

Frequently asked questions

These are provided for guidance or quick reference guide only, so always refer to the policy

1. Identifying Capability Issues

1.1 What is capability/poor performance?

Capability refers to your ability to carry out your duties and/or when your manager has a concern that you may not be able to achieve the performance standards required of your job/role. The Employment Rights Act 1996 describes capability as being assessed by reference to skill, aptitude, health or any other physical or mental quality.

1.2 How can I assess whether one of my team members is not performing or carrying out their duties to the required standards?

Capability is when you may be struggling to carry out what is expected of you. If you think one of your team is struggling with their work you can check by considering:

- Do they continually make errors and/or miss out things they shouldn't when carrying out their work
- Has another manager or team member told you that they have concerns about their standard of work. This could be because they believe your employee is not working to the level expected, or because they need to regularly help them carry out their own work
- Have they made a mistake which has caused a serious error or potential harm
- Have their actions resulted in standards, regulation or legislation not being met and has resulted in an investigation finding that there is a performance issue.

1.3 What standards should I be measuring performance/capability against?

You should consider measuring your employee's performance the following standards:

- Duties as described in the job description profile and/or person specification of the job
- Written reasonable standards set by you which are relevant to the job being carried out
- Professional codes of practice or guidelines relevant to the role
- KSF outline may be considered if available and you use it consistently in your department
- Details in the employee's contract of employment which relates to the expectations of the job
- Feedback from other supervisors/managers or team members on your employee's performance
- Any other reasonable factor you consider you can measure the performance against

When considering these you may need to compare them against the performance of relevant team/s and others offering the same services nationally; taking into consideration the spread of performance in any task or area of work.

2. Initial Management of Capability

2.1 How soon should I talk to an employee about any performance issues or capability concerns I have about their ability to carry out their work?

You will need to speak to your employee as soon as possible once you have identified any performance/capability concerns. Some employees might not know that there are any issues and may think that they are carrying out their duties as they should be. Talking to them at the earliest opportunity will give them a chance to understand the issues and work to change. By talking to your employee, on most occasions, you should be able to resolve the issue without needing to manage it through capability review.

2.2 I have a new member of my team, they are currently carrying out their induction with a trainer. The trainer has raised concerns about their performance. How do I manage this?

You would need to discuss the full details with the trainer to find out the reasons for this and then agree what other support they think may help and how long to extend the induction period for. The extension period should be for a reasonable and realistic amount of time to enable the new employee to reach the required standards expected to be able to sign off their induction and effectively carry out their new role. The reasonable and realistic timescale should be based on the needs of the individual, the service and the trainer's advice. You should then meet with your new employee to advise them of this and give them the details of any extra support to be provided with and the agreed induction extension period.

If at the end of the induction period, including any extension, the new employee has still not achieved the required standards of performance, you will need to apply the 'Final Review' process.

2.3 I have a new member of my team who I am carrying out an induction for. I have concerns over their performance, how do I manage this?

You should have set a full induction programme for your new employee to carry out when they first join. The programme should be clear on the length of period of the induction, the contents and an end date. Any relevant training they require to be able to carry out their new role should be delivered during the induction period and the standards expected to be achieved made clear.

If you have concerns about their abilities during the induction and/or training period you should discuss these with your new employee and agree what level of support needs to be provided to for them to achieve the induction/ training and reach the performance standards required. As part of this you may wish to discuss and agree an extension period to the induction. The extension period should be a reasonable and realistic amount of time to enable the new employee to reach the required standards expected to be able to sign off their induction and effectively carry out their new role. The reasonable and realistic timescale should be based on the needs of the individual, the service and the trainer's advice

If at the end of the induction, including any agreed extension, the new employee has still not achieved the required standards of performance, you will need to apply the 'Final Review' process.

2.4 I am concerned about my ability to carry out my job, what should I do?

If you are struggling with any aspect of your work, talk to your manager as soon as possible and explain what you are struggling with and why. Your manager should be able to agree any support to help you perform as required. Aspects you could both consider to help you include:

- Re-training in an area of work
- Extra training
- Shadowing
- Mentoring
- Coaching
- Reasonable adjustments
- Restricted duties
- Flexible working

3. Capability Support

3.1 What options do I have to help support one of my employee's who I am concerned has performance capability issues?

The support you offer will depend on the reasons why they are struggling. Therefore you will need to talk to them first to really understand the reasons for this. You may want to consider the following:

If it's a training issue consider?

- Re-training – so your employee can re-familiarise themselves with the work and levels expected with the part of the job with which they may be struggling
- Extra training – with the part of the job they may be struggling with,, either through OWD or within the department
- Working through any mandatory training together – to achieve the required standards
- Shadowing another team member who you know is able to carry out the same duties to the standards required and expected
- Coaching
- Mentoring

If it's a personal issue consider?

- Personal Health and Wellbeing – use the Health and Wellbeing Policy to help you both understand any possible issues or concerns
- Flexible working – if your employee is struggling due to the hours they work
- EAP – confidential advice, signposting or counselling if your employee has personal issues which are affecting their performance
- Time off work – if there are other concerns such as needing to care for a child or parent, where an amount of short time off would support them to effectively carry out their job. This would need to be agreed in line with the Time off Work Policy
- Coaching/Shadowing – if your employee is lacking confidence to carry out their work e.g. they have just been promoted and need some extra support to carry out the new duties

If it's a medical issue consider?

You will need to consider this in combination with the Attendance Policy.

- Occupational health – if it is linked to medical concerns
- Reasonable adjustments to the work they are expected to carry out and when this should be reviewed
- Restricted duties – allowing your employee to carry out other duties or less duties for a short time period and when this should be reviewed

4. Formal Review

4.1 As a manager when should I consider moving my employee to the 'Formal Review' stage of the Capability Policy?

You need to ensure that you have been having regular discussions with them so they are aware that there is a performance issue and they have had some opportunity to improve. You will also need to ensure that you have carried out and/or your employee is up-to-date with the following:

- PDPR - You have set and both agreed objectives
- Review of objectives - If the objectives relate to the performance areas of concern; that you have reviewed where your employee is with achieving these objectives and whether they are still relevant
- Mandatory training – they have completed any mandatory training that is relevant for them to be able to carry out their duties to the expected standards
- Medical Conditions – You have both discussed and addressed (through reasonable adjustments or restricted duties) any medical conditions your employee may have that are affecting their performance. Do this in combination with the 'Attendance' and 'Health and Wellbeing' policies.
- Personal Issues – You have both discussed any personal issues which your employee feels may be affecting their abilities to carry out the duties of concern. Where relevant, you have considered any support or options that may help.

If you have already discussed the above and implemented any relevant changes/support and they are still not achieving the expected standards then you will need to place them on a 'Formal Review'.

NB. You will need to refer to the policy in relation to new joiners.

4.2 How long should the 'Formal Review' period of the Capability policy be?

This will depend on what support is needed to carry out the duties of concern, the nature of the job and the length of time it will take to establish whether if there is improvement, and that the standards of performance required are being met.

If specific training or actions have been agreed, these will need to have taken place and a reasonable amount of time given afterwards to see the expected benefit from them.

The review period should be no less than 4 weeks and up to a maximum of 3 months.

4.3 Do I need to do anything during the 'Formal Review' period?

You would need to ensure you hold regular one-to-one meetings with your employee and also a formal mid review meeting, to discuss your employee's progress in line with the action plan. The meetings will also assist you to make sure any support agreed for your employee is taking place.

4.4 What paperwork needs to be completed for the 'Formal Review' period?

You will need to complete an Action Plan (see 'Templates') which will be agreed between you both. You will need to make a record of any meetings you have in relation to the 'Formal Review' and outcome letters should be provided within 7 calendar days of the meeting.

4.5 I don't think I will be able to achieve the performance standards expected of me under the Formal Review process, what can I do?

You should raise your concerns immediately within the 'Formal Review' meeting. Your manager will then be able to discuss the options you have which are;

- To go through the Capability process ensuring you have the right level of support and training to help you achieve the required standards of performance.
- If you think that even with support or extra training you will not be able to reach the expected standards of performance of the role you can discuss the option of leaving your role.

Unless you have a disability you will not be given redeployment support however, if you wanted to consider resigning, your manager and/or HR will be able to support you with completing applications for roles within NHSBT or the wider NHS, and allow you reasonable time off to attend any interviews. Your manager can also discuss with you your notice period to try and support a reasonable short extension to allow you to search and apply for NHSBT/NHS vacancies whilst still employed. Consideration would need to be given as to what duties you are able to safely carry out whilst working your notice period.

4.6 We are coming to the end of the 'formal Review' period what should be considered at the 'End of Formal Review' if my employee is not achieving the standards of performance expected?

If you believe that they are still not achieving the standards of performance expected, you should provide them with the reasons and documentation that demonstrates this. You should also both discuss any reasons if certain parts of the action plan have not have been carried out and why e.g. any training that was agreed where the training dates changed and therefore this has not been completed.

You can then consider the issues and decide whether you believe that there has been enough improvement that with an extension of the review period you are confident they will achieve the standards required. Or if you do not feel the standards would be achieved with an extended review period you will need to explain why to your employee and move them to the 'Final Review'.

You will need to ensure the outcome of the meeting is recorded and provide a letter to them within 7 calendar days, ensuring you advise them of the potential outcomes of the 'Final Review' meeting.

You will also need to ensure that if they have any medical conditions considered to be covered by the Equality Act, that they are offered the option of redeployment by completing the relevant form.

5. Final Review

5.1 What should I consider when I need to refer to an employee to the 'Final Review' stage?

You must make sure you have held an 'End of Formal Review' meeting with your employee and advised them you will be moving their performance/capability issues to a 'Final Review Meeting'.

You will need to arrange a panel for the meeting who will consider your employee's performance, the process that has been followed to support your employee to achieve the required standards and whether or not they believe your employee is capable of reaching the standards or if they should dismiss them due to capability.

The panel should consist of the chair who needs to be a manager (not previously involved in the process).with dismissing authority and they should be supported by Human Resources in an advisory capacity.

You or the chair will need to provide the employee with reasonable notice of the meeting, advising them of the reason the meeting is taking place, the arrangements, their right to be accompanied and the possible outcome of this meeting. You will need to provide the employee with two copies of your Management Statement of Case (one for them and one for their representative, if they intend to bring one).

5.2 What information will I need to present in a case for a 'Final Review Meeting'?

You will need to produce a management case which contains all the relevant documentation you used to manage your employee's performance/capability issues. This would include;

- Details of the performance/capability concerns and how these were identified
- Copy of your employee's PDPR
- Job description profile and/or person specification of the job
- Any formal documentation sent to your employee in relation to the capability process e.g. invite and outcome letters
- Any training records relevant to the performance issue/s identified (including mandatory training)
- Any support provided to help your employee achieve the standards required e.g. reasonable adjustments, flexible working etc
- The action plan agreed at the 'Formal Review Meeting'

You will present this information to the panel in order for them to understand the performance/capability issues you have raised with your employee, the actions agreed and any support provided.

5.3 I have been told that I need to attend a 'Final Review' meeting due to poor performance/my capability to carry out my job. What does this mean?

A 'Final Review' meeting is where a panel of either 2 or 3 managers, which may include a member of the HR department, consider the process that has been carried out since your manager identified there was an issue with your ability to carry out specific duties to the standards required.

The panel will ask your manager to present any documentation and details as to the reason why they believe you have an issue carrying out the duties of your work to the standards expected, the process they have followed in managing this and what they have done to support you to improve or achieve this.

You will be provided with an opportunity to discuss any reasons why you may not be improving or achieving the standards expected of the duties identified or any issues you have had with the process followed by your manager.

5.4 What can the panel decide as an outcome of the 'Final Review' meeting for capability issues?

The panel can decide to:

- Dismiss you – which would mean that your employment would end due to capability. You would be provided with the amount of notice required as shown in your contract of employment.
- Remove you from capability review as they believe you are working to the standards required
- Ask your manager to go back to the start of the process, should they feel necessary e.g. your PDPR, reasonable adjustments etc if not been completed
- Extension of the 'Formal Review' period – if they feel that you will be able to achieve the standards required with either more time or more support

5.5 Can I be dismissed due to poor performance / capability?

Yes. However this will be the last option that would be considered and only after the right level of support has been provided.

5.6 What will a panel at the 'Final Review' meeting consider when reviewing capability/performance issues?

- Have adequate advice been provided about the nature of the problems?
- Are the improvements required reasonable in terms of the needs of the job and the time allowed for improvement / achievement of the required standards?
- Has appropriate support agreed been provided. If not are there valid reasons for this?
- Have the processes in the policy been followed?

6. Disability/Medical Condition

6.1 I have a disability and think it might be affecting my performance. I would like to consider redeployment, can I consider this sooner than at the End of Review meeting?

Yes. If you feel you would like to consider it sooner in the process then you need to discuss this with your manager / or the person who is managing your capability review.

They will need to confirm that your medical condition is covered under the Equality Act either by asking you to provide some documentation to confirm this or by asking you to attend an Occupational Health appointment.

6.2 My manager has put me on a capability 'Formal Review'. I'd like to consider applying for ill-health retirement, what should I do?

If you want to consider ill-health retirement you will need to refer to the Attendance Policy and the related Frequently Asked Questions.

If you are a member of the NHS Pension Scheme you can make an application for ill health retirement. However this would need to be supported by medical evidence, which is usually obtained via OH. Your manager would therefore need to obtain advice from HR as to how to take this request forward.

Your performance issues will continue to be managed under the Capability Policy while you decide whether to apply for ill-health. If you decide to pursue an ill health application then your manager would need to provide you with written notice that your employment is being terminated at the point when your application is submitted.

6.3 What should I do if my employee wants to consider ill-health whilst on capability monitoring?

The ill-health retirement process is explained in the Attendance Policy and related Frequently Asked Questions so you need to look at those documents.

All options around the support that can be offered should be discussed to ensure ill-health is the right option. You need to consider and discuss;

- change in working hours etc; that could be made due to a medical condition, that could support in improving performance and whether you/your employee wishes to consider these.
- if a medical condition is covered under the Equality Act whether there is a preference to consider redeployment options.
- if restricted duties for a reasonable amount of time could be considered to support an improvement in performance

7. Retirement

7.1 I am currently on a 'Formal Review' under the Capability policy, and want to consider retirement, what should I do?

You should discuss this with the manager who is supporting you on the 'Formal Review' so you can talk about the options open to you. If you are over the appropriate age to be able to apply for retirement your manager will be able to discuss the process with you.

8. Conduct

8.1 I am concerned about a conduct issue with one of my employees, should I manage this under the Capability policy?

Any conduct issue needs to be managed under the Disciplinary policy. Capability only refers to an issue with the poor performance of an employee. If you have concerns one of your employee's behaviour is affecting their ability to do their work appropriately, you should initially refer to the Disciplinary policy and seek guidance from HR. The Disciplinary FAQ's will provide you with some guidance on what a conduct issue is so you can make sure you are managing the issue under the right policy.

9. Redeployment/demotion

9.1 My manager has told me there is an issue with my performance and wants to meet with me under the Formal Review stage of the Capability policy. I'd like to consider redeployment, what should I do?

You will only be able to be placed on the redeployment register if you have a medical condition that is classed as a disability. In the policy redeployment is offered at the end of the Formal Review stage as we want to be able to support you to achieve the performance standards required. However, if you have a disability and would like to consider it sooner in the process then you need to discuss this with your manager / or the person who is managing your capability review at the meeting.

Your manager will need to confirm that your medical condition is covered under the Equality Act either by asking you to provide some documentation to confirm this or by asking you to attend an Occupational Health appointment.

If you do not have a medical condition or your medical condition is not classed as a disability then you would not be offered the option of redeployment. If, however, you feel that even with support or extra training you will not be able to reach the expected standards of performance of the role, you can discuss the option of leaving your role. If you wanted to consider resigning, you still have the option to look at other jobs within NHSBT via the Vacancy bulletin. Although you won't be placed on the redeployment register your manager and/or HR will be able to support you with completing any applications for roles within NHSBT or the wider NHS, and allow you reasonable time off to attend any interviews. Your manager can also discuss with you your notice period to try and support a reasonable short extension to allow you to search and apply for NHSBT/NHS vacancies whilst still employed. Your manager would also need to look at what duties you are able to safely carry out whilst working your notice period.

9.2 My manager has identified some issues with my performance, I want to consider demotion back in to my previous role, is this an option?

We would encourage you to discuss your concerns about the new role with your manager first. It can be difficult to start in a new role and fully understand or carry out the duties of the role, especially when it is a promotion. You should consider talking to your manager about what support can be offered to help you achieve the new duties and consider continuing with the Capability process.

Your manager would not be able to offer you an automatic demotion. If there was a vacancy in a position you have previously worked in, you would need to apply for the position following the usual recruitment process.

Although you won't be offered demotion your manager and/or HR will be able to support you with completing any applications for roles within NHSBT or the wider NHS. They will also be able to allow you reasonable time off to attend any interviews.

9.3 Can I offer an employee who has recently been promoted a demotion back to their previous role, if they are not achieving the performance standards expected in their role?

Demotion is not an option that can be offered to an employee who has poor performance issues. You should be looking at supporting your employee to be able to achieve the standards required.

We don't offer demotion for various reasons;

- There may not be a vacant position in the employee's previous role.
- If there was a suitable position you may have other employee's who wish to be considered for the role and therefore all employee's (including any that you are managing through the Capability procedure) should apply for the position following the usual recruitment process.

10. Representation

10.1 Do I have the right to representation during any stage of the capability process?

For an informal meeting, no representation is required. You do however, have the right to representation during any part of the 'formal' stages of the capability process.

At the formal stages you will have the right to representation by a NHSBT employee or representative of a Trade Union you belong to, not acting in a legal capacity.

Your representative is allowed to put forward your case and respond on behalf of you to any views expressed at the meeting if you want them to. However, they will not be able to answer questions on your behalf, prevent you from explaining your case or address your manager or the panel (at the 'Final Review Meeting' stage) if you do not want them to.

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