



**partnership**  
information network  
*for the service by the service*

# MANAGEMENT OF EMPLOYEE CAPABILITY PIN POLICY

**APRIL 2012**

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## Ministerial Foreword



NHSScotland aims to deliver the highest quality healthcare services and, through this, to ensure that NHSScotland is recognised by the people of Scotland as amongst the best in the world. The *Quality Strategy*<sup>1</sup> sets the overall direction for achieving this, both now and in the future, focussing on three Quality Ambitions: ‘person-centred’, ‘safe’ and ‘effective’. Delivering against all three is dependent on having a committed, dedicated, professional and healthy workforce.

I am proud of the progress made by NHSScotland Boards in striving towards exemplar employer status. Staff Governance (ensuring the fair and effective management of staff) has been enshrined in legislation, and enjoys equal status with the other pillars of clinical and financial governance. Similarly, the evolution of partnership working between employers and trade unions/professional organisations at both local and national level has helped to ensure that we have a health service in which employees are actively involved in the decisions which affect them and engaged in delivering high quality services. Indeed, the approach to employee relations within NHSScotland has been described in a recent report as “*groundbreaking*” and “*arguably the most ambitious labour-management partnership so far attempted in the UK public sector*”<sup>2</sup>.

The development of NHSScotland Partnership Information Network (PIN) policies provides a means of further ensuring sound staff governance practice. They set a minimum standard of practice in the area of employment policy, helping to ensure a fair and consistent means of managing staff which meets both current legislative requirements and best employment practice. These PIN policies have been published following significant work in partnership between the Scottish Government, NHSScotland employers and recognised trade union/professional organisation partners, and following widespread consultation across the service.

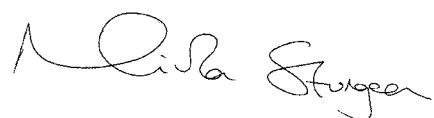
These PIN policies form part of the terms and conditions of employment of all NHSScotland employees. While Boards may develop policies to meet particular local needs, I expect all Boards to adhere to the PIN policies and ensure that practice never falls short of any of the provisions set out within these policies. By doing so, we can ensure that employees are treated fairly and consistently irrespective of the part of the service in which they work.

<sup>1</sup> <http://www.scotland.gov.uk/Topics/Health/NHS-Scotland/NHSQuality/QualityStrategy>

<sup>2</sup> Nottingham University Business School, 2011. *Evaluating Labour-Management Partnership in NHSScotland: first-findings*.

I am asking all NHSScotland managers and leaders to ensure that they adopt and embrace the PIN policies within their Boards and within their individual roles. I am also tasking Employee Directors and Board Partnership Forums to champion these policies and to raise non-compliance in a positive and constructive manner.

These PIN policies represent an exemplar approach to employment policy and practice, and I look forward to seeing evidence of their implementation across NHSScotland in the months and years ahead.

A handwritten signature in black ink, appearing to read 'Nicola Sturgeon'. The signature is fluid and cursive, with the first name 'Nicola' written in a larger, more prominent script than the surname 'Sturgeon'.

Cabinet Secretary for Health, Wellbeing and Cities Strategy

# Preface

## Staff Governance

Staff Governance is defined as “a system of corporate accountability for the fair and effective management of all staff”. The [Staff Governance Standard](#)<sup>3</sup>, which is applicable to all staff employed in NHSScotland, sets out what each NHSScotland employer must achieve in order to improve continuously in relation to the fair and effective management of staff. The Standard requires that all NHS Boards must demonstrate that staff are:

- Well informed;
- Appropriately trained;
- Involved in decisions which affect them;
- Treated fairly and consistently; and
- Provided with an improved and safe working environment.

It is recognised that staff are central to achieving the principal aims of NHSScotland, namely to improve health and wellbeing, and to deliver high quality care to those with ill health. Achievement against the Staff Governance Standard is therefore key to the effective and efficient delivery of services by providing an environment that is inclusive and conducive to employees giving of their best.

NHSScotland’s commitment to staff governance has been reinforced by its legislative underpinning within the [National Health Service Reform \(Scotland\) Act 2004](#)<sup>4</sup>, which ensures parity with the other two governance pillars of clinical and financial governance.

## PIN Policies

Partnership Information Network (PIN) policies define a minimum standard of best employment practice and are designed to achieve a consistent approach to the way NHSScotland deals with its employees. They have been developed in partnership between NHSScotland management, trade unions/professional organisations and Scottish Government. While local adaptations may be agreed in partnership to suit Boards’ own local needs, any such adaptations must still meet or exceed the minimum standards set out within the PIN policies.

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<sup>3</sup> <http://www.staffgovernance.scot.nhs.uk>

<sup>4</sup> <http://www.legislation.gov.uk/asp/2004/7/contents>

Compliance with the Staff Governance Standard includes implementation of PIN policies. Boards will be expected to evidence adherence to the PIN policies as part of the annual SAAT and accountability review processes. Part 1: Principles and Partnership of the *Agenda for Change Terms and Conditions Handbook*<sup>5</sup> incorporates PIN policies within the terms and conditions of employment of all NHSScotland staff and serves to further reinforce the fact that adherence to the minimum standards set out within them is mandatory for all NHSScotland Boards.

Board Partnership Forums therefore have a key role in ensuring that locally developed policies meet or exceed the minimum standards set out in the PIN policies; and in raising non-compliance in a positive and constructive manner.

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<sup>5</sup> <http://www.msg.scot.nhs.uk/wp-content/uploads/Agenda-for-Change-Handbook-Master-Scottish-Copy-Amendment-24.pdf>

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# 1 Introduction

- 1.1** The purpose of this Partnership Information Network (PIN) policy on the management of employee capability is to set a minimum standard and to provide a model of current best practice which can be developed in partnership at a local level to create policies to support the management of issues in relation to employee capability. Such local policies should be developed and agreed by the appropriate partnership forum and jointly reviewed on a regular basis. Alternative approaches are not precluded provided that they are based upon the best practice principles outlined in this policy. The ultimate decision about a Board's approach must be developed in a fully inclusive manner to ensure that the required changes in organisational culture, behaviour and attitude are achieved. (In addition to the model policy provided, best practice guidance for those undertaking investigations or chairing formal meetings/appeals, while detailed in the appendices of the *Management of Employee Conduct PIN Policy*<sup>6</sup>, is equally relevant in relation to issues of capability.)
- 1.2** Employees are required to perform the duties of their post to an acceptable standard. Where this standard is not met, employees will be offered support, encouragement, guidance and, if necessary, training to improve their work performance.
- 1.3** Nothing within this PIN policy is intended to prevent the normal process of supervisory control whereby managers allocate work, monitor performance, draw attention to errors and poor quality and, as importantly, highlight work done well. This ongoing process may include informal assistance in achieving improvement to the required standard of work for the particular post. Such discussions are not part of the formal procedure outlined in this PIN policy, with formal interviews and representation not being appropriate to this everyday ongoing process.
- 1.4** This PIN policy provides the broad principles to enable the management of capability issues by managers and trade unions/professional organisations working together at all levels to seek resolutions. It is designed to promote fairness and consistency in the treatment of all employees, in compliance with Boards' obligations under the NHSScotland *Staff Governance Standard*<sup>7</sup>.

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<sup>6</sup> <http://www.staffgovernance.scot.nhs.uk/>

<sup>7</sup> <http://www.staffgovernance.scot.nhs.uk/>

- 1.5** This PIN policy is also designed to clarify the rights and responsibilities of Boards, managers, employees and trade unions/professional organisations in respect of employees who require to be managed regarding capability issues relating to their employment.
- 1.6** This PIN policy applies in the case of issues of capability (i.e. where the employee is lacking in some area of knowledge, skill or ability, resulting in a failure to be able to carry out the required duties of the post to an acceptable standard). It does not apply in the case of issues of conduct, which are separately covered under the *Management of Employee Conduct PIN Policy*<sup>8</sup>. A distinction must be drawn between a genuine lack of capability and unsatisfactory performance that is attributable to a wilful refusal on the part of the employee to perform to the standards of which they are capable. This would be a question of “won’t do” rather than “can’t do” and, as a matter of conduct, should be dealt with under Boards’ local policies developed in line with the *Management of Employee Conduct PIN Policy*.
- 1.7** However, it is recognised that it may not be clear at the outset whether a matter is one of conduct or capability, and therefore it may be that the approach to be followed requires to be changed in the course of managing such matters.
- 1.8** This PIN policy does not apply in the case of issues of capability related to ill health impacting on attendance, which are separately covered under the *Managing Health at Work PIN Policy*<sup>9</sup>. It does, however, apply in the case of issues of capability related to ill health where such issues impact upon performance (as opposed to attendance).
- 1.9** Other local policies may be relevant, for example in the case of misconduct as described above, or Boards’ local policies developed in line with the *Preventing and Dealing with Bullying and Harassment in NHSScotland PIN Policy*<sup>10</sup> (if capability issues are found to be connected to bullying/harassment in the workplace).

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<sup>8</sup> <http://www.staffgovernance.scot.nhs.uk/>

<sup>9</sup> <http://www.staffgovernance.scot.nhs.uk/>

<sup>10</sup> <http://www.staffgovernance.scot.nhs.uk/>

**1.10** This PIN policy does not apply in the case of employees who are unable to undertake their contracted role as a result of the following:

- Loss of eligibility to work in the UK;
- Disqualification from driving as a result of a driving offence;
- Criminal convictions;
- Barring from undertaking regulated work; or
- Loss/suspension of professional registration.

While this PIN policy would apply separately in the case of any associated capability issues, decisions specifically in relation to those areas identified above would not be made on the basis of capability (or conduct), but rather on the basis of ‘some other substantial reason’. The procedure to be followed, therefore, in the case of the latter, (where dismissal has not already previously resulted in relation to any associated capability issues) is as set out within the *Safer Pre and Post Employment Checks PIN Policy*<sup>11</sup>.

**1.11** This PIN policy applies to all directly employed staff, including bank/temporary staff and NHSScotland staff on secondment. It does not apply to matters concerning the professional competence of medical and dental staff, which are covered by national agreements as set out in section 10.1.1 and 10.4.1 of the *2004 Terms and Conditions of Service for Consultants*<sup>12</sup>, or for other grades as set out in the following circulars: NHS Circular *1990 (PCS)8*<sup>13</sup>, as amended by NHS Circular *1990 (PCS)32*<sup>14</sup>, *PCS(DD)1994/11*<sup>15</sup>, *PCS(DD)1999/7*<sup>16</sup>, *PCS(DD)2001/09*<sup>17</sup> and *MEL 1993/149 (Annex B - Paragraph 9)*<sup>18</sup>. In the case of doctors in training, Boards should also refer to the NHS Education for Scotland *Doctors in Difficulty Policy*<sup>19</sup>.

<sup>11</sup> <http://www.staffgovernance.scot.nhs.uk/>

<sup>12</sup> <http://www.msg.scot.nhs.uk/wp-content/uploads/Consultant-contract-2007-version.doc>

<sup>13</sup> <http://www.msg.scot.nhs.uk/wp-content/uploads/Circulars/PCS's/PCS%20Publications%20DD/pcs1990%208.pdf>

<sup>14</sup> <http://www.msg.scot.nhs.uk/wp-content/uploads/Circulars/PCS's/PCS%20Publications%20DD/pcs%201990%2032.pdf>

<sup>15</sup> <http://www.msg.scot.nhs.uk/wp-content/uploads/Circulars/PCS's/PCS%20Publications%20DD/pcs%20DD%201994%2011.pdf>

<sup>16</sup> [http://www.sehd.scot.nhs.uk/pcs/PCS1999\(DD\)07.pdf](http://www.sehd.scot.nhs.uk/pcs/PCS1999(DD)07.pdf)

<sup>17</sup> [http://www.msg.scot.nhs.uk/wp-content/uploads/Circulars/PCS's/PCS%20Publications%20DD/pcs2001\(dd\)9.pdf](http://www.msg.scot.nhs.uk/wp-content/uploads/Circulars/PCS's/PCS%20Publications%20DD/pcs2001(dd)9.pdf)

<sup>18</sup> [http://www.sehd.scot.nhs.uk/mels/1993\\_149.pdf](http://www.sehd.scot.nhs.uk/mels/1993_149.pdf)

<sup>19</sup> <http://www.nes.scot.nhs.uk/education-and-training/by-discipline/medicine/help-and-support/doctors-in-difficulty.aspx>

- 1.12** In the case of capability or conduct issues relating to staff groups who require to be professionally registered, Boards will have in place mechanisms to ensure that relevant statutory regulatory bodies are informed, as appropriate, where such issues arise. Decisions in relation to ongoing professional registration as a result of such issues will be for the relevant statutory regulatory body to determine. However, Boards' local policies developed in line with this PIN policy (or the *Management of Employee Conduct PIN Policy*) will apply in relation to those capability (or conduct) issues in so far as they relate to an individual's employment within a Board.
- 1.13** The NHSScotland *Code of Conduct for Healthcare Support Workers* details the mandatory standards for how Healthcare Support Workers should work on a day-to-day basis and the *Code of Practice for Employers of Healthcare Support Workers* sets out standards for Boards based on existing good employer practice. Under the terms of [CEL 23 \(2010\)](#)<sup>20</sup> and any future Directions incorporating amendments to it, all employed or engaged Healthcare Support Workers (as defined by the CEL) should be treated fairly and consistently by Boards with regard to performance and capability matters covered by the Code of Conduct. All Healthcare Support Workers must comply with the Code of Conduct and Boards must comply with the Code of Practice. Boards must not continue to employ a Healthcare Support Worker who continually fails to comply with the Code of Conduct despite adequate training and support. Boards' local policies developed in line with this PIN policy should be applied in such cases, where such a failure to comply is identified as a matter of capability. Where such a failure to comply is identified as a matter of conduct, Boards' local policies developed in line with the *Management of Employee Conduct PIN Policy* will apply.
- 1.14** This PIN policy complements the '[ACAS Code of Practice - Disciplinary and Grievance Procedures](#)'<sup>21</sup> as revised on 6th April 2009.

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<sup>20</sup> [http://www.sehd.scot.nhs.uk/mels/CEL2010\\_23.pdf](http://www.sehd.scot.nhs.uk/mels/CEL2010_23.pdf)

<sup>21</sup> <http://www.acas.org.uk/index.aspx?articleid=2174>

## 2 Main Report

### 2.1 Strategic Framework/Organisational Culture

- 2.1.1** When performance concerns become apparent, action is required in the interests of both the Board and the employee. A failure to deal with it may adversely affect colleagues and standards of patient care, and as a result other staff may become disillusioned and dissatisfied. Some may even look elsewhere for employment. In this way, the efficiency and the quality of the service can quickly deteriorate.
- 2.1.2** Performance concerns in relation to supervisors and managers require immediate attention from senior management. The temptation to ignore such concerns, just because an individual is a manager, may have adverse consequences for the service. Employees managed by an ineffective line manager may perceive that raising such concerns with senior management will have repercussions for them. These individuals may become frustrated and there exists the potential for them to leave or become demotivated.
- 2.1.3** Since the publication of the first edition of this PIN policy in 2002, NHSScotland Boards and trade unions/professional organisations have made great progress in agreeing local policies and in managing issues relating to employee capability appropriately. This significant cultural shift has been achieved in partnership. Managers have embraced the required change in approach and are working with employees and trade unions/professional organisations to provide support and encouragement to employees to improve when capability issues arise. Employees are increasingly aware that they can acknowledge difficulties with their own performance, or concerns relating to the performance of a colleague, knowing that positive action will be taken timeously, and in a supportive and encouraging manner.
- 2.1.4** Supporting employees to work to high standards of performance, and adopting a fair, consistent and prompt approach where concerns exist that such standards have not been met, will be key to creating the workforce environment where employees are able to deliver results in a supportive environment, and as a result meet the 'person-centred', 'safe' and 'effective' quality ambitions set out within the NHSScotland *Quality Strategy*<sup>22</sup>.

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<sup>22</sup> <http://www.scotland.gov.uk/Topics/Health/NHS-Scotland/NHSQuality/QualityStrategy>

## 2.2 Principles & Values

### 2.2.1

It is important that all NHSScotland Boards have a policy in place which ensures that capability issues are dealt with in a fair and consistent manner, which provides:

- Assistance to employees to improve wherever possible when such issues arise;
- Firm but fair and consistent means of dealing with capability issues, without recourse to local management of employee conduct policies;
- A means of resolving capability issues where improvement in the current job is unachievable; and
- Mechanisms in relation to informing relevant statutory regulatory bodies where competence issues arise, as appropriate.

**2.2.2** In order to achieve this, the following principles and values are required:

- Boards' local policies developed in line with this PIN policy must be the sole route for dealing with issues of capability other than for matters of ill health related to attendance;
- Such policies must be appropriately communicated to all employees and made readily accessible to them;
- All employees must be made aware of the standards of performance required, and of the need to perform acceptably to such standards;
- Issues of capability must be addressed at the earliest opportunity and (except in more serious cases) on an informal basis in the first instance before resorting to the formal procedure;
- Issues of capability must be addressed fairly, consistently and confidentially, irrespective of the position/level within the Board of employees with whom such matters arise;
- Issues of capability must be addressed in a supportive manner, with every opportunity to improve within the current role being offered, and where such improvement is not achievable and sustainable, considering exploration of suitable alternative employment opportunities. Termination of employment on grounds of capability must only ever be as a last resort;
- At all stages of the formal procedure, employees will be entitled to be accompanied by a trade union/ professional organisation representative or work colleague (recognising that, by agreement of all parties, it may be helpful to additionally allow an individual to be accompanied during the informal stage); and
- A different (and ideally more senior manager) must be involved at each stage, to ensure greater fairness within the procedure (through the introduction of a 'fresh pair of eyes') and to enable the identification of additional support measures not previously considered at an earlier stage of the process. At the same time, the employee's immediate line manager will be involved throughout, in order to ensure consistency (beyond the informal stages, supporting, monitoring and advising on progress in relation to any agreed supported improvement plan).



## 2.3 Roles & Responsibilities

### 2.3.1

Boards will:

- In partnership with local trade unions/professional organisations, agree a management of employee capability policy which reflects the parameters provided by this PIN policy;
- Ensure that the local policy is appropriately communicated to all employees and made readily accessible to them;
- Ensure that effective recruitment and selection policies are applied in order that only suitable candidates are appointed to posts, thereby preventing potentially avoidable capability issues from arising;
- Ensure that all employees are made aware of the standards of performance required, and of the need to perform acceptably to such standards. Such standards should be clearly articulated through induction and orientation processes, personal development planning and review discussions, and through effective communication strategies;
- Promote a culture in which good performance, and special effort by individuals and teams, is acknowledged, encouraged and reinforced. Personal development planning and review/appraisal processes, for example, should be used throughout Boards to promote positive performance;
- Ensure that all relevant staff are sufficiently skilled and competent in implementing the local policy. Joint training on the local policy must be provided for managers and trade union/professional organisation representatives using a partnership model;
- Ensure that specialist HR advice is available to managers involved in implementing the local policy; and
- Subject the local policy to ongoing monitoring to ensure that it is being fairly and consistently applied and that the stated principles and values are being met. The local policy must also be subject to regular review, in partnership, to ensure that any new standards and/or structures are incorporated when necessary and that it remains fit for purpose.

### 2.3.2 Employees will:

- Ensure that they are aware of the standards of performance expected of them, and that they seek further guidance if unclear;
- Try, to the best of their ability, to meet the expected standards;
- Approach their manager at the earliest opportunity where they are having difficulties meeting the expected standards of performance;
- Work with managers on any agreed supported improvement plan;
- Comply with any support/monitoring mechanisms put in place; and
- Raise concerns with the appropriate manager where they perceive others not to be performing to the expected standards.

### 2.3.3 Managers will:

- Ensure that they fully comply with the provisions of their Board's recruitment and selection policy;
- Ensure that all employees for whom they are responsible are made aware of the standards of performance required;
- Ensure that such employees are made aware of and have access to the Board's local policy developed in line with this PIN policy;
- Ensure that they monitor employee performance on an ongoing basis;
- Ensure that they effectively apply the appropriate personal development planning and review/appraisal process in respect of such employees;
- Ensure that good performance, and special effort by individuals and teams, is acknowledged, encouraged and reinforced;
- Ensure that they are fully aware of and comply with the provisions of the local policy, identifying and dealing with issues which arise in a fair, consistent, confidential, timely and supportive manner; and
- Ensure that they seek HR advice where necessary and appropriate when dealing with capability issues.

**2.3.4** Trade union/professional organisation representatives will:

- In partnership with the Board, agree a management of employee capability policy which reflects the parameters provided by this PIN policy;
- Work in partnership with the Board to develop joint training as part of the implementation of the local policy and participate in such joint training;
- Work in partnership with the Board to raise awareness of the benefits of, and the approach to, the management of employee capability as outlined in the local policy;
- Support their members, including providing representation throughout the formal stages of the procedure (and participating at the informal stages where agreement is reached in individual cases to do so), ensuring that their members are aware of their rights and responsibilities under this and other relevant policies; and
- Participate in partnership monitoring, evaluation and review of the local policy.

**2.3.5** Human Resources will:

- Develop and deliver, in partnership, training on the Board's local policy for managers and trade union/professional organisation representatives;
- Advise managers on the correct implementation of the local policy; and
- Support employees by providing advice on the local policy.

### 2.3.6 Occupational Health will:

- Provide timely and comprehensive guidance to managers and support to employees following any referral which requires to be made in the course of managing capability issues; and
- Specifically in the case of capability issues relating to ill health which are impacting on performance, advise on whether an employee may be considered as having a 'disability' under the *Equality Act 2010*<sup>23</sup> and on all potential reasonable adjustments which should be considered (seeking advice from external organisations where necessary). Advice on reasonable adjustments will include advice regarding adjustments to the existing job role; or whether suitable alternative employment should be considered and, if so, any restrictions as to the type of role, or adjustments which would require to be made to a role, in order to ensure suitability (and thereby avoid similar capability issues arising in future).

## 2.4 Legal Framework

**2.4.1** The purpose of this section is to provide the legal context against which this PIN policy has been developed and to provide a source of reference to Boards where questions arise on areas not covered within the PIN policy. It should be noted, however, that the PIN exceeds minimum legal requirements in a number of respects.

**2.4.2** Managers must always seek HR advice when addressing capability issues, where necessary and appropriate, to ensure compliance with current employment legislation and the Board's management of employee capability policy developed in line with this PIN policy.

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<sup>23</sup> <http://www.legislation.gov.uk/ukpga/2010/15/contents>

### 2.4.3 Employment Rights Act 1996<sup>24</sup>

The Employment Rights Act 1996 details a number of different employment rights, including the right not to be unfairly dismissed.

Section 98(3)(a) provides the legal definition of capability:

- *“capability’, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality”.*

Section 98(2)(a) explains that, where an employee is dismissed on grounds of capability, it must relate to:

- *“capability...for performing work of the kind which he was employed by the employer to do”.*

The *“work of the kind which he was employed by the employer to do”* must be determined in accordance with the employee’s current contractual obligations and job description.

Additionally, whether or not a dismissal on grounds of capability is fair will be dependant upon whether, in the circumstances, the employer acted reasonably in treating it as a sufficient reason for dismissing the employee.

The Act also places a duty on an employer to provide written particulars to an employee within two months of commencement of employment, which must include details of any disciplinary procedure which is applicable to them (where organisations have a separate procedure for dealing with matters of capability, details of any such procedure should therefore be similarly included).

### 2.4.4 Employment Act 2008<sup>25</sup>

The Employment Act 2008 introduced new legislation pertaining to how disciplinary and grievance issues must be dealt with. While the Act (and the Code referred to below) refer to discipline and grievance, their provisions equally apply to issues relating to capability.

<sup>24</sup> <http://www.legislation.gov.uk/ukpga/1996/18/contents>

<sup>25</sup> <http://www.legislation.gov.uk/ukpga/2008/24/contents>

#### 2.4.4.1 *'ACAS Code of Practice – Disciplinary and Grievance Procedures'*<sup>26</sup>

The Employment Act 2008 is supported by the *'ACAS Code of Practice – Disciplinary and Grievance Procedures'*.

It sets out the principles employers should follow when dealing with certain issues in the workplace. However, the same principles equally apply in the case of issues relating to capability.

It encourages employers to seek resolution through informal means where possible.

It states that, when dealing with such issues, the basic standards of fairness should apply. For example, issues should be raised and dealt with promptly, and employees should be informed of any issues the employer may have with them and be given the opportunity to respond before decisions are reached.

Although a failure to follow the Code does not make a person or an organisation liable to proceedings, employment tribunals are legally required to take the Code into account when considering relevant cases.

More comprehensive advice and guidance is contained in the ACAS booklet, *'Discipline and grievances at work: the ACAS guide'*<sup>27</sup>. Unlike the Code, employment tribunals are not required to have regard to the ACAS guidance booklet. However, it provides more detailed advice and guidance that employers and employees will often find helpful when dealing formally with capability issues both in general terms and in individual cases.

#### 2.4.5 **Employment Relations Act 1999**<sup>28</sup>

The Employment Relations Act 1999 sets out the right of employees to be accompanied at any formal hearing.

If the representative chosen by the employee is not available at the time proposed, the employer must postpone the hearing to an alternative time suggested by the employee, provided that such alternative time is reasonable and falls before the end of five working days after the day proposed by the employer.

<sup>26</sup> <http://www.acas.org.uk/index.aspx?articleid=2174>

<sup>27</sup> <http://www.acas.org.uk/index.aspx?articleid=2174>

<sup>28</sup> <http://www.legislation.gov.uk/ukpga/1999/26/contents>

### 2.4.6 Equality Act 2010<sup>29</sup>

In order to comply with the Equality Act 2010, employers must take care to ensure that their approach to dealing with matters of capability is not discriminatory, in terms of both the approach adopted, as well as any decisions taken. This includes ensuring that reasonable adjustments are made in the case of those involved who may be considered to have a 'disability' under the Act. Further information is set out within the *Embracing Equality, Diversity and Human Rights in NHSScotland PIN Policy*<sup>30</sup>.

## 2.5 What Can Affect Performance?

2.5.1 The main factors that can affect performance include:

- Lack of awareness/understanding of the standards of performance required;
- Ill health;
- Difficulties in personal circumstances;
- Organisational change;
- Bullying or harassment;
- Inappropriate or ineffective recruitment and selection processes; or
- A combination of more than one of the above factors.

Please note that this list is not exhaustive. Apart from ill-health related to attendance, which is dealt with in detail in the *Managing Health at Work PIN Policy*<sup>31</sup>, each given reason is considered in more detail.

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<sup>29</sup> <http://www.legislation.gov.uk/ukpga/2010/15/contents>

<sup>30</sup> <http://www.staffgovernance.scot.nhs.uk/>

<sup>31</sup> <http://www.staffgovernance.scot.nhs.uk/>

### **2.5.2 Lack of Awareness/Understanding of the Standards of Performance Required**

In ensuring that employees are able to perform to the standard required in their roles, it is crucial that they are made aware of what those standards of performance are. Matters should never be escalated formally without ensuring that employees are in fact clear on what is expected of them.

The following are essential to ensure that employees are clear about what is expected of them:

- Accurate, comprehensive job descriptions;
- Comprehensive induction processes (at both corporate and team/department level);
- Appropriate learning and development, including on the job training; and
- Regular discussion between managers and employees for whom they are responsible to ensure that performance objectives and outcomes are agreed and monitored (not restricted solely to implementation of the appropriate personal development planning and review/appraisal process).



### 2.5.3 Ill Health (Not Relating to Attendance)

Ill health (which may relate to an individual's mental or physical health) can impact upon capability in two ways. Firstly, it can result in sickness absence and therefore potentially impact upon an employee's ability to maintain a satisfactory level of attendance at work. Such cases should be managed in accordance with Boards' local policies developed in line with the *Managing Health at Work PIN Policy*<sup>32</sup>.

Ill health can, however, also impact upon an individual's ability to perform to the expected standards of the job whilst at work. The provisions as set out within this PIN policy apply in such cases. Boards must be mindful of the fact that such employees may be considered to have a 'disability' (as defined within the *Equality Act 2010*<sup>33</sup>), in which case a legal obligation arises, not just in terms of avoiding discrimination, but also in terms of a duty to make reasonable adjustments. Further information in terms of Boards' obligations in relation to employees who may be classed as having a 'disability' under the Act are set out within the *Embracing Equality, Diversity and Human Rights in NHSScotland PIN Policy*<sup>34</sup>.

Regardless of whether or not an employee may be considered to have a 'disability', Boards should always seek advice on reasonable adjustments which may help to resolve capability issues related to ill health which are impacting upon an individual's ability to perform to the expected standards of the job whilst at work. Such advice should be sought from Occupational Health in the first instance, who should ensure that advice is sought, as appropriate, from external organisations such as Jobcentre Disability Employment Advisors and Access to Work.

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<sup>32</sup> <http://www.staffgovernance.scot.nhs.uk/>

<sup>33</sup> <http://www.legislation.gov.uk/ukpga/2010/15/contents>

<sup>34</sup> <http://www.staffgovernance.scot.nhs.uk/>

#### 2.5.4 Difficulties in Personal Circumstances

Unsatisfactory performance may arise as a result of difficulties in an employee's personal circumstances. Given that such difficulties may be many and varied, it is impossible to list them. However, managers should remember that the overall aim is to keep the employee at work. Several measures may be considered, including:

- Referral to Occupational Health;
- Access to employee counselling services;
- Flexible working (see the *Supporting the Work-Life Balance PIN Policy*<sup>35</sup>);
- A change in duties; or
- A change of work location.

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<sup>35</sup> <http://www.staffgovernance.scot.nhs.uk/>

### 2.5.5 Organisational Change

Organisational change will more than likely affect all employees in some way during the course of their working lives. Many things can cause organisational change, such as Boards needing to respond to financial constraints, changes in strategy, technological changes, changes in service demand, transfers of undertakings, learning new organisational behaviours and skills, and government legislation/initiatives.

In terms of the impact on employees, this can manifest itself in several ways. It may be that employees require to undertake new duties or take on additional responsibilities, which require the development of additional knowledge or skills. In some cases, it may be that the impact of the change is greater still, requiring changing staffing levels and a need to examine redeployment to different roles. Either way, Boards should manage such situations utilising their local organisational change policies, ensuring an approach which involves employees and their representatives as early as possible in the decision-making process and a fair, consistent and sensitive approach to the development of existing roles or redeployment and transition to new roles. Key within this process is the need to recognise that, with changes to job roles, there is a potential for issues of capability to arise.

In all organisational change situations, in order to minimise the risk of capability issues arising, maximise successful change and satisfy the requirements of the NHSScotland *Staff Governance Standard*<sup>36</sup>, good employment practice should include the following:

- An assessment of the demands of the change which is agreed with employees and their representatives;
- A sensitive discussion with the aim of encouraging employees who may lack confidence in meeting the demands of a changed/new role;
- A learning needs analysis of the employees affected;
- Sourcing and provision of appropriate learning and development opportunities;
- Support through any training activities and to the resumption of the full duties of the existing or new role; and
- Implementation of the relevant personal development planning and review/appraisal process.

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<sup>36</sup> <http://www.staffgovernance.scot.nhs.uk/>

### 2.5.5.1 *Changes to Existing Role*

Job roles will inevitably evolve over time and there may be circumstances where capability issues arise as a result of such resulting changes. The approach to be taken will depend very much on the extent of such changes.

Where such changes affect a small proportion of an individual's job role, and where efforts to reach the required standard of performance required for this part of the role have been exhausted, it may still be appropriate to enable them to continue to operate within their existing role, potentially looking at redistribution of duties, where this would not impact significantly on the ability to meet service demands or on other staff members.

Ultimately, however, where as a result of a substantial change, an individual becomes incapable of performing their revised role, the Board should explore suitable alternative employment on grounds of organisational change.

### 2.5.5.2 *Movement into a New Role*

Boards have a legal obligation to explore suitable alternative employment opportunities where someone has been displaced from their substantive role as a result of organisational change. Further information on the process to be followed in ensuring suitability of alternative employment opportunities is contained within the [Redeployment PIN Policy](#)<sup>37</sup>. Provided that change management principles have been applied, particularly around adopting a sensitive, fair, transparent and inclusive approach with those likely to be affected, and provided that employees are appropriately matched to redeployment vacancies, it would be hoped that matters of incapability in this regard are unlikely to arise.

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<sup>37</sup> <http://www.staffgovernance.scot.nhs.uk/>

### 2.5.5.2.1 *Pre-existing Capability Issues*

There may, separately, be occasions where employees are already being managed under the local management of employee capability policy in their original roles prior to the organisational change taking place. In such circumstances, care around the redeployment process is essential. Until such times as the capability process, in terms of supported improvement, has been exhausted, employees should be treated no differently in terms of offers of suitable alternative employment than would have been the case were there no existing capability issues.

There should be an appropriate handover of the supported improvement plan to ensure that the new manager can carry on this process. Ideally, there should be consistency of HR support through the change of roles. Should it be the case, thereafter, that the employee is incapable of completing their supported improvement plan satisfactorily, redeployment will require to be considered on the basis of capability as opposed to organisational change, with the cessation (if in place) of organisational change protection of earnings.

## 2.5.6 **Bullying or Harassment**

The *Preventing and Dealing with Bullying and Harassment in NHSScotland PIN Policy*<sup>38</sup> confirms that bullying and harassment will not be tolerated in NHSScotland. Managers should bear in mind that issues of capability can be one of the signs exhibited by an individual who is being subjected to bullying/harassment.

If, on investigation of the capability issues, it appears that bullying/harassment might be the cause of the problem, then it may be appropriate to use the Board's local policy developed in line with the above PIN policy. In such circumstances, it may be decided to suspend implementation of the local management of employee capability policy whilst alleged bullying/harassment is investigated. However, implementation of the local policy developed in line with this PIN policy will require to be recommenced if necessary, following completion of any process undertaken in relation to alleged bullying or harassment.

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<sup>38</sup> <http://www.staffgovernance.scot.nhs.uk/>

### **2.5.7 Inappropriate or Ineffective Recruitment and Selection Processes**

Failure to recruit the right person can lead to increased employee turnover, increased costs, lowering of morale in the existing workforce, and an adverse impact on wider organisational performance.

In order to avoid capability issues arising as a result of a failure to undertake a comprehensive recruitment and selection procedure, Boards must ensure that their procedures allow for the identification of the best person for the job and the organisation, and that managers fully comply with these procedures.

In the event that capability issues are identified very soon following appointment, the procedure outlined in the Board's local policy developed in line with this PIN policy must still be followed. Early intervention is essential in such cases.

### **2.5.8 A Combination of More Than One of the Above Factors**

Boards should be aware of the potential for capability issues to arise as a result of a combination of more than one of the above factors.

Care should be taken to ensure that the potential reasons are explored fully and, where capability issues have indeed arisen as a result of a combination of more than one of the above factors, each should be addressed as part of the support process which follows thereafter, in an agreed sequence or order of priority.

## **2.6 Key Procedural Elements**

**2.6.1** This section sets out the key procedural elements which will be expected to be included, as a minimum standard, within local policies developed in line with this PIN policy. It is recognised that, beyond this minimum standard, local policies may be further developed, in partnership, which reflect the culture, scale and complexity of the Board (including staff groups, management structures and risks to patients, clients or customers).

**2.6.2** It is usually best for managers to deal with performance concerns informally in the first instance. In many cases an informal conversation between the manager and an employee will be sufficient to ensure that performance improves.

**2.6.3** Formal action will be appropriate where the initial approach has not led to the necessary improvement in performance, although, in more serious cases, a formal approach may need to be adopted from the outset.

### **2.6.4 Is There a Performance Issue?**

**2.6.4.1** Indications that an employee is not performing to the required standards of the job may arise in a variety of different ways:

- There may be complaints about, or criticisms of, the employee's work from colleagues, patients or visitors;
- There may be factual grounds to indicate unsatisfactory performance, such as poor results;
- The manager's own observations of the employee's performance may give rise to concerns; or
- The employee may have requested help to overcome a problem.

**2.6.4.2** It may often be necessary to undertake an investigation as part of the procedure, in order to determine the nature and extent of the performance concerns, whether the matter is one of capability or conduct and why such concerns have arisen. Such investigation, which should be conducted according to the principles contained within the *Management of Employee Conduct PIN Policy*<sup>39</sup>, may involve examining work records and/or interviewing other individuals with whom the employee works (such as key internal/external contacts or other colleagues).

### **2.6.5 Preliminary Precautionary Measures**

It may be necessary, due to the nature of the issues of concern, to remove an employee from certain duties or to put in place additional supervision in order to mitigate risk, whilst any necessary investigation is undertaken and in advance of agreeing a supported improvement plan. It may ultimately be necessary, in such cases, to place an employee on a short period of paid leave until such times as a supported improvement plan can be agreed and implemented. However, this should be as a last resort and for as short a period as possible, all effort being made to identify alternatives which will allow the employee to remain at work (e.g. through the use of alternative duties or additional supervision).

<sup>39</sup> <http://www.staffgovernance.scot.nhs.uk/>

## 2.6.6 Informal Approach

2.6.6.1 The employee's manager should meet with the employee, informally in the first instance, to discuss the following:

- The particular performance concerns and whether the employee accepts that there is a problem;
  - It may be necessary at this stage to undertake a formal investigation if the nature and extent of the unsatisfactory performance is unclear or if the employee does not accept that there is a problem.
  - A written rationale of the nature and extent of the unsatisfactory performance must be provided to the employee without censure and they must be given reasonable time to consider this information in order to allow them to respond.
  - The employee may still express doubt or deny the existence of the problem. They must be encouraged to offer an explanation as to why they do not agree that there is a problem and the manager must listen to and consider what is said. However, where evidence supports that there is a problem, the employee's response does not prevent the manager from setting out the need to improve nor reduce the need to provide the employee with the requisite support and encouragement to do so.
- Possible contributing factors (including whether indeed the matter is one of capability), such as:
  - Lack of awareness/understanding of the standards of performance required;
  - Ill health (while capability issues relating to ill health impacting on attendance should be managed under the Board's local policy developed in line with the *Managing Health at Work PIN Policy*<sup>40</sup>, capability issues relating to ill health impacting upon performance should be addressed under this policy);
  - Difficulties in personal circumstances;
  - Organisational change;
  - Bullying or harassment;

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<sup>40</sup> <http://www.staffgovernance.scot.nhs.uk/>



- Inappropriate or ineffective recruitment and selection processes; or
- A combination of more than one of the above factors.
- Possible solutions (a number of potential solutions are set out within Annex B); and
- Agree a supported improvement plan with specified time limits. (A template supported improvement plan is set out at Annex A. See also below.)

2.6.6.2 This will require a sensitively handled discussion free from interruption, involving the manager's undivided attention, in order to establish an atmosphere of trust and open discussion. Employees must be encouraged to describe the situation from their perspective. They must not evade pertinent questions and managers must probe the employee's response through open-ended, non-negative questions in order to identify possible contributing factors. The manager must constantly bear in mind that the aim is to assist the employee to improve their work performance to an acceptable standard. It is crucial that as many aspects of the problem as possible, as perceived by the employee and the manager, are established. It is important that this is not one-sided and that, as well as the manager understanding the employee's perspective, the employee understands the manager's issues. In all cases, managers will respond by adopting a non-threatening and non-critical approach.

2.6.6.3 The outcome of the meeting should be confirmed by the manager in writing to the employee. The letter should give details of the issues discussed, the agreements reached, the date of interim and final reviews, and include any supported improvement plan and timescales agreed.

2.6.6.4 The employee should be advised of the possibility of progression to the formal stages of the procedure should there be inadequate improvement within the agreed timescales.

## 2.6.7 Supported Improvement Plans

- 2.6.7.1 A supported improvement plan (a sample template is provided at Annex A) should be completed and updated at each stage of the procedure. It should detail the nature and extent of the unsatisfactory performance, the standards of performance required, how reaching and maintaining such standards are expected to be evidenced, what support mechanisms have been put in place (whether solely for the duration of the supported improvement plan or as permanent supports) and the timescales within which satisfactory improvement is expected to be reached and sustained.
- 2.6.7.2 There may be circumstances where, due to the nature of the issues of concern, there is a requirement to remove an individual from certain duties or to put in place additional supervision in order to mitigate risk during the supported improvement plan period. It may similarly be necessary to amend an individual's duties during the course of the supported improvement plan, to enable a focus on the particular areas of concern or through a need to introduce greater levels of supervision. It should always be made clear, however, that successful completion of the supported improvement plan will ultimately require the employee to be able to reach and sustain the required performance standards across their full range of job duties and without the need for any such increased level of work supervision. That said, a distinction should be drawn with those supports which would be considered sustainable beyond completion of the supported improvement plan, such as those introduced by way of a reasonable adjustment in the case of employees who may be considered to have a 'disability'.
- 2.6.7.3 The supported improvement plan should be signed and dated by both the manager and the employee to confirm agreement. It should be noted, however, that a failure by the employee to agree to the contents of a supported improvement plan will not prevent its implementation.
- 2.6.7.4 The employee's line manager should meet with the employee to undertake regular reviews within the agreed timescale in order to discuss progress and provide additional support as necessary. The manager must complete a written note of such review meetings, which the employee will also be invited to comment against. Again, such written notes should be signed and dated by both parties to confirm agreement.

## 2.6.8 Formal Procedure

2.6.8.1 Where there has been inadequate improvement and the employee is continuing to fail to perform to an acceptable standard despite having been given initial, informal guidance and support, or in more serious cases, a more formal approach will be required. Where evidence exists that there is a genuine factor which renders an employee incapable of carrying out their current role, and all parties are in agreement that redeployment is the only option, there is scope to move straight to Stage 2 of the formal procedure. Matters should not, however, be progressed to the formal stages if it is established that the employee has not had the necessary training, guidance and support required to undertake the job.

### 2.6.8.2 *Timescales*

2.6.8.2.1 Boards must ensure that issues are raised and dealt with promptly and that there are no unreasonable delays to setting up meetings, or in providing decisions or confirmation of those decisions.

2.6.8.2.2 Boards must determine, in partnership, reasonable timescales for each stage of the process, which should meet or exceed the recommended timescales set out within the ACAS booklet, *'Discipline and grievances at work: the ACAS guide'*<sup>41</sup>.

### 2.6.8.3 *Right to be Accompanied*

2.6.8.3.1 Employees have a right to be accompanied by a trade union/professional organisation representative or a work colleague at any investigatory meeting or meeting being held under the formal stages of the local policy (including appeals).

2.6.8.3.2 While there is no right to be accompanied at a meeting to confirm any preliminary precautionary measures, employees should (where practicable) be given reasonable notice to organise representation.

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<sup>41</sup> <http://www.acas.org.uk/index.aspx?articleid=2174>

2.6.8.3.3 Specific to any meeting being held under the formal stages (including appeals), the role of such a representative will be as follows:

- To prepare, present and sum up the employee's case on their behalf; and
- To provide further information after the employee's response or to respond on behalf of the employee to any views expressed, with a view to providing additional clarity to the case.
- The representative is not permitted to answer questions on the employee's behalf, with the employee being required to personally respond to any specific questions directly.

2.6.8.3.4 Where the employee is a trade union/professional organisation representative, no formal action should be taken without discussion with a full-time official of the appropriate organisation.

2.6.8.3.5 If the representative chosen by the employee is not available at the time proposed for any investigatory meeting or meeting being held under the formal stages (including appeals), the meeting must be postponed to an alternative time suggested by the employee, provided that such alternative time is reasonable and falls before the end of five working days after the original date proposed.

#### 2.6.8.4 *Attendance at Meetings Under the Formal Stages (Including Appeals)*

2.6.8.4.1 Formal Stage 1 meetings will comprise the Chair, the employee and their representative. The employee's line manager will also be in attendance.

2.6.8.4.2 Formal Stage 2 meetings will comprise the Chair, the employee and their representative. The employee's line manager and the Stage 1 Chair will also be in attendance.

2.6.8.4.3 A member of the HR department should normally be present at all formal meetings.

2.6.8.4.4 The panel make-up, and similarly the format, in the case of formal Stage 3 meetings and appeals, should mirror that contained within local policies developed in line with the *Management of Employee Conduct PIN Policy*<sup>42</sup>.

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<sup>42</sup> <http://www.staffgovernance.scot.nhs.uk/>

2.6.8.4.5 It is recognised that different Boards have evolved to different levels in terms of partnership working. Individual Boards may wish to discuss with their local partnership forum whether a trade union/professional organisation partner could be included in an appeal panel.

#### 2.6.8.5 *Schemes of Delegation*

2.6.8.5.1 The local policy must clearly identify the appropriate level of management which can chair meetings under the formal stages (including appeals) and those which have specific authority to dismiss employees.

2.6.8.5.2 Given the complexity within each Board, schemes of delegation should be agreed locally in partnership. The basic principle is that whoever hears the formal meeting must be impartial and have had no prior involvement in the case.

#### 2.6.8.6 *Formal Meetings*

##### 2.6.8.6.1 *Stage 1*

Where the informal approach has not resulted in the required improvement in performance, or in more serious cases, the matter will be escalated to Stage 1 of the formal procedure (except where evidence exists that there is a genuine factor which renders an employee incapable of carrying out their current role, and all parties are in agreement that redeployment is the only option, in which case there is scope to move straight to Stage 2).

The identified Chair will write to the employee and their representative in line with the locally agreed timescale, advising as follows:

- The date, time and location of the meeting;
- The procedure and stage being used;
- Clear details of the performance concerns;
- All necessary supporting documentation (including details of any informal approach already undertaken);
- Who will be attending the meeting;
- The right to be accompanied;
- An indication of the possible outcomes of the meeting;  
and
- A copy of the local policy.

The purpose of the meeting at Stage 1 will be to discuss and agree the following:

- The nature and extent of the performance concerns and whether such concerns are well-founded;
- Possible contributing factors (including whether indeed the matter is one of capability and whether the employee accepts that there is a problem);
- A review of action taken to date;
- Possible solutions (a number of potential solutions are set out within Annex B);
- A supported improvement plan, detailing the improvement in performance required, how it will be achieved, how achievement will be measured/evidenced and the identified timescales for improvement;
- The date on which the employee's performance will be reviewed again; and
- Action which may follow if the required improvement in performance is not achieved and maintained.

During the meeting, the employee will be told clearly and precisely the areas identified in which their performance is unsatisfactory and the improvement in work standard which is required (with the possible consequences of not doing so). There must be an opportunity for the employee to answer these points and to explain any difficulties which they may be having. There should also be a discussion about the ways and means by which the desired improvement may be achieved.

The outcome will be formally recorded in a letter to the employee and their representative within the locally agreed timescale following the meeting. The letter will include:

- Clear details of the performance concerns;
- The improvement(s) required;
- An agreed supported improvement plan to achieve improvement, underpinned by regular monitoring meetings;
- Timescales for improvement, with a date for overall review;

- The possible consequences if the necessary improvement is not achieved; and
- Details of the right of appeal.

The employee's line manager will thereafter be responsible for implementation of the agreed supported improvement plan, and ensuring regular interim review, prior to the meeting being reconvened at the overall review date to examine progress to date and the appropriate next steps.

The outcome of this reconvened meeting will fall into one of the following categories:

- The employee has improved to the required standard and maintained their performance to the extent that unsatisfactory performance is no longer an issue. This will be confirmed in writing to the employee and their representative, and application of the procedure will cease. Normal management support arrangements will thereafter apply;
- The required improvement has not been satisfactorily achieved and maintained, but it is agreed that this is likely to be the case following an extension to the supported improvement plan timescale for a reasonable period or through the introduction of further support measures not previously identified. In such cases, the process should remain at the current stage and this should be confirmed in writing to the employee and their representative; or
- The required improvement has not been satisfactorily achieved and maintained; it is agreed that this is unlikely to be the case following an extension to the supported improvement plan timescale for a reasonable period; and no further support measures have been able to be identified. In such cases, the matter should be progressed to the next stage of the procedure and this should be confirmed in writing to the employee and their representative.

### 2.6.8.6.2 Stage 2

Upon being advised that the matter is being escalated to Stage 2 of the procedure, the identified Chair will write to the employee and their representative in line with the locally agreed timescale, advising as per Stage 1.

The format of the meeting will also be as per Stage 1, with the support measures previously identified being reviewed and discussion as to whether they should continue or if additional support measures might be helpful.

However, at Stage 2, it may be felt appropriate to discuss other options, for example, formal career counselling or whether permanent redeployment (at the same or a lower pay level) would be possible, and, if so, is an agreeable option for the employee. In the case of redeployment, the local policy developed in line with the [Redeployment PIN Policy](#)<sup>43</sup> will apply. Redeployment should only be considered where there is a likelihood of a suitable alternative role (i.e. which is likely to be performed to the required standard and not present a continuing capability concern) arising within the Board within a reasonable period of time. It should be noted that there is no legal requirement to create a post for an employee who can no longer carry out the job they were employed to do. Redeployment to another post will only be an option where such a post exists. A post will not be created to facilitate such a move.

The outcome will be formally recorded in a letter to the employee and their representative within the locally agreed timescale following the meeting. Where the outcome of the meeting is to continue to pursue a supported improvement plan, the letter will be as per Stage 1, but will additionally note that, should the necessary improvement not be achieved, the matter may be escalated to Stage 3, which may result in consideration being given to redeployment, or if not appropriate, termination of employment on grounds of capability.

Where the outcome of the meeting is to pursue redeployment, this should be confirmed in writing to the employee and their representative, advising that if suitable alternative employment is not secured within a reasonable timescale, the matter will be escalated to Stage 3, which may result in consideration of termination of employment on grounds of capability.

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<sup>43</sup> <http://www.staffgovernance.scot.nhs.uk/>



As per Stage 1, the employee's line manager will thereafter be responsible for implementation of the agreed supported improvement plan, and ensuring regular interim review, prior to the meeting being reconvened at the overall review date to examine progress to date and the appropriate next steps. This presents a further opportunity to consider whether permanent redeployment would be possible, and, if so, is an agreeable option for the employee.

Where as a result of a reconvening of the above meeting, it is determined that there has been a failure to secure suitable alternative employment within a reasonable timescale, consideration will be given to escalating the matter to Stage 3, and, if so, this will be confirmed in writing to the employee and their representative.

#### 2.6.8.6.3 *Stage 3*

If, despite all the measures outlined above, the desired improvement has still not been achieved (or redeployment has already been exhausted or dismissed by one of the parties as a reasonable option), a Stage 3 meeting must be convened by the manager with the authority to dismiss upon being advised that the matter is being escalated to this stage of the procedure.

The identified Chair will write to the employee and their representative in line with the locally agreed timescale, advising as per Stage 1, but additionally confirming that consideration may be given to redeployment, or if not appropriate, termination of employment on grounds of capability.

As the outcome of this meeting may involve termination of employment on the grounds of capability, the manager involved at Stage 2 will be required to submit a written case within the locally agreed timescale, which will be shared with all parties in advance of the meeting. Similarly, the employee, if they wish to submit a written case in response, should do so within the locally agreed timescale following receipt of the manager's case, and, again, this will be shared with all parties in advance of the meeting. As such, notification of the meeting must include arrangements for the exchange of cases.

The purpose of the meeting will be to discuss the following:

- The nature and extent of the performance concerns and whether such concerns are well-founded;

- Possible contributing factors (including whether indeed the matter is one of capability and whether the employee accepts that there is a problem);
- The improvement in performance which was required and the extent of such improvement achieved;
- What action has been taken by the Board and by the individual with regard to the agreed supported improvement plan (including any reasonable adjustments and other support mechanisms put in place to address the performance concerns); and
- Whether there are any further considerations, not previously explored, which might result in the required improvement being achieved or whether timeframes previously applied should be extended, with clear consideration of the Board's duties under the *Equality Act 2010*<sup>44</sup> with regard to employees who may be considered to have a 'disability'.

There are three potential outcomes:

- It may be considered that the employee will be able to achieve and maintain the required standard of performance within their current role within a reasonable period of time, in which case a supported improvement plan should be agreed and implemented as per the earlier stages, with the Stage 3 meeting being adjourned until an agreed review date;
- Where it is considered that such improvement is not likely to be achieved and maintained, it may be considered that permanent redeployment (at the same or lower pay level) would be possible. Redeployment should only be considered where there is a likelihood of a suitable alternative role (i.e. which is likely to be performed to the required standard and not present a continuing capability concern) arising within the Board within a reasonable period of time. It should be noted that there is no legal requirement to create a post for an employee who can no longer carry out the job they were employed to do. Redeployment to another post will only be an option where such a post exists. A post will not be created to facilitate such a move. If such a decision is reached, the provisions of the Board's local

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<sup>44</sup> <http://www.legislation.gov.uk/ukpga/2010/15/contents>

policy developed in line with the *Redeployment PIN Policy*<sup>45</sup> should be used, with the Stage 3 meeting being reconvened should there be a failure to secure suitable alternative employment within a reasonable timescale; or

- It may be that, having considered both of the above options, termination of employment on the grounds of capability is the only option.

The employee and their representative will be advised in writing, within the locally agreed timescale following the meeting, of the outcome. If the outcome is to adjourn the Stage 3 meeting following pursuit of redeployment or further implementation of a supported improvement plan, then this should be confirmed in writing as per the above.

If the outcome is dismissal, the letter will include:

- Details of who was present at the meeting;
- Clear details of the performance concerns;
- Confirmation of the decision to dismiss and the reason such a decision was taken;
- The date on which employment will terminate (recognising the employee's contractual notice);
- Any necessary administrative or financial arrangements; and
- Details of the right of appeal.

#### 2.6.8.6.4 Appeals

The right to an appeal exists at all stages of the formal procedure. There will not be a delay in implementing management decisions pending an appeal, but they may subsequently be amended or reversed as a result of an appeal meeting. However, an appeal cannot result in a higher level of sanction on the employee than the action being appealed.

The procedure for appeal against decisions reached at each stage, including appeal against dismissal, should mirror that contained within the Board's local policy developed in line with the *Management of Employee Conduct PIN Policy*<sup>46</sup>.

<sup>45</sup> <http://www.staffgovernance.scot.nhs.uk/>

<sup>46</sup> <http://www.staffgovernance.scot.nhs.uk/>

#### 2.6.8.7 *Grievances/Dignity at Work Complaints*

Where an employee raises a grievance or dignity at work complaint during implementation of the formal capability process, the capability process may be temporarily suspended in order to deal with the grievance/complaint. Where the grievance/complaint and capability case are related, however, it may equally be appropriate to deal with both issues concurrently.

#### 2.6.8.8 *Failure to Engage*

There may be occasions when an employee is repeatedly unable or unwilling to attend an investigatory meeting or meeting being held under the formal stages (including appeals). This may be for various reasons, including illness or a refusal to face up to the issue. In such cases, consideration will require to be given to all the facts before coming to a reasonable decision on how to proceed. Considerations will include:

- Any rules the Board has for dealing with failure to attend such meetings;
- The seriousness of the issue under consideration;
- The employee's general work record, work experience, position and length of service;
- Medical opinion on whether the employee is fit to attend the meeting;
- How similar cases in the past have been dealt with; and
- Whether, therefore, it is considered fair and reasonable in the particular circumstances to proceed in the absence of the employee.

Where an employee continues to be unavailable to attend a meeting, it may be concluded that a decision in their absence will need to be made based on the evidence available. The employee must be informed where this is to be the case.

## **2.6.9 Debrief & Reintegration**

**2.6.9.1** Regardless of whether or not a matter progresses to the formal stages, it may be appropriate to undertake a debrief in order to review the case, any lessons learned and agree any further action required (not in relation to the individual with whom the matter was concerned, but in terms of general organisational improvement actions identified during the process). Involvement in such a discussion will be determined on a case-by-case basis.

**2.6.9.2** In addition to the duty of care, referred to below, it is also critical to ensure that, where the outcome does not involve dismissal, the employee is supported in being reintegrated back into their job role and within their team (or within any new job role/team into which they are redeployed). Managers should liaise with HR and staff-side representatives to discuss measures which might help to support reintegration.

## **2.6.10 Duty of Care**

**2.6.10.1** In line with current health and safety legislation, Boards have a duty of care to their employees. In the context of this PIN policy, this means that Boards needs to be mindful of the potential risks to health and safety associated with individuals who are involved (primarily the individual who is the subject of the case and any witnesses).

**2.6.10.2** Where it is suspected that an individual's health and safety may be at risk, at any stage of the procedure, contact should be made with Occupational Health as a matter of priority. Trade union/professional organisation representatives, where they perceive any potential concerns in this regard, should advise their member to seek Occupational Health support, as well as advising management accordingly.

**2.6.10.3** Particular consideration needs to be given in circumstances where a decision is reached following a Stage 3 meeting to dismiss an employee (or where such a decision has been upheld following appeal). Where concerns around the individual's health and safety exist, it may be helpful to arrange for the individual to meet with Occupational Health following verbal confirmation of the outcome or, where the outcome is to be conveyed solely in writing, invite the employee to attend to receive the written confirmation, with Occupational Health on-hand for immediate support.

## 2.6.11 Retention of Records

2.6.11.1 Boards must ensure that records pertaining to capability matters are managed in accordance with the *Data Protection Act 1998*<sup>47</sup> and the *Scottish Government Records Management: NHS Code of Practice (Scotland) Version 2.1 (January 2012)*<sup>48</sup>.

## 2.6.12 Notification of Statutory Regulatory Bodies

2.6.12.1 Mechanisms should be in place to ensure that statutory regulatory bodies are promptly informed, as appropriate, where concerns arise which suggest that an employee's fitness to practice may be impaired. Employees must be advised in advance of any such referral being made.

2.6.12.2 Where an employee's professional registration has been lost or suspended, and where any associated capability issues have not resulted in dismissal from the Board, such loss/suspension may mean that the employee is unable to fulfil the terms of their contract of employment.

2.6.12.3 Further information on when to refer to statutory regulatory bodies, and on the procedure to be followed in the case of loss/suspension of registration, is contained within the *Safer Pre and Post Employment Checks PIN Policy*<sup>49</sup>.

## 2.7 Training

2.7.1 To support the fair and consistent implementation of this PIN policy locally, it will be essential for NHSScotland Boards to ensure that those involved in managing capability issues have been appropriately trained. Joint training on Boards' local policies developed in line with this PIN policy should be developed in partnership and be delivered to managers and trade union/professional organisation representatives using a partnership model. It may be appropriate to incorporate such training into local management development programmes (which should additionally cover training on recruitment and selection, and on personal development planning and review/appraisal processes, as referred to within this PIN policy).

<sup>47</sup> <http://www.legislation.gov.uk/ukpga/1998/29/contents>

<sup>48</sup> <http://www.scotland.gov.uk/Publications/2012/01/10143104/0>

<sup>49</sup> <http://www.staffgovernance.scot.nhs.uk/>

**2.7.2** Additional training should be provided for those managers who may require to chair meetings under the formal stages of the procedure (including appeals) and no manager should be required to undertake such a role unless they have participated in such training.

## **2.8 Basis for Evaluation/Indicators of Success**

**2.8.1** Boards must subject their local policy developed in line with this PIN policy to ongoing monitoring to ensure that it is being fairly and consistently applied and that the stated principles and values are being met. The local policy must also be subject to regular review, in partnership, to ensure that any new standards and/or structures are incorporated when necessary and that it remains fit for purpose.

**2.8.2** In order to gauge how successful the local policy has been in operation, it is important in the first instance to establish baseline criteria. In order to do this, Boards will need to gather information about the current approach to capability issues. This information gathering can then be repeated after an agreed time span, following the introduction of the policy, to determine improvement or otherwise.

**2.8.3** A basis for evaluation could include:

- Feedback from staff surveys on changes in the approach to, and management of, capability issues;
- Joint review of anonymous facts and figures from trade union/professional organisation representatives, Occupational Health, managers, HR and confidential contacts (given that bullying/harassment can often affect performance) with a view to monitoring the overall picture; or
- Information gained from exit interviews.

**2.8.4** Boards should also monitor application of the policy in order to ensure that its approach avoids discrimination on grounds, for example, of the protected characteristics set out within the *Equality Act 2010*<sup>50</sup>. Additionally, in the case of disability, application of the policy should be monitored in order to ensure that the process is conducive to the early identification of all reasonable adjustments and that termination of employment on grounds of capability does not occur in such cases until it can be demonstrated that all such adjustments have been identified and exhausted without success.

**2.8.5** Other indicators of success can include:

- Awareness by employees that a policy exists and an understanding of how it works;
- Managers and employees using the procedure to deal with issues of capability;
- Managers and employees believing in the policy and feeling comfortable when using it;
- Improvements in the approach to capability issues; and
- Open discussions at local partnership forums about the effectiveness of the policy.

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<sup>50</sup> <http://www.legislation.gov.uk/ukpga/2010/15/contents>



# Appendix 1

## Model Management of Employee Capability Policy

### 1 Policy Statement

It is the aim of *[name of organisation]* to ensure that all employees are treated in a fair and equitable manner. Employees are required to perform the duties of their post to an acceptable standard. Where such standards are not met, a formal process should only be followed where there is no other alternative. In all cases, the primary objective must be to assist and support the employee to improve to the required standard. Dismissal on grounds of capability should only be considered as a last resort.

Nothing within this policy is intended to prevent the normal process of supervisory control whereby managers allocate work, monitor performance, draw attention to errors and poor quality and, as importantly, highlight work done well. This ongoing process may include informal assistance in achieving improvement to the required standard of work for the particular post. Such discussions are not part of the formal procedure outlined in this policy, with formal interviews and representation not being appropriate to this everyday ongoing process.

When performance concerns become apparent, action is required in the interests of both *[name of organisation]* and the employee. A failure to deal with it may adversely affect colleagues and standards of patient care, and as a result other staff may become disillusioned and dissatisfied. Some may even look elsewhere for employment. In this way, the efficiency and the quality of the service can quickly deteriorate.

Performance concerns in relation to supervisors and managers require immediate attention from senior management. The temptation to ignore such concerns, just because an individual is a manager, may have adverse consequences for the service. Employees managed by an ineffective line manager may perceive that raising such concerns with senior management will have repercussions for them. These individuals may become frustrated and there exists the potential for them to leave or become demotivated.

This policy has been developed in partnership with trade unions/professional organisations. It reflects the best practice identified in, and meets the minimum standards set out in, the *Management of Employee Capability Partnership Information Network (PIN) Policy*. The policy also reflects relevant current employment legislation.

## 2 Scope

This policy applies to all directly employed staff, including bank/temporary staff and *[name of organisation]* staff on secondment. It does not apply to matters concerning the professional competence of medical and dental staff. Nor does this policy apply in the case of capability issues relating to ill-health impacting upon attendance.

In the case of capability issues relating to staff groups who require to be professionally registered, *[name of organisation]* has in place a mechanism to ensure that relevant statutory regulatory bodies are informed, as appropriate, where such issues arise *[please state]*. Employees must be advised in advance of any such referral being made. Decisions in relation to ongoing professional registration as a result of such issues will be for the relevant statutory regulatory body to determine. However, this policy will apply in relation to those capability issues in so far as they relate to an individual's employment within *[name of organisation]*.

### 3 Definition

This policy applies in the case of issues of capability (i.e. where an employee is lacking in some area of knowledge, skill or ability, resulting in a failure to be able to carry out the required duties of the post to an acceptable standard). It does not apply in the case of issues of conduct. A distinction must be drawn between a genuine lack of capability and unsatisfactory performance that is attributable to a wilful refusal on the part of the employee to perform to the standards of which they are capable. This would be a question of “won’t do” rather than “can’t do” and, as a matter of conduct, should be dealt with under *[name of organisation]*’s Management of Employee Conduct Policy. However, it is recognised that it may not be clear at the outset whether a matter is one of conduct or capability, and therefore it may be that the approach to be followed requires to be changed in the course of managing such matters. Nor does this policy apply in the case of issues of capability related to ill health impacting on attendance. Such issues would be managed under *[name of organisation]*’s Promoting Attendance Policy.

The Employment Rights Act 1996 states that “*capability*” is “*assessed by reference to skill, aptitude, health or any other physical or mental quality*”. It also indicates that, where an employee is dismissed on grounds of capability, it must relate to: “*capability ... for performing work of the kind which he was employed by the employer to do*”. The “*work of the kind which he was employed by the employer to do*” must be determined in accordance with employee’s current contractual obligations and job description.

## 4 Aims of Policy

This policy will ensure that capability issues are dealt with in a fair and consistent manner. The policy provides:

- Assistance to employees to improve wherever possible when such issues arise;
- Firm but fair and consistent means of dealing with capability issues without recourse to the Management of Employee Conduct Policy; and
- A means of resolving capability issues where improvement in the current job is unachievable.

In order to achieve these aims, the following principles and values apply:

- This policy will be the sole route for dealing with issues of capability other than for matters of ill health related to attendance;
- This policy will be appropriately communicated to all employees and will be made readily accessible to them;
- Our Recruitment and Selection Policy will be applied effectively so as to ensure that only suitable candidates are appointed to posts and therefore prevent potentially avoidable capability issues from arising;
- All employees will be made aware of the standards of performance required, and of the need to perform acceptably to those standards;
- Good performance, and special effort by individuals and teams, will be acknowledged, encouraged and reinforced;
- Issues of capability will be addressed at the earliest opportunity and (except in more serious cases) on an informal basis in the first instance before resorting to the formal procedure;
- Issues of capability will be addressed fairly, consistently and confidentially, irrespective of the position/level within *[name of organisation]* of employees with whom such matters arise;
- Issues of capability will be addressed in a supportive manner, with every opportunity to improve within the current role being offered, and where such improvement is not achievable and sustainable, considering exploration of

suitable alternative employment opportunities. Termination of employment on grounds of capability will only ever be as a last resort;

- Joint training on the policy will be provided for managers and trade union/professional organisation representatives using a partnership model, in order to ensure that relevant staff are sufficiently skilled and competent in implementing the process;
- Specialist HR advice will be available to managers involved in implementing the process;
- At all stages of the formal procedure, an employee will be entitled to be accompanied by a trade union/professional organisation representative or work colleague (recognising that, by agreement of all parties, it may be helpful to additionally allow an individual to be accompanied during the informal stage);
- A different manager will be involved at each stage to ensure greater fairness within the procedure (through the introduction of a 'fresh pair of eyes') and to enable the identification of additional support measures not previously considered at an earlier stage of the process, thereby helping to ensure that all potential support measures have been identified and exhausted before any decision is taken to progress to the final stage of the procedure;
- The employee's immediate line manager will be involved throughout the procedure in order to ensure consistency. Beyond the informal stages their role will be to support and monitor progress against the identified supported improvement plan and to advise on such progress at any subsequent formal stage of the procedure; and
- This policy will be subject to ongoing monitoring to ensure that it is being fairly and consistently applied and that the stated principles and values are being met. The policy will be subject to regular review, in partnership, to ensure that any new standards and/or structures are incorporated when necessary and that it remains fit for purpose.

## 5 Roles & Responsibilities

Employees will:

- Ensure that they are aware of the standards of performance expected of them, and that they seek further guidance if unclear;
- Try, to the best of their ability, to meet the expected standards;
- Approach their manager at the earliest opportunity where they are having difficulties meeting the expected standards of performance;
- Work with managers on any agreed supported improvement plan;
- Comply with any support/monitoring mechanisms put in place; and
- Raise concerns with the appropriate manager where they perceive others not to be performing to the expected standards.

Managers will:

- Ensure that they fully comply with the provisions of *[name of organisation]*'s Recruitment and Selection Policy;
- Ensure that all employees for whom they are responsible are made aware of the standards of performance required;
- Ensure that such employees are made aware of and have access to this policy;
- Ensure that they monitor employee performance on an ongoing basis;
- Ensure that they effectively apply the appropriate personal development planning and review/appraisal process in respect of such employees;
- Ensure that good performance, and special effort by individuals and teams, is acknowledged, encouraged and reinforced;
- Ensure that they are fully aware of and comply with the provisions of this policy, identifying and dealing with issues which arise in a fair, consistent, confidential, timely and supportive manner; and

- Ensure that they seek HR advice where necessary and appropriate when dealing with capability issues.

Trade union/professional organisation representatives will:

- Work in partnership with *[name of organisation]* to develop joint training as part of the implementation of this policy and participate in such joint training;
- Work in partnership with *[name of organisation]* to raise awareness of the benefits of, and the approach to, the management of employee capability as outlined in this policy;
- Support their members, including providing representation throughout the formal stages of the procedure (and participating at the informal stages where agreement is reached in individual cases to do so), ensuring that their members are aware of their rights and responsibilities under this and other relevant policies; and
- Participate in partnership monitoring, evaluation and review of this policy.

Human Resources will:

- Develop and deliver, in partnership, training on this policy for managers and trade union/professional organisation representatives;
- Advise managers on the correct implementation of this policy; and
- Support employees by providing advice on this policy.

Occupational Health will:

- Provide timely and comprehensive guidance to managers and support to employees following any referral which requires to be made in the course of managing capability issues; and
- Specifically in the case of capability issues relating to ill-health which are impacting on performance, advise on whether an employee may be considered as having a 'disability' under the Equality Act 2010 and on all potential reasonable adjustments which should be considered (seeking advice from external organisations where necessary). Advice on reasonable adjustments will include advice regarding adjustments to the existing job role; or whether suitable alternative employment should be

considered and, if so, any restrictions as to the type of role, or adjustments which would require to be made to a role, in order to ensure suitability (and thereby avoid similar capability issues arising in future).

## 6 Procedure

It is usually best for managers to deal with performance concerns informally in the first instance. In many cases an informal conversation between the manager and an employee will be sufficient to ensure that performance improves.

Formal action will be appropriate where the initial approach has not led to the necessary improvement in performance, although, in more serious cases, a formal approach may need to be adopted from the outset.

### 6.1 Is There a Performance Issue?

Indications that an employee is not performing to the required standards of the job may arise in a variety of different ways:

- There may be complaints about, or criticisms of, the employee's work from colleagues, patients or visitors;
- There may be factual grounds to indicate unsatisfactory performance, such as poor results;
- The manager's own observations of the employee's performance may give rise to concerns; or
- The employee may have requested help to overcome a problem.

It may often be necessary to undertake an investigation as part of the procedure, in order to determine the nature and extent of the performance concerns, whether the matter is one of capability or conduct and why such concerns have arisen. Such investigation, which should be conducted according to the principles contained within *[name of organisation]*'s Management of Employee Conduct Policy, may involve examining work records and/or interviewing other individuals with whom the employee works (such as key internal/external customers or other team members).



## 6.2 Preliminary Precautionary Measures

It may be necessary, due to the nature of the issues of concern, to remove an employee from certain duties or to put in place additional supervision in order to mitigate risk, whilst any necessary investigation is undertaken and in advance of agreeing a supported improvement plan. It may ultimately be necessary, in such cases, to place an employee on a short period of paid leave until such times as a supported improvement plan can be agreed and implemented. However, this should be as a last resort and for as short a period as possible, all effort being made to identify alternatives which will allow the employee to remain at work (e.g. through the use of alternative duties or additional supervision).

## 6.3 Informal Approach

The employee's manager should meet with the employee, informally in the first instance to discuss the following:

- The particular performance concerns and whether the employee accepts that there is a problem:
  - It may be necessary at this stage to undertake a formal investigation if the nature and extent of the unsatisfactory performance is unclear or if the employee does not accept that there is a problem.
  - A written rationale of the nature and extent of the unsatisfactory performance must be provided to the employee without censure and they must be given reasonable time to consider this information in order to allow them to respond.
  - The employee may still express doubt or deny the existence of the problem. They must be encouraged to offer an explanation as to why they do not agree that there is a problem and the manager must listen to and consider what is said. However, where evidence supports that there is a problem, the employee's response does not prevent the manager from setting out the need to improve nor reduce the need to provide the employee with the requisite support and encouragement to do so.
- Possible contributing factors (including whether indeed the matter is one of capability), such as:
  - Lack of awareness/understanding of the standards of performance required;

- Ill health;
  - Difficulties in personal circumstances;
  - Organisational change;
  - Bullying or harassment;
  - Inappropriate or ineffective recruitment and selection processes; or
  - A combination of more than one of the above factors.
- Possible solutions;
  - Agree a supported improvement plan with specified time limits.

This will require a sensitively handled discussion free from interruption, involving the manager's undivided attention, in order to establish an atmosphere of trust and open discussion. Employees must be encouraged to describe the situation from their perspective. They must not evade pertinent questions and managers must probe the employee's response through open-ended, non-negative questions in order to identify possible contributing factors. The manager must constantly bear in mind that the aim is to assist the employee to improve their work performance to an acceptable standard. It is crucial that as many aspects of the problem as possible, as perceived by the employee and the manager, are established. It is important that this is not one-sided and that, as well as the manager understanding the employee's perspective, the employee understands the manager's issues. In all cases, managers will respond by adopting a non-threatening and non-critical approach.

The outcome of the meeting should be confirmed by the manager in writing to the employee. The letter should give details of the issues discussed, the agreements reached, the date of interim and final reviews, and include any supported improvement plan and timescales agreed.

The employee should be advised of the possibility of progression to the formal stages of the procedure should there be inadequate improvement within the agreed timescales.

## 6.4 Supported Improvement Plans

A supported improvement plan should be completed and updated at each stage of the procedure. It should detail the nature and extent of the unsatisfactory performance, the standards of performance required, how reaching and maintaining such standards are expected to be evidenced, what support mechanisms have been put in place (whether solely for the duration of the supported improvement plan or as permanent supports) and the timescales within which satisfactory improvement is expected to be reached and sustained.

There may be circumstances where, due to the nature of the issues of concern, there is a requirement to remove an individual from certain duties or to put in place additional supervision in order to mitigate risk during the supported improvement plan period. It may similarly be necessary to amend an individual's duties during the course of the supported improvement plan, to enable a focus on the particular areas of concern or through a need to introduce greater levels of supervision. It should always be made clear, however, that successful completion of the supported improvement plan will ultimately require the employee to be able to reach and sustain the required performance standards across their full range of job duties and without the need for any such increased level of work supervision. That said, a distinction should be drawn with those supports which would be considered sustainable beyond completion of the supported improvement plan, such as those introduced by way of reasonable adjustment in the case of employees who may be considered to have a 'disability'.

The supported improvement plan should be signed and dated by both the manager and the employee to confirm agreement. It should be noted, however, that a failure by the employee to agree to the contents of a supported improvement plan will not prevent its implementation.

The employee's line manager should meet with the employee to undertake regular reviews within the agreed timescale in order to discuss progress and provide additional support as necessary. The manager must complete a written note of such review meetings, which the employee will also be invited to comment against. Again, such written notes should be signed and dated by both parties to confirm agreement.

## 6.5 Formal Procedure

Where there has been inadequate improvement and the employee is continuing to fail to perform to an acceptable standard despite having been given initial, informal guidance and support, or in more serious cases, a more formal approach will be required. Where evidence exists that there is a genuine factor which renders an employee incapable of carrying out their current role, and all parties are in agreement that redeployment is the only option, there is scope to move straight to the formal process at Stage 2. Matters should not, however, be progressed to the formal stages if it is established that the employee has not had the necessary training, guidance and support required to undertake the job.

### 6.5.1 Right to be Accompanied

Employees have a right to be accompanied by a trade union/professional organisation representative or a work colleague at any investigatory meeting or meeting being held under the formal stages of this policy (including appeals).

While there is no right to be accompanied at a meeting to confirm any preliminary precautionary measures, employees should (where practicable) be given reasonable notice to organise representation.

Specific to any meeting being held under the formal stages (including appeals), the role of such a representative is as follows:

- To prepare, present and sum up the employee's case on their behalf; and
- To provide further information after the employee's response or to respond on behalf of the employee to any views expressed, with a view to providing additional clarity to the case.
- The representative is not permitted to answer questions on the employee's behalf, with the employee being required to personally respond to any specific questions directly.

Where the employee is a trade union/professional organisation representative, no formal action should be taken without discussion with a full-time official of the appropriate organisation.

If the representative chosen by the employee is not available at the time proposed for any investigatory meeting or meeting

being held under the formal stages (including appeals), the meeting must be postponed to an alternative time suggested by the employee, provided that such alternative time is reasonable and falls before the end of five working days after the original date proposed.

### **6.5.2 Attendance at Meetings Under the Formal Stages (Including Appeals)**

Formal Stage 1 meetings will comprise the Chair, the employee and their representative. The employee's line manager will also be in attendance.

Formal Stage 2 meetings will comprise the Chair, the employee and their representative. The employee's line manager and the Stage 1 Chair will also be in attendance.

A member of the HR department will normally be present at all formal meetings.

The panel make-up and similarly the format, in the case of formal Stage 3 meetings and appeals, mirrors that contained within the Management of Employee Conduct Policy.

Chairs will be identified in accordance with the scheme of delegation.

### **6.5.3 Stage 1**

Where the informal approach has not resulted in the required improvement in performance, or in more serious cases, the matter will be escalated to Stage 1 of the formal procedure (except where evidence exists that there is a genuine factor which renders an employee incapable of carrying out their current role, and all parties are in agreement that redeployment is the only option, in which case there is scope to move straight to Stage 2).

The identified Chair will write to the employee and their representative no later than *[state]* days in advance of the meeting, advising as follows:

- The date, time and location of the meeting;
- The procedure and stage being used;
- Clear details of the performance concerns;
- All necessary supporting documentation (including details of any informal approach already undertaken);
- Who will be attending the meeting;

- The right to be accompanied;
- An indication of the possible outcomes of the meeting; and
- A copy of the policy.

The purpose of the meeting at Stage 1 will be to discuss and agree the following:

- The nature and extent of the performance concerns and whether such concerns are well-founded;
- Possible contributing factors (including whether indeed the matter is one of capability and whether the employee accepts that there is a problem);
- A review of action taken to date;
- Possible solutions;
- A supported improvement plan, detailing the improvement in performance required, how it will be achieved, how achievement will be measured/evidenced and the identified timescales for improvement;
- The date on which the employee's performance will be reviewed again; and
- Action which may follow if the required improvement in performance is not achieved and maintained.

During the meeting, the employee will be told clearly and precisely the areas identified in which their performance is unsatisfactory and the improvement in work standard which is required (with the possible consequences of not doing so). There must be an opportunity for the employee to answer these points and to explain any difficulties which they may be having. There should also be a discussion about the ways and means by which the desired improvement may be achieved.

The outcome will be formally recorded in a letter to the employee and their representative issued within *[state]* days following the meeting. The letter will include:

- Clear details of the performance concerns;
- The improvement(s) required;
- An agreed supported improvement plan to achieve improvement, underpinned by regular monitoring meetings;
- Timescales for improvement, with a date for overall review;

- The possible consequences if the necessary improvement is not achieved; and
- Details of the right of appeal.

The employee's line manager will thereafter be responsible for implementation of the agreed supported improvement plan, and ensuring regular interim review, prior to the meeting being reconvened at the overall review date to examine progress to date and the appropriate next steps.

The outcome of this reconvened meeting will fall into one of the following categories:

- The employee has improved to the required standard and maintained their performance to the extent that unsatisfactory performance is no longer an issue. This will be confirmed in writing to the employee and their representative, and application of the procedure will cease. Normal management support arrangements will thereafter apply;
- The required improvement has not been satisfactorily achieved and maintained, but it is agreed that this is likely to be the case following an extension to the supported improvement plan timescale for a reasonable period or through the introduction of further support measures not previously identified. In such cases, the process should remain at the current stage and this should be confirmed in writing to the employee and their representative; or
- The required improvement has not been satisfactorily achieved and maintained; it is agreed that this is unlikely to be the case following an extension to the supported improvement plan timescale for a reasonable period; and no further support measures have been able to be identified. In such cases, the matter should be progressed to the next stage of the procedure and this should be confirmed in writing to the employee and their representative.

#### 6.5.4 Stage 2

Upon being advised that the matter is being escalated to Stage 2 of the procedure, the identified Chair will write to the employee and their representative no later than *[state]* days in advance of the meeting, advising as per Stage 1.

The format of the meeting will also be as per Stage 1, with the support measures previously identified being reviewed and discussion as to whether they should continue or if additional support measures might be helpful.

However, at Stage 2 it may be felt appropriate to discuss other options, for example formal career counselling, or whether permanent redeployment would be possible, and, if so, is an agreeable option for the employee. In the case of redeployment, *[name of organisation]*'s Redeployment Policy will apply. Redeployment should only be considered where there is a likelihood of a suitable alternative role (i.e. which is likely to be performed to the required standard and not present a continuing capability concern) arising within *[name of organisation]* within a reasonable period of time. It should be noted that there is no legal requirement to create a post for an employee who can no longer carry out the job they were employed to do. Redeployment to another post will only be an option where such a post exists. A post will not be created to facilitate such a move.

The outcome will be formally recorded in a letter to the employee and their representative within *[state]* days following the meeting. Where the outcome of the meeting is to continue to pursue a supported improvement plan, the letter will be as per Stage 1, but will additionally note that, should the necessary improvement not be achieved, the matter may be escalated to Stage 3, which may result in consideration being given to redeployment, or if not appropriate, termination of employment on grounds of capability.

Where the outcome of the meeting is to pursue redeployment, this should be confirmed in writing to the employee and their representative, advising that if suitable alternative employment is not secured within a reasonable timescale, the matter will be escalated to Stage 3, which may result in consideration of termination of employment on grounds of capability.

As per Stage 1, the employee's line manager will thereafter be responsible for implementation of the agreed supported improvement plan, and ensuring regular interim review, prior



to the meeting being reconvened at the overall review date to examine progress to date and the appropriate next steps. This presents a further opportunity to consider whether permanent redeployment would be possible, and, if so, is an agreeable option for the employee.

Where as a result of a reconvening of the above meeting, it is determined that there has been a failure to secure suitable alternative employment within a reasonable timescale, consideration will be given to escalating the matter to Stage 3, and, if so, this will be confirmed in writing to the employee and their representative.

### 6.5.5 Stage 3

If, despite all the measures outlined above, the desired improvement has still not been achieved (or redeployment has already been exhausted or dismissed by one of the parties as a reasonable option), a Stage 3 meeting must be convened by the manager with the authority to dismiss upon being advised that the matter is being escalated to this stage of the procedure.

The identified Chair will write to the employee and their representative no later than *[state]* days in advance of the meeting, advising as per Stage 1, but additionally confirming that consideration may be given to redeployment, or if not appropriate, termination of employment on grounds of capability.

As the outcome of this meeting may involve termination of employment on the grounds of capability, the manager involved at Stage 2 will be required to submit a written case no later than *[state]* days in advance of the meeting, which will be shared with all parties in advance of the meeting. Similarly, following receipt of the manager's case, the employee, if they wish, may submit a written case in response, no later than *[state]* days in advance of the meeting, and, again, this will be shared with all parties in advance of the meeting. As such, notification of the meeting must include arrangements for the exchange of cases.

The purpose of the meeting will be to discuss the following:

- The nature and extent of the performance concerns and whether such concerns are well-founded;
- Possible contributing factors (including whether indeed the matter is one of capability and whether the employee accepts that there is a problem);

- The improvement in performance which was required and the extent of such improvement achieved;
- What action has been taken by *[name of organisation]* and the individual with regard to the agreed supported improvement plan (including any reasonable adjustments and other support mechanisms put in place to address the performance concerns); and
- Whether there are any further considerations, not previously explored, which might result in the required improvement being achieved or whether timeframes previously applied should be extended, with clear consideration of *[name of organisation]*'s duties under the Equality Act 2010 with regard to employees who may be considered to have a 'disability'.

There are three potential outcomes:

- It may be considered that the employee will be able to achieve and maintain the required standard of performance within their current role within a reasonable period of time, in which case a supported improvement plan should be agreed and implemented as per the earlier stages, with the Stage 3 meeting being adjourned until an agreed review date;
- Where it is considered that such improvement is not likely to be achieved and maintained, it may be considered that permanent redeployment (at the same or lower pay level) would be possible. Redeployment should only be considered where there is a likelihood of a suitable alternative role (i.e. which is likely to be performed to the required standard and not present a continuing capability concern) arising within *[name of organisation]* within a reasonable period of time. It should be noted that there is no legal requirement to create a post for an employee who can no longer carry out the job they were employed to do. Redeployment to another post will only be an option where such a post exists. A post will not be created to facilitate such a move. If such a decision is reached, the provisions of *[name of organisation]*'s Redeployment Policy should be used, with the Stage 3 meeting being reconvened should there be a failure to secure suitable alternative employment within a reasonable timescale; or
- It may be that, having considered both of the above options, termination of employment on the grounds of capability is the only option.

The employee and their representative will be advised in writing within *[state]* days following the meeting, of the outcome. If the outcome is to adjourn the Stage 3 meeting following pursuit of redeployment or further implementation of a supported improvement plan, then this should be confirmed in writing as per the above.

If the outcome is dismissal, the letter will include:

- Details of who was present at the meeting;
- Clear details of the performance concerns;
- Confirmation of the decision to dismiss and the reason such a decision was taken;
- The date on which employment will terminate (recognising the employee's contractual notice);
- Any necessary administrative or financial arrangements; and
- Details of the right of appeal.

### **6.5.6 Appeals**

The right to an appeal exists at all stages of the formal procedure. There will not be a delay in implementing management decisions pending an appeal, but they may subsequently be amended or reversed as a result of an appeal meeting. However, an appeal cannot result in a higher level of sanction on the employee than the action being appealed.

The procedure for appeal against decisions reached at each stage, including appeal against dismissal is as follows *[state – should mirror that contained within the Management of Employee Conduct Policy]*.

### **6.5.7 Grievances/Dignity at Work Complaints**

Where an employee raises a grievance or dignity at work complaint during implementation of the formal capability process, the capability process may be temporarily suspended in order to deal with the grievance/complaint. Where the grievance/complaint and capability case are related, however, it may equally be appropriate to deal with both issues concurrently.

### 6.5.8 Failure to Engage

There may be occasions when an employee is repeatedly unable or unwilling to attend an investigatory meeting or meeting being held under the formal stages (including appeals). This may be for various reasons, including illness or a refusal to face up to the issue. In such cases, consideration will require to be given to all the facts before coming to a reasonable decision on how to proceed. Considerations will include:

- *[State any rules the organisation has for dealing with failure to attend meetings/hearings];*
- The seriousness of the issue under consideration;
- The employee's general work record, work experience, position and length of service;
- Medical opinion on whether the employee is fit to attend the meeting;
- How similar cases in the past have been dealt with; and
- Whether, therefore, it is considered fair and reasonable in the particular circumstances to proceed in the absence of the employee.

Where an employee continues to be unavailable to attend a meeting, it may be concluded that a decision in their absence will need to be made based on the evidence available. The employee must be informed where this is to be the case.

## 7 Debrief & Reintegration

Regardless of whether or not a matter progresses to the formal stages, it may be appropriate to undertake a debrief in order to review the case, any lessons learned and agree any further general organisational improvement actions identified during the process. Involvement in such a discussion will be determined on a case-by-case basis.

In addition to the duty of care, referred to below, it is also critical to ensure that, where the outcome does not involve dismissal, the employee is supported in being reintegrated back into their job role and within their team (or within any new job role/team into which they are redeployed). Managers should liaise with HR and staff-side representatives to discuss measures which might help to support reintegration.

## 8 Duty of Care

In line with current health and safety legislation, *[name of organisation]* has a duty of care to its employees. In the context of this policy, this means that *[name of organisation]* needs to be mindful of the potential risks to health and safety associated with individuals who are involved (primarily the individual who is the subject of the case and any witnesses).

Where it is suspected that an individual's health and safety may be at risk, at any stage of the procedure, contact should be made with Occupational Health as a matter of priority. Trade union/professional organisation representatives, where they perceive any potential concerns in this regard should advise their member to seek Occupational Health support, as well as advising management accordingly.

Particular consideration needs to be given in circumstances where a decision is reached following a Stage 3 meeting to dismiss an employee (or where such a decision has been upheld following appeal). Where concerns around the individual's health and safety exist, it may be helpful to arrange for the individual to meet with Occupational Health following verbal confirmation of the outcome or, where the outcome is to be conveyed solely in writing, invite the employee to attend to receive the written confirmation, with Occupational Health on-hand for immediate support.

## 9 Retention of Records

All records pertaining to management of an employee under this policy must be held in accordance with both the Data Protection Act 1998 and the *Scottish Government Records Management: NHS Code of Practice (Scotland) Version 2.1 (January 2012)*.

## 10 Review

This policy will be subject to ongoing monitoring and evaluation to ensure that it is being implemented fairly, consistently, effectively and in line with the policy's stated principles and values. The policy will be subject to regular review, in partnership, to ensure that any new standards and/or structures are incorporated when necessary and that it remains fit for purpose.

## Annex A: Supported Improvement Plan Template

| Area of concern | Level of expectation | Evidence of achievement | Support measures             | Review date |
|-----------------|----------------------|-------------------------|------------------------------|-------------|
|                 |                      |                         | (O) Ongoing<br>(T) Temporary |             |
|                 |                      |                         |                              |             |
|                 |                      |                         |                              |             |
|                 |                      |                         |                              |             |
|                 |                      |                         |                              |             |
|                 |                      |                         |                              |             |
|                 |                      |                         |                              |             |

**Additional Comments**

**Employee Signature:** ..... **Date:** .....

**Line Manager Signature:** ..... **Date:** .....

## Annex B: Suggested Solutions

There are many potential solutions to issues of capability. These may include but are not limited to:

- Provision of learning and development opportunities;
- Flexible working;
- Referral to Occupational Health;
- Relocation;
- Support in the workplace;
- Access to independent counselling services; or
- Redeployment.

### Provision of Learning and Development Opportunities

The provision of learning and development opportunities to assist an employee to improve their performance should be considered. The decision as to what constitutes appropriate learning and development and its delivery should be discussed and agreed with the employee in each case.

### Flexible Working

There are many variations around the theme of flexible working and it may be that a change of working hours or moving to part-time employment may assist in improving performance. Such a change may be temporary or permanent. Any changes would have to be agreed between the manager and employee, and every effort must be made to accommodate such requests when capability issues are being addressed. Details of flexible working practices which might be considered will be contained in Boards' local policies developed in line with the *Supporting the Work-Life Balance PIN Policy*<sup>51</sup>.

### Referral to Occupational Health

Occupational Health will, in many instances, have a key role in assessing and addressing certain aspects of capability issues. Managers may refer employees to Occupational Health or individuals may self-refer. Employees are assured that confidentiality will be maintained.

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<sup>51</sup> <http://www.staffgovernance.scot.nhs.uk/>

## Relocation

In supporting an individual to improve performance, it may be beneficial to offer either temporary or permanent relocation. The nature and duration of any relocation must be agreed between the individual and the manager. The employee would normally be doing the same job in the new location.

## Support in the Workplace

It is good practice to provide an employee who is under-performing with support from a skilled colleague. This promotes awareness of the demands of the job and an example against which to measure their own performance. The selection of the colleague will need to be carefully thought through by management and agreed with both of the individuals concerned. It is important to recognise that poor selection of the supporting colleague could result in further de-motivation of the under-performing employee.

## Access to Independent Counselling Services

Some employees may benefit from access to independent counselling services. Managers should ensure that employees are made aware of these services and how they may be accessed.

## Redeployment

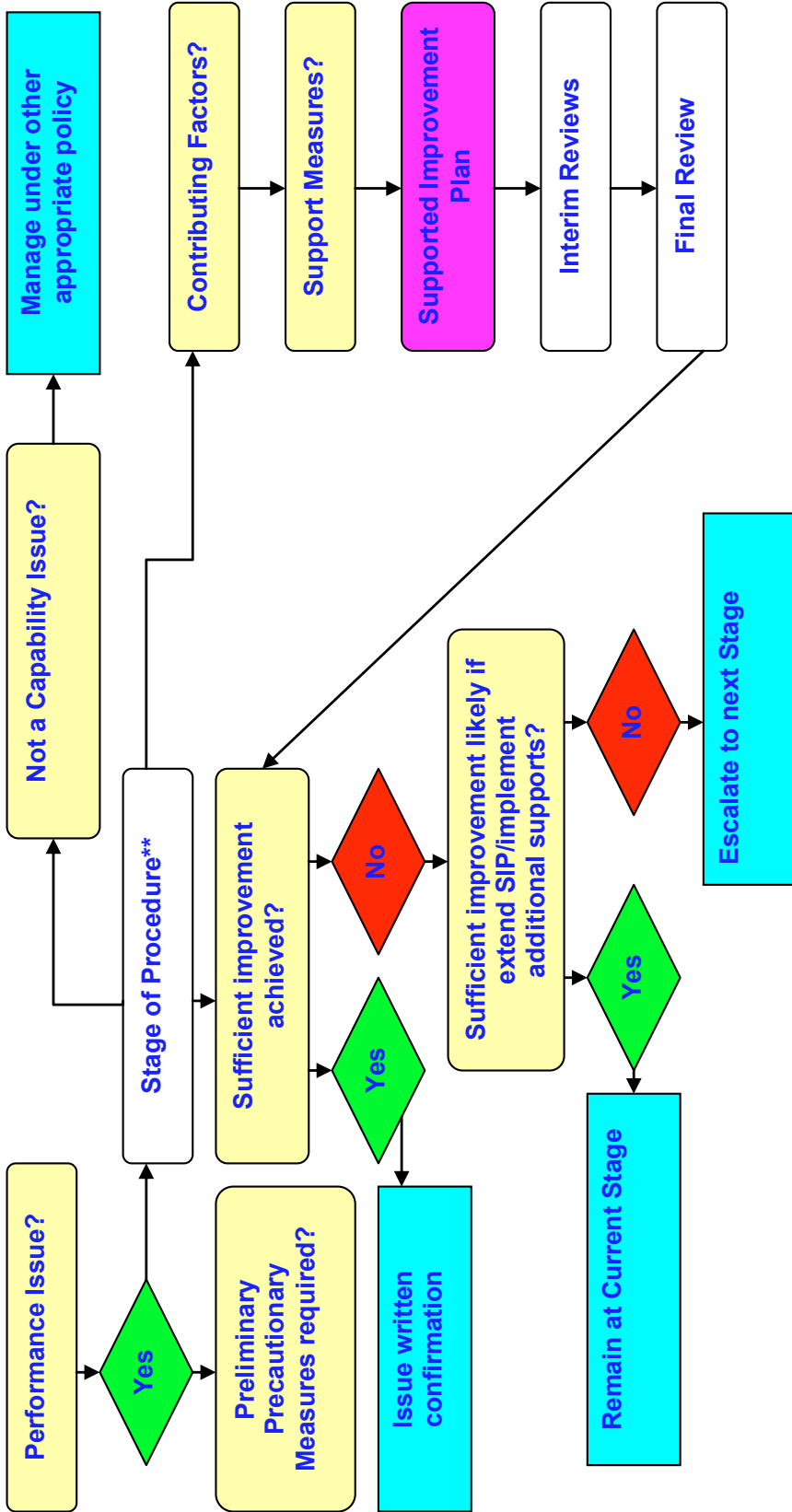
Where redeployment is considered this should be managed in accordance with Boards' local policies developed in line with the *Redeployment PIN Policy*<sup>52</sup>.

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<sup>52</sup> <http://www.staffgovernance.scot.nhs.uk/>

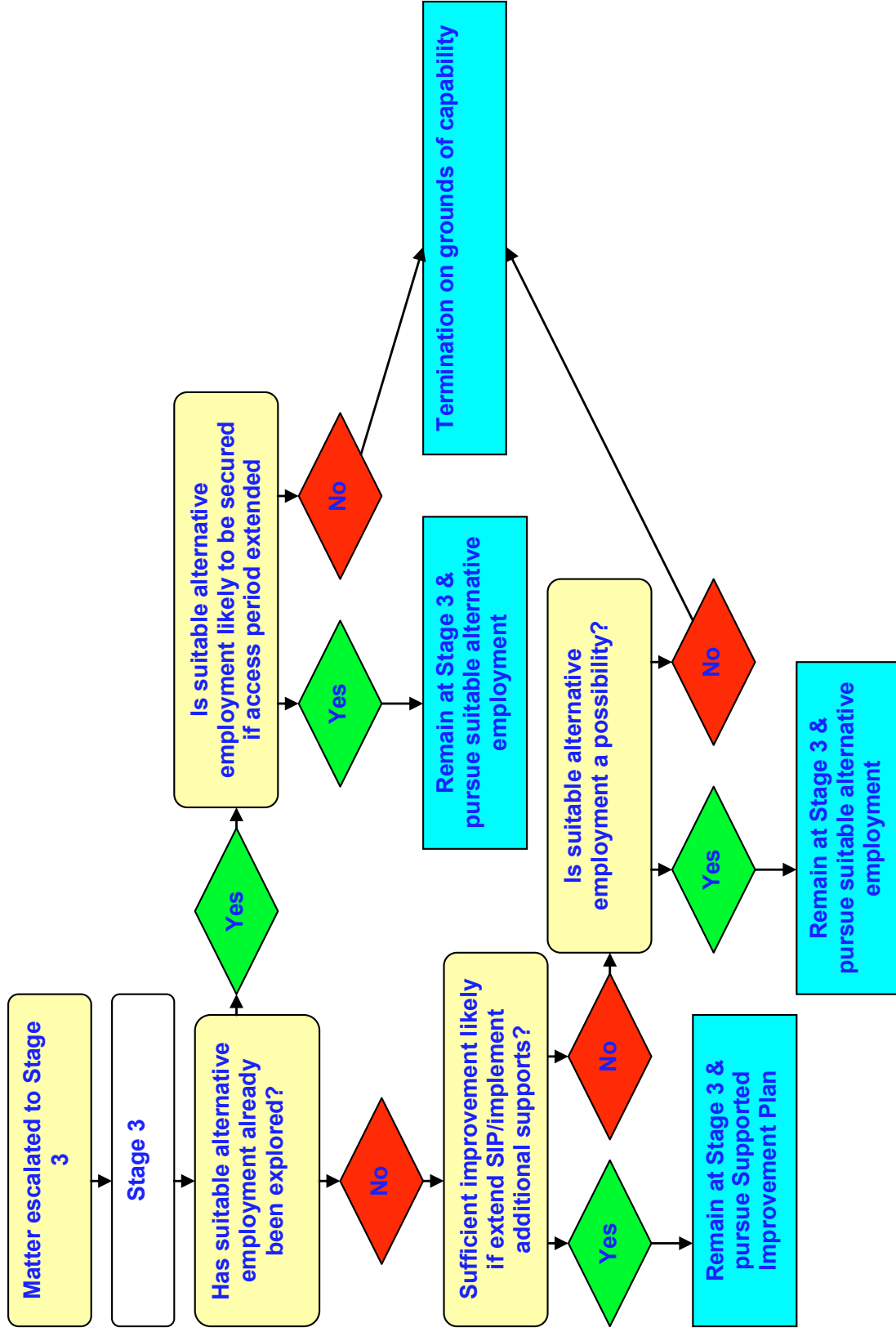


# Annex C: Procedure Flowchart



\*\* Procedure ordinarily commences from informal stage, although in more serious cases it can commence from formal Stage 1 (or, where all parties are agreeable that exploration of suitable alternative employment is the only option, from Stage 2)

\*\* At all stages, outcomes must be confirmed in writing



\*\* Exploration of suitable alternative employment, in line with the Board's redeployment policy, should be subject to interim review, with the Stage 3 meeting being convened (where this was pursued at Stage 2) or reconvened (where this was pursued at Stage 3) at the final review date if no suitable role has been secured.

## Appendix 2

### PIN Policy Review Group

|          |                 |  |
|----------|-----------------|--|
| Members: | Shazia Ashraf   | Staff Governance Associate, Scottish Government                                |
|          | Joyce Davison   | Assistant Secretary, BMA   |
|          | Linda Davidson  | Deputy Director of Human Resources & Staff Governance, NHS Dumfries & Galloway |
|          | Lillian Macer   | Employee Director, NHS Lanarkshire   |
|          | Darren Paterson | Staff Governance Associate, Scottish Government                                |
|          | Rhona Waugh     | Head of Human Resources, NHS Fife  |