

## PROPOSED AMENDMENT TO THE PSC MANUAL & CRAFT MOA 2015

<b>Ref:</b>	<b>Amendment PSC 15-107 PSC M&amp;C MOA Appendix 7</b>
<b>Re:</b>	<b>PSC Harmonised Capability Procedure</b>
<b>Proposal:</b>	Amendment to point 6.1 (stages)
<b>Existing Regulation:</b>	
<b>1. Introduction &amp; Definition</b>	
<p>1.1. The Isle of Man Government is committed to supporting and developing its employees in a fair and equitable manner to ensure that they are able to fulfil their roles and responsibilities to a standard of competence.</p>	
<p>1.2. Capability relates to the skills, aptitudes, mental or physical health or attendance at work of an employee and should not be confused with the Disciplinary Procedure which deals with an employee's conduct. A clear distinction must be drawn between lack of skill or ability and misconduct. The latter normally involves a measure of wilfulness for which some form of action under Disciplinary Procedures may be appropriate.</p>	
<p>1.3. At each stage of the Capability Procedure managers should give consideration to suitable alternative employment in the same Department if appropriate (consideration can be given to suitable alternative roles within other Departments), flexible working or offering a voluntary downgrading if this can be accommodated. Equally employees may also consider requesting flexible working, redeployment or voluntary downgrading.</p>	
<p>1.4. There may be occasions when some or all of the procedure is undertaken by another appropriate manager, for example during absence or if the specific circumstances of the case warrant it.</p>	
<p>1.5. Where an employee's poor performance is related to a qualifying disability under the Equality Act 2017, the Employer has a duty to make reasonable adjustments in the workplace and reasonable adjustments to the role. The employer must also not discriminate. Further guidance can be found in Annex A.</p>	
<b>2. Scope</b>	
<p>2.1. The Capability Procedure applies to individuals employed under the following terms and conditions:</p> <ul style="list-style-type: none"><li>• Public Services Commission Civil Service</li><li>• Public Services Commission Manual And Craft Workers</li></ul>	
<p>2.2. The Capability Procedure applies to all employees including those on probation and bank, casual and relief who are employees, but does not cover agency staff.</p>	
<p>2.3. The Office of Human Resources (OHR) and relevant Department, Board or Office Privacy Notices describe how personal information about an employee</p>	

is collected and used during and after their working relationship within the Isle of Man Government and what legal basis there is for gathering and retaining that information in accordance with the Data Protection Act 2018 including the General Data Protection Regulation. For further details about the information collected and retention periods, please refer to the Office of Human Resources and relevant Department, Board or Office Privacy Notices which are incorporated in to this procedure by reference.

### 3. Purpose

- 3.1 The purpose of the Capability Procedure is to:
- a) Assist and encourage employees to achieve and maintain the required standards of job performance/attendance.
  - b) Address unsatisfactory performance/attendance and allow employees the opportunity to improve.
  - c) Ensure issues in relation to performance and attendance are dealt with efficiently and that clear outcomes are identified at all stages.
  - d) Ensure a consistent, fair approach for employees who experience difficulties in performing the duties required of their post or attaining the standards required.

### 4. Right to be accompanied

- 4.1 At each stage of the formal procedure the employee should be advised of their right to be accompanied by a work colleague or trade union representative.
- 4.2 A member of the OHR may be present to clarify issues and provide advice to both parties if necessary.
- 4.3 There is no right to be accompanied by a legal representative other than in cases where the allegation is such that in addition to the risk of dismissal, the employee would also be at risk of being prohibited from working within their profession or with young or vulnerable people.

### 5. Referral to Professional Bodies

- 5.1. Certain groups of professional staff are responsible for complying with the relevant standards set by their professional regulatory body<sup>1</sup>. At any stage during the Capability Procedure, consideration may be given to refer the individual to their relevant professional regulatory body for consideration of action by that body even if the local investigation is not complete.
- 5.2. The responsibility for referral usually rests with a manager dealing with the case or chairing the meeting/ hearing, depending at what stage referral is deemed necessary. The manager should make a judgement about whether to refer, based on the individual circumstances of the case and in conjunction with guidelines issued by the relevant professional regulatory body.

---

<sup>1</sup> Such as Civil Aviation Authority, Health & Care Professions Council, Royal College of Veterinary Surgeons.

- 5.3. Where required the manager must always report a case to the relevant local services and professional regulatory body if they believe the conduct, competence, health<sup>2</sup> or character of a professional presents a risk.
- 5.4. The employer may take action under the Capability Procedure regardless of and independent of the outcome of any referral to a professional regulatory body.

## 6. Stages

- 6.1. Before the stages in the formal procedure are engaged, the employee should receive informal verbal feedback from their manager setting out any concerns about performance and/or attendance and how this can be improved. The following stages of the Capability Procedure are intended to be used when such informal discussions do not lead to the employee improving performance or attendance to an acceptable level.

## 7. Stage 1

- 7.1 When a manager believes that an employee's performance and/or attendance falls below the standards expected or they are experiencing difficulties with certain areas of work, the manager should invite the employee to a formal meeting to have a discussion that will consider the factors which may be contributing to the performance and/or attendance issues. If the reason for capability is attendance then this process can still be commenced if the employee is absent from work and they fail to engage with the process, but this should not be undertaken if the employee is medically certified as unable to engage with the process. Particular care needs to be taken if the reason for Relates to a mental or physical condition that may be defined as a disability as set out in the Equality Act 2017. You should consult with OHR for advice as to whether the employee may meet the definition of disability.
- 7.2 The purpose of this discussion is to establish the likely reasons for the poor performance/attendance and to:-
  - a) Establish the type and level of support the manager can provide.
  - b) Confirm the standards of performance / attendance expected.
  - c) Discuss which areas of performance / attendance the employee needs to improve.
  - d) Assess whether training or retraining is necessary.
  - e) Assess whether adaptations to the workplace may be required.
  - f) Identify whether the employee might appreciate some closer supervision and support or mentoring.
  - g) Assess whether welfare<sup>3</sup> support may be necessary.
  - h) Determine, where relevant, whether any stress management risk assessments may be necessary <https://hr.gov.im/media/1019/prevention-and-management-of-workplace-stress.pdf>
  - i) Identify the improvements required and agree an action plan as per 7.4
  - j) Explain the action that could be taken if there is no improvement.

---

<sup>2</sup> Health being a mental or physical condition or impairment

<sup>3</sup> Welfare support includes contact officer, union, OHR, staff welfare

- 7.3 Managers should also consider making an Occupational Health referral in conjunction with the employee and allow time to consider any recommendations made by the Occupational Health Adviser, which may include suggestions for reasonable adjustments to the role and/or workplace. Occupational Health cannot legally advise if an employee has a disability within the meaning of the Equality Act 2017. Advice should be taken from OHR where Occupational Health indicates that there may be a disability issue.
- 7.4 The manager should subsequently confirm support and the outcome to the employee, in writing, and that the Manager will monitor performance during the review period against the agreed action plan.
- 7.5 Where the employee meets the standard(s) required within the timescale set, the Capability Procedure should cease and the employee will be given both written confirmation and in any other form required by the employee<sup>4</sup> that:
- a) no further action will be taken at this time;
  - b) their performance/attendance shall be monitored in the normal way.
- 7.6 If after the agreed review period the employee has not shown sufficient improvement, the manager may progress to Stage 2.

## 8. Stage 2

- 8.1 If performance/attendance remains unsatisfactory, a further review meeting should take place - normally no later than 3 months after the first stage. The employee should be invited in writing to a capability meeting for which a minimum of 7 working days' notice should be given.
- 8.2 It is the employee's responsibility to arrange for a work colleague, trade union or staff association representative to attend with them, should they wish to be accompanied, and to ensure that the person they choose to accompany them is available to attend meetings. If their chosen companion is not available on the proposed meeting date, the employee can propose an alternative time provided that it is reasonable and preferably within 7 working days of the original scheduled date, having regard to the availability of the other parties involved.
- 8.3 At this meeting the manager should allow a positive and constructive discussion at which the manager will give a full explanation of the performance/attendance issues. The meeting should also consider factors from the employee which may be contributing to the employee's poor performance/attendance and consider options for addressing the issues, such as redeployment, welfare support or occupational health advice.
- 8.4 Following the stage 2 meeting, regular monitoring and assessment should be undertaken over a predetermined period; this will be dependent upon individual circumstances and may also involve further meetings to support and discuss progress. The review period may be determined by workflow cycles. The employee should be advised that help and encouragement will be given.
- 8.5 Where the employee meets the standard(s) required within the timescale set after the Stage 2 meeting, the Capability Procedure should cease and the

---

<sup>4</sup> Some individuals may require assistance in accessing and completing documents

employee will be given both written confirmation and in any other form required by the employee that:

- a) no further action will be taken at this time;
- b) their performance/attendance shall be monitored in the normal way;
- c) it would be expected that the improved performance/attendance would be sustained and if standards failed to be maintained within an agreed period the procedure will recommence at stage 2.

8.6 Where an employee fails to meet the standard(s) required at the end of the agreed timescale set, consideration should be given to:

- a) Options for redeployment (including within a different Department, Board or Office).
- b) Medical advice/treatment where performance attendance issues relate to ill health.
- c) More intensive counselling/advice if the reasons for the problem or the solution are not clear.
- d) Whether all reasonable adjustments have been made if the issues relate to illness or disability.

8.7 The employee must be made aware that failure to improve within a specified time period may justify dismissal on the grounds of capability. The agreed course of action and the consequences of failure to improve must be confirmed in writing to the employee as soon as possible after the meeting.

8.8 If no alternative option is suitable the employee should be informed of this and given written notification that the matter will progress to Stage 3 of the Capability Procedure.

### 9. Stage 3

9.1 If, despite encouragement and assistance, sufficient improvement has not occurred and is considered unlikely, a Stage 3 Capability Hearing will be convened usually from end of stage 2.

9.2 The employee should be notified in writing (and in any other form required by the employee) that they are required to attend a Stage 3 Capability Hearing, for which a minimum of 7 working days' notice should be given. The letter should specify the areas of performance/attendance which remain unsatisfactory. Additionally, the notification should state that the possible outcome could be dismissal and the employee will be given an opportunity to put forward their case/views at the Hearing.

9.3 The manager should prepare a detailed capability report and provide the employee with all relevant and supporting documentation and a copy of the report at least 10 working days prior to the hearing. The report must also be forwarded by the manager to the Chair of the hearing panel.

9.4 The Hearing panel will be the same as that which is defined for gross misconduct cases within the Disciplinary procedure for the employment group concerned. A representative of OHR will usually attend this hearing in an advisory capacity.



- 9.5 The role of the Hearing panel will be to take into consideration the facts contained within the report, including any alternative options that were considered to manage and support the employee.
- 9.6 Following the Capability Hearing, the hearing panel, can take one of the following courses of action:-
- a) A decision to take no further action.
  - b) Allow further time for improvement (with a final warning). If the panel is of the view that further time is required, it should notify the employee of the performance/attendance improvements still required, including targets and timescales. If the standard(s) are met during this extended time period, no further action should be taken, apart from monitoring, to ensure such improvements are sustained for a no more than 6 months. If the standards are not met or the improvements are not sustained for the 6 months the procedure may re-commence at Stage 3.
  - c) Redeployment and other options. The employee may be offered other options, for example, suitable alternative roles within the same Department, if opportunities available( if appropriate consideration can be given to suitable alternative roles within other Departments), 'flexible working' or a voluntary downgrade if these can be accommodated. If a suitable option is available, then the offer shall be made in writing, explaining why it is being made, the possible consequences of refusing it, and giving the employee reasonable time to consider the offer and to discuss it with their work colleague or trade union/staff representative. Where no alternative role can be found, or if the employee refuses the offer, the panel should consider one of the other options available at this Stage. If redeployed to another Department an appropriate level of training will be provided.
  - d) Dismissal with notice or pay in lieu of notice. If it is determined that dismissal is appropriate, this decision will be confirmed in writing within 5 working days of the hearing stating the employee's right to appeal and to whom the appeal should be addressed. The employee shall be informed that the appeal must be lodged in writing within 5 working days of the date of the dismissal letter and must state the grounds on which the appeal is made. When a dismissal is proposed the panel should consider whether adequate evidence has been presented that alternative employment is not available or appropriate.

## 10. Appeals against Dismissal

- 10.1 Employees who have been dismissed following a Stage 3 Capability Hearing have the right of appeal. The purpose of the appeal hearing is to review the decision made at the Stage 3 hearing.
- 10.2 The following are examples of grounds for appeal:
- a) The original hearing was in some way procedurally unfair.
  - b) The penalty of dismissal was excessive in relation to the performance/attendance issue.
  - c) New information of a material nature has come to light after the original hearing.
  - d) There was a failure to make reasonable adjustments for a disability

10.3 The appeal process is that which is defined for the Gross Misconduct Procedure.

## 11. Procedural Matters

11.1 The Capability Procedure could be implemented at stage 3 immediately depending upon the seriousness and circumstances of a case; however advice must be sought from OHR as to whether bypassing earlier stages can be justified.

The following may be examples where progression to stage 3 could be justified

- a) being long term absence with no prognosis for return to work)
- b) Position of Authority (where the poor performance could, given the seniority of the individual, have potentially severe effects on the team /organisation).
- c) Where there is a sudden and unexpected deterioration in the employee's ability to fulfil the role.( despite reasonable adjustments having been implemented in the event of an employee's disability where applicable)
- d) The actual or potential consequences of single errors are so serious that the submission of a capability report has to be contemplated.
- e) Instances where external factors make employment unsustainable e.g. additional qualification requirement, loss of registration/licence.

11.2 At each stage of the Capability Procedure, consideration should be given to whether the failure to meet standard(s) required in relation to unsatisfactory performance and/or poor attendance is related to other factors such as a disability, as defined by the Equality Act 2017 or acute or sudden personal/ domestic difficulty and if so, whether any reasonable adjustments could be made to the requirements of the job or other aspects of the working arrangements to support the employee. The reasonable adjustments if they can be accommodated, should, be made as soon as practicable. Advice should be sought from OHR in relation to reasonable adjustments. A failure to comply with the duty to make reasonable adjustments is unlawful where the employee has a disability.

11.3 Where the employee requests ill health early retirement, this should be handled in accordance with the employee's sick pay provisions within their terms and conditions for which there is a separate appeals procedure. Any request would be managed concurrently with the Capability Procedure and does mean the procedure would be suspended, depending on the merits of each case, whilst the ill health retirement application was in progress.

11.4 Sometimes an employee may raise a grievance, or a complaint connected to the case during the course of a Capability Procedure. In these circumstances the case should continue in parallel and any issues should be raised through either the Grievance or Fairness at Work procedures. If the Grievance or Fairness at Work complaint is upheld then the capability process may take this into consideration. In some cases the grievance may recommend that the capability process is not progressed and where the Grievance /Fairness at Work/Capability are running concurrently, any dismissal should not occur before any outstanding grievance or complaint connected to the capability is concluded. This only applies where there is a direct link between the capability and the grievance/complaint.

## 12. Privacy Notice

The Office of Human Resources (OHR) and relevant Department, Board or Office Privacy Notices describe how personal information about an employee is collected and used during and after their working relationship within the Isle of Man Government and what legal basis there is for gathering and retaining that information in accordance with the Data Protection Act 2018 including the General Data Protection Regulation. For further details about the information collected and retention periods, please refer to the [Office of Human Resources' Privacy Notice](#) and the relevant Department, Board or Office's Privacy Notice which are incorporated in to this document by reference.

**Annex A**

### AVOIDING DISCRIMINATION WHEN handling capability issues

This section provides guidance for managers to avoid discriminating unlawfully when handling capability issues in the workplace.

#### A. CAPABILITY PROCEDURES AND CRITERIA

The procedures must be applied fairly, in accordance with employment law, and avoid unlawfully discriminating directly or indirectly against people with protected characteristics.

As a reminder, the nine protected characteristics under Equality legislation are:

- disability,
- pregnancy and maternity,
- age,
- religion or belief,
- race,
- marriage and civil partnership,
- gender reassignment,
- sex,
- sexual orientation.

#### B. CAPABILITY PROCEDURES AND disability

Under the Equality Act 2017 a person has a 'disability' if they have a physical or mental impairment that has a substantial and long-term adverse impact on her or his ability to carry out normal day-to-day activities.

A disabled person is discriminated against if s/he is treated unfavourably because of something arising in consequence of their ability, and the person discriminating cannot show that the treatment is a proportionate means of achieving a legitimate aim. There is also protection for direct and indirect disability discrimination.

The Equality Act 2017 requires the employer to make 'reasonable adjustments' where:

- an employer's provision, criteria or practices put a disabled person at a 'substantial disadvantage' compared with a person who is not disabled;
- an employer's premises have physical features which puts a disabled person at a substantial disadvantage;



- a disabled employee will be put at a substantial disadvantage if they are not provided with an auxiliary aid.

A person with a disability may be discriminated against if they are treated less favourably due to their disability when compared to someone without a disability. This is direct discrimination can never be justified.

A person with a disability may be discriminated against because an apparently neutral practice, provision or criterion has the effect of treating the disabled person less favourably putting them at a particular disadvantage when compared to a person without a disability. This is indirect discrimination which may be objectively justified if it can be shown that the difference in treatment was a proportionate means to a legitimate aim.

A disabled person may also be discriminated against if they are treated unfavourably because of something arising in consequence of their disability. There is no requirement to compare the unfavourable treatment to another person. This is discrimination arising from a disability which may be objectively justified if it can be shown that the difference in treatment is a proportionate means of achieving a legitimate aim.

A legitimate aim is the reason behind the discrimination. The reason must not be discriminatory itself and it must be a genuine or real reason. An example of a legitimate aim may be health and safety of individuals, the efficient running of the service or the requirements of the business. Costs alone are not a legitimate aim.

The method of achieving the legitimate aim must be proportionate, which means it must be appropriate and necessary and that there are no other less discriminatory ways of achieving the same aim.

The Equality Act 2017 requires the employer to make 'reasonable adjustments' where:

- a provision, criteria or practices put a disabled person at a substantial disadvantage compared with a person who is not disabled;
- premises have physical features which puts a disabled person at a substantial disadvantage;
- a disabled employee will be put at a substantial disadvantage if they are not provided with an auxiliary aid.

As an employer, you should ensure that you have first considered the legal duty to make reasonable adjustments before using the capability procedure. If despite the reasonable adjustments, a disabled employee is not performing then you should implement the procedure.

There will be 'absence triggers' that may initiate this procedure. You should first consider whether those 'absence triggers' should be modified to become a 'reasonable adjustment' in the particular circumstances of the individual with a disability. What is 'reasonable' can depend on the alteration being sought by the disabled employee for an illness linked to their disability. An employer is not expected to make unreasonable adjustments to its sickness absence policy and 'absence triggers' for a disabled employee. You should be cautious however as disputes over sickness absence linked to disability might be considered as discrimination arising from disability, where the employee only needs to evidence unfavourable treatment because of something connected to their disability. It is advisable to seek further guidance from OHR.

### C. CAPABILITY PROCEDURES AND pregnancy AND MATERNITY

Action under the capability procedures should only be taken against a pregnant employee or employee on maternity leave if the action is about a matter that has nothing to do with her pregnancy or maternity. Action must not be taken if this relates to the employee's performance which has been poor because of pregnancy related illness or another reason related to her pregnancy or maternity.

If the performance is unrelated to the pregnancy or maternity, managers should ensure that the employee is well enough to attend meetings, and if not, timescales may need to be extended to accommodate specific circumstances e.g. maternity leave.

The employee may assume that you are taking action because she is pregnant or on maternity leave. You must show that this is not the case, and give clear examples of the reasons that are not connected to the pregnancy or leave.

#### D. CAPABILITY PROCEDURES AND AGE

The Equality Act 2017 protects the rights of people who share the protected characteristic of 'age' or 'perceived age'. A reference to age includes a particular age, an age range and an age group. However, there is no single age where someone becomes an 'older worker'. It is important with older workers, not to assume that performance deteriorates with age. Performance should be managed in the same way for every employee.

The Public Services Commission does not have a set compulsory retirement age, (except for some specific exceptions due to the requirements of the role), meaning employees can retire when they wish.

If there is a performance issue, the manager and the employer must give the employee a fair chance to reach and maintain an acceptable standard, no matter what their age. Only if the employee fails to improve after reasonable steps have been taken to help them, can the employer consider dismissing them for under-performance. And the manager and the employer must ensure the dismissal for under-performance is based on relevant facts. Under the legislation there is now no set 'retirement age' for most employment groups, meaning that employees can retire when they wish. It is important that managers do not use 'capability' as grounds for dismissing older workers, and if performance is an issue, it must not be connected to the person's age. Managers should consider the full range of remedial options and reasonable adjustments which may include reduced or flexible working.

#### E. CAPABILITY PROCEDURES AND RELIGION

Employees are protected from discrimination because they have a religion or a religious or philosophical belief. This also includes a lack of religion or belief. An employee may observe particular practices connected to their religion or belief.

For example, some followers of a religion may fast which could reduce their job performance during this period. Managers are advised to make allowances where the employee has advised of their religious belief and there is no justification for not accommodating the employee's needs. Criticising the employee's productivity or performance at this time could be discriminatory.

#### F. CAPABILITY PROCEDURES AND RACE

With an increasingly diverse workforce, staff of different nationalities, ethnic or national origins will be employed. As a result, there may be employees for whom English is not their first language.

Therefore, managers should consider assistance to those whose English skills are limited and find difficulty in communicating in English in an emotive situation such as a capability hearing. For example, an employer may wish to provide an interpreter.

**Proposed Amendment**

## 1. Introduction & Definition

- 1.1. The Isle of Man Government is committed to supporting and developing its employees in a fair and equitable manner to ensure that they are able to fulfil their roles and responsibilities to a standard of competence.
- 1.2. Capability relates to the skills, aptitudes, mental or physical health or attendance at work of an employee and should not be confused with the Disciplinary Procedure which deals with an employee's conduct. A clear distinction must be drawn between lack of skill or ability and misconduct. The latter normally involves a measure of wilfulness for which some form of action under Disciplinary Procedures may be appropriate.
- 1.3. At each stage of the Capability Procedure managers should give consideration to suitable alternative employment in the same Department if appropriate (consideration can be given to suitable alternative roles within other Departments), flexible working or offering a voluntary downgrading if this can be accommodated. Equally employees may also consider requesting flexible working, redeployment or voluntary downgrading.
- 1.4. There may be occasions when some or all of the procedure is undertaken by another appropriate manager, for example during absence or if the specific circumstances of the case warrant it.
- 1.5. Where an employee's poor performance is related to a qualifying disability under the Equality Act 2017, the Employer has a duty to make reasonable adjustments in the workplace and reasonable adjustments to the role. The employer must also not discriminate. Further guidance can be found in Annex A.

## 2. Scope

- 2.1. The Capability Procedure applies to individuals employed under the following terms and conditions:
  - Public Services Commission Civil Service
  - Public Services Commission Manual And Craft Workers
- 2.2. The Capability Procedure applies to all employees including those on probation and bank, casual and relief who are employees, but does not cover agency staff.
- 2.3. The Office of Human Resources (OHR) and relevant Department, Board or Office Privacy Notices describe how personal information about an employee is collected and used during and after their working relationship within the Isle of Man Government and what legal basis there is for gathering and retaining that information in accordance with the Data Protection Act 2018 including the General Data Protection Regulation. For further details about the information collected and retention periods, please refer to the Office of Human Resources and relevant Department, Board or Office Privacy Notices which are incorporated in to this procedure by reference.

## 3. Purpose

- 3.1 The purpose of the Capability Procedure is to:
- Assist and encourage employees to achieve and maintain the required standards of job performance/attendance.
  - Address unsatisfactory performance/attendance and allow employees the opportunity to improve.
  - Ensure issues in relation to performance and attendance are dealt with efficiently and that clear outcomes are identified at all stages.
  - Ensure a consistent, fair approach for employees who experience difficulties in performing the duties required of their post or attaining the standards required.

#### 4. Right to be accompanied

- 4.1 At each stage of the formal procedure the employee should be advised of their right to be accompanied by a work colleague or trade union representative.
- 4.2 A member of the OHR may be present to clarify issues and provide advice to both parties if necessary.
- 4.3 There is no right to be accompanied by a legal representative other than in cases where the allegation is such that in addition to the risk of dismissal, the employee would also be at risk of being prohibited from working within their profession or with young or vulnerable people.

#### 5. Referral to Professional Bodies

- 5.1. Certain groups of professional staff are responsible for complying with the relevant standards set by their professional regulatory body<sup>5</sup>. At any stage during the Capability Procedure, consideration may be given to refer the individual to their relevant professional regulatory body for consideration of action by that body even if the local investigation is not complete.
- 5.2. The responsibility for referral usually rests with a manager dealing with the case or chairing the meeting/ hearing, depending at what stage referral is deemed necessary. The manager should make a judgement about whether to refer, based on the individual circumstances of the case and in conjunction with guidelines issued by the relevant professional regulatory body.
- 5.3. Where required the manager must always report a case to the relevant local services and professional regulatory body if they believe the conduct, competence, health<sup>6</sup> or character of a professional presents a risk.
- 5.4. The employer may take action under the Capability Procedure regardless of and independent of the outcome of any referral to a professional regulatory body.

#### 6. Stages

---

<sup>5</sup> Such as Civil Aviation Authority, Health & Care Professions Council, Royal College of Veterinary Surgeons.

<sup>6</sup> Health being a mental or physical condition or impairment

6.1. Prior to commencing capability stage 1 the employee must receive feedback from their manager setting out concerns about performance and /or attendance and have an informal discussion on how this can be improved. This should be followed up with an email or letter so that both parties are aware of the expected level of performance with a review date. The following stages of the Capability Procedure are intended to be used when te informal discussions does not lead to the employee improving performance or attendance to an acceptable level.

~~Before the stages in the formal procedure are engaged, the employee should receive informal verbal feedback from their manager setting out any concerns about performance and/or attendance and how this can be improved. The following stages of the Capability Procedure are intended to be used when such informal discussions do not lead to the employee improving performance or attendance to an acceptable level.~~

## 7. Stage 1

- 7.1 When a manager believes that an employee's performance and/or attendance falls below the standards expected or they are experiencing difficulties with certain areas of work, the manager should invite the employee to a formal meeting to have a discussion that will consider the factors which may be contributing to the performance and/or attendance issues. If the reason for capability is attendance then this process can still be commenced if the employee is absent from work and they fail to engage with the process, but this should not be undertaken if the employee is medically certified as unable to engage with the process. Particular care needs to be taken if the reason for Relates to a mental or physical condition that may be defined as a disability as set out in the Equality Act 2017. You should consult with OHR for advice as to whether the employee may meet the definition of disability.
- 7.2 The purpose of this discussion is to establish the likely reasons for the poor performance/attendance and to:-
- Establish the type and level of support the manager can provide.
  - Confirm the standards of performance / attendance expected.
  - Discuss which areas of performance / attendance the employee needs to improve.
  - Assess whether training or retraining is necessary.
  - Assess whether adaptations to the workplace may be required.
  - Identify whether the employee might appreciate some closer supervision and support or mentoring.
  - Assess whether welfare<sup>7</sup> support may be necessary.
  - Determine, where relevant, whether any stress management risk assessments may be necessary <https://hr.gov.im/media/1019/prevention-and-management-of-workplace-stress.pdf>
  - Identify the improvements required and agree an action plan as per 7.4
  - Explain the action that could be taken if there is no improvement.
- 7.3 Managers should also consider making an Occupational Health referral in conjunction with the employee and allow time to consider any recommendations made by the Occupational Health Adviser, which may

---

<sup>7</sup> Welfare support includes contact officer, union, OHR, staff welfare



include suggestions for reasonable adjustments to the role and/or workplace. Occupational Health cannot legally advise if an employee has a disability within the meaning of the Equality Act 2017. Advice should be taken from OHR where Occupational Health indicates that there may be a disability issue.

- 7.4 The manager should subsequently confirm support and the outcome to the employee, in writing, and that the Manager will monitor performance during the review period against the agreed action plan.
- 7.5 Where the employee meets the standard(s) required within the timescale set, the Capability Procedure should cease and the employee will be given both written confirmation and in any other form required by the employee<sup>8</sup> that:
- no further action will be taken at this time;
  - their performance/attendance shall be monitored in the normal way.
- 7.6 If after the agreed review period the employee has not shown sufficient improvement, the manager may progress to Stage 2.

## 8. Stage 2

- 8.1 If performance/attendance remains unsatisfactory, a further review meeting should take place - normally no later than 3 months after the first stage. The employee should be invited in writing to a capability meeting for which a minimum of 7 working days' notice should be given.
- 8.2 It is the employee's responsibility to arrange for a work colleague, trade union or staff association representative to attend with them, should they wish to be accompanied, and to ensure that the person they choose to accompany them is available to attend meetings. If their chosen companion is not available on the proposed meeting date, the employee can propose an alternative time provided that it is reasonable and preferably within 7 working days of the original scheduled date, having regard to the availability of the other parties involved.
- 8.3 At this meeting the manager should allow a positive and constructive discussion at which the manager will give a full explanation of the performance/attendance issues. The meeting should also consider factors from the employee which may be contributing to the employee's poor performance/attendance and consider options for addressing the issues, such as redeployment, welfare support or occupational health advice.
- 8.4 Following the stage 2 meeting, regular monitoring and assessment should be undertaken over a predetermined period; this will be dependent upon individual circumstances and may also involve further meetings to support and discuss progress. The review period may be determined by workflow cycles. The employee should be advised that help and encouragement will be given.
- 8.5 Where the employee meets the standard(s) required within the timescale set after the Stage 2 meeting, the Capability Procedure should cease and the employee will be given both written confirmation and in any other form required by the employee that:
- no further action will be taken at this time;

---

<sup>8</sup> Some individuals may require assistance in accessing and completing documents

- their performance/attendance shall be monitored in the normal way;
- it would be expected that the improved performance/attendance would be sustained and if standards failed to be maintained within an agreed period the procedure will recommence at stage 2.

8.6 Where an employee fails to meet the standard(s) required at the end of the agreed timescale set, consideration should be given to:

- Options for redeployment (including within a different Department, Board or Office).
- Medical advice/treatment where performance attendance issues relate to ill health.
- More intensive counselling/advice if the reasons for the problem or the solution are not clear.
- Whether all reasonable adjustments have been made if the issues relate to illness or disability.

8.7 The employee must be made aware that failure to improve within a specified time period may justify dismissal on the grounds of capability. The agreed course of action and the consequences of failure to improve must be confirmed in writing to the employee as soon as possible after the meeting.

8.8 If no alternative option is suitable the employee should be informed of this and given written notification that the matter will progress to Stage 3 of the Capability Procedure.

### 9. Stage 3

9.1 If, despite encouragement and assistance, sufficient improvement has not occurred and is considered unlikely, a Stage 3 Capability Hearing will be convened usually from end of stage 2.

9.2 The employee should be notified in writing (and in any other form required by the employee) that they are required to attend a Stage 3 Capability Hearing, for which a minimum of 7 working days' notice should be given. The letter should specify the areas of performance/attendance which remain unsatisfactory. Additionally, the notification should state that the possible outcome could be dismissal and the employee will be given an opportunity to put forward their case/views at the Hearing.

9.3 The manager should prepare a detailed capability report and provide the employee with all relevant and supporting documentation and a copy of the report at least 10 working days prior to the hearing. The report must also be forwarded by the manager to the Chair of the hearing panel.

9.4 The Hearing panel will be the same as that which is defined for gross misconduct cases within the Disciplinary procedure for the employment group concerned. A representative of OHR will usually attend this hearing in an advisory capacity.

9.5 The role of the Hearing panel will be to take into consideration the facts contained within the report, including any alternative options that were considered to manage and support the employee.

9.6 Following the Capability Hearing, the hearing panel, can take one of the following courses of action:-

- A decision to take no further action.
- Allow further time for improvement (with a final warning). If the panel is of the view that further time is required, it should notify the employee of the performance/attendance improvements still required, including targets and timescales. If the standard(s) are met during this extended time period, no further action should be taken, apart from monitoring, to ensure such improvements are sustained for a no more than 6 months. If the standards are not met or the improvements are not sustained for the 6 months the procedure may re-commence at Stage 3.
- Redeployment and other options. The employee may be offered other options, for example, suitable alternative roles within the same Department, if opportunities available (if appropriate consideration can be given to suitable alternative roles within other Departments), 'flexible working' or a voluntary downgrade if these can be accommodated. If a suitable option is available, then the offer shall be made in writing, explaining why it is being made, the possible consequences of refusing it, and giving the employee reasonable time to consider the offer and to discuss it with their work colleague or trade union/staff representative. Where no alternative role can be found, or if the employee refuses the offer, the panel should consider one of the other options available at this Stage. If redeployed to another Department an appropriate level of training will be provided.
- Dismissal with notice or pay in lieu of notice. If it is determined that dismissal is appropriate, this decision will be confirmed in writing within 5 working days of the hearing stating the employee's right to appeal and to whom the appeal should be addressed. The employee shall be informed that the appeal must be lodged in writing within 5 working days of the date of the dismissal letter and must state the grounds on which the appeal is made. When a dismissal is proposed the panel should consider whether adequate evidence has been presented that alternative employment is not available or appropriate.

## 10. Appeals against Dismissal

10.1 Employees who have been dismissed following a Stage 3 Capability Hearing have the right of appeal. The purpose of the appeal hearing is to review the decision made at the Stage 3 hearing.

10.2 The following are examples of grounds for appeal:

- The original hearing was in some way procedurally unfair.
- The penalty of dismissal was excessive in relation to the performance/attendance issue.
- New information of a material nature has come to light after the original hearing.
- There was a failure to make reasonable adjustments for a disability

10.3 The appeal process is that which is defined for the Gross Misconduct Procedure.

## 11. Procedural Matters

- 11.1 The Capability Procedure could be implemented at stage 3 immediately depending upon the seriousness and circumstances of a case; however advice must be sought from OHR as to whether bypassing earlier stages can be justified.

The following may be examples where progression to stage 3 could be justified

- being long term absence with no prognosis for return to work)
  - Position of Authority (where the poor performance could, given the seniority of the individual, have potentially severe effects on the team /organisation).
  - Where there is a sudden and unexpected deterioration in the employee's ability to fulfil the role.( despite reasonable adjustments having been implemented in the event of an employee's disability where applicable)
  - The actual or potential consequences of single errors are so serious that the submission of a capability report has to be contemplated.
  - Instances where external factors make employment unsustainable e.g. additional qualification requirement, loss of registration/licence.
- 11.2 At each stage of the Capability Procedure, consideration should be given to whether the failure to meet standard(s) required in relation to unsatisfactory performance and/or poor attendance is related to other factors such as a disability, as defined by the Equality Act 2017 or acute or sudden personal/ domestic difficulty and if so, whether any reasonable adjustments could be made to the requirements of the job or other aspects of the working arrangements to support the employee. The reasonable adjustments if they can be accommodated, should, be made as soon as practicable. Advice should be sought from OHR in relation to reasonable adjustments. A failure to comply with the duty to make reasonable adjustments is unlawful where the employee has a disability.
- 11.3 Where the employee requests ill health early retirement, this should be handled in accordance with the employee's sick pay provisions within their terms and conditions for which there is a separate appeals procedure. Any request would be managed concurrently with the Capability Procedure and does mean the procedure would be suspended, depending on the merits of each case, whilst the ill health retirement application was in progress.
- 11.4 Sometimes an employee may raise a grievance, or a complaint connected to the case during the course of a Capability Procedure. In these circumstances the case should continue in parallel and any issues should be raised through either the Grievance or Fairness at Work procedures. If the Grievance or Fairness at Work complaint is upheld then the capability process may take this into consideration. In some cases the grievance may recommend that the capability process is not progressed and where the Grievance /Fairness at Work/Capability are running concurrently, any dismissal should not occur before any outstanding grievance or complaint connected to the capability is concluded. This only applies where there is a direct link between the capability and the grievance/complaint.

## 12. Privacy Notice

The Office of Human Resources (OHR) and relevant Department, Board or Office Privacy Notices describe how personal information about an employee is collected and used during and after their working relationship within the Isle of Man Government and what legal basis there is for gathering and retaining that information in accordance with the Data Protection Act 2018 including the General Data Protection Regulation. For further details about the information collected and retention periods, please refer to the Office of Human Resources' Privacy Notice and the relevant Department, Board or Office's Privacy Notice which are incorporated in to this document by reference.

## Annex A

### AVOIDING DISCRIMINATION WHEN handling capability issues

This section provides guidance for managers to avoid discriminating unlawfully when handling capability issues in the workplace.

#### A. CAPABILITY PROCEDURES AND CRITERIA

The procedures must be applied fairly, in accordance with employment law, and avoid unlawfully discriminating directly or indirectly against people with protected characteristics.

As a reminder, the nine protected characteristics under Equality legislation are:

- disability,
- pregnancy and maternity,
- age,
- religion or belief,
- race,
- marriage and civil partnership,
- gender reassignment,
- sex,
- sexual orientation.

#### B. CAPABILITY PROCEDURES AND disability

Under the Equality Act 2017 a person has a 'disability' if they have a physical or mental impairment that has a substantial and long-term adverse impact on her or his ability to carry out normal day-to-day activities.

A disabled person is discriminated against if s/he is treated unfavourably because of something arising in consequence of their ability, and the person discriminating cannot show that the treatment is a proportionate means of achieving a legitimate aim. There is also protection for direct and indirect disability discrimination.

The Equality Act 2017 requires the employer to make 'reasonable adjustments' where:

- an employer's provision, criteria or practices put a disabled person at a 'substantial disadvantage' compared with a person who is not disabled;
- an employer's premises have physical features which puts a disabled person at a substantial disadvantage;



- a disabled employee will be put at a substantial disadvantage if they are not provided with an auxiliary aid.

A person with a disability may be discriminated against if they are treated less favourably due to their disability when compared to someone without a disability. This is direct discrimination can never be justified.

A person with a disability may be discriminated against because an apparently neutral practice, provision or criterion has the effect of treating the disabled person less favourably putting them at a particular disadvantage when compared to a person without a disability. This is indirect discrimination which may be objectively justified if it can be shown that the difference in treatment was a proportionate means to a legitimate aim.

A disabled person may also be discriminated against if they are treated unfavourably because of something arising in consequence of their disability. There is no requirement to compare the unfavourable treatment to another person. This is discrimination arising from a disability which may be objectively justified if it can be shown that the difference in treatment is a proportionate means of achieving a legitimate aim.

A legitimate aim is the reason behind the discrimination. The reason must not be discriminatory itself and it must be a genuine or real reason. An example of a legitimate aim may be health and safety of individuals, the efficient running of the service or the requirements of the business. Costs alone are not a legitimate aim.

The method of achieving the legitimate aim must be proportionate, which means it must be appropriate and necessary and that there are no other less discriminatory ways of achieving the same aim.

The Equality Act 2017 requires the employer to make 'reasonable adjustments' where:

- a provision, criteria or practices put a disabled person at a substantial disadvantage compared with a person who is not disabled;
- premises have physical features which puts a disabled person at a substantial disadvantage;
- a disabled employee will be put at a substantial disadvantage if they are not provided with an auxiliary aid.

As an employer, you should ensure that you have first considered the legal duty to make reasonable adjustments before using the capability procedure. If despite the reasonable adjustments, a disabled employee is not performing then you should implement the procedure.

There will be 'absence triggers' that may initiate this procedure. You should first consider whether those 'absence triggers' should be modified to become a 'reasonable adjustment' in the particular circumstances of the individual with a disability. What is 'reasonable' can depend on the alteration being sought by the disabled employee for an illness linked to their disability. An employer is not expected to make unreasonable adjustments to its sickness absence policy and 'absence triggers' for a disabled employee. You should be cautious however as disputes over sickness absence linked to disability might be considered as discrimination arising from disability, where the employee only needs to evidence unfavourable treatment because of something connected to their disability. It is advisable to seek further guidance from OHR.

### C. CAPABILITY PROCEDURES AND PREGNANCY AND MATERNITY

Action under the capability procedures should only be taken against a pregnant employee or employee on maternity leave if the action is about a matter that has nothing to do with her pregnancy or maternity. Action must not be taken if this relates to the employee's performance which has been poor because of pregnancy related illness or another reason related to her pregnancy or maternity.

If the performance is unrelated to the pregnancy or maternity, managers should ensure that the employee is well enough to attend meetings, and if not, timescales may need to be extended to accommodate specific circumstances e.g. maternity leave.

The employee may assume that you are taking action because she is pregnant or on maternity leave. You must show that this is not the case, and give clear examples of the reasons that are not connected to the pregnancy or leave.

#### D. CAPABILITY PROCEDURES AND AGE

The Equality Act 2017 protects the rights of people who share the protected characteristic of 'age' or 'perceived age'. A reference to age includes a particular age, an age range and an age group. However, there is no single age where someone becomes an 'older worker'. It is important with older workers, not to assume that performance deteriorates with age. Performance should be managed in the same way for every employee.

The Public Services Commission does not have a set compulsory retirement age, (except for some specific exceptions due to the requirements of the role), meaning employees can retire when they wish.

If there is a performance issue, the manager and the employer must give the employee a fair chance to reach and maintain an acceptable standard, no matter what their age. Only if the employee fails to improve after reasonable steps have been taken to help them, can the employer consider dismissing them for under-performance. And the manager and the employer must ensure the dismissal for under-performance is based on relevant facts. Under the legislation there is now no set 'retirement age' for most employment groups, meaning that employees can retire when they wish. It is important that managers do not use 'capability' as grounds for dismissing older workers, and if performance is an issue, it must not be connected to the person's age. Managers should consider the full range of remedial options and reasonable adjustments which may include reduced or flexible working.

#### E. CAPABILITY PROCEDURES AND RELIGION

Employees are protected from discrimination because they have a religion or a religious or philosophical belief. This also includes a lack of religion or belief. An employee may observe particular practices connected to their religion or belief.

For example, some followers of a religion may fast which could reduce their job performance during this period. Managers are advised to make allowances where the employee has advised of their religious belief and there is no justification for not accommodating the employee's needs. Criticising the employee's productivity or performance at this time could be discriminatory.

#### F. CAPABILITY PROCEDURES AND RACE

With an increasingly diverse workforce, staff of different nationalities, ethnic or national origins will be employed. As a result, there may be employees for whom English is not their first language.

Therefore, managers should consider assistance to those whose English skills are limited and find difficulty in communicating in English in an emotive situation such as a capability hearing. For example, an employer may wish to provide an interpreter.

Agreed and authorised by:

Signed on behalf of  
Prospect

*M. A. Hevel*

Date: 27-2020

Signed on behalf of Unite  
the Union

*S. Hanson*

Date: 17/7/2020

Signed on behalf of the  
Commission

*[Signature]*

Date: 02/07/2020

---