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# MANAGEMENT OF EMPLOYEE CAPABILITY POLICY

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## 1. POLICY STATEMENT

It is the aim of NHS Highland 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 NHS Highland 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 feel threatened, become frustrated and there exists the potential for them to leave or lose motivation.

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 NHS Highland 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. This policy will apply to the management of capability (ill health) that affects performance of an employee in their current role and this policy will cover cases where the Equality Act applies.

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In the case of capability issues relating to staff groups who require to be professionally registered, NHS Highland has in place a mechanism to ensure that relevant statutory regulatory bodies are informed, as appropriate, where such issues arise. 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 NHS Highland.

### 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 NHS Highland'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 NHS Highland'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:

- Assurance that management of capability is carried out in partnership with Nursing, Midwifery & Allied Health / Social Work (NMAHP/SW)  
Professional leadership by managers seeking support at an early stage to ensure appropriate professional advice informs the process as relevant at all stages
- Assistance to employees to improve wherever possible when such issues arise;

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- 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. Serious cases will be defined by the impact capability has;
- Issues of capability will be addressed fairly, consistently and confidentially, irrespective of the position / level within NHS Highland 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;
- HR advice and relevant professional specific 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);

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- 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’) unless agreed otherwise 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 or seek support from the NMAHP/SW Professional Lead at the earliest opportunity where they are having difficulties meeting the expected standards of performance;
- Work with managers and professional leads as relevant 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 NHS Highland’s *Recruitment and Selection Policy*;
- Ensure that all employees for whom they are responsible are made aware of the standards of performance required;

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- 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.
- Ensure that they seek profession specific advice where necessary and appropriate when dealing with NMAHP/SW capability issues.

Trade union / professional organisation representatives will:

- Work in partnership with NHS Highland to develop joint training as part of the implementation of this policy and participate in such joint training;
- Work in partnership with NHS Highland 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 informal and formal stages of the procedure, 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:

- Will attend formal meetings to provide advice on process; ensure a consistent and balanced decision has been reached; and to ensure that special advice or knowledge is accessed and adequately documented.
- Develop and deliver, in partnership, training on this policy for managers, professional leads, and trade union / professional organisation representatives;
- Advise managers on the correct implementation of this policy; and
- Support employees by providing advice on this policy.

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## 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 in accordance with Annex D, 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).

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## Loss of Registration

If a member of staff becomes ineligible for registration with the relevant body then (s) he can no longer be employed in a post requiring registration. Employers are expected to deal with such a situation, which is not associated with conduct issues, in the same way as any other capability issue. However, it is also recognised that the circumstances leading to the loss of registration may have arisen due to issues of conduct, in which case referral to the Management of Employee Conduct Policy would be appropriate.

## 6.2 Preliminary Precautionary Measures

It may be necessary, due to the nature of the issues of concern, or where there is evidence of poor professional practice, 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:

Facts and / or evidence relating to the capability issue must be made clear by the line manager.

- Advice should be sought from professional advisors when appropriate.
- If the extent of the unsatisfactory performance is unclear or if the employee does not accept that there is a problem, it may be necessary at this stage to undertake an investigation. Guidance on how to investigate is contained in NHS Highland Management of Employee Conduct Policy.
- 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

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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 with appropriate involvement from profession specific leads. 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

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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. Annex A provides a pro forma guidance and Annex D provides a checklist of factors a manager should consider.

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 in professional competency and any other standards across their full range of job duties and without the need for any such increased level of work supervision. Except for those introduced by way of reasonable adjustment in the case of employees who may be considered to have a disability. Annex E provides further guidance on the definition of what is a reasonable adjustment.

The supported improvement plan should be signed and dated by both the manager and the employee to confirm agreement. It should be noted, however, if the employee does not agree to the contents of a supported improvement plan this will not necessarily 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 review meetings need to be documented and Annex A provides a template.

## 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. The formal procedure may also be required where it is not possible to reach agreement regarding support / timescales etc at the informal stage. 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, or if the support plan reviews have not been carried out as required in section 6.4.

### 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 informal and formal stages of this policy (including appeals).

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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 informal and 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)**

In most cases the following people will be present at each formal meeting: The chairperson with a member of the personnel team, the employee, the employee's representative and the employee's manager.

The same people present can meet at each stage of the process.

There may be times when a professional advisor will be invited to attend the meeting.

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).

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The identified Chair will write to the employee and their representative providing at least 5 working days notice 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 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 5 working days following the meeting. The letter will include:

- Clear details of the performance concerns;

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- 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 be responsible for implementation of the supported improvement plan. The manager will ensure regular interim monitoring, prior to the planned review meeting to examine regular progress to date and the appropriate next steps, seeking relevant professional advice as appropriate.

The outcome of the review 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 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 providing at least 5 working days notice 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 redeployment would be possible,

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and, if so, is an option for the employee. In the case of redeployment, *NHS Highland'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 NHS Highland 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 be in accordance with NHS Highland's Redeployment Policy and is only an option where 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 5 working 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 scheme of delegation for this stage is attached in Annex F.

The identified Chair will write to the employee and their representative providing at least 15 working days notice 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.

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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 at least 10 working 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 5 working 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 NHS Highland 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 NHS Highland'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 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 NHS Highland 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 NHS Highland's Redeployment Policy should be used, with the Stage 3

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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 5 working 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:

All employees have a right to appeal against any decision taken.

NHS Highland undertakes to hear all appeals within 20 working days of the appeal being submitted. All exceptions to this will be reviewed by the Director of HR or nominated deputy involving the Employee Director where appropriate.

Details of the right of appeal will be confirmed in the template letter (Annex A) detailing to whom such an appeal must be made and the timescale within which it must be lodged (i.e. no later than 10 working days following receipt of the letter confirming the outcome of the Capability meeting).

The identified Chair, in accordance with the scheme of delegation, will be responsible for identifying membership of the appeal hearing panel.

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The Chair will also be responsible for ensuring that the employee and their representative are advised in writing, no later than 10 working days prior to the hearing, of the following:

- The date, time and location of the hearing;
- Who will be attending the hearing;
- The right to be accompanied;
- Arrangements for the exchange of cases; and
- A copy of the policy.

At least 10 working days in advance of the hearing, the employee's appeal case will be shared with the appeal panel and Chair, and with the manager who chaired the capability meeting. Similarly, 5 working days following receipt of the employee's appeal case, the written case produced by the manager who chaired the earlier hearing will be shared with the appeal panel and Chair and the employee and their representative. Such cases will include details of any witnesses which either party is calling to the appeal hearing. It is the responsibility of the party calling the witness to inform them of the arrangements for the appeal hearing.

Following the hearing the Chair will be responsible for ensuring that the employee and their representative are advised in writing of the outcome of the appeal hearing. This should include the rationale behind any decisions taken in response to the employee's grounds for appeal. Such a letter must be issued within 10 working days following the appeal hearing. The outcome of the appeal will be final, with no further internal right of recourse.

There will be up to 6 people present at an appeal meeting: the chairperson, a member of the personnel team, the chairperson of the formal meeting assisted by a member of the personnel team, the employee and the employee's representative. There may be times that a professional advisor would be required to attend. The appeal is lodged against the decision reached by the chairperson of the formal meeting. It is expected that the chair of the appeal will be senior to the chairperson who made the decision at the formal meeting. The chairperson for the appeal meeting will have no prior knowledge of the matter.

### **6.5.7 Grievances / Bullying & Harassment Complaints Required.**

Where an employee raises a grievance or bullying and harassment 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. Personnel advice should be sought at the time.

### **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

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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:

- 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, NHS Highland has a duty of care to its employees. In the context of this policy, this means that NHS Highland needs to be mindful of the potential risks to health and safety associated with individuals who are involved and affected, 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.

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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)* and *NHS Highland Policy for the Storage and Retention of Employee Records*.

## 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.

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**Annex A:**  
**TEMPLATE LETTER AND SUPPORTED IMPROVEMENT PLAN**

**Strictly Private & Confidential**

Name  
Home address

Dear

**MANAGEMENT OF EMPLOYEE CAPABILITY OUTCOME OF FORMAL STAGE X**

Thank you for attending the meeting on DATE when you were represented by NAME, TU. I chaired the meeting and was assisted by NAME, PERSONNEL REP. NAME, JOB TITLE is your manager and he / she attended to provide information relating to the matter. The purpose of the meeting was to identify the reason(s) for the implementation of NHS Highland's Management of Employee Capability Policy, discuss the details of a supported improvement plan, and the format and frequency of monitoring.

Attached is the supported improvement plan which confirms the level of expectation, evidence of achievement expected, supportive measures, and the frequency and format of monitoring meetings for each of the areas to be addressed. This plan includes a template form which should focus discussions that you and your manager will have between now and the formal review meeting.

As noted at the meeting should the required improvement not be achieved then we will discuss this in order that the way forward can be adjusted. This may require... (*examples....*)

- *The need for further advice*
- *The next stage of the formal capability process being progressed*
- *Extension of the current stage*
- *Consideration of redeployment*

In accordance with NHS Highland's Management of Employee Capability Policy you retain the right to appeal against my decision(s) at formal stage X and should you chose to do so then please write to NAME / JOB TITLE / ADDRESS within 10 working days following receipt of this letter stating the reasons for your appeal.

The arrangements for our next formal meeting are:

**Stage:**  
**Date:**  
**Time:**  
**Venue:**

I look forward to hearing progress at our next meeting. Meantime if you require clarity on this letter please do not hesitate to contact me.

Yours sincerely

NAME  
JOB TITLE

Encl: Supported Improvement Plan pages 1-2

cc. Personnel Team representative  
Employee's representative  
Employee's manager  
OH – As Appropriate  
Others – As Appropriate

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## SUPPORTED IMPROVEMENT PLAN

Full Name  
 Job Title  
 Manager's name

Reason for Management of Capability	Level of expectation	Evidence of achievement	Support measures	Frequency & format of monitoring meetings
1.			(O) Ongoing (T) Temporary	
2.				
3.				
4.				

Planned Formal Review:  
 Date  
 Time  
 Venue

## MONITORING OF SUPPORTED IMPROVEMENT PLAN

Full Name  
 Job Title  
 Manager's name

Level of expectation	Evidence of achievement	Support measures provided	Date of monitoring meeting	Outcome of monitoring meeting	Manager's signature	Employee's signature
1.		(O) Ongoing (T) Temporary				
2.						
3.						
4.						

To be tabled as report for the review of Formal Stage:

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**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;
- Coaching
- 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*.

**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.

**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.

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**Support in the Workplace**

It is good practice to provide an employee who is underperforming 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. Manager should consider discussing with Occupational Health how these may be accessed.

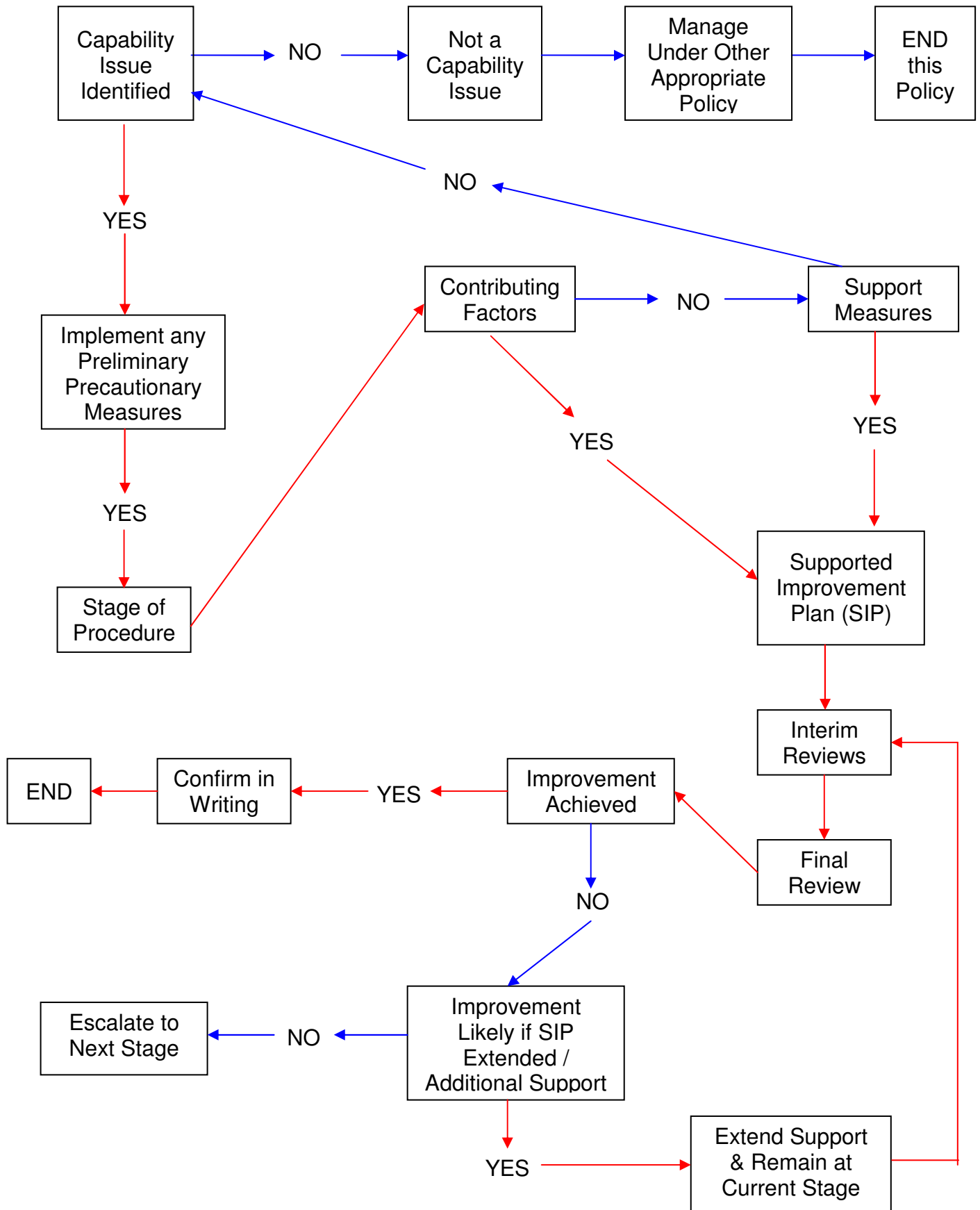
**Redeployment**

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

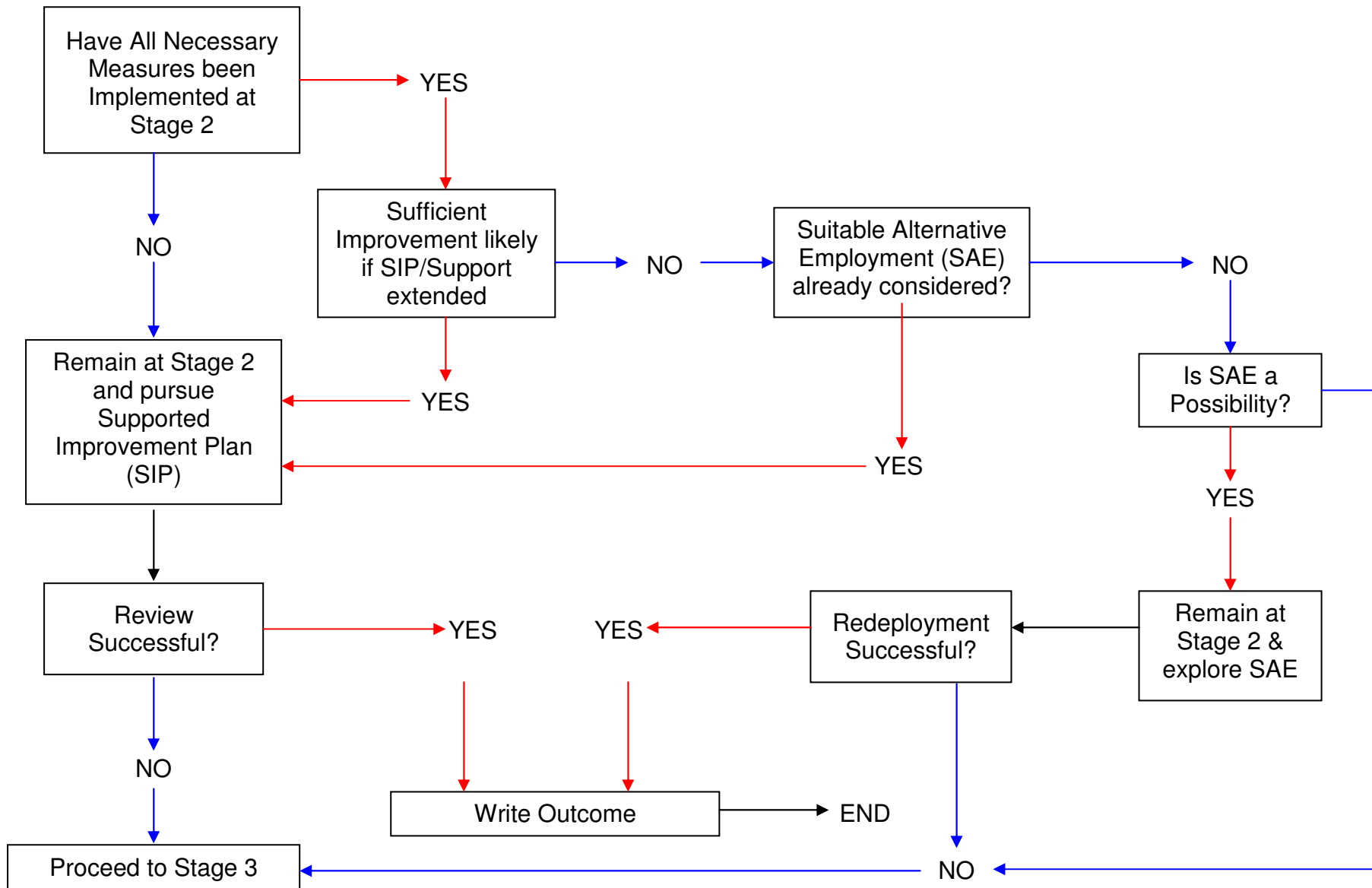
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# Annex C: PROCEDURE FLOWCHARTS

## 1. Overview of Management of Employee Capability Process

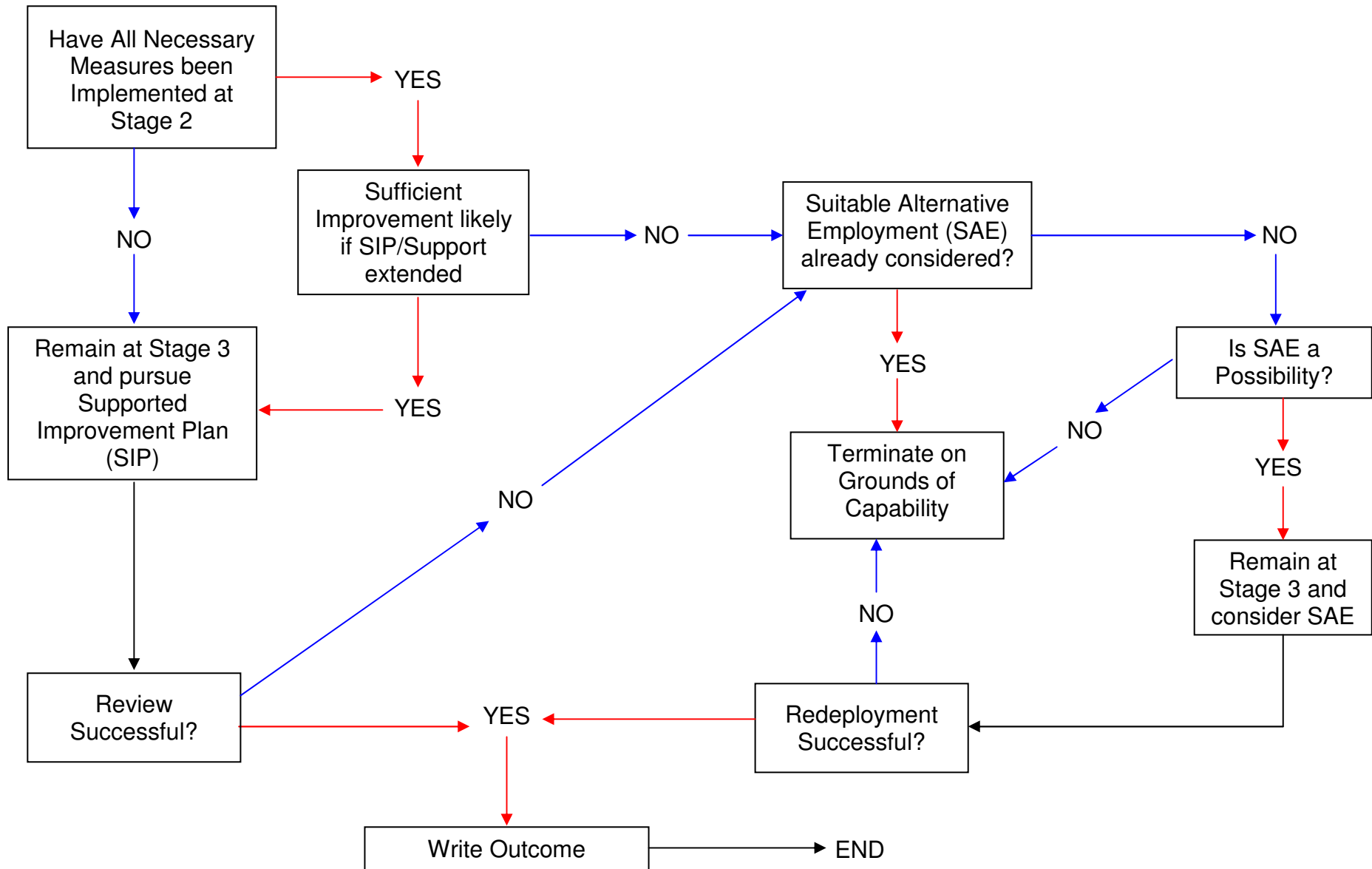


## 2. Stage 2 Hearing



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### 3. Stage 3 Hearing



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**Annex D**

**MANAGERS' CHECKLIST**

In discussing and agreeing any supported improvement plans to address matters related to Employee Capability the line manager needs to consider the following:

- How have concerns come to light?
- What evidence is there that this a Capability issue?
- What impact does this have and how serious is it?
- Have you explored the person's insight and understanding of the capability issue?
- In what ways have you supported the employee?
- Have you explored sufficiently the need for guidance / training?
- What opportunities have you given for the employee to improve?
- What flexibility in the role has been considered to support the employee?
- Are there any other contributing factors to be considered?
- What steps have you taken to ascertain the medical position?
- Is there a need for any "reasonable adjustments" to be considered?
- How much have you involved the employee?

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## Annex E

# THE EQUALITY ACT

## **GUIDANCE ON THE DEFINITION OF A “REASONABLE ADJUSTMENT”**

A *reasonable adjustment* can apply indefinitely, not just for the life of a supported improvement plan. What is reasonable in one situation may be different from what is reasonable in another situation.

### **Definition of Disability**

An employee is considered disabled under the Equality Act 2010 if they have a physical or mental impairment that has a ‘substantial’ and ‘long-term’ negative effect on their ability to do normal daily activities.

### **What is meant by a Reasonable Adjustment**

Various factors influence whether a particular adjustment is considered reasonable. The test of what is reasonable is ultimately an objective test and not simply a matter of what the employee or NHSH may think is reasonable. The onus is on the employer to identify reasonable adjustments and managers need to be clear on decisions reached and why.

When deciding whether an adjustment is reasonable NHSH can consider:

1. How effective the change will be in avoiding the disadvantage you would otherwise experience.
2. The prognosis in terms of future outlook for the wellbeing of the employee.
3. Its practicality including the impact on patient care and provision of service.
4. The cost
5. The organisation’s resources and size
6. The availability of financial support.

NHS Highland’s overall aim should be, as far as possible, to remove or reduce any substantial disadvantage faced by employees which would not be faced by a non-disabled person. Issues which should be considered:

Employers are allowed to treat disabled people better or 'more favourably' than non-disabled people and sometimes this may be part of the solution.

The adjustment must be effective in helping to remove or reduce any disadvantage you are facing. If it doesn't have any impact at all or only a very minor one, then there is no point. In reality it may take several different adjustments to deal with that disadvantage but each change must contribute towards this.

The employer can consider whether an adjustment is practical. The easier an adjustment is, the more likely it is to be reasonable. However, just because something is difficult doesn't mean it can't also be reasonable. The employer needs to balance this

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against other factors.

If an adjustment costs little or nothing and is not disruptive, it would be reasonable unless some other factor (such as impracticality or lack of effectiveness) made it unreasonable.

NHS Highland's size and resources are another factor. Resources must be looked at across the whole organisation, not just for the branch or section where the employee is working. This is an issue which NHS Highland has to balance against the other factors.

In changing policies, criteria or practices, NHS Highland does not have to change the basic nature of the job, where this would go beyond what is reasonable. It is reasonable for a manager to continue to have discussion on any aspects impacting on trigger points to obtain a better understanding in promoting attendance.

Advice or support is available, for example, from *Access to Work* or from another organisation (sometimes charities will help with costs of adjustments).

If making a particular adjustment would increase the risks to the health and safety of anybody, then NHS Highland can consider this when making a decision about whether that particular adjustment or solution is reasonable. NHS Highland's decision must be based on a proper assessment of the potential health and safety risks. NHS Highland should not make assumptions about risks which may face certain disabled workers.

If the employee does not agree about whether an adjustment is reasonable or not, in the end, only an Employment Tribunal can decide this.

Some examples of reasonable adjustments:

- Change in office location
- Adjusting duties
- Flexible working hours
- Education & training to team on a specific condition
- Provision of reader / interpreter (provision of information in an accessible format)
- Provision of supervision / additional support
- Adapting reference materials at work
- Supportive equipment at work
- Additional time for record keeping

For further guidance managers should discuss with a member of the Personnel Team.

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## Annex F

### SCHEME OF DELEGATION

CATEGORY GRADE OF STAFF	INFORMAL STAGE	1 <sup>st</sup> STAGE	SECOND STAGE	THIRD STAGE
Chief Executive	Line Manager	Equivalent of the employee's line manager or above	Equivalent of the manager of the line manager or above Or the same chair as FS1 with prior agreement	NHS Highland Chairman & Non-Executive Directors
Executive Directors / Direct Reports to Chief Executive	Line Manager	Equivalent of the employee's line manager or above	Equivalent of the manager of the line manager or above Or the same chair as FS1 with prior agreement	Panel of NHS Highland Chairman, Non-Executive Directors and Chief Executive
Other Directors / Directors of Operations Direct Reports to Chief Operating Officer	Line Manager	Equivalent of the employee's line manager or above	Equivalent of the manager of the line manager or above Or the same chair as FS1 with prior agreement	Chief Executive / Chief Operating Officer
All other Staff	Line Manager	Equivalent of the employee's line manager or above	Equivalent of the manager of the line manager or above Or the same chair as FS1 with prior agreement	Director of Operations, Area Manager / Raigmore Divisional Managers Within Corporate Services / Facilities etc this will normally be the Director or nominated Deputy. A&B – Locality Manager and Head of Services

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