



# Capability Procedure

## *Local Conditions of Service for School Based Employees*

ConnectEd Partnership highly recommend the use of this policy. The policy is considered best HR practice, it has been developed in accordance with current employment law and has been negotiated with all recognised professional associations and HR providers across the City of Wolverhampton.

Reviewed October 2020

Adopted by: Penn Hall School

On: 28/9/21

Signed (Chair of Governors/Trust):

**This procedure document was reviewed in October 2020 and did not require any amendments**

## Capability Procedure

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## **1. Policy Statement**

- 1.1 The Employer is committed to adopting policies and procedures to encourage a positive working environment and a health and safety culture to improve and maintain performance of all Teachers and Support staff working in Schools. This procedure aims to ensure that any capability issue is dealt with in a fair, prompt and supportive manner.

## **2. Scope**

- 2.1 This policy applies to all teaching, non-teaching staff employed by schools/academies and all teaching staff employed centrally.
- 2.2 This procedure is for Head teachers/Heads of Service to follow when dealing with capability issues.

## **3. Principles**

- 3.1 Head teachers and Heads of Service or his/her nominee will apply the procedure. Throughout this policy if the procedure is to be applied to the Head teacher, the role is to be undertaken by a nominated Governor (normally the Chair of Governors) or equivalent, acting with professional HR advice from the Employer or Appointed HR provider.
- 3.2 In respect of a trade union or professional association representative no action will be taken under the formal review stage until the circumstances of the case have been discussed with a senior representative or paid official of the trade union or professional association.
- 3.3 Governors should be aware that their involvement in the early stages of these procedures is likely to prevent their subsequent involvement should a dismissal and appeals meeting be required.

## **4. Employees' Responsibilities**

- 4.1 Employees have a contractual responsibility to perform the requirements of their job to a satisfactory level and in line with the appropriate standards. To achieve this employees are expected to:
- work within allocated resources and school regulations to achieve all the requirements of their role to the required standard and within the required timescales
  - work to the best of their ability and participate in self-development activities as agreed with their line manager
  - attend work in accordance with their Conditions of Employment and make the best use of their time at work

- fully engage in discussions about their role and performance and development, including the Appraisal process and for support staff if applicable.

## **5. Managers' Responsibilities**

- 5.1 Good management should lead to the ability to give advice, support and encouragement as part of the day to day management function and shall not form any part of an employee's record.
- 5.2 It is the responsibility of the employer to ensure that employees are aware of the standards of performance required of them, that they have been provided with reasonable opportunity to fulfil those requirements and understand the consequences of not meeting them. In particular, managers should ensure that employees:
- are aware of what is expected of them in their role and function
  - are given the necessary guidance and training to fulfil their role and to meet required standards of performance
  - receive regular feedback on their work and performance

## **6. Equal Opportunities Policy**

- 6.1 The School and Local Authority recognise that the Equality Act 2010 covers the protected characteristics of age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion and belief, sex and sexual orientation.
- 6.2 Under the Equality Act 2010 it is unlawful to discriminate against a disabled person for reasons related to their disability. Disability covers both physical and mental impairments that have a substantial and long term effect (i.e. has lasted or is expected to last for at least 12 months) on the person's ability to carry out normal day to day activities.
- 6.3 Progressive conditions, such as HIV, cancer and multiple sclerosis, are considered a disability immediately from the point of diagnosis and do not need to last for a year. However addictions to non-prescribed substances are specifically excluded.
- 6.4 Where an employee meets the definition of a disabled person under the Equality Act employers are required to make reasonable adjustments to any elements of the job which place a disabled person at a substantial disadvantage compared to non-disabled people. Employers are only required to make adjustments that are reasonable. Factors such as the cost and practicability of making an adjustment and the resources available to the employer may be relevant in deciding what is reasonable. Further information can be found within the Manager's Guide.

## **7. Introduction**

- 7.1 The success of any school is dependent upon the performance and wellbeing of its employees therefore schools should be committed to making the best use of their potential by improving and maintaining their development and capability.
- 7.2 It is important to recognise that many potential problems and difficulties that may arise can be and should be resolved by provision of additional support identified through an extended appraisal process. This procedure is intended to operate in respect of formal action only. Good management should lead to the ability to give advice, support and encouragement as part of the day to day management function and shall not form any part of an employee's record. Before embarking on a formal capability procedure, the Chair of Governors or equivalent (in the case of head teachers) or head teacher (in case of other employees) must be able to evidence that every aspect of support as outlined in the manager's guidance has been fully exhausted and have failed to achieve the required improvements.
- 7.3 The formal procedures should only be used in those situations where an employee fails consistently to perform his or her duties to a professionally acceptable standard and which remain unresolved after various methods of support have failed to achieve a satisfactory outcome.
- 7.4 In addition, in order to identify the causes of a decline in performance or failure to meet required standards of a member of staff, schools should investigate whether the situation has been generated by personal circumstances such as bereavement, emotional upheaval or illness, or whether the issues are work related. In the light of such circumstances being established, reasonable time and support should be given in order that the difficulties can be resolved. If long term sickness absence appears to have been triggered by the commencement of monitoring or a formal capability procedure, the case will be dealt with in accordance with the school's absence policy.
- 7.5 Moreover, schools should ensure, before proceeding to a Capability, that they are not in breach of their duty to vulnerable groups under Equalities duties and legislation.
- 7.6 Where there is evidence that an employee is experiencing professional difficulties, it would normally be expected that this would have been raised during the appraisal process as well as part of the day to day management of the advice, support and encouragement. The Capability Procedure cannot be triggered by an individual circumstance or piece of evidence. Managers must refer to the Manager's guide for various sources of examples.
- 7.7 At any point in this procedure nothing shall prevent the employee seeking alternative employment.
- 7.8 In accepting this procedure, the Governing/Trust Board or equivalent must decide who has the power to dismiss at the school. It is essential that the school selects which of the given options will be adopted in respect of the power to dismiss.
- 7.9 A flow chart of the capability procedure is attached at Appendix A.

## **8. Capability**

### **8.1 Capability vs Disciplinary**

A distinction **must** be drawn between the procedure for capability and the procedure for disciplinary issues. Capability applies to those situations where an employee's performance is unacceptable because they are unable to perform their duties to the required level (due to lack of ability, skill, experience or inadequate training). Disciplinary issues apply to those situations where the employee is capable but wilfully refuses to perform to the required standard. Such neglect of duty usually involves an element of culpability which may have arisen from lack of motivation or inattention to detail. These latter issues are a matter of conduct and should be dealt with in accordance with disciplinary procedures for employees, not capability procedures. HR advice should be sought prior to proceeding and throughout either procedure.

## **9. Preliminary Capability Meeting**

- 9.1 Where the capability procedure is being considered for either the head teacher or other employees, the Chair of Governors or equivalent (in respect of the head teacher) or head teacher (in respect of other employees) will convene a meeting. This preliminary meeting is to provide an opportunity for the information collated to be discussed. It is intended to establish the facts and may provide additional information. At least five working days' notice will be given. The notification will contain sufficient information about the concerns about performance and their possible consequences to enable the employee to prepare a response. It will also contain copies of any written evidence; the details of the time and place of the meeting; and will advise the employee of their right to be accompanied by a work colleague or a trade union official, or a trade union representative who has been certified by their union as being competent. Employees who are unable to attend the preliminary capability meeting because their trade union representative or work colleague cannot attend may offer a reasonable alternative date within five school working days of the original date. In instances where the employee becomes sick or has a stress related illness the matter should be dealt with under the Management of Attendance procedure.
- 9.2 The person conducting the meeting may conclude that there are insufficient grounds for pursuing the capability issue and that it would be more appropriate to continue to address the remaining concerns through the appraisal process. In such cases, the capability procedure will come to an end. The person conducting the meeting may also adjourn the meeting if, for example, they decide that further investigation is needed, that more time is needed in which to consider any additional information, or to decide to proceed to a Formal Capability meeting.
- 9.3 Once a decision has been made to proceed with a formal Capability Procedure a meeting should be held to formally suspend the appraisal process prior to moving forward, details of which should be provided to the employee in writing.

## **10. Formal Capability Meeting**

10.1 At least five working days' notice will be given. The notification will contain a copy of the procedure, copies of any written evidence, the details of the time and place of the meeting and will advise the employee of their right to be accompanied by a work colleague or a trade union official, or a trade union representative who has been certified by their union as being competent. The notification will contain sufficient information about the concerns about performance. Employees who are unable to attend the preliminary capability meeting because their trade union representative or work colleague cannot attend may offer a reasonable alternative date within five school working days of the original date. In instances where the employee becomes sick or has a stress related illness the matter should be dealt with under the Management of Attendance procedure.

10.2 During the meeting, the person conducting the meeting will:

- identify the professional shortcomings, *for example, which of the standards expected of employees are not being met;*
- give clear guidance on the improved standard of performance needed to ensure that the employees can be removed from formal capability procedures (*this should include the precise descriptions of improvements that are required, focus on the specific weaknesses that need to be addressed, any success criteria that might be appropriate and the evidence that will be used to assess whether or not the necessary improvement has been made*);
- detail any support that will be available to help the employee improve their performance, for example coaching, training, in-class support, mentoring, peer mentoring, structured observations, visits to other classes or schools or discussions with advisory staff (this is not an exhaustive list);
- set out an agreed timetable for improvement and explain how performance will be monitored and reviewed. The timetable will depend on the circumstances of the individual case. It should be realistic, reasonable and proportionate, but not excessively long, and should provide sufficient opportunity for an improvement to take place
- Warn the employee that failure to improve within the set period could lead to dismissal.

10.3 Notes will be taken of formal meetings and a copy sent to the member of staff. The employee will be informed in writing of the matters covered in the bullet points above and given information about the timing, handling of the review stage.

## **11. Monitoring and Review Period**

11.1 The agreed performance monitoring and review period will follow the formal capability meeting. Formal monitoring, evaluation, guidance and support will continue during this period. The member of staff will be invited to a formal review meeting.

## **12. Formal Review Meeting**

- 12.1 The Headteacher (or chair of governors in the case of the Headteacher) will chair the meeting.
- 12.2 The evidence gathered during the monitoring and review period, any evidence presented and representations from the employee will be considered before reaching a decision.
- 12.3 A short adjournment should be taken to consider the information discussed at the meeting, in order to decide that;
- a) The employee has made sufficient improvement. In this case the procedure will cease and the appraisal process will be reinstated. However, the employee is to be made aware that in achieving this, they are expected to continue to maintain the required standards. Should an employee's satisfactory improvement prove only to be of a temporary nature (less than 12 months) and the performance concerns are related, they are to be made aware of the option once the evidence has been assessed to return immediately to this point in the procedure.
  - b) Some progress is made and there is confidence that more is likely. In this case it may be appropriate to extend the monitoring and review period, for a reasonable amount of time e.g. half a term. Consideration will be given as to whether there are any additional support/further reasonable adjustments that could assist the employee to reach the required standard.
  - c) No or insufficient progress has been made during the monitoring and review period the employee should be informed that a Capability hearing will be convened and his/her employment may be terminated on grounds of capability.

## **13. Confirming the Outcome of the Review Meeting**

- 13.1 The outcome of the review meeting should be confirmed to the employee in writing, normally within five school days of the decision.

## **14. Referral to Capability Hearing**

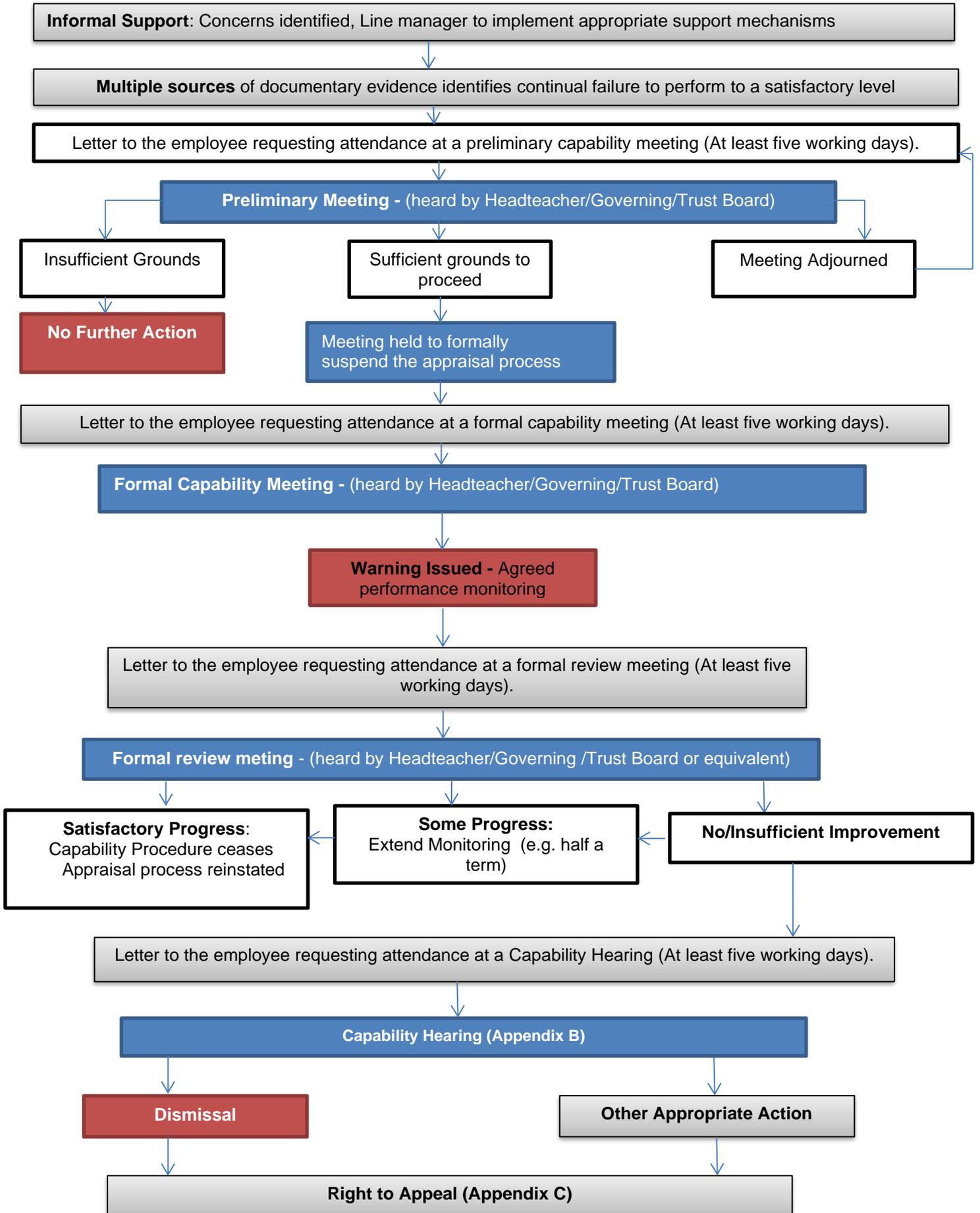
- 14.1 Cases may be referred where no or insufficient progress has been made during the monitoring and review period. The employee must also have been notified in writing following the formal and formal review meetings that their employment will be at risk if they are unable to meet the performance standards required.
- 14.2 The employee will be invited to the decision meeting; at least five working days' notice will be given along with copies of documents to be referred to at the hearing. The employee has the right to be accompanied by a work colleague or a trade union official, or a trade union representative who has been certified by their union as being competent.
- 14.3 Where the Head teacher has attended Formal Review Meetings, the Capability Hearing will take place before a Panel consisting of three members of the

Governing/Trust Board. The Panel may be accompanied by a HR professional, and for teachers employed in a maintained school is required to invite the attendance of the Local Authority to allow it to exercise its statutory advisory rights in respect of its employees.

- 14.4 Where the Head teacher has not attended the Formal Review Meetings, and the Governing/Trust Board has delegated power of dismissal to the Head teacher, the Head teacher may Chair the Hearing. The Head teacher may be accompanied by a HR professional, and in a maintained school is required to invite the attendance of the Local Authority to allow it to exercise its statutory advisory rights in respect of its employees.
- 14.5 The person who has been responsible for managing the employee's performance will attend the Hearing to present the School's case, and may be accompanied by HR professional.
- 14.6 The Hearing will take place in accordance with Appendix B, and the purpose of the Hearing will be for the Panel or Head teacher to consider all of the circumstances in respect of the employee's performance including:
- Any medical advice and reports received.
  - The adjustments and support that the School have considered in order to help the employee to improve their performance.
  - The impact of the employee's performance on service delivery and colleagues, and whether the School can continue to sustain the impact.
  - Whether the Capability Procedure has been followed and applied fairly.
- 14.7 The employee and their representative will have the opportunity to respond to the School's case and to present any relevant information that they wish to.
- 14.8 The Panel or the Head teacher may determine one of the following outcomes:
- That the Capability Hearing will be adjourned and a further review and monitoring period will be set. In the event that the employee is unable to meet the performance requirements set, the Hearing will be re-convened.
  - That an adjournment is required to seek further information or advice, following which the Hearing will be reconvened.
  - That the employee's employment will be terminated on the grounds of capability. Termination will be with statutory or contractual notice, whichever is the greater. Notice may be paid in lieu.
- 14.9 The decision of the Panel or Head teacher and the reasons for it shall be communicated in writing to the employee.

## **15. Right of Appeal**

- 15.1 If an employee feels that a decision to dismiss them, or other action taken against them at the Capability Hearing, is wrong or unjust, they may appeal in writing against the decision within 10 working days of the decision, setting out at the same time the grounds for appeal.
- 15.2 An Appeal Committee shall normally hear the matter not more than 5 weeks after receipt of an appeal letter. Appeals will be heard in accordance with Appendix C.
- 15.3 The decision of the Appeal Committee and the reasons for it shall be communicated in writing to the employee. The decision of the Appeal Committee will be final.



## Capability Hearing

### 1. Preliminary Matters

- 1.1 Any Member of the Capability Meeting who has been involved in the particular action taken, or who is to be called as a witness, or who is in any material way an interested party, shall not participate in the proceedings.
- 1.2 The meeting shall take place in private session and parties shall be reminded that proceedings are confidential.
- 1.3 The subject and Presenter shall have the right to call witnesses and the subject shall have the right to be accompanied/represented by a work colleague or a trade union official, or a trade union representative who has been certified by their union as being competent.
- 1.4 It should be established whether the services of an interpreter are required.
- 1.4 Facilities shall be provided for each side to meet separately.

### 2. Outline of Procedure to be Followed

- 2.1 It shall be confirmed that the preliminary matters in paragraph 1 above have been carried out.
- 2.2 The witnesses shall be instructed not to discuss the matter outside the hearing and advised at which point they may no longer be required. Witnesses will only be present in the hearing when giving evidence or being questioned.
- 2.3 At the commencement of the meeting a procedure shall be agreed which it is suggested should follow the format set out below.

### 3. Opening Remarks by Chair

- 3.1 Introducing those present at the hearing.
- 3.2 Advising that an adjournment may be requested at any time during the hearing.
- 3.3 Outlining the procedure to be followed.
- 3.4 Outlining the reason(s) for calling the Capability Hearing.

### 4. The Procedure

#### 4.1 The Case Against the Employee or Headteacher

- 4.1.1 Opening remarks by the Presenter including any evidence he/she may wish to offer.

- 4.1.2 The subject or his/her representative may question the Presenter of the case on any evidence which he/she has given.
- 4.1.3 The Presenter may then call and question the first witness.
- 4.1.4 The subject of the action and/or his/her representative may then question the witness. The witness then withdraws.
- 4.1.5 Subsequent witnesses may then be called and treated in the same manner. In the light of evidence presented further questions may be asked of the Presenter.
- 4.1.6 In exceptional circumstances, witnesses may be recalled.

## **4.2 The Case for the Employee or Headteacher**

- 4.2.1 Opening remarks by the subject or his/her representative including any evidence he/she may wish to offer.
- 4.2.2 The Presenter may question the subject of the case or his/her representative on any evidence which he/she has given.
- 4.2.3 The subject may then call and question the first witness.
- 4.2.4 The Presenter may then question the witness. The witness then withdraws.
- 4.2.5 Subsequent witnesses may then be called and treated in the same manner. In the light of evidence presented further questions may be asked of the subject.
- 4.2.6 In exceptional circumstances witnesses may be recalled.
- 4.2.7 A closing statement which shall not include new material may be made by the subject or his/her representative.

## **4.3 The Decision**

- 4.3.1 The subject and his/her representative will withdraw. The panel will consider the evidence presented to determine the facts of the case. He/she may seek the advice of any attending officer on questions of law and procedure only.
- 4.3.2 The Capability Panel shall reach a decision and inform the subject.
- 4.3.3 This decision will be confirmed in writing.

## **Appeals Procedure**

### **1. Preliminary matter**

- 1.1 Any Member of the Appeals Committee who has been involved in the particular action taken, or who is to be called as a witness, or who is in any material way an interested party, shall not participate in the proceedings.
- 1.2 The meeting shall take place in private session and all parties shall be reminded that proceedings are confidential.
- 1.3 The subject and Presenter shall have the right to call witnesses and all parties shall have the right to be accompanied/represented by a work colleague or a trade union official, or a trade union representative who has been certified by their union as being competent.
- 1.4 It should be established whether the services of an interpreter are required.
- 1.5 Facilities shall be provided for each side to meet separately.

### **2. Outline of Procedure to be Followed**

- 2.1 The Clerk to the Committee shall confirm that the Committee is correctly constituted and that the preliminary matters in paragraph 1, above, have been carried out.
- 2.2 The Committee shall, at the commencement of the meeting, agree a procedure which it is suggested should follow the format set out below.
- 2.3 The witnesses shall be instructed not to discuss the matter outside the hearing and advised at which point they may no longer be required. Witnesses will only be present in the hearing when giving evidence or being questioned.
- 2.4 The parties to the matter, with their representatives, if any, should be invited into the meeting.

### **3. Opening Remarks by Chair of the Appeals Committee**

- 3.1 Introducing those present at appeal.
- 3.2 Advising that an adjournment may be requested at any time during the appeal.
- 3.3 Outlining the reason(s) for calling the hearing.

### **4. The Procedure**

- 4.1 The Case Against the Employee or Headteacher
  - 4.1.1 Opening remarks by the Presenter of the case including any evidence he/she may wish to offer.

- 4.1.2 The subject or his/her representative and members of the Committee may question the Presenter of the case on any evidence which he/she has given.
- 4.1.3 The Presenter may then call and question the first witness.
- 4.1.4 The subject of the action and/or any member of the Committee may also ask questions of the witness on the evidence presented. The witness then withdraws.
- 4.1.5 Subsequent witnesses may then be called and treated in the same manner. In the light of evidence presented further questions may be asked of the Presenter.
- 4.1.6 In exceptional circumstances, witnesses may be recalled.

## **4.2 The Case for the Employee or Headteacher**

- 4.2.1 Opening remarks by the subject or his/her representative including any evidence he/she may wish to offer.
- 4.2.2 The Presenter and members of the Committee may question the subject of the case or his/her representative on any evidence which he/she has given,
- 4.2.3 The subject may then call and question the first witness.
- 4.2.4 The Presenter of the action and any member of the Committee may also ask questions of the witness on the evidence presented. The witness then withdraws.
- 4.2.5 Subsequent witnesses may then be called and treated in the same manner. In the light of evidence presented further questions may be asked of the subject.
- 4.2.6 In exceptional circumstances witnesses may be recalled.
- 4.2.7 Closing statements which shall not include new material will be made by:
  - (i) the Presenter
  - (ii) the subject or his/her representative

## **4.3 The Decision**

- 4.3.1 All parties will then withdraw. The Committee will consider the matter to determine the facts of the case. They may seek the advice of any attending officer on questions of law and procedures only. If the Committee decides to recall either side to clarify any points, then both parties will be invited to return for that clarification.
- 4.3.2 The Committee shall reach a decision and inform all parties. This decision is final and there will be no recourse to any other procedures.
- 4.3.3 This decision will be confirmed in writing to all parties by the Clerk to the Committee.