Reasonable adjustments if appropriate should be considered by the manager.</p> <p>Where it is identified that it may be the working environment contributing to the individual's ability to perform their duties, an alternative</p>	During the meeting

	(temporary) working environment may be identified.	
Line manager	Identify any further additional training needs and support available to the employee.	During the meeting
Line manager and employee	<p>Agree a formal action plan, setting out the following:-</p> <ul style="list-style-type: none"> • Areas of concern /aims relating to poor lapse in performance; • Specific objectives to be achieved; • Deadline/time frame (this should differ according to each specific objective and would normally be between 1-3 months) • Details of how this will be achieved and support required to achieve; this will include any training identified either by the manager and/or employee to assist in the individual achieving the action plan • The measurement criteria 	During the meeting
Line manager	Must clarify if the individual works Bank shifts elsewhere in the Trust. If so, advise the individual that it would not be appropriate for that to continue whilst the formal capability process is ongoing.	During the meeting
Line manager	Establish dates for the review meetings set	At the end of the first formal meeting
Line manager	<p>Record the content of the discussion with clear outcomes and expectations</p> <p>Both the manager and employee should sign the agreed action plan.</p>	At the end of the first formal meeting
Line manager	Provide a copy of the documentation to the employee with a copy retained on the personal file	After the meeting



In addition to the above, the manager will include agreed regular supervision meetings with the employee on a fortnightly basis to offer additional support. These sessions should be documented and signed by the employee.

Individuals should be clearly informed at the meeting what action will be taken if there is not a significant improvement in performance over the agreed timescales which can include; A Written Warning; A Final Written Warning; Dismissal

If there is a consistent failure to agree an action plan between the manager and the employee at the informal stage, then an independent manager will be asked to review it.

5.5 Formal review meeting



Regular supervision **must** take place during the formal capability procedure to review the individual's progress to-date and to provide support to the individual. The Formal Review Meeting will be held in line with the timescales outlined in the action plan (i.e., after 1 – 3 months)

A representative from the Operational HR Team will be in attendance.

The Employee will be given the right to be accompanied to the review meeting(s) by a colleague or staff side representative.

The manager will:-

- Formally invite the employee to the review meeting
- Have gathered the necessary evidence before the meeting with the employee to ascertain improvement/no improvement made
- Ensure that the meeting is held and conducted in line with the Trust Values
- Review and update the action plan where appropriate, e.g., dates when objectives are achieved/any additional training identified/if deadlines/time frames are amended
- Consider the level of support or adjustments made available to the employee to improve their performance

All review meetings will be documented with a copy provided to the employee and a copy retained on personal file



Throughout the process the emphasis should be on helping the employee to achieve the objectives set out in the action plan

5.6 Outcome of Formal Review meeting

5.6.1 If the employee has achieved the standard of performance/competence required (the employee needs to be):-

- Informed of this with an acknowledgement of their improvement
- Reminded that they are expected to maintain the level of performance/competence required of their role
- If the employee does not sustain the standard of performance/competence required, the manager should advise the employee that failure to do so could result in disciplinary action.
- A letter confirming the outcome of the meeting(s) will be sent to the employee by the manager confirming that the employee has achieved the action plan.



Where there is a lapse in performance after the achievement of the standard of performance/competence, a review meeting will be undertaken to understand the cause and determine the appropriate course of action.

5.6.2 If the employee has failed to achieve the standard of performance/competence required:-

- The manager will have highlighted any ongoing concerns during their regular supervision with the employee
- The Manager will share any information with the employee in relation to the ongoing concerns and inform them that they have failed to meet the required level of performance/competence. Unless there are any mitigating circumstances in relation to the employee's failure to improve their performance, the manager will issue a **Written Warning usually for a period of twelve months**. The individual will be given the right of appeal.
- The action plan will be reviewed and amended accordingly to demonstrate any additional support identified. Advice should be sought from the appropriate professional lead if required.
- The employee's performance will continue to be monitored monthly to give the employee the opportunity to achieve the objectives.
- During the 12 month period of the warning, if there is no improvement in the employee's performance, **a second review meeting will be arranged** and a **Final Written Warning will be issued usually for a period of 18 months** during which time monitoring of the action plan will continue. This meeting will be held with a manager senior to the person who issued the written warning.
- Where it is identified that the individual's performance is not improving; there is no requirement to wait for the full 12 month period of the written warning to have the second review meeting. The individual will be given the right of appeal.

- During the monitoring periods, if the standard of the employee's performance is of such a serious concern, consideration should be given to the level of risk of the employee remaining in the same environment. Advice should be sought from Human Resources and the appropriate professional lead and consideration given as to whether it is deemed appropriate to proceed to a Final Capability Meeting.
- Where the individual's performance is deemed to be affected by an underlying health issue, the manager should seek further advice from Occupational Health with regards to redeployment. Advice should also be sought from the appropriate professional lead if required.
- A letter confirming the outcome of the meeting(s) will be sent to the employee by the manager, including detail of their right to appeal against the decision of the manager should disciplinary action have been taken. Appeal timescales and arrangements shall be consistent with the terms of [Managing Concerns of Potential Conduct \(Disciplinary\) Procedure](#).



If the employee's performance continues to be of serious concern and the individual has been issued with a Written Warning and a Final Written Warning, consideration can be given as to whether this is deemed to be 'Irredeemable Capability' and/or whether it is appropriate to progress to a Final Capability Meeting. Advice should be sought from Human Resources and the appropriate professional lead.

5.7 Final capability meeting

The meeting will be chaired by a Head of Service/General Manager or Associate Director supported by a representative from the Operational HR Team and relevant professional lead i.e. Nursing/Occupational Therapy.

During the meeting the remaining shortcomings, any employee mitigation and consequences of failure to achieve the required standards will be discussed.

The employee will be given the right to be accompanied by a colleague or staff side representative.

The chair of the meeting will ensure that the meeting is held and conducted in line with the Trust values

Prior to the Final Capability Meeting, managers should prepare a report which will include all information produced as a result of both the informal and formal stage of this procedure. Managers must ensure that the individual receives a copy of this information in line with the timescales within the Trusts Managing Concerns of Potential Conduct (Disciplinary) Procedure.

5.7.1 Before any decision is made (the following should be considered)

- Has there been a fair review of the employee's performance issues?
- Has full consideration and appropriate advice been sought in the event of contributing factors such as a health condition, stress related reaction, previous trauma or personal experience/circumstance
- Has all reasonable adjustments/support/training been offered?
- Is there documentary evidence available to demonstrate that the procedure has been followed and the employee has been given every opportunity to improve their performance?
- Have the relevant warnings been issued?

5.7.2 The options available at this stage (include)

- Extending the monitoring period (this should only occur where there is evidence that management have not afforded the individual the necessary support)
- Consider redeployment for the employee (usually based on advice from Occupational Health)
- If the performance issues are of such a serious nature and appropriate sanctions have been issued or it is deemed to be 'Irredeemable Capability', dismissal should be considered
- In exceptional circumstances demotion may be applied, however, it must be offered as an alternative to dismissal and accepted by the employee and have clear objectives that must be achieved within an agreed timescale. If an alternative to dismissal is refused this will be recorded and the employee will be dismissed.

5.7.3 Outcome of the Final Capability Meeting

A letter confirming the outcome of the Final Capability Meeting will be sent to the employee by the Determining Manager, including information about their right to appeal against the decision of the manager should disciplinary action have been taken. Appeal timescales and arrangements shall be consistent with the terms of Disciplinary Procedure.



Please note that template letters will be available from the People and Culture - HR Operational Department.

5.8 Reporting Capability/Poor Performance issues to Professional Bodies

In some circumstances the Trust is required to notify the appropriate professional body e.g., Nursing and Midwifery Council, Health and Care Professions Council, General Medical Council, who are responsible for the professional practice of particular staff groups.

Dependent upon the seriousness of the capability/poor performance concerns, the Trust may be obliged to inform the professional body. This would normally occur once all the Trust’s procedures have **concluded** including the Appeals Process, unless the individual resigns prior to the formal procedures taking place.

 Where a Determining Manager finds it necessary to recommend referral to a professional body the employee must be notified in writing of the intention to do so.

6 Terms and definitions

Term	Definition
Capability	<ul style="list-style-type: none"> is the ability to perform or achieve certain actions or outcomes to the required standard as outlined in an individual’s Job Description
Lapse in performance	<ul style="list-style-type: none"> a short period of time when you fail to carry out the requirements of your role well or properly
Companion	<ul style="list-style-type: none"> “The Chosen Companion may be a fellow worker, a trade union representative, or an official employed by a trade union. A trade union representative who is not an employed official must have been certified by their union as being competent to accompany a worker” (ACAS Code of Practice). A fellow worker is an employee of the Trust.
Determining Manager	<ul style="list-style-type: none"> The chair of the Final Capability Meeting

7 How this procedure will be implemented

- This procedure will be published on the Trust’s intranet and external website. Awareness of the new procedure will be included in the Trust internal bulletin
- Line managers will disseminate this procedure to all Trust employees through a line management briefing.

7.1 Training needs analysis

Staff/Professional Group	Type of Training	Duration	Frequency of Training
All staff	Training NA – Awareness required		

8 How the implementation of this procedure will be monitored

Number	Auditable Standard/Key Performance Indicators	Frequency/Method/Person Responsible	Where results and any Associate Action Plan will be reported to, implemented and monitored; (this will usually be via the relevant Governance Group).
1	Monitoring of Formal Capability cases	HR Operational Team - ongoing	Within People and Culture Reports distributed to Care Group General Managers, Care Group Directors and Care Group Board.

9 References

acas.org.uk/capability-procedures
 Employment Rights Act 1996

10 Document control (external)

To be recorded on the policy register by Policy Coordinator

Date of approval	15 March 2022
Next review date	15 March 2025
This document replaces	HR 003 V4
This document was approved by	PWG 11 February 2022, and JCC 15 March 2022
This document was approved	15 March 2022
This document was ratified by	n/a
This document was ratified	n/a
An equality analysis was completed on this policy on	01 March 2022
Document type	Public

FOI Clause (Private documents only)	NA
-------------------------------------	----

Change record

Version	Date	Amendment details	Status
v5	15 March 2022	<p>Review to include OJTC – Trust Values, Trauma informed Care</p> <p>Staff Support Section with link to intranet and Overarching policy</p> <p>Written with enhanced emphasis on understanding the reasons for the lapse in performance at the informal stage and ensuring that all avenues for support have been explored.</p>	Approved

Appendix 1 - Equality Analysis Screening Form

Please note: The Equality Analysis Policy and Equality Analysis Guidance can be found on the policy pages of the intranet

Section 1	Scope
Name of service area/directorate/department	People and Culture Directorate
Title	Capability Procedure HR 003 V4
Type	Procedure
Geographical area covered	Trust Wide
Aims and objectives	To provide a fair and consistent process for addressing concerns relating to poor performance which meets the ACAS Code of Practice.
Start date of Equality Analysis Screening	1 st March 2022
End date of Equality Analysis Screening	

Section 2	Impacts
Who does the Policy, Service, Function, Strategy, Code of practice, Guidance, Project or Business plan benefit?	Staff, managers and service users.
Will the Policy, Service, Function, Strategy, Code of practice, Guidance, Project or Business plan impact negatively on any of the protected characteristic groups?	<ul style="list-style-type: none"> • Race (including Gypsy and Traveller) NO • Disability (includes physical, learning, mental health, sensory and medical disabilities) NO • Sex (Men, women and gender neutral etc.) NO • Gender reassignment (Transgender and gender identity) NO

	<ul style="list-style-type: none"> • Sexual Orientation (Lesbian, Gay, Bisexual, Heterosexual, Pansexual and Asexual etc.) /NO • Age (includes, young people, older people – people of all ages) NO • Religion or Belief (includes faith groups, atheism and philosophical beliefs) NO • Pregnancy and Maternity (includes pregnancy, women who are breastfeeding and women on maternity leave) /NO • Marriage and Civil Partnership (includes opposite and same sex couples who are married or civil partners) NO • Veterans (includes serving armed forces personnel, reservists, veterans and their families) NO
Describe any negative impacts	
Describe any positive impacts	

Section 3	Research and involvement
What sources of information have you considered? (e.g. legislation, codes of practice, best practice, nice guidelines, CQC reports or feedback etc.)	ACAS Code of Practice, Employment Rights Act 1996 Focus groups The Big Conversation
Have you engaged or consulted with service users, carers, staff and other stakeholders including people from the protected groups?	Yes all staff were invited to attend a number of focus groups focussed on the HR Procedures. All staff were invited to comment on the Big Conversation – in relation to HR procedures
If you answered Yes above, describe the engagement and involvement that has taken place	See above Policy working group and JCC

If you answered No above, describe future plans that you may have to engage and involve people from different groups	
--	--

Section 4	Training needs
As part of this equality analysis have any training needs/service needs been identified?	No formal training
Describe any training needs for Trust staff	Awareness information/sessions for existing managers. In-depth session for new managers (on all of the HR procedures) as part of their local induction.
Describe any training needs for patients	Na
Describe any training needs for contractors or other outside agencies	Na

Check the information you have provided and ensure additional evidence can be provided if asked

Appendix 2 – Approval checklist

To be completed by lead and attached to any document which guides practice when submitted to the appropriate committee/group for consideration and approval.

	Title of document being reviewed:	Yes / No / Not applicable	Comments
1.	Title		
	Is the title clear and unambiguous?	Yes	
	Is it clear whether the document is a guideline, policy, protocol or standard?	Yes	
2.	Rationale		
	Are reasons for development of the document stated?	Yes	
3.	Development Process		
	Are people involved in the development identified?	Yes	
	Has relevant expertise has been sought/used?	Yes	
	Is there evidence of consultation with stakeholders and users?	Yes	
	Have any related documents or documents that are impacted by this change been identified and updated?	Yes	
4.	Content		
	Is the objective of the document clear?	Yes	
	Is the target population clear and unambiguous?	Yes	
	Are the intended outcomes described?	Yes	
	Are the statements clear and unambiguous?	Yes	
5.	Evidence Base		
	Is the type of evidence to support the document identified explicitly?	Yes	
	Are key references cited?	Yes	
	Are supporting documents referenced?	Yes	
6.	Training		
	Have training needs been considered?	Yes	
	Are training needs included in the document?	Yes	

	Title of document being reviewed:	Yes / No / Not applicable	Comments
7.	Implementation and monitoring		
	Does the document identify how it will be implemented and monitored?	Yes	
8.	Equality analysis		
	Has an equality analysis been completed for the document?	Yes	
	Have Equality and Diversity reviewed and approved the equality analysis?	Yes	
9.	Approval		
	Does the document identify which committee/group will approve it?	Yes	JCC
10.	Publication		
	Has the policy been reviewed for harm?	Yes	
	Does the document identify whether it is private or public?	Yes	Public
	If private, does the document identify which clause of the Freedom of Information Act 2000 applies?	NA	