



## Capability Policy & Procedure

|                            |                        |
|----------------------------|------------------------|
| Version:                   | V6.00                  |
| Name of originator/author: | HR Policy & ER Manager |

|                |                     |
|----------------|---------------------|
| <b>Policy:</b> |                     |
| Ratified by:   | JPPF                |
| Date ratified: | 16.10.18 (by email) |

|                       |               |
|-----------------------|---------------|
| Date issued:          | 29.10.18      |
| Date next review due: | 15.10.19      |
| Target audience:      | All employees |
| Replaces:             | V5.00         |

### Equality Analysis Record

|                       |        |                   |
|-----------------------|--------|-------------------|
| Approved EA submitted | Dated: | 14 September 2016 |
|-----------------------|--------|-------------------|

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## **1 Objectives**

- 1.1 South East Coast Ambulance Service NHS Foundation Trust (the Trust) and its employees are committed to delivering high quality services and this policy and procedure will help to ensure the high standards of performance expected by the Trust, its patients and the public.
- 1.2 This policy and procedure sets out a fair and effective framework to ensure consistent and fair treatment for all employees who experience difficulties in performing their duties to the required standards.

## **2 Scope**

- 2.1 This policy and procedure deals with concerns related to the employee's inability to achieve and sustain satisfactory performance at work where this is involuntary, and may arise from a lack of skill or aptitude rather than a lack of effort or commitment.
- 2.2 All employees of the Trust who have completed their probationary period are covered by this policy and procedure. Issues involving new employees still within their probationary period will be dealt with under the Trust's Probationary Procedure.
- 2.3 Capability matters relating to individuals employed by a third party will be dealt with by the source agency/company.
- 2.4 Separate procedures exist for managing sickness absence, and for disciplinary matters relating to attendance, behaviour and conduct.

## **3 Principles**

- 3.1 The Trust seeks to eliminate unlawful discrimination against colleagues, potential employees, patients or clients on the grounds of sex, marital status, disability, sexual orientation, gender identity, age, race, ethnic or national origin, religion, pregnancy/maternity, political opinion, or trade union membership and to promote equality of opportunity and good relations between employees and clients.
- 3.2 Employees must at all times indicate an acceptance of these principles and fulfil their responsibilities with regard to equality legislation and the Trust's Equality Diversity and Human Rights Policy and protocols.
- 3.3 Reasonable adjustments or arrangements may be made for example for an employee or companion with a disability or for employees whose first language is not English.
- 3.4 Mindful of the culture of openness and the premise of most mistakes being human error or "honest mistakes". The Trust recognises that lack of capability may have a variety of causes, some of which may be outside the employee's control. Any such incidents will be discussed and investigated in line with Appendix B.

- 3.5 Occupational Health may be involved at any stage and their advice will be sought specifically on issues of disability or ill health (including stress) which may become apparent and which are relevant to the employee's capability.
- 3.6 All employees will be treated fairly and consistently and reasonable targets and time frames will be set to allow understanding and achievement of the standards required and expected.
- 3.7 Action plans will be developed where necessary, including agreed targets and detailing appropriate support, for example training, mentoring, counselling, coaching, peer guidance.
- 3.8 Concerns about capability will normally be addressed through the informal stage before entering the formal procedure, however there may be circumstances in which the seriousness of the situation warrants entry at a formal or final stage, for example where a serious mistake or shortcoming occurs. In the latter situation it may be necessary to suspend or change the employee's duties until the problem is resolved.
- 3.9 Where redeployment is agreed as a possible solution, an initial trial period of up to three months (with pay protection) will allow capability in the new role to be fairly assessed. In the event that the standards specified for this new role are not achieved, the case will revert for further consideration at Stage 3 of the formal procedure.
- 3.10 If an employee feels that their capability has not been fairly assessed, or that standards required are inappropriate, they should follow the Trust's Grievance Policy and Procedure.

## **4 Confidentiality**

- 4.1 It is the Trust's aim to deal with capability matters sensitively and with due respect for the privacy of any individuals involved. All employees must treat as confidential any information communicated to them in connection with a matter which is subject to this policy and procedure.
- 4.2 Employees will normally be told the names of any witnesses whose evidence is relevant to their capability matter unless the Trust believes that their identity should remain confidential.
- 4.3 Records relating to any action taken under this procedure will be removed from the employee's personnel file once a warning or sanction has expired. These records will be kept on a separate central HR file for reference in any subsequent related capability case.
- 4.4 Any party attending a meeting or hearing under this procedure must not make electronic recordings, unless this is required as a reasonable adjustment.

## **5 Right to be Accompanied**

- 5.1 The employee has the right to be accompanied at any **formal** stage of this procedure, including an appeal. The right to be accompanied does not apply to informal discussions, although the Trust can agree to a reasonable request to be accompanied.
- 5.2 The companion must be a work colleague, a trade union representative or an official employed by a trade union. A trade union representative who is not an employed official must have been certified by their union as being competent to accompany the employee. There is no right to legal representation.

- 5.3 A companion may, with the employee's permission, address the meeting or hearing to put the employee's case, to ask questions on behalf of the employee and to sum up. The companion does not have the right to answer questions on the employee's behalf or prevent the employee from explaining their case.
- 5.4 The employee must tell the manager conducting the meeting or hearing who their chosen companion is, 2 working days in advance of the meeting or hearing.
- 5.5 If the employee or companion cannot attend on a proposed date, the employee can suggest an alternative date if it is reasonable and is not more than 7 calendar days after the original date, although consideration will be given to all parties' work patterns and the ability to change rotas and shifts.
- 5.6 If there is a repeated failure to attend a hearing without good reason, the Trust has the option, with HR advice, to make a decision in the employee's absence on the evidence available.

## **6 Capability Review Meetings**

- 6.1 At all stages of this procedure a capability review meeting should be arranged, giving the employee at least 7 calendar days' notice in writing.
- 6.2 The purpose of the capability review meeting is to:
- confirm under what stage of procedure the meeting is being held
  - make the employee aware of the issues and the effect on the Trust and other employees and to clarify expected standards
  - attempt to establish the cause and obtain the employee's perspective on the matter
  - identify solutions and confirm what support mechanisms will be put in place to assist the employee to achieve the required standards
  - identify realistic, measurable targets and the period over which these should be achieved and sustained to achieve satisfactory improvement
  - discuss redeployment options, if appropriate
  - agree or amend any action plan as necessary
  - issue a capability warning, as appropriate
  - set a date for further review (usually after 28 calendar days although this can vary depending on whether the issue can be addressed quickly, or for example where lengthier training is required)
- 6.3 The outcome of the meeting will be provided in writing within 7 calendar days, enclosing a copy of any agreed action plan.

## **7 Informal Capability Review**

- 7.1 Many issues of capability can be resolved without recourse to the formal capability procedure. In this case the line manager should make note of any evidence of shortcomings in order that these can be discussed on an informal basis with the employee.
- 7.2 A summary of the outcome of the meeting will be confirmed in writing to the employee within 7 calendar days, including a copy of any agreed action plan and the date for review. This summary of outcome should be held at a local level.
- 7.3 If at the end of the review period the required standards have been achieved and there are no further capability issues the manager will confirm this in writing.
- 7.4 If at the end of the review period (or earlier if further difficulties arise) there is no evidence of improvement, the employee will be invited in writing to attend a formal review meeting.
- 7.5 Only where there has been some improvement, but the required standards have not been reached, consideration may be given to extending the review period (usually up to another 28 calendar days) in order to give the employee an opportunity to reach the required standards.

## **8 Stage 1 Formal Review Meeting**

- 8.1 If there is failure to improve following the informal stage, or a serious mistake or shortcoming occurs (short of gross negligence or misconduct) the employee will be invited to attend a review meeting - see Capability Review Meetings, above.
- 8.2 The employee may be given a verbal warning in writing (3-6 months) that failure to improve may result in restricted practice (where this has not yet been put into place), redeployment, regrading and/or relocation, or termination of employment.

## **9 Stage 2 Formal Review Meeting**

- 9.1 If the employee's failure to improve is of a serious kind, the process can be entered at this stage.
- 9.2 A second formal review meeting will also be held at the expiry of the review period at Stage 1 (or earlier if further difficulties arise).
- 9.3 If required standards were achieved within the agreed timescale at Stage 1, the manager will confirm removal of any capability warning at the point the warning expires. Capability will be monitored while the warning is in place, and through the Trust's appraisal process.
- 9.4 If the employee failed to improve to a satisfactory level or a serious mistake or shortcoming occurs (short of gross negligence or misconduct) the employee will be invited to a Stage 3 formal review meeting.
- 9.5 The employee may be given a written warning (6-12 months) that failure to improve may result in restricted practice (where this has not yet been put into place), redeployment, regrading and/or relocation, or termination of employment.

## 10 Stage 3 Final Review Meeting

- 10.1 If the employee's failure to improve is of a more serious kind, the process can be entered at this stage.
- 10.2 A final formal review meeting will also be held at the expiry of the review period at Stage 2 (or earlier if further difficulties arise).
- 10.3 If required standards were achieved within the agreed timescale at Stage 2, the manager will confirm removal of any capability warning at the point the warning expires. Capability will be monitored while the warning is in place, and through the Trust's appraisal process.
- 10.4 If the employee's work continues to be unsatisfactory in spite of encouragement and support, a final formal meeting will take place.
- 10.5 A Stage 3 meeting, at which dismissal is under consideration, should be chaired by a senior manager with authority to dismiss. They will not have been involved in the matter previously, and will be supported by a senior HR representative. This meeting will follow the procedure outlined in Appendix A.

## 11 Warnings

- 11.1 Formal protective warnings are set separately from review periods i.e. a review meeting may take place while a warning is still in place. If there is no improvement, or where a serious mistake or shortcoming occurs, and the process moves to the next stage, a new warning may be given and may absorb the previous warning.
- 11.2 At the conclusion of review meetings at **formal** stages of the procedure, the manager may issue capability warnings, as follows:

|         |  |               |
|---------|--|---------------|
| Stage 1 | Verbal, in writing   | 3 - 6 months  |
| Stage 2 | Final written  | 6 - 12 months |
| Stage 3 | Restricted practice (if not already in place), redeployment, regrading and/or relocation, or termination of employment |               |

- 11.3 If capability relates to a clinical professional, the employee will be required to self-refer as appropriate and the manager will inform the employee to refrain from clinical responsibilities outside the Trust. If the employee fails to self-refer as required, the Trust may make the referral on their behalf.
- 11.4 There are some exceptional situations in which a warning may not be appropriate, for example:
- where the employee is incapable or unwilling to change; this situation will be dealt with under the Trust's Disciplinary Policy and Procedure (misconduct)
  - where an incompetent employee may be fairly dismissed summarily for one serious act or omission (gross negligence)

## **12 Appeal**

- 12.1 The employee has the right to appeal against any sanction issued under the formal stages of this procedure and has a right to be accompanied.
- 12.2 The employee must inform the manager who issued the sanction, in writing within 14 calendar days, that they wish to appeal, stating the grounds on which the decision should be reviewed.
- 12.3 The appeal hearing will normally be held within 28 calendar days of receipt of the appeal and will be conducted by a manager at a higher level than the manager who issued the sanction. The hearing manager must not have been previously involved in the case. A member of the HR department will also attend as a panel member.
- 12.4 Appeals against termination of employment will be heard by a panel comprising a director or non-executive director, and a senior HR representative.
- 12.5 At least 7 calendar days' notice will be given to the employee of the hearing so that a companion can be arranged if required. The hearing will not be unreasonably delayed by the non-availability of the companion.
- 12.6 If without reasonable explanation either party fails to attend within fifteen minutes of the specified start time, the chair of the panel has absolute discretion to adjourn or determine the appeal on the basis of the evidence submitted and any further representations from the party in attendance.
- 12.7 The procedure for appeal hearings is set out in Appendix A. After the hearing or if this is not possible, within 7 calendar days, the chair of the panel will give all parties a decision which will be followed up in writing. The panel's decision will be final.

## **13 Responsibilities**

- 13.1 The Chief Executive has delegated responsibility for the development and application of this procedure to the HR Director
- 13.2 Managers have responsibility for applying the procedure fairly and consistently, without unlawful discrimination. They will ensure that comprehensive job-related induction is provided for newly appointed employees.
- 13.3 HR has responsibility for the effective implementation of the policy and procedure and will provide relevant data for internal audits and other analyses, ensuring adherence to the Trust's policies on data protection and information governance.
- 13.4 HR will advise and guide managers and employees on the application of this policy throughout all stages of the process, and help to ensure consistency of sound practice across the Trust.

## **14 Associated Documentation**

Disciplinary Policy and Procedure  
Grievance Policy and Procedure



Sickness Absence Management Policy

## **15 References**

Employment Rights Act 1996 s.98 (2)(a) and s.98(3)

## Appendix A: Conducting a Stage 3 Meeting or Appeal Hearing

A panel may be comprised of one manager or senior manager (in the case of appeal against termination of employment, one director or non-executive director) and an HR representative.

“Manager” below refers to the manager who issued the sanction, or in the case of an appeal, chaired the panel at the formal capability review meeting.

**NB: In the case of an appeal hearing, A5/A6/A7 precedes A2/A3/A4.**

- A1 The chair of the panel introduces the parties present and explains the purpose of the hearing and how it will be conducted, ensuring everyone has all relevant documentation.
- A2 The manager details the capability concerns of the employee and presents all relevant evidence to support those concerns and identifies what support has been provided to assist the employee to improve. Witnesses may be called as necessary.
- A3 The employee or their companion may cross-examine any witness called and/or question the manager on any aspect of the case presented.
- A4 The manager may re-examine any witnesses on any matters referred to in cross examination.
- A5 The employee or their companion may present any evidence or witness in support of their appeal against the manager’s case, and call witnesses as necessary.
- A6 The manager may cross-examine any witnesses or ask the employee questions on any aspect relevant to the matter in hand.
- A7 The employee or their companion may re-examine any witnesses on any matters referred to in their cross-examination.
- A8 The manager may then address the panel with a summary of the case against the employee.
- A9 The employee or their companion may then address the panel with a summary of the employee’s response.
- A10 The panel may ask questions, seek clarification or further information, or adjourn at any time to consider more fully the information presented.
- A11 The panel, without any other persons present except any secretary and/or advisor to the panel, considers the matter in the light of the evidence.
- A12 The panel then communicates the decision to the manager and the employee and their companion at the conclusion of the hearing, or if not practicable within 7 calendar days, and this will be confirmed in writing.

## Appendix B

### Our Commitment to a Fair and Open Culture

A clinical or non-clinical error, accident or incident, however serious, is rarely caused willfully. It is not, in itself, evidence of carelessness, neglect or a failure to carry out a duty of care. Errors are often caused by a number of factors including process problems, human error, individual behaviour and lack of knowledge or skills. Learning from incidents can only take place when they are reported and investigated in an open and structured way.

Determining safe practice is a vital part of successful risk management. Learning from incidents will promote a fair and open culture and ensure the best possible practice across the organisation. This will enable the Trust to identify trends and take positive action to prevent similar incidents from happening again.

To promote a fair and open culture and encourage the reporting of incidents, disciplinary action will not be taken against a member of staff for reporting an incident, except in the rare circumstances where there is evidence of:

- \* Gross professional or gross personal misconduct
- \* Repeated breaches of acceptable behaviour or protocol

Staff remain accountable to our service users, carers, the Trust and their professional bodies for their actions.

## Document Control

### Manager Responsible

|                                   |                        |                |  |
|-----------------------------------|------------------------|----------------|--|
| Name:                             |                        |                |  |
| Job Title:                        | HR Policy & ER Manager |                |  |
| Directorate:                      | HR Directorate         |                |  |
| Committee/Working Group to ratify | JPPF                   |                |  |
| Version No. V5.2                  | Final                  | Date: 16.10.18 |  |

### Draft/Evaluation/Approval (Insert stage of process)

| Person/Committee                          | Comments                | Version | Date       |
|---|-------------------------|---------|------------|
| Joint Partnership Forum                   | For approval            | V5.1    | 16.10.18   |
| Joint Partnership Forum                   | For approval            | V4.05   | 23/09/2016 |
| Senior HR & Policy Manager                | Incorporating changes   | V4.05   | 19/08/2016 |
| Extraordinary JPF                         | For approval            | V4.04   | 18/08/2016 |
| Senior HR & Policy Manager                | Incorporating changes   | V4.04   | 15/08/2016 |
| People Policy Subgroup                    | Review and comments     | V4.03   | 11/08/2016 |
| Senior HR & Policy Manager/<br>HR Advisor | Review and restructure  | V4.02   | 22/07/2016 |
| HR Director/DAC Beachcroft                | Review and legal update | V4.02   | 01/05/2016 |
| Francesca Okosi                           | Review and minor update | V4.01   | 14/01/2016 |

### Circulation

|                             |                |
|-----------------------------|----------------|
| Records Management Database | Date: 29.10.18 |
| Internal Stakeholders       |                |
| External Stakeholders       | N/A            |

### Review Due

|         |  |                |
|---------|--|----------------|
| Manager | HR Business Partner  |                |
| Period  | Every three years or sooner if new legislation, codes of practice or national standards are introduced | Date: 15.10.19 |

### Record Information

|                             |  |
|-----------------------------|--|
| Security Access/Sensitivity | None   |
| Publication Scheme          | Yes  |
| Where Held                  | Records management database                          |
| Disposal Method and date:   | According to records disposal and archive guidelines |

## Equality Analysis Record

|   |  |   |
|---|--|---|
| <p><b>1. Trust policies, procedures and guidelines must not be contrary to the requirements of the Equality Duty within the Equality Act:</b></p> <p><input type="checkbox"/> Eliminate discrimination, harassment and victimisation;</p> | <ul style="list-style-type: none"> <li>• Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;</li> <li>• Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.</li> </ul> | <p><b>When designing the processes in your document, have you taken care not to contravene the Equality Act?</b></p> <p>Yes. The principles of this policy and procedure include mandatory fair treatment of all employees and responsibilities for this are clearly set out.</p> |
|---|--|---|

|   |   |   |
|---|---|---|
| <p><b>2. When considering whether the processes outlined in your document may adversely impact on anyone, is there any existing research or information that you have taken into account?</b></p> | <p>For example:</p> <ul style="list-style-type: none"> <li>• Local or national research</li> <li>• National health data</li> <li>• Local demographics</li> <li>• SECAMB race equality data</li> <li>• Work undertaken for previous EAs</li> </ul> | <p>Guidance was taken from ACAS and CIPD and input considered from consultation and engagement with equality advice, and user groups consisting of Operational Managers and representatives from Trade Unions and HR.</p> |
|---|---|---|

|  |   |
|--|---|
| <p><b>3. Do the processes described have an impact on anyone's human rights?</b></p> | <p><b>If so, please describe how (positive/negative etc):</b> No impact</p> |
|--|---|

| <p><b>4. What are the outcomes of the EA in relation to people with protected characteristics?</b></p> |  |   |  |
|--|--|---|--|
| <p><b>Protected Characteristic</b></p>   | <p><b>Impact</b><br/>Positive/Neutral/Negative</p>   | <p><b>Protected Characteristic</b></p>                      | <p><b>Impact</b><br/>Positive/Neutral/Negative</p>   |
| <p>Age</p>   | <p>Neutral</p>   | <p>Race</p>   | <p>Neutral</p>   |
| <p>Disability</p>  | <p>Neutral. The duty to make reasonable adjustments for employees with disabilities is reflected in this document.</p> | <p>Religion or belief</p>                                   | <p>Neutral. An alternative date for a meeting/hearing may be proposed to allow for religious observance.</p> |
| <p>Gender reassignment</p>   | <p>Neutral.</p>  | <p>Sex</p>  | <p>Neutral</p>   |
| <p>Marriage and civil partnership</p>  | <p>Neutral</p>   | <p>Sexual orientation</p>                                   | <p>Neutral</p>   |
| <p>Pregnancy and maternity</p>   | <p>Neutral</p>   | <p><b>Date the EA was undertaken: 14 September 2016</b></p> |  |

|  |
|--|
| <p><b>5. Mitigating negative impacts:</b></p> <p>If any negative impacts have been identified, an Equality Analysis Action Plan must be completed and attached to the EA Record. A template for the action plan is available in the Equality Analysis Guidance on the Trust's website. Please contact <a href="mailto:inclusion@secamb.nhs.uk">inclusion@secamb.nhs.uk</a> for support and guidance.</p> |
|--|