



University Hospitals  
of North Midlands  
NHS Trust

# Policy No. (HR29) Capability Policy and Procedure

The following personnel have direct roles and responsibilities in the implementation of this policy:

- All Trust Staff

Version:	7
Ratified By:	TJNCC (via Chair's actions 5 <sup>th</sup> June 2018)
Date Ratified:	June 2018
Date of Issue via Intranet:	June 2018
Date of Review:	June 2021
Trust Contact:	Human Resources Manager
Executive Lead:	Director of Human Resources

## **Statement on Trust Policies to be included in all policies**

### **Staff Side and Trade Unions**

The University Hospitals of North Midlands NHS Trust is committed to ensuring that, as far as is reasonably practicable, the way in which we provide services to the public and the way in which we treat our staff reflects their individual needs and does not discriminate against individuals or groups on any grounds.

### **Equality and Diversity**

The University Hospitals of North Midlands aims to promote equality and diversity and value the benefits this brings. It is our aim to ensure that all staff feel valued and have a fair and equitable quality of working life.

### **Equality Impact Assessment**

The organisation aims to design and implement services, policies and measures that meet the diverse needs of our service, population and workforce, ensuring that none are placed at a disadvantage over others. The Equality Impact Assessment tool is designed to help you consider the needs and assess the impact of your policy.

### **Information Governance**

Any Trust policy which impacts on or involves the use and disclosure of personal information (patient or employee) must make reference to and ensure that the content of the policy is comparable with the relevant statutory or legal requirement and ethical standards

### **Data Protection Bill, General Data Protection Regulations (GDPR) and the NHS Code of Confidentiality**

GDPR replaces the EU Data Protection Directive of 1995 and supersedes the law of member states that were developed in compliance with the Data Protection Directive 95/45/EC. Its purpose is to protect the “right and freedom” of natural persons (i.e. living individuals) and to ensure that personal data is not processed without their knowledge, and, wherever possible, that it is processed with their consent.

Processing includes holding, obtaining, recording, using and disclosing of information and applies to all forms of media, including paper and images. It applies to confidential patient information but is far wider in its scope, e.g. it also covers personal records

While GDPR applies to both patient and employee information, the Confidentiality Code of Practice (COP) applies only to patient information. The COP incorporates, the requirements of GDPR and other relevant legislations together with the recommendations of the Caldicott report and medical ethics considerations, in some cases extending statutory requirements and provides detailed specific guidance.

### **Freedom of Information Act 2000**

The Freedom of Information Act 2000 (FOIA) is an Act which makes legal provision and creates a legal gateway and timetable for the disclosure, to the public, of the **majority** of corporate information held (but not necessarily created) by this Trust. The Trust has a legal responsibility to proactively provide a large amount of information to the public and to pro-actively respond to specific requests for information. Information will not be disclosed when the Trust can claim legal exemption. Any non-disclosure must be conveyed in writing; quoting the relevant exemption together with signposting to internal and external methods of complaint. Locally, guidance on the DPA, FOIA and COP can be obtained from the Information Governance Manager or the Caldicott Guardian.

### **Mental Capacity Act**

Any Trust policy which may affect a person who may lack capacity should comply with the requirements of the Mental Capacity Act 2005 (MCA)

The MCA and its associated Code of Practice provides the framework for making decisions on behalf of individuals who lack the mental capacity to do these acts or make these decisions for themselves. Everyone working with and/or caring for adults who lack capacity, whether they are dealing with everyday matters or life-changing events in the lives of people who lack capacity must comply with the Act.

In a day to day context mental capacity includes making decisions or taking actions affecting daily life – when to get up, what to wear, what to eat etc. In a legal context it refers to a person's ability to do something, including making a decision, which may have legal consequences for the person lacking capacity, or for other people.

The Code provides guidance to all those working with and/or caring for adults who lack capacity, including family members, professionals and carers. It describes their responsibilities when acting or making decisions with, or on behalf of, individuals who lack the capacity to do this for themselves. In particular, it focuses on those who will have a duty of care to a person lacking capacity and explains how the legal rules set out in the Act will work in practice.

### **The Health Act: Code of Practice for the Prevention and Control of Health Care Associated Infections**

The purpose of the Code is to help NHS bodies plan and implement how they can prevent and control HCAI. It sets out criteria by which managers of NHS organisations are to ensure that patients are cared for in a clean, safe environment, where the risk of HCAI is kept as low as possible. Failure to observe the Code may either result in an Improvement Notice being issued by the Care Quality Commission, or in the Trust being reported for significant failings and placed on 'Special Measures'.

The Code relates to healthcare provided by all NHS bodies. Each NHS body is expected to have systems in place sufficient to comply with the relevant provisions of the Code, so as to minimise the risk of HCAI to patients, staff and visitors.

The Trust Board must have an agreement outlining its collective responsibility for minimising the risks of infection and the general means by which it prevents and controls such risks.

Effective prevention and control of HCAI must be embedded into everyday practice and applied consistently by all staff.

### **Human Rights**

The Trust is committed to the principles contained in the Human Rights Act. We aim to ensure that our employment policies protect the rights and interests of our staff and ensure that they are treated in a fair, dignified and equitable way when employed at the Trust.

### **Sustainable Development**

The University Hospitals of North Midlands NHS Trust (UHNM) is committed to demonstrating leadership in sustainability and has a Trust Board approved Sustainable Development Management Plan (SDMP): Our 2020 Vision: Our Sustainable Future which sets out the route to developing a world-class healthcare system that is financially, socially and environmentally sustainable.

There are three 'Key Priorities' to aim for by 2020. With the help of employees, key partners and other stakeholders the trust will embed opportunities to:

1. Reduce our environmental impact, associated carbon emissions and benefit from a healthier environment;
2. Improve the resilience of our services and built environment as a result of severe environmental and climatic changes;
3. Embed sustainable models of care and support our local community to be well-connected, healthy, resilient, independent and managing their lives in a positive way.

The SWITCH campaign is designed to achieve these priorities. It is relevant to all departments and all members of staff. The focus is on using resources sustainably in order to provide better patient care, improve health and our working environment.

University Hospitals of North Midlands NHS Trust  
Capability Policy and Procedure

**Version Control Schedule**

<b>Final Version</b>	<b>Issue Date</b>	<b>Comments</b>
1	2001	
2	2006	
3	2008	
4	2010	Ratified Executive Committee
5	May 2015	Reviewed and Modified Procedures Included
6	February 2018	Reviewed with changes to capability procedure and modified capability procedure. Suspension of pay progression when formal proceedings are underway
7	June 2018	

<b>Contents</b>		<b>Page</b>
1.	<a href="#">Introduction</a>	6
2.	<a href="#">Policy Statement</a>	6
3.	<a href="#">Scope of Policy</a>	7
4.	<a href="#">Roles &amp; Responsibilities</a>	7
5.	<a href="#">Education &amp; Training</a>	9
6	<a href="#">Monitoring and Review</a>	9
7.	<b>Appendices</b>	
	<a href="#">Appendix One - Supporting Information for the Procedures</a>	10
	<a href="#">Appendix Two - Procedure for staff with more than 2 years' service</a>	13
	<a href="#">Appendix Three – Procedure for staff with less than 2 years' service (modified procedure)</a>	19
	<a href="#">Appendix Four – Informal Procedure for Staff With More Than 2 Years' Service</a>	24
	<a href="#">Appendix Five –Levels of Authority/Who Should Be Present At Each Stage of the Capability Procedure</a>	26
	<a href="#">Appendix Six – Levels of Authority/Who Should Be Present At Each Stage of the Modified Capability Procedure</a>	28
	<a href="#">Appendix Seven - Conduct of Final Review Hearing</a>	30
	<a href="#">Appendix Eight – Conduct of Capability Appeals Hearings</a>	32

## INTRODUCTION

- 1.1 The intention of this policy is to resolve situations which relate specifically to the lack of capability of an employee to perform the role at the level for which they are employed. It is anticipated that in most cases this procedure would not be invoked for a one-off error or mistake.
- 1.2 There will be occasions where the Trust considers that there has been a clear failure by an individual to deliver an adequate standard of performance, through lack of knowledge, skill, competence, understanding or poor attendance. These are described as capability issues and are dealt with by this policy. Matters that should be described and dealt with as misconduct issues are covered in the [Trust's Disciplinary Policy \(HR01\)](#).
- 1.3 The framework required to ascertain levels required would be by reference to a range of information which could include competencies, job descriptions, performance and development reviews etc.
- 1.4 Capability may be affected by ill health and this will be considered in any fact-finding exercise. Arrangements for handling concerns about health are described in part 3.3 of this policy.
- 1.5 The key feature of lack of capability is that it is **not** the employee's fault.
- 1.6 Performance management is important and how well we do it has a big impact on the quality of care that people who use our services receive.
- 1.7 Line managers are responsible for leading and managing an individual or team of people and the quality of the service they deliver. The way they recruit, supervise and develop employees will make a difference to how they feel about their job and their ability to work to the right standard.

## POLICY STATEMENT

- 2.1 The University Hospital of North Midlands NHS Trust (UHNM) aims to provide the highest quality standards of health care within available resources. The contribution and performance of each individual is crucial to achieving this aim. The Trust will therefore encourage and ensure attainment of the highest possible standards of performance by all staff and address appropriately, areas of unsatisfactory performance.
- 2.2 Wherever possible, the Trust will aim to resolve issues of capability (including clinical competence and health) through on going assessment and support. Early identification of problems is essential to allow for remedial action to take place.
- 2.3 Capability issues arising in relation to personal competence may result from shortfalls in skill or knowledge which could be addressed through further training and development. The Trust is committed to ensuring appropriate training and development is made available to ensure that individuals can competently perform within their role.
- 2.4 Where there is a fundamental inability to perform the scope and range of duties in a post, every effort is made to secure suitable alternative employment.

- 2.5 The UHNM aims to promote equality and diversity and value the benefits this brings. It is our aim to ensure that all staff feel valued and have a fair and equitable quality of working life.

## SCOPE OF POLICY

- 3.1 The policy applies to all non-medical members of staff employed by the University Hospitals of North Midlands, however for non-medical staff who have less than two years' service a modified procedure detailed in Appendix 3 will apply.

- 3.2 This policy should be read in conjunction with the following

- All appropriate codes of conduct/rules for professional bodies
- [Alcohol and Substance Misuse Policy \(HR21\)](#)
- [Trust Sickness Absence Management Policy and Procedure \(HR14\)](#)
- [Dignity at Work Policy and Procedure \(HR02\)](#)
- [Trust Disciplinary Policy and Procedure \(HR01\)](#)
- [Equality and Diversity Policy \(HR12\)](#)
- [Flexible Working Policy \(HR51\)](#)
- [Raising Concerns at Work \(Whistleblowing\) Policy and Procedure \(HR30\)](#)
- [Organisational Change Policy and Procedure \(HR04\)](#)
- [Trust Policy for Performance and Development Review \(HR50\)](#)
- [Trust Policy for Induction Training \(HR17\)](#)
- [Learning and Education Policy \(HR49\)](#)

Medical staff shall be handled in accordance with the following:

- [Trust Policy for Maintaining High Professional Standards in the Modern NHS \(HR18\)](#)

Where medical staffs have remunerated Management posts i.e. Divisional Chairs, Clinical Director and Clinical Leads this procedure will apply.

- 3.3 Where ill health is an over-riding factor in causing poor performance, this should be handled under the [Trust Sickness Absence Management Policy and Procedure \(HR14\)](#). There may also be issues of capability which straddle the boundary between competence and health, e.g. in relation to alcohol or drug abuse. Performance may be impaired but without obvious signs of health problems which frustrate the ability to undertake the role. In these circumstances the issues should be addressed through the [Trusts' Alcohol and Substance Misuse Policy \(HR21\)](#) and/or referral to the Occupational Health Department.

## ROLES & RESPONSIBILITIES

### 4.1 Managers

Managers need to:

- Promote an open and supportive culture in which they are accessible and understand individual roles within their department
- To help a member of staff achieve and maintain the standard of performance required using a procedural framework
- Ensure regular reviews are in place to ensure identification of training and development needs is a continuous process

- Not wait until annual performance and development reviews to address capability issues
- Use informal action where appropriate
- Ensure that staff are made aware and given guidance on the capability procedure and its application
- Facilitate staff corporate and comprehensive local induction which identifies individual development needs and requirements of the post
- Performance and development reviews should be undertaken on at least an annual basis to identify development needs to enable an individual to perform their role to the best of their ability.
- It is the responsibility of every manager to ensure that staff are recruited in accordance with the [Trust's Recruitment and Selection Policy and Procedure \(HR08\)](#), that they know what is expected of them and that areas of performance which cause concern are pointed out and corrected as they arise.
- Be aware that identification of training and development needs is a continuous process and managers should ensure regular reviews are in place to ensure this occurs.
- It is a manager's responsibility to report related data as appropriate if required.
- Speak confidentially with the member of staff in order to seek to identify any underlying reason for poor performance as soon as concerns arise
- It is important that the manager handles such meetings in a sensitive way, to enable any underlying cause to be identified; ensuring appropriate help and advice are offered.
- Confidentiality will be maintained at all stages of the procedure
- Additional performance issues arise that are not directly linked to the performance issue currently being managed, these should be considered separately
- Clear, concise written documentation should be kept at each meeting with the individual detailing actions which are jointly agreed between the employee and the manager as appropriate.
- Ensure staff are aware of rights of accompaniment and rights of appeal detailed in Appendix A

#### 4.2 **All Staff**

All staff need to;

- Undertake corporate induction and a comprehensive local induction
- If identified, highlight any training they require to complete their job to their managers
- Familiarise themselves and comply with all Trust policies relevant to their role and responsibilities
- Raise any queries about implementation of Trust policies with their Line manager regardless of the review date of the policies
- Participate in the performance and development review process

#### 4.3 **Staff Side**

It is the role of Staff Side to negotiate, raise concern, or provide support on a member's behalf as necessary in relation to this policy.

#### 4.4 **Human Resources**

Human Resources will provide support to managers and staff where necessary (refer to Appendix 4 and 5)

**5. EDUCATION AND TRAINING**

- 5.1 Managers should receive appropriate and effective training in the operation of this procedure and the Trust will endeavour to provide this or give guidance as is necessary. Training will be provided by HR when appropriate.

**6. MONITORING AND REVIEW**

- 6.1 This policy will be monitored on an on-going basis (via feedback received from Trust staff) and capability cases will be monitored via the employee relations tracker and reported on at the regular Human Resource Management meetings. The policy will be reviewed periodically in line with the [Trust's Policy for the Development and Control of Procedural Documents \(G01\)](#)
- 6.2 This policy may be amended at any stage by joint agreement. In any event the policy will be reviewed and updated in line with any changes to legislation or as deemed necessary or in three years, whichever is the sooner.

## Appendix 1

### Procedural Information Supporting the Policy

#### Introduction

- The primary objective of this procedure is to help a member of staff achieve and maintain the standard of performance required using a procedural framework. Managers need to promote an open and supportive culture in which they are accessible and understand individual roles within their department
- The key feature of lack of capability is that it is **not** the employee's fault.
- If, during the review period, additional performance issues arise that are not directly linked to the performance issue currently being managed, then these should be considered separately, (e.g. a member of staff may be the subject of a complaint at the same time that their timekeeping is being managed. One does not necessarily compound the other). If issues arise that are directly linked, then it shall be made clear to the employee why it is deemed that they are linked as they will be considered in total.
- Where possible, informal procedures should always be followed as most issues of capability can be resolved informally.
- Clear, concise written documentation should be kept at each meeting with the individual detailing actions which are jointly agreed between the employee and the manager as appropriate.
- It is the role of staff side to negotiate, raise concern, or provide support on a member's behalf as necessary in relation to this policy.
- **Incremental Pay Progression** will be frozen for the period when formal capability proceedings commence.

#### A.1.1 IDENTIFYING POOR PERFORMANCE

It is the responsibility of managers and supervisors as part of their day to day duties to identify instances of poor performance. Problems should be raised appropriately by the manager as near to the time of occurrence as is reasonably practical, to enable the individual to respond.

Unsatisfactory work performance *may* become apparent in a number of ways which may include:

- through formal objective setting and review process;
- through informal discussions with the individual;
- poor recurring standards of work, e.g. recurring mistakes, not completing tasks, unable to cope with reasonable instructions given;
- attitude to work, e.g. poor interpersonal skills;

- team, peer group concerns;
- high staff turnover, high non-attendance;
- feedback from exit interviews.

**This procedure is not intended to replace individual guidance and supervision on a day to day basis, but to be applied where there are recurring instances of poor performance.**

**If unsatisfactory performance is a consequence of personal conduct, consideration should be given to using the disciplinary policy.**

#### **A.1.2 RIGHTS OF ACCOMPANIMENT**

At informal stages employees don't have the statutory right to be accompanied and it is not usually necessary for employees to be represented, however should an individual ask to be accompanied this should not be unreasonably refused.

At formal stages of the procedure, employees have the right to be represented/accompanied by their staff side organisation, trade union representative, or work colleague. They must be notified of this right and may then choose to exercise it. It is the employee's responsibility to make arrangements to be represented/accompanied.

#### **A.1.3 RIGHTS OF APPEAL**

Where a member of staff is dismissed on the grounds of capability, they have a right of appeal. Requests for appeals must be made in writing using the Appeal Form found on the Intranet to the HR Director within 7 calendar days of the date of the letter advising of the meeting outcome. Individuals should identify in writing their grounds for making an appeal.

As far as is reasonably practical, an appeal will be heard within 4 weeks from the date of receipt of the appeal letter.

Appendix 7 provides details of the procedure to be followed during a capability appeal hearing.

#### **A1.4 CAPABILITY VERSES CONDUCT**

For the purposes of this policy, capability will be defined as any skill, aptitude, health or any physical or mental quality that is required to carry out one's duties to an adequate level of performance.

The definition of 'capability' refers to an employee's inability to perform work which is expected as part of their job role to a required standard due to insufficient skill level or aptitude.

Lack of capability will be reflected in the person being unable to perform their duties to the required standard for reasons that are not related to negligence carelessness, recklessness or any other deliberate behaviour over which the employee has control and which may be more appropriately handled under [\(HR01\) Trust Disciplinary Policy and Procedure](#).

University Hospitals of North Midlands NHS Trust  
Capability Policy and Procedure

The key feature of lack of capability is that it is **not** the employee's fault. Very few employees choose to perform their work badly, make mistakes, fail to complete tasks or have poor relationships with colleagues or customers. Appropriate action should be taken promptly as soon as it is noticed that the employee is not performing certain aspects of his or her job satisfactorily. Delaying - or worse doing nothing - may cause the performance problem to escalate.

NHS Employers define conduct as 'I can; but I don't want to' and capability as 'I want to, but I can't'.

FOI Ref 182-1819

## A2 PROCEDURE FOR STAFF WITH 2 YEARS OR MORE SERVICE

When the performance of an individual member of staff becomes unacceptable due to lack of capability, the primary objective is to help him/her to achieve the standard of performance required using the following procedural framework.

Capability refers to an employee's inability to perform work which is expected as part of their job role to a required standard due to insufficient skill level or aptitude and should be dealt with differently than issues relating to conduct which should be dealt with in line with the [Trust Disciplinary Policy and Procedure \(HR01\)](#).

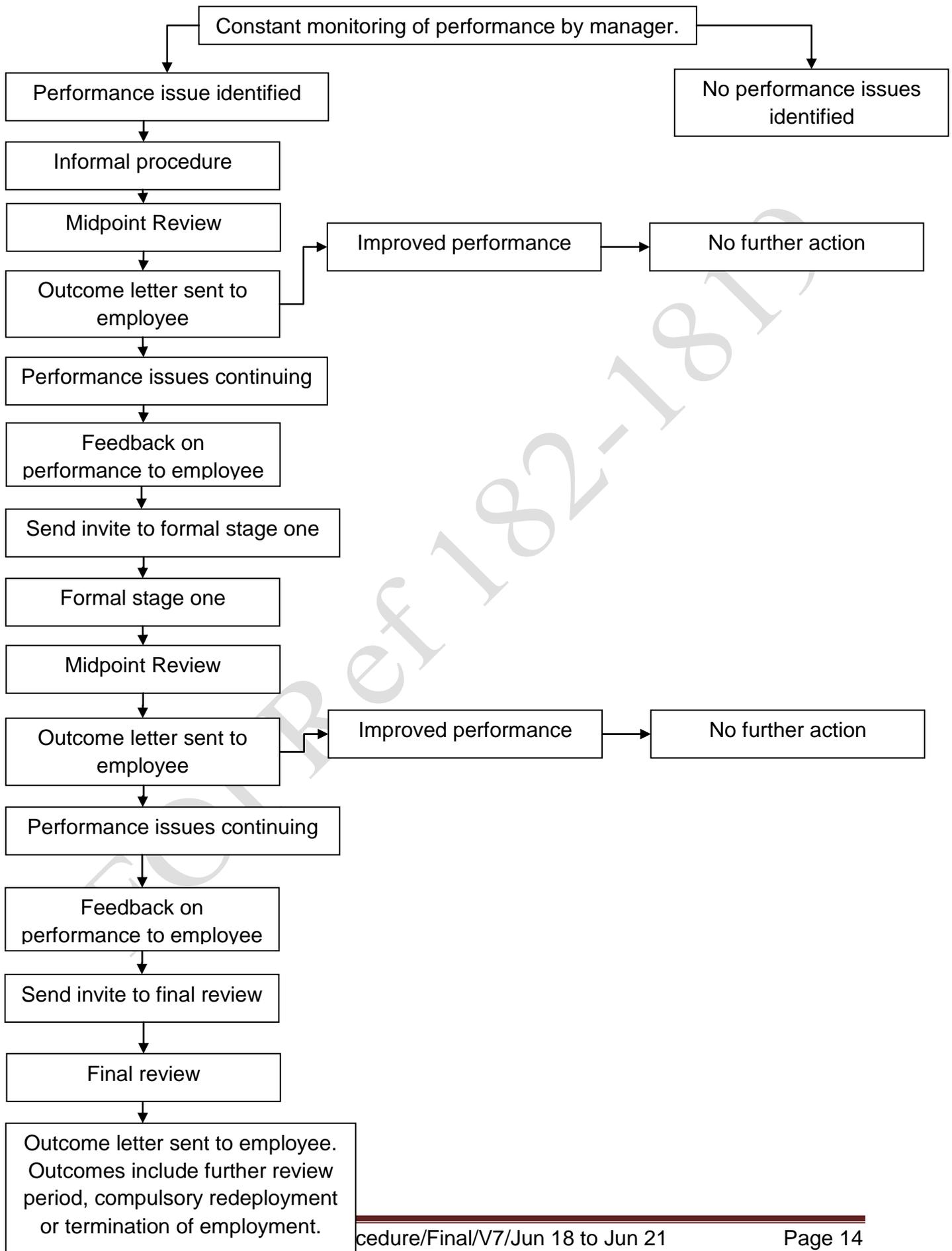
N.B. At all stages of the procedure in cases where performance is below an acceptable standard and it is considered that there is a clinical risk that may present a danger to patients the review period needs to be shortened to up to one or two weeks, as opposed to up to three months. During this period arrangements must be made to ensure that the member of staff is working with a colleague or manager at all times, they must not operate unsupervised. If poor performance has the potential of causing a major problem/clinical risk it may be necessary to implement a period of retraining or shadowing with immediate effect. Suspension should be considered as the last available option.

For guidance on differentiating capability from conduct see A1.4.

In such cases, where the employee is being represented by a trade union/professional body the relevant representative should be notified of the situation before the review meeting with the member of staff is held in order that they can best advise and support the member of staff.

**Where possible, informal action should always be considered first. Guidance on how to conduct the informal procedure for employees with more than 2 years' service can be found in Appendix 4.**

**A2.1 CAPABILITY PROCESS FLOWCHART WITH TWO YEARS OF MORE SERVICE**



### **A2.2.1 Formal Stage One and Development Phase**

A2.2.2 If, despite support being provided during the informal stage of the procedure, the employee is unable to reach and/or maintain the agreed required standard of performance, the manager may hold a Formal Stage One Meeting. A formal stage one meeting should take place no later than 17 calendar days after the review meeting for the informal stage was conducted.

### **A2.3. Fact Finding**

A2.3.1 Prior to the formal stage one meeting, the manager should undertake a fact-finding exercise into the capability issues of the employee.

A2.3.2 The fact finding stage will be the collation of evidence by the manager for use at any capability hearing, should it arise.

A2.3.3 Before the fact finding exercise begins, the manager should ensure they have precisely framed the performance concern against the employee's job description.

A2.3.4 In some circumstances, the employee's manager may feel it necessary to gather evidence from other parties. For example, if the manager does not have direct experience of the employee's capability issue when the employee is managed by someone else on a day-to-day basis. However, this is unlikely.

A2.3.5 Materials gathered during the fact finding exercise *could* include training records related to the capability issue or absence records.

A2.3.6 Managers should make a copy of any of the materials they have gathered (whilst maintaining the anonymity of any witness statements) available to the employee at least 7 calendar days before the formal stage one meeting.

### **A2.4 Formal Stage One Meeting**

The manager will arrange to meet the member of staff to discuss their concerns.

A2.341 A letter should be sent to the individual asking them to attend a formal stage one meeting, which is in accordance with the Capability Policy (HR29). This letter should contain a clear statement by the manager of the areas for performance still considered unacceptable and the standard expected. The letter should be sent to the individual at least 7 calendar days before the meeting. The employee should be informed that they have the right to be accompanied.

The meeting should allow:

- An opportunity for both the manager and the member of staff to identify any underlying reason for poor performance. This may arise from either work or personal concerns and it is important that the manager offers appropriate help and advice.
- Review of the manager's fact-finding exercise
- The identification of how these factors may be overcome, e.g. additional training and development, a change in working arrangements, role clarification, closer supervision.
- The setting of (SMART) targets for improvement and the monitoring arrangements.
- Again whilst it is acknowledged that timescales set will vary, dependent on the individual case and the support required, it is expected that the timescale will not exceed four to six weeks, thus allowing the individual time to demonstrate improvements. The review period will be identified and clearly stated to the member of staff.
- Clarification that the employee may be dismissed at the next stage of the procedure if they do not attain the required standard of performance and sustain this.

A2.4.2 A member of the HR Employee Relations team should be notified in advance of this meeting for advice and guidance but HR would not usually be in attendance at this meeting.

A2.4.3 The manager should make a record of this meeting, summarising the agreed main points and objectives, a copy of the main objectives should be sent to the member of staff within 7 calendar days of the meeting and the agreed main points should be available on request.

A2.4.4 The agreed objectives will be complemented by a development phase, which will continue for the period that the Formal Stage is active (up to three months). The purpose of the development phase is for the employee to demonstrate sustained improvement and for the manager to ensure they continue to assess the employee's needs, providing tailored support to the individual and continuous assessment of their capability. Details of this phase, such as supervision meetings, should be planned and set out in the objectives, where possible.

A2.4.5 Review periods should be set by the manager and can be up to three months. However, three month review periods are not prescriptive and review periods should be considered on a case by case basis. For example, some may be six or eight weeks. Review periods may need to be up to three months long, for example, if:

- a member of staff has just returned from sick leave and is still receiving treatment.
- There is a significant period of annual leave scheduled during the review period
- a member of staff falls ill (for reasons other than stress related to performance management) which causes a deterioration in performance, or leads to absence during which performance cannot be monitored. The absence is to be managed under the [Sickness Absence Management Policy and Procedure \(HR14\)](#). Performance monitoring is to be resumed once the member of staff is in good health, or clearance is obtained from Occupational Health.
- a member of staff's personal circumstances warrant an extension e.g. bereavement or severe domestic distress which occurs during the review period.
- a member of staff has worked well over a number of years and performance has only recently emerged as an issue due to change in line management. Here a change in line manager means that a longer period is needed for fair and accurate assessment.

A2.4.6 When review periods are set, managers and employees should also schedule a mid-point review during the development period in order to review the employee's progress against the pre-agreed objectives and see if there is any more support that needs to be offered.

A2.4.7 At the end of the formal review period the manager and employee should meet and the outcome will be one of the following:-

- performance has improved and been maintained to a satisfactory standard in which case the member of staff will be told that whilst the required standard is maintained, no further action will be taken.
- performance has not improved or been maintained to the required standard, in which case a final review meeting will be held.

A2.4.8 The process will not be unduly delayed if an employee's preferred representative is unavailable. Key meetings may only be re-scheduled once if the employee's representative is unavailable on the initial date.

## **A2.5 Final Review**

A2.5.1 Before a capability issue is taken to final review, managers should ensure that a sufficient fact-finding exercise has been completed.

A2.5.2 The appropriate Senior Manager (see appendix 4) will call a joint meeting between the line manager managing the issue of the member of staff. The member of staff shall be given at least 14 calendar days' notice. Details of the following need to be provided:

- The date, time and venue.
- The purpose of the review.
- The right to be accompanied and encouragement to pursue this
- Who will be present on behalf of the management.
- The written information to be presented during the meeting.
- Whether the employee's manager feels it is necessary to invite other parties. For example, if the manager does not have direct experience of the employee's capability issue when the employee is managed by someone else on a day-to-day basis. However, this is unlikely.
- The possibility that termination of employment on the grounds of capability could be an outcome if this is appropriate. If authority to dismiss has been delegated, this should also be included in the letter.
- The fact that the meeting will be recorded – the meeting can be recorded either by an appropriate note-taker (as appointed by the senior manager) or the meeting can be recorded on a voice recorder. A copy of the review recording will be made available to the employee/witnesses.

A2.5.3 A statement of case will be required from both parties and the chair of the panel should ensure that both parties are aware of this. Statements of case from management should be forwarded to the Chair of the panel and panel members no later than 7 calendar days before the capability hearing. Employees should submit a statement of case to the Chair of the panel no later than 7 calendar days before the capability hearing. Statements of case from managers should include details of capability issues and detail of what support has been offered to the employee. Statements of case from employees should include any mitigating factors against alleged performance issues.

A2.5.4 In more complex cases, or where specialist information will be discussed, a professional advisor may be co-opted on to a capability panel to provide advice on professional or technical issues at the discretion of the manager

A2.5.5 The meeting will review the action taken to date and explore any outstanding concerns. The appropriate senior manager (Appendix 4) will make a decision as to whether to continue with a further review period, consider compulsory redeployment to a suitable alternative position, or to terminate the member of staff's contract of employment on grounds of capability. The main points of the discussion and agreed action to be taken will be confirmed in writing to the member of staff within 7 calendar days of the meeting, unless it has been agreed (by all parties) otherwise.

University Hospitals of North Midlands NHS Trust  
Capability Policy and Procedure

A2.5.6 Managers are advised that whenever termination of employment is a possible outcome of a final review, advice must be sought from the HR Employee Relations team, who will review the case with the presenting manager to ensure that the procedure has been correctly followed and it is reasonable to proceed and will provide support at this stage.

A2.5.7 Where it is decided to terminate a member of staff's contract on the grounds of capability, the individual will be given appropriate notice or payment in lieu of notice, plus any outstanding holiday entitlement.

A2.5.8 Employees will also be advised if they don't attend without good explanation or for a rearranged review that a decision will be made in their absence

A2.5.9 The process will not be unduly delayed if an employee's preferred representative is unavailable. Key meetings may only be re-scheduled once if the employee's representative is unavailable on the initial date.

**A3 PROCEDURE FOR STAFF WITH LESS THAN 2 YEARS SERVICE (MODIFIED CAPABILITY PROCEDURE)**

When the performance of an individual member of staff becomes unacceptable due to lack of capability, the primary objective is to help him/her to achieve the standard of performance required using the following procedural framework.

Capability refers to an employee's inability to perform work which is expected as part of their job role to a required standard due to insufficient skill level or aptitude and should be dealt with differently than issues relating to conduct which should be dealt with in line with the [Trust Disciplinary Policy and Procedure \(HR01\)](#).

N.B. At all stages of the procedure in cases where performance is below an acceptable standard and it is considered that there is a clinical risk that may present a danger to patients the review period needs to be shortened to one or two weeks, as opposed to up to three to six weeks. During this period arrangements must be made to ensure that the member of staff is working with a colleague or manager at all times, they must not operate unsupervised. If poor performance has the potential of causing a major problem/clinical risk it may be necessary to implement a period of retraining or shadowing with immediate effect. Suspension should be considered as the last available option.

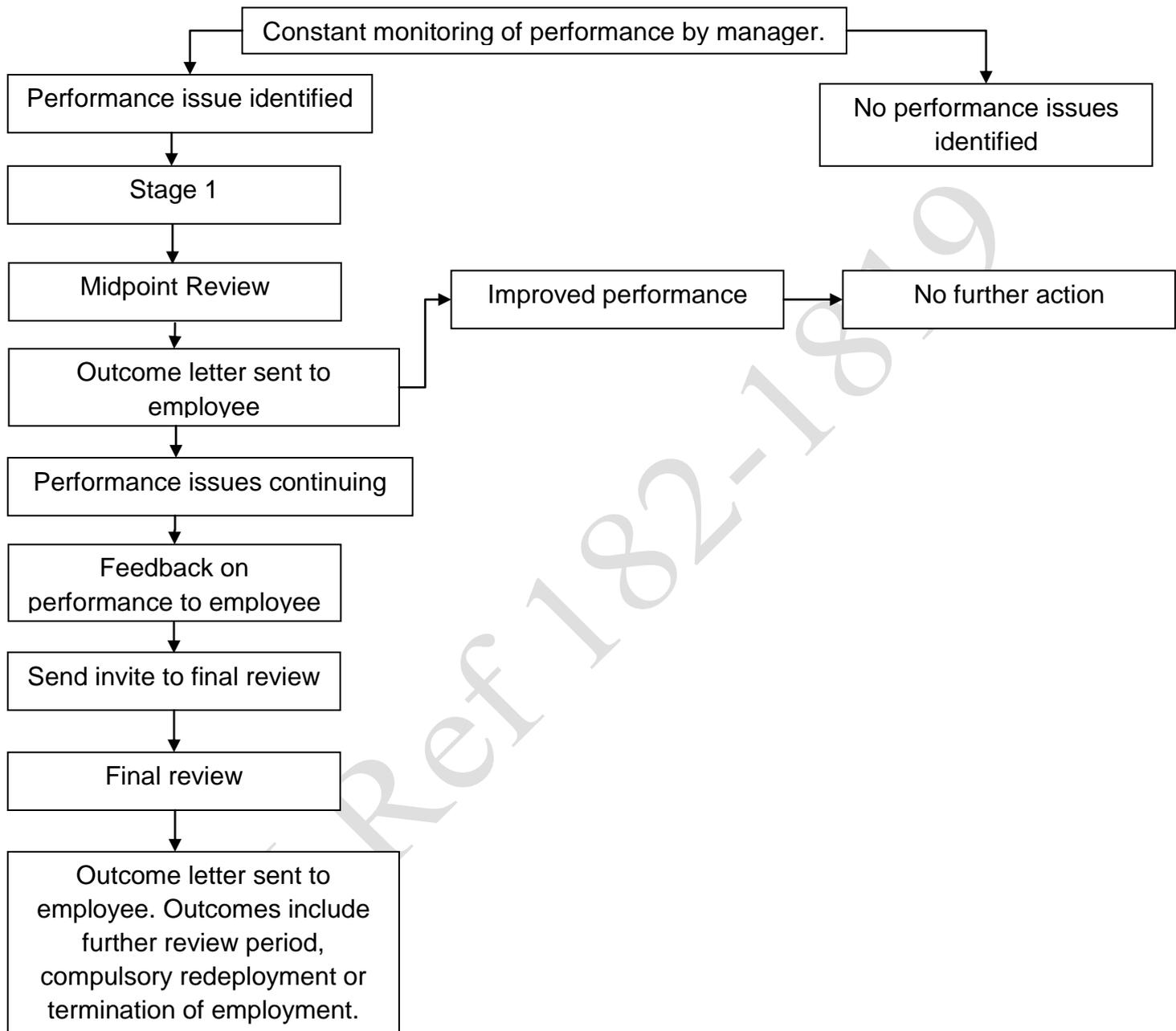
For guidance on differentiating capability from conduct see A1.4.

In such cases, where the employee is being represented by a trade union/professional body the relevant representative should be notified of the situation before the review meeting with the member of staff is held in order that they can best advise and support the member of staff.

Before the commencement of the modified capability procedure, advice should be sought from the local HR representative around the suitability of the procedure. Suitability of the procedure will be considered on a case-by-case basis.

Once advice has been sought and the modified capability procedure has commenced, the policy should be followed as outlined below.

**A3.1 CAPABILITY PROCESS FLOWCHART WITH LESS THAN TWO YEARS OF SERVICE**



### A3.1 Stage 1

A3.1.1 The manager must meet with staff to discuss their concerns. A letter should be sent to the individual asking them to attend a formal stage one meeting, which is in accordance with the Capability Policy (HR29). This letter should contain a clear statement by the manager of the areas for performance considered unacceptable and the standard expected. The letter should be sent to the individual at least 7 calendar days before the meeting. The employee should be informed that they have the right to be accompanied.

A3.1.2 Managers must raise concerns regarding capability at the earliest opportunity and point these out to the individual in a one to one meeting, explaining the areas in which he/she is failing to meet expectations. Through these discussions, actions and objectives will be agreed to help rectify the concerns raised. Objectives should be specific, measurable, achievable, realistic, and time bound (SMART). Additional training and development, a change in working arrangements on a temporary or permanent basis, role clarification or closer supervision may be required. The manager must make it clear that this is Stage 1 of the Modified Capability Procedure

A3.1.3 A review period will be set. Typically this would be between 3 and 6 weeks.

A3.1.4 Additionally, managers and employees should also schedule a mid-point review during the stage 1 review period in order to review the employee's progress against the pre-agreed objectives and see if there is any more support that needs to be offered.

A3.1.4 The meeting should allow:

- An opportunity for both the manager and the member of staff to identify any underlying reason for poor performance. This may arise from either work or personal concerns and it is important that the manager offers appropriate help and advice.
- The identification of how these factors may be overcome, e.g. additional training and development, a change in working arrangements, role clarification, closer supervision.
- The setting of (SMART) targets for improvement and the monitoring arrangements.
- Again whilst it is acknowledged that timescales set will vary, dependent on the individual case and the support required, it is expected that the timescale will not exceed four to six weeks, thus allowing the individual time to demonstrate improvements. The review period will be identified and clearly stated to the member of staff.
- Clarification that the employee may be dismissed at the next stage of the procedure if they do not attain the required standard of performance and sustain this.

A3.1.5 The manager should make a record of this meeting, summarising the agreed main points, a copy of which should be sent to the member of staff within 7 calendar days of the meeting. The manager should make the member of staff aware that continued failure to meet the required standard will lead to further formal action which could result in the termination of their contract.

A3.1.6 At the end of the review period, the outcome will be one of the following:-

- performance has improved and been maintained to a satisfactory standard, in which case the member of staff will be informed of this in writing. Whilst the required standard is maintained, no further action will be taken.

- performance has not improved or been maintained to the required standard, in which case Stage 2 will begin.

### **A3.2 Formal Hearing/Final Review**

#### **A3.2.1 Fact-Finding**

A3.2.2 Prior to the formal hearing, the manager should undertake a fact-finding exercise into the capability issues of the employee.

A3.2.3 The fact-finding stage will be the collation of evidence by the manager for use at any capability hearing, should it arise.

A3.2.4 Before the fact-finding exercise begins, the manager should ensure they have precisely framed the performance concern against the employee's job description.

A3.2.5 In some circumstances, the employee's manager may feel it necessary to gather evidence from other parties. For example, if the manager does not have direct experience of the employee's capability issue when the employee is managed by someone else on a day-to-day basis. However, this is unlikely.

A3.2.6 Materials gathered during the fact-finding exercise *could* include training records related to the capability issue or absence records.

A3.2.7 Managers should make a copy of any of the materials they have gathered (whilst maintaining the anonymity of any witness statements) available to the employee at least 7 calendar days before the final review process.

#### **A3.3 Final Review Process**

A3.3.1 Before a capability issue is taken to final review, managers should ensure that a sufficient fact-finding exercise has been completed.

A3.3.2 In cases where the employee has not met the required standard of work set out in their SMART objectives after the review period, the appropriate Senior Manager (see Appendix 5) will call a formal hearing between the line manager managing the issue of the member of staff and the member of staff in question. The member of staff shall be given at least 10 calendar days' notice. Details of the following need to be provided:

- The date, time and venue.
- The purpose of the review.
- The right to be accompanied and encouragement to pursue this
- Who will be present on behalf of management.
- The written information to be presented during the meeting.
- Whether witnesses will be called and the identity of such witnesses.
- The possibility that termination of employment on the grounds of capability could be an outcome if this is appropriate. If authority to dismiss has been delegated, this should also be included in the letter.

A3.3.3 A statement of case will be required from both parties and the chair of the panel should ensure that both parties are aware of this. Statements of case from management should be forwarded to the Chair of the panel and panel members no later than 5 calendar days before the capability hearing. Employees should submit a statement of case to the Chair of the panel no later than 5 calendar days before the capability hearing. Statements of case from managers should include details of capability issues and detail of what support has been offered to the employee.

University Hospitals of North Midlands NHS Trust  
Capability Policy and Procedure

Statements of case from employees should include any mitigating factors against alleged performance issues.

- A3.3.4 The meeting will review the action taken to date and explore any outstanding concerns. The appropriate senior manager will make a decision as to whether to continue with a further review period, consider compulsory redeployment to a suitable alternative position, or to terminate the member of staff's contract of employment on grounds of capability. The main points of the discussion and agreed action to be taken will be confirmed in writing to the member of staff within 7 calendar days of the meeting, unless it has been agreed (by all parties) otherwise.
- A3.3.5 Where it is decided to terminate a member of staff's contract on the grounds of capability, the individual will be given appropriate notice or payment in lieu of notice, plus any outstanding holiday entitlement.
- A3.3.6 Employees will also be advised if they don't attend without good explanation or for a rearranged review that a decision will be made in their absence
- A3.3.7 The process will not be unduly delayed if an employee's preferred representative is unavailable. Key meetings may only be re-scheduled once if the employee's representative is unavailable on the initial date.

## INFORMAL PROCEDURE FOR STAFF WITH MORE THAN 2 YEARS SERVICE

- A4.1 Managers must raise concerns regarding capability at the earliest opportunity and point these out to the individual in a one to one meeting, explaining the areas in which he/she is failing to meet expectations against the employee's job description. Concerns raised by the manager must be measurable and objective. Through these discussions, actions and objectives will be agreed to help rectify the concerns raised. Objectives should be specific, measurable, achievable, realistic, and time bound (SMART). Additional training and development, a change in working arrangements on a temporary or permanent basis, role clarification or closer supervision may be required. The manager must make it clear that this is the informal stage of the Capability Policy. It may be necessary to involve other staff at this stage, as the line manager may not have first-hand knowledge of the capability issues causing concern.
- A4.2 Employees should leave the conversation, motivated; feeling valued and empowered to achieve their full potential.
- A4.3 Review periods should be set by the manager and can be up to three months. However, three month review periods are not prescriptive and review periods should be considered on a case by case basis. For example, some may be six or eight weeks. Review periods may need to up to three months long, for example, if:
- a member of staff has just returned from sick leave and is still receiving treatment.
  - There is a significant period of annual leave scheduled during the review period
  - a member of staff falls ill (for reasons other than stress related to performance management) which causes a deterioration in performance, or leads to absence during which performance cannot be monitored. The absence is to be managed under the [Sickness Absence Management Policy and Procedure \(HR14\)](#). Performance monitoring is to be resumed once the member of staff is in good health, or clearance is obtained from Occupational Health.
  - a member of staff's personal circumstances warrant an extension e.g. bereavement or severe domestic distress which occurs during the review period.
  - a member of staff has worked well over a number of years and performance has only recently emerged as an issue due to change in line management. Here a change in line manager means that a longer period is needed for fair and accurate assessment.
- A4.4 When review periods are set, managers and employees should also schedule a mid-point review during the development period in order to review the employee's progress against the pre-agreed objectives and see if there is any more support that needs to be offered.
- A4.5 The manager should make a record of this meeting, summarising the agreed main points and objectives, a copy of the main objectives should be sent to the member of staff within 7 calendar days of the meeting and the agreed main points should be available on request.
- At the end of the informal review period the manager and employee should meet and the outcome will be one of the following:-

University Hospitals of North Midlands NHS Trust  
Capability Policy and Procedure

- performance has improved and been maintained to a satisfactory standard, in which case the member of staff will be informed of this in writing. Whilst the required standard is maintained, no formal action will be taken.
- performance has not improved or been maintained to the required standard, in which case the formal stages will be followed.

A4.6 In most cases, employee's performance will have improved and no formal action will be necessary. The formal capability procedure will only be used as a last resort when informal management actions have failed to produce the required improvement in performance or where the performance is so poor as to justify immediate formal procedures.

FOI Ref 182-1819

**APPENDIX 5**

**LEVELS OF AUTHORITY/WHO SHOULD BE PRESENT AT EACH STAGE OF THE CAPABILITY PROCEDURE FOR EMPLOYEES WITH TWO OR MORE YEARS SERVICE**

For all Directorate staff excluding Medical staff see table 1 below. The table details who should be present at each stage of the capability procedure:

**Table 1**

<b>Informal</b>	<b>Stage One Formal and Development Period</b>	<b>Final Stage</b>	<b>Appeal against Outcome of Final Stage</b>
Line Manager + Employee	Line Manager + Employee + Employee Representative* + another, previously uninvolved, manager	Directorate Manager/Dept. Head (Chair)/Head of Service (or equivalent) + Line Manager + Professional Advisor, if necessary + Witnesses, if necessary + Employee* + Employee Representative* + Another, previously uninvolved, Manager + Senior HR Rep.	Associate/Deputy Assistant Director (Chair) + Executive Director + Employee + Employee Representative + HR Rep not previously involved

*\*Stages will not be unduly delayed due to the absence of these members. See A2.4.8, A2.5.9*

For Associate Directors (or equivalent), Clinical Directors and Directors see table 2 below. The table details who should be present at each stage of the capability procedure:

**Table 2**

<b>Informal</b>	<b>Stage One Formal and Development Period</b>	<b>Final Stage</b>	<b>Appeal against Outcome of Final Stage</b>
AD's or equivalent, Directors or Clinical Directors + Employee	Associate/Deputy/Assistant Medical Director + Associate/Deputy/Assistant Director + Employee* + Employee Representative*	Associate/Deputy/Assistant Medical Director + Associate/Deputy/Assistant Director + Witnesses, if necessary + Professional Advisor, if necessary + Employee* + Employee Representative* + Senior HR Rep	Chief Exec + 1 other Executive Director + HR Rep not previously involved

*\*Stages will not be unduly delayed due to the absence of these members. See A2.4.8, A2.5.9*

University Hospitals of North Midlands NHS Trust  
Capability Policy and Procedure

For Chief Executives see table 3 below. The table details who should be present at each stage of the capability procedure:

**Table 3**

Informal	Stage One Formal and Development Period	Final Stage	Appeal against Outcome of Final Stage
Trust Board Chairman + Employee	Trust Board Chairman + Employee + Employee Representative	Trust Board Chairman (Chair)+ Employee* + Witnesses, if necessary + Employee Representative* + Professional Advisor, if necessary + Senior HR Rep	Independent third party (Chair) + Employee + Employee Representative + Senior HR Rep not previously involved

*\*Stages will not be unduly delayed due to the absence of these members. See A2.4.8, A2.5.9*

**Notes:**

- This is minimum level of authority to hear a case. In particular cases, it may be necessary for others to join the panel, e.g. technical experts or where employee works for two people (e.g. capability) or works for one and is line managed by another.
- It is important that at the initial stage of the process consideration is given to ensure that the appropriate person is identified for every stage to ensure the appropriate level of management is represented and present to take the issue forward. The relevant authorised manager must preside over the Final Review Hearing, unless specific written permission to delegate to other senior managers is given by the HR Director.

**LEVELS OF AUTHORITY/WHO SHOULD BE PRESENT AT EACH STAGE OF THE MODIFIED CAPABILITY PROCEDURE FOR EMPLOYEES WITH LESS THAN TWO YEARS SERVICE**

For all Directorate staff excluding Medical staff see table 1 below. The table details who needs to be present at each stage of the modified capability procedure:

**Table 1**

Stage 1	Formal Hearing	Appeal against Outcome of Formal Hearing
Line Manager + Employee	Directorate Manager/Dept. Head (Chair)/Head of Service (or equivalent) + Line Manager + Witnesses, if necessary + Professional Advisor, if necessary + Employee* + Employee Representative* + Another, previously uninvolved, Manager + Senior HR Rep.	Associate/ Deputy Assistant Director (Chair) + Executive Director + Employee + Employee Representative + HR Rep not previously involved

*\*Stages will not be unduly delayed due to the absence of these members. See A3.3.7*

For Associate Directors (or equivalent), Clinical Directors and Directors see table 2 below. The table details who needs to be present at each stage of the modified capability procedure:

**Table 2**

Stage 1	Formal Hearing	Appeal against Outcome of Formal Hearing
AD's or equivalent, Directors or Clinical Directors + Employee	Associate/Deputy/Assistant Medical Director + Associate/Deputy/Assistant Director + Witnesses, if necessary + Professional Advisor, if necessary + Employee* + Employee Representative* + Senior HR Rep	Chief Exec + 1 other Executive Director + HR Rep not previously involved

*\*Stages will not be unduly delayed due to the absence of these members. See A3.3.7*

For Chief Executive see table 3 below. The table details who needs to be present at each stage of the modified capability procedure:

**Table 3**

Stage 1	Formal Hearing - Dismissal	Appeal against Dismissal
Trust Board Chairman + Employee	Trust Board Chairman (Chair)+ Witnesses, if necessary + Employee* + Employee Representative* + Professional Advisor, if necessary + Senior HR Rep	Independent third party (Chair) + Employee + Employee Representative + Senior HR Rep not previously involved

*\*Stages will not be unduly delayed due to the absence of these members. See A3.3.7*

**Notes:**

- This is minimum level of authority to hear a case. In particular cases, it may be necessary for others to join the panel, e.g. technical experts or where employee works for two people (e.g. capability) or works for one and is line managed by another.
- It is important that at the initial stage of the process consideration is given to ensure that the appropriate person is identified for every stage to ensure the appropriate level of management is represented and present to take the issue forward. The relevant authorised manager must preside over the Final Review Hearing, unless specific written permission to delegate to other senior managers is given by the HR Director.

**CONDUCT OF FINAL REVIEW MEETING**

1. The Manager who has undertaken the reviews to date should be present. The member of staff and their representation/accompaniment should also be present, together with the HR representative who has supported the process.
2. The Chair of the Panel/appropriate senior manager will introduce all present and ensure that all parties are aware of the procedure to be followed.
3. The manager who undertook the capability review meetings will present the written information from the informal (for capability issues of employees with more than 2 years service) and formal stages and state all actions taken to date and the reasons for requesting a final review hearing.
4. The member of staff or their representative shall have the opportunity to question any of the actions taken.
5. The Review Panel will have the opportunity to ask questions of the manager.
6. The member of staff or their representative shall put his/her case, explaining any mitigating factors.
7. The manager will have the opportunity to ask questions of the member of staff or their representative.
8. The Review Panel will have the opportunity to ask questions of the member of staff or their representative.
9. The Review Panel may, at its discretion, adjourn the hearing in order that further evidence may be produced by either party.
10. Each party shall be given the opportunity to sum up but the employee must be given the opportunity to sum up last.
11. The manager, HR rep, member of staff and their representative will withdraw in order to allow the panel to consider the information presented and to make their decision.
12. The manager, HR rep, member of staff and their representative will be recalled to be notified of the decision.
13. The decision must be confirmed in writing within 7 calendar days of the hearing.

## TERMINATION OF EMPLOYMENT

17. If, after careful consideration, the decision has been made to terminate employment, dismissal shall be on the grounds of capability.
18. Notice of termination shall be given in accordance with the individual's Contract of Employment. This notice will be paid in lieu, if it is felt to be in the Department's and/or the individual's best interests.
19. The main points of the decision and the reasons for the decision to terminate employment should be confirmed in writing to the member of staff. This should be done within 7 calendar days of the meeting, together with their right of appeal against the decision to the HR Director, within 21 calendar days of the date of termination.
20. The appeals process is explained in Appendix 8 overleaf

## **CONDUCT OF CAPABILITY APPEALS HEARINGS**

Appeals may be raised by employees on any number of grounds, for instance new evidence, undue severity or inconsistency of the penalty.

At the appeal hearing, the following procedure shall be observed:

1. The Chairperson of the panel will introduce all present and ensure that all parties are aware of the procedure to be followed.
2. The management representative shall state the management case in the presence of the member of staff and their representative and may call witnesses.
3. The member of staff or their representative shall have the opportunity to ask questions of the management representative and witnesses.
4. The members of the panel shall have the opportunity to ask questions of the management representative and witnesses.
5. The management representative shall have the opportunity to re-examine his or her witnesses on any matter referred to in their examination by members of the panel, the member of staff or their representative.
6. The member of staff or their representative shall put his or her case in the presence of the management representative and may call witnesses.
7. The management representative shall have the opportunity to ask questions of the member of staff or their representative and witnesses.
8. The members of the panel shall have the opportunity to ask questions of the member of staff or their representative and witnesses.
9. The member of staff or their representative shall have the opportunity to re-examine his or her witnesses on any matter referred to in their examination by members of the panel or the management representative.
10. Witnesses will only be present at those parts of the hearing during which they are required to give evidence or be subject to questioning. At all other stages, they should withdraw. Witnesses should be prepared to answer challenging questions by both management and staff side, and as a consequence, by prior agreement, they may be supported but not represented during the hearing by a Staff Side or Trade Union representative or work colleague.
11. The management representative and the member of staff or their representative shall have the opportunity to sum up their cases if they so wish. The employee or the employee's representative shall have the right to speak last. In their summing up neither party may introduce any new matter

12. Nothing in the foregoing procedure shall prevent the members of the panel from inviting either side to elucidate or amplify any statement they may have made; or from asking them such questions as may be necessary to ascertain whether or not they propose to call any evidence in respect of any part of their statement.
13. The panel may at its discretion adjourn the hearing in order that further evidence may be produced by either party.
14. The management representative, the member of staff and their representative shall withdraw.
15. The panel shall deliberate in private only recalling both parties to clear points of uncertainty on evidence already provided. If recall is necessary both parties shall return notwithstanding only one is concerned with the point giving rise to doubt.
16. Once the panel has reached a decision, all parties should be recalled for the Chairperson to notify them of that decision. This should always take place on the same day of the hearing, unless there are exceptional circumstances.
17. The decision must be confirmed in writing within 7 calendar days of the hearing.
18. There is no further internal right of appeal beyond this stage.