

ILL HEALTH CAPABILITY PROCEDURE

1. INTRODUCTION

1.1 Background

Absence due to ill health adversely affects service delivery. Where an level of absence due to ill health, or the nature of the illness, affects an employee's ability to carry out their duties it should be regarded as an ill health capability problem. This includes persistent short term absences and long term ill health problems. All ill health capability problems should be carried out in accordance with this procedure.

Our objective is to maintain high standards of attendance and work performance through the fair and effective management of capability issues related to ill health.

1.2 Scope

This procedure applies to all Barnet Council employees with the exception of school based and teaching staff who have separate arrangements in place.

This procedure should not be used for cases concerning a genuine lack of capability (skill and aptitude), where **the capability procedure** must be used.

Where there is a deliberate failure or negligence on the part of an employee for example, laziness, carelessness or an unwillingness to perform, **the misconduct procedure** must be used.

1.3 Stages of the procedure

There are three stages of the ill health capability procedure:

- Stage 1 – Informal Attendance Meeting
- Stage 2 – Formal Capability Interview
- Stage 3 – Formal Capability Hearing (where dismissal may be considered)

1.4 Key Principles

There are a number of key principles involved in conducting attendance meetings, ill health capability interviews and hearings:

- employees must understand how their attendance impacts on their work and the work of their colleagues
- managers must monitor absences and provide feedback on an on-going basis, so that any problems can be addressed as they arise
- managers must consider and manage the impact of any absence on the other members of the team

- targets will be used for improving attendance including setting reasonable timescales. Employees will be clear about what is expected of them and what support the manager will provide to help them achieve the standard required
- a summary of the discussion and agreed action will be confirmed in writing
- medical advice will be obtained where necessary
- employees may be asked to provide a doctor's certificate from the first day of any future absence. Where this is the case, the employee will be reimbursed for the cost of the certificate
- full consideration will be given to reasonable adjustments in the work place
- managers will balance the needs of the service with an employee's need to recover fully and return to work
- employees will be made aware of the consequences of not achieving the required standards of attendance including possible dismissal on the grounds of capability at the appropriate time
- the management of absence needs to be conducted sensitively and sympathetically and individual circumstances should always be taken into account.

2. STAGE 1 INFORMAL ATTENDANCE MEETING

Managers are required to monitor and analyse all sickness records to ensure all employees are treated consistently. Managers who regularly monitor and act upon sickness information will enable problems to be identified and addressed at an early stage. Most problems can usually be dealt with informally with assistance being given to the employee where necessary.

If an employee reaches one of the set trigger points and there is cause for concern, managers should arrange to meet with the employee informally.

2.1. The Meeting

The purpose of an attendance meeting is to enable managers and employees to discuss the following:

The Manager	The Employee
<ul style="list-style-type: none"> • detail absences • explain why absences are giving cause for concern • ascertain whether absence is being caused or aggravated by working conditions • discuss referral to Occupational Health • discuss the effect the absences are having on colleagues and on service delivery • discuss practical steps to reduce absence 	<ul style="list-style-type: none"> • given opportunity to comment • discuss any issues affecting their attendance record • discuss any relevant medical information

Attendance meetings must be conducted sensitively and in confidence, a brief note of the meeting should be produced and agreed with a copy given to the member of staff.

2.2. Absence caused or aggravated by working conditions

Where working conditions are or appear to be a contributory factor, managers should address the issues and offer the employee assistance in finding ways to improve their attendance/work performance. A referral to the Occupational Health Physician should be made to assist with this process.

2.3. Concluding the Meeting

At the end of the meeting managers should conclude that either:

- no further action is needed at this stage, **or**
- agree an action plan with the employee for improving attendance. The manager should monitor and review the employee's attendance against the action plan.

2.4 Suitable Review Periods

A three to four week review period for cases of long term sickness and a review period of three months for cases of regular short term absence are recommended as reasonable review periods.

2.5. Possible Outcomes following a Review Period

Possible outcome	Action to be taken	Points to consider
1. Where the employees attendance improves to the standard set out in the action plan and they have demonstrated their ability to maintain that level of attendance.	No further action should be taken.	If the level of attendance is subsequently not sustained, the manager should meet with employee to determine the reason(s) and decide if further action is required.
2. If there is a partial improvement in attendance or there are good reasons as to why attendance has not improved.	Manager should consider continuing with the agreed monitoring arrangements.	Consider the long term sickness record and whether, there has been improvements followed by further poor attendance levels.
3. If there is no improvement in attendance where it could have reasonably been expected.	Employees should be told why it is necessary to move to the next stage of the procedure – stage 2 - the formal capability interview.	Confirmation that Stage 1 has been satisfactorily completed before moving to stage 2.

3. STAGE 2 - FORMAL ILL HEALTH CAPABILITY INTERVIEW

If following the informal attendance meeting the manager is still concerned about an employee's absence levels the employee should be called to attend a first formal meeting, *the capability interview*.

Prior to arranging this, managers should ensure that an attendance meeting has already taken place and that the pattern/level of absence warrants further action. Advice from the Council's Occupational Health Physician should be sought if it has not been done already.

This stage of the process will enable the manager to;

- detail all of the absences and if required to investigate further the underlying reasons
- reiterate management concerns
- discuss the effect of the absence on performance
- discuss with the employee a strategy for reducing sickness absence
- objectively consider the employee's explanation(s)
- decide whether to set targets and the timescale for review period
- explain the Council's policy on sickness absence, including the management focus on whether the employee can regularly and efficiently provide a service
- consider a further referral to the Occupational Health Physician

Employees must be made to understand the effects of sickness absence on performance, the quality of service to the public and the added burden placed on colleagues.

Any standards of acceptable attendance that are set must be clearly communicated. The individual must know where they stand. The consequences of what will happen if they fail to meet the targets set must be clearly explained to them.

3.1 Notification

Managers should ensure that the following points are all covered as part of the notification process:

- notify the employee in writing of the capability interview, clearly giving the reasons for it giving a minimum of **seven working days** notice
- state that the level/pattern of absence is such that it is believed that the employee is no longer capable of performing their duties
- notify the employee that they have the right to be accompanied by a trade union representative or Barnet work colleague

If an employee requests that the interview be carried out by a manager of the same sex (due to confidential health issues) this request should be granted wherever possible.

3.2 Following the Interview

A letter should be sent to the employee within five working days of the interview, confirming issues considered and the decision and action plans made to reduce sickness.

Where targets have been set the letter must state the consequences of failure to meet the targets, or of a continuation of sickness absence following the end of the review period at a level deemed unacceptable by the manager will mean that the employee will be required to attend a formal capability hearing, where a decision to dismiss the employee will be considered.

3.3 Outcomes of the Review Period

When managers have all of the facts they must decide on one of the following courses of action:

Possible Outcome	Action	Points to consider
Attendance now acceptable.	No further formal monitoring is required.	Confirm with the employee that there are no other issues that could impact on their attendance levels.
There has been some improvement.	A further period of monitoring may be necessary and an appropriate review period should be set.	The length of the review period should be sufficient to determine whether any further action should be taken.
There has been insufficient improvement or no improvement.	Manager should move to – stage 3 – the formal capability hearing Where there is little or no improvement it must be made clear to the employee that their attendance falls short of the standard required and that the Council requires an improvement in attendance to meet the standard.	The improvement must be sustained and where this is not achieved the employee should be informed that their continued employment with the Council may be at risk.

4. STAGE 3 – FORMAL CAPABILITY HEARING

4.1 When to Convene a Hearing

Where an employee's pattern or level of absence continues to give cause for concern, and their work continues to be affected by poor health impacting on service delivery, a capability hearing should be convened. The employee should already have been informed at stage 2 that this course of action would be taken if attendance/work performance did not improve within the agreed review period.

4.2 When a Hearing is not appropriate

On some occasions when the Occupational Health Physician has declared the employee permanently unfit for their job, and alternative employment cannot be found, ill health retirement should be considered before a formal capability hearing is convened.

4.3 Preparation for the Hearing

A manager who has the authority to dismiss will chair the hearing. They will be accompanied by a presenting manager (usually the employee's line manager) and a HR adviser.

The presenting manager should carry out a review of the case carefully prior to the hearing to ensure that stage 2 has been completed correctly.

The hearing needs to be structured in order for management to set out all of the relevant information and to allow the employee and their representative to respond.

4.4 Notification

Managers must advise the employee in writing of the date, time and place of the meeting, giving a minimum of seven working days notice. The letter should:

- state the purpose of the hearing
- give the name of the manager hearing the case and their designation
- state that the level/pattern of absence is such that it is believed that the employee is no longer capable of performing their duties
- notify the employee that they have the right to be accompanied by a trade union representative or Barnet work colleague
- that a possible outcome is dismissal from the Council's service

Any evidence gathered by management should be included with the notification. This evidence should include a written statement of facts, the latest medical report and a full absence record.

4.5 Documentation

Any evidence gathered by the employee which will be presented at the hearing must be exchanged with management at least **3 working days** before the hearing.

In exceptional circumstances the manager hearing the case may allow additional documents to be presented at the hearing, if they could not reasonably have been presented within the stipulated time and subject to the other party being allowed to seek an adjournment to consider the documents.

4.6 Representation

The employee may request a postponement of the hearing of up to 5 working days if their representative is unable to attend the hearing. Any alternative time and date proposed by the employee must be reasonable.

The employee should be informed that they have the right to call witnesses if desired and that they must provide the presenting manager with copies of any documentation they wish to present, along with the names of any witnesses they wish to call.

The employee may request that the Capability Hearing be conducted by a manager of the same sex due to the confidential nature of the illness. This request should be agreed wherever possible.

4.7 Procedure at the Hearing

4.7.1 The presenting manager should open the hearing by explaining the reasons why the hearing has been arranged and explain the order of proceedings, answering any questions with regard to the procedure.

The manager should then submit their case details listing all of the following:

- all sickness absences
- an assessment of the effect on the individual's performance and on the service generally
- dates of all return to work discussions
- dates of all attendance meetings and an overview of action taken
- date of the Informal Capability Interview
- that the pattern or level of absence can no longer be sustained
- the presenting manager's recommendation concerning whether or not the employee should be dismissed and the reasons for this

4.7.2. The manager calls upon any witnesses to give evidence or produce any necessary documentary evidence in support of the case (usually medical reports).

The employee and/or their representative will then have the opportunity to put questions to the witnesses.

After answering any questions, any witnesses called by management will then be asked to leave the hearing.

4.7.3 The employee will then be given the opportunity to submit their case and call upon any witnesses or to produce any necessary documentary evidence in support of their case. This will usually be in the form of updated medical advice that may have a bearing on the case.

There will then be the opportunity for questions from the presenting manager, the hearing officer and the HR adviser.

After answering any questions, any witnesses called by the employee will be asked to leave the hearing.

4.7.4 The management representative makes a closing statement, followed by the employee or representative. No new evidence can be introduced in the closing statements. Both parties then leave the hearing room.

- 4.7.5 The presenting manager, the employee and their representative will withdraw from the hearing whilst the hearing manager considers the case with the HR adviser.
- 4.7.6 If recall is necessary to clarify points of uncertainty, both parties will be asked to return. In addition the hearing manager may require that other witnesses/ evidence should be called/produced in order to ensure that all the necessary facts can be considered before making a decision on the case. S/he may decide to adjourn the hearing to allow for this if necessary.
- 4.7.7 Both parties are recalled to the hearing room and informed of the decision.
- 4.7.8 In some circumstances, the hearing manager may require more time to consider the evidence rather than making a decision on the day of the hearing. The decision may be conveyed through correspondence within three working days, or the hearing reconvened to announce the decision.

4.8 Factors for the Hearing Officer to consider (cases of short term absence)

Case Law has set out the following factors that should be considered before a dismissal decision is taken in cases of persistent short-term absence:

- i. the nature of the illness
- ii. the likelihood of recurrence or some other illness arising
- iii. the length of the various absences and the periods of good health in-between the absences
- iv. the need of the employer for the work to be done by the employee
- v. the impact of the absences on other employees
- vi. the correct procedure has been followed at all times
- vii. will the employee be able to give regular and efficient service
- viii. the extent to which the employee has been made fully aware of the situation and when the point of no return would be reached

5. ABSENCE OF THE EMPLOYEE

Where an employee is unable, or chooses not to attend the hearing, any written representations submitted by them or their representative (either in person or in writing) will be considered after the presenting manager has set out the case.

6. EMPLOYEES FOUND PERMANENTLY UNFIT

If the employee has been found permanently unfit by the Occupational Health Physician for their job and no alternative is available, then the employee should be retired on grounds of ill health, or dismissed on grounds of incapability if they are not a member of the pension scheme.

7. EMPLOYEES NOT DECLARED PERMANENTLY UNFIT

For persistent short term absence which can no longer be tolerated, where no underlying medical reason is the problem, or where Occupational Health does not declare the employee unfit, the employee should be dismissed on grounds of

incapability. Such employees should be deemed not capable of performing their duties by reason of their persistent absenteeism.

Where an individual's employment is terminated either by reason of permanent ill health or because they are incapable due to persistent absenteeism, their termination should be with full contractual pay in lieu of notice, even in cases where sick pay entitlement has been exhausted.

8. RIGHT OF APPEAL

Employees dismissed for either of the above reasons have the right of appeal against dismissal in accordance with the Council's Appeals Procedure and should be informed of this right in their letter of termination. The letter of termination should also state that notification of intent to appeal must be submitted to the Appeals Committee within seven working days of the date of receipt of the letter notifying the outcome of the hearing.

The appeal is not a re-hearing of evidence submitted at the hearing.

Disputes about medical evidence cannot form the basis of an appeal. Such disputes should only be decided by an independent medical examiner.

The appeal must be made in writing and clearly state in detail the grounds for appeal, which must be one or more of the following reasons:

- **Procedural flaw:** failure to follow procedure had a material effect on the decision.
- **The decision:** the manager who took the decision to dismiss came to a conclusion on the facts that no reasonable person would have come to.
- **The penalty:** the decision to dismiss rather than an alternative option was one that would not have been reached by a reasonable person.
- **New evidence:** evidence which the employee wishes to introduce for the first time at the appeal could not reasonably have been raised at the stage 3 hearing and the absence of this had a material effect on the dismissal decision.

9. REVIEW PERIOD

This policy will be reviewed after 1 year of operation and then after a further 3 years.

10. FURTHER INFORMATION

For additional information managers may find the following organisations useful:-

Advisory Conciliation and Arbitration Service (ACAS) - www.acas.org.uk

Department of Trade & Industry (DTI) - www.dti.gov.uk

Chartered Institute of Personnel & Development – www.cipd.co.uk