

**31. Capability, Disciplinary and Grievance Policy and Procedure**

**Policy Statement**

This procedure covers the area where an employee’s performance may be impaired or prevented through:

1. Incapability - because of sub-standard work, (determined by reference to, for example, the Job Description, supervision/appraisal discussions.)
2. Incapability - because of ill-health or disability

This procedure does not apply where impaired performance relates to conduct rather than incapability. It is important to distinguish between an employee who is able but unwilling to improve, which is dealt with under our Disciplinary Procedure, and one who is willing but unable to improve, which is dealt with under this procedure.

This procedure applies to all staff employed by Play Station Nursery Ltd with the exception of probationary staff.

**Key Principles**

1. ***Dealing with Probationary Staff***

* Employees are subject to a probationary period of employment of three months.
* The owner/manager should, at the start of employment, make it clear to the employee that continued employment after the three months probationary period is dependent on satisfactory performance and attendance. The capability procedure does not therefore apply to probationary employees.
* The setting’s Disciplinary Procedure details how probationary employees should be handled where unsatisfactory conduct or performance, including capability, applies.

1. ***Dealing with incapability due to sub-standard work***

* ‘Sub-standard’ work includes performance of duties, which fall below the required standard.
* The incidence of substandard work will be minimised through the effective recruitment, selection, induction and training of staff. Ongoing performance management is an essential feature in ensuring effective work performance. Regular, honest dialogue between managers and staff should help to resolve issues of sub-standard work without the need for formal procedures.
* The possibility of ill health or disability having an effect on performance should also be considered.
* An individual’s circumstances must be considered when applying this procedure. Circumstances such as length of service, previous performance and changes in the workplace, must be taken into account.
* The standard against which performance is judged should be fully explained, be as objective as is possible and should relate to the job description for the role. Support and training should be provided to help rectify poor performance.
* No employee will be dismissed without prior warning that performance is sub-standard and the opportunity to improve, with appropriate support and training, made available. This will take place within agreed and reasonable timescales.
* If it is clear, following performance management reviews and appropriate training and support, that continuing in the current post will not result in the required improvements in performance the procedure outlined will be implemented.
* The employee will always be given the right to be accompanied at formal meetings by either a Trade Union representative or a work place colleague.
* The decision to dismiss an employee can only be made by those with responsibility for recruitment and retention of staff.
  1. ***Incapability due to Poor Performance – Procedure***

In all cases where work or performance appears to be below the required standard, the owner/manager should undertake all of the following steps:

1. Investigate fully the reasons for poor performance,
2. Discuss with the employee his/her shortcomings and the standard required,
3. Provide a reasonable time for improvement,
4. Seek to agree the areas where improvement can be made and provide appropriate training, support and supervision,
5. Monitor performance during and at the end of the time set for improvement. Provide ongoing feedback to the employee,
6. Where the required standard is still not reached at the end of the improvement period, other options must be considered before dismissal, for example, a further period in which to improve.

* In many cases improvement will not be instant and, depending on the nature of the job, and the effect the sub-standard performance has on the workplace, the counselling and training process should continue for a reasonable period of time, beyond the monitoring period. This will also depend on the circumstances relating to the individual.
* A record of meetings held, the nature of poor performance, the standard required and actions taken to resolve the problem must be kept and copied to the employee. The employee should be invited to comment on these.
  1. ***Continuing problem of Poor Performance***

If the counselling process described above does not bring about a rise in performance considered satisfactory, the owner/manager should arrange a formal meeting. The employee will be entitled to be accompanied at this meeting by either a Trade Union representative or work place colleague. The owner/manager should chair the meeting and a representative of the management team may also be present. There are no time specifications for how much notice must be given to the employee before arranging such a meeting. However, it would be recommended that a minimum of 12 hours notice may be given.

The purpose of the formal meeting is to establish as fully as possible:

1. The nature of the sub-standard work and the effect this has on the operation of the service,
2. The steps being taken to rectify the situation and their likely duration,
3. Agreed written targets and objectives, including realistic dates for achievement, against which the employee’s performance can be monitored and evaluated.
4. Any other circumstances that may be affecting performance, for example personal or ill-health/disability considerations.
5. The steps to be taken following the meeting by both sides to bring performance to the required level.
   1. ***Timescales for improvement***

* Except in exceptional circumstances (e.g. in instances where the safeguarding of children is not met or when poor performance amounts to gross incompetence) no employee should be dismissed for sub-standard performance until all warning stages have been completed and a reasonable period should be allowed for raising performance to a satisfactory standard.
* The length of time allowed between formal hearings will depend on individual circumstances (see above). It is not necessary to wait until the expiry of each warning before progressing to the next level. The time between formal meetings will depend on a number of factors and the individual circumstances.
* Should performance continue to be sub-standard, consideration prior to dismissal should be given to:
  + alternative employment
  + demotion
  + retraining
  + career counselling
  1. ***Issuing Warnings***

Following each formal hearing a warning should be given if it is clear that the required standard of performance has not been reached. The structure of warnings to be issued is as follows;-

1. First Level Warning – this warning will be held on file for a period of 6 months,
2. Second Level Warning – this will be held on file for a period of 12 months,
3. Final Warning – this will be held on file for a period of 18 months,
4. Dismissal
   1. ***Termination of Employment***

* Ultimately, termination of employment may be the only effective way of dealing with incapability due to poor performance.
* If dismissal is inevitable, it shall be on the grounds of incapability, and following a formal hearing. If dismissal is inevitable, it shall be on the grounds of incapability and following a formal hearing, be given with the notice required under the employee’s contract.
* The procedure to be followed for the final formal hearing is as outlined in our disciplinary procedure.
* The right to appeal against the decision to dismiss will be included in the letter to the employee.

1. ***Dealing with incapability due to ill-health or disability – Procedure***

Incapability in this context describes an employee’s inability to perform the duties of the job to the required standard on medical grounds.

The following procedure should be followed when dealing with employees suffering from long term sickness or disability, or employees who are incapable of performing their duties to the required standard due to frequent short-term sickness absence.

* An employee who has a medical condition or disability, as defined by the Equality Act 2010, will need to be treated in accordance with the requirements of the Act.
* The Equality Act defines disability as “A physical or mental impairment that has a ‘substantial’ and ‘long-term’ negative effect on a person’s ability to do normal daily activities”. The Act further defines ‘substantial’ as “is more than trivial, e.g. it takes much longer than it usually would to complete a daily task like getting dressed” and ‘long-term’ as “12 months or more, e.g. a breathing condition that develops as a result of a lung infection”
* In addition a person with a progressive condition (defined as “one that gets worse over time”) can be classed as disabled. A person automatically meets the disability definition of the Equality Act 2010 from the day they are diagnosed with HIV infection, cancer or multiple sclerosis.
* It is important to establish at an early stage whether or not an employee is ‘disabled’ as defined by the Equality Act 2010. In order to determine this we use Equality Act guidance issued by the HM Government Office for Disability Issues on “matters to be taken into account in determining questions relating to the definition of disability”.

<https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85038/disability-definition.pdf>

* If the owner/manager is uncertain whether an employee’s condition is a disability as defined by the Act, advice be sought from the Local Authority.
* Under the terms of the Equality Act when “a disabled person (as defined by the Act) is put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled” an employer must “take such steps as it is reasonable to have to take to avoid the disadvantage”. In practice this may mean reallocating an employee’s duties, altering working hours, providing specialist equipment, etc.
* In many cases the likely duration of the illness and/or absence will be known and the employee’s capacity to return to current employment will not be in doubt. In such cases it is still important for there to be regular dialogue between the manager and the employee to check on progress.
* Wherever possible, the employee should be retained in employment and given the opportunity to recover and return to their full duties.
* Individual circumstances should be taken into consideration. However the basic steps to be followed are:

1. Discuss with the individual the problem preventing them from attending work or undertaking their duties to the required standard.
2. Medical advice received from the relevant health professionals shall be discussed with the employee, and their views sought on the advice and the implications for their future employment.
3. Consideration should be given to providing a period of easing back to work. This may take the form of providing amended duties or hours for a limited period, with the intention of returning the employee to the full requirements of the role at the end of this period.
4. If it is established that the current employment is unsuitable on medical grounds notice will be given terminating employment
5. Where the duration of the illness or absence is uncertain, it is particularly important for the owner/manager to maintain regular contact with the employee.
6. The employee shall always be offered the right to be accompanied at formal hearings by either a Trade Union representative or work place colleague.
7. A series of formal hearings should be held, at which warnings will be issued if it is clear an employee’s attendance remains unsatisfactory. The structure of warnings is detailed in 2.4. Prior to each hearing the employee will receive in writing details of the concerns about their absence and any other relevant information.
8. Following review hearings with employees, it is important that the manager writes to confirm the meeting, what was said and what has been agreed. It should be made clear to the employee that continued absence could result in the termination of employment.
9. If it appears that all possible options short of dismissal have been exhausted, for example, return to work, reduced hours, early retirement on the grounds of ill health, a formal hearing should be set up. The procedure to be followed for this hearing is detailed in our Disciplinary Procedure

***3.1 Termination of Employment***

* Ultimately, termination of employment may be the only effective way of dealing with ‘incapability’ due to ill health or disability. If dismissal is inevitable, it shall be on the grounds of incapability and following a formal hearing, be given with notice required under the employee’s contract.
* Unless the employee has agreed in writing to a mutually agreeable termination date, the date of termination should not normally be effective until half pay has been exhausted, except where regular short-term sickness absence render exhaustion of sick pay unfeasible.
* The period of notice shall be at full pay, irrespective of whether the half or nil pay stage has been reached.
* The right to appeal against the decision to dismiss will be included in the letter to the employee.
* Termination of employment will only take place as a last resort and when the following have been undertaken:

1. Medical advice has been sought
2. Reasonable adjustments’ have been actively pursued if required by the Equality Act 2010.
3. Regular contact has been maintained with the employee (if this is possible)
4. The employee has been warned of the likelihood of dismissal if the absence continues or the regular short-term absence does not improve
5. ***Right to appeal***

* Whether the incapability is due to poor performance or ill-health or disability all employees have the right to appeal against the warning given or the decision to dismiss. The procedure for appeals is as outlined in our disciplinary procedure.
* Any appeal against dismissal, demotion or a warning must be lodged within 10 working days of receipt of the letter advising the employee of the outcome of the formal hearing.
* The individual will have the right to be accompanied at the appeal hearing by a trade union representative or work place colleague.

1. ***Work related stress***

* Work related stress is defined by the HSE as being; ‘the adverse reaction people have to excessive pressure or other types of demand placed upon them. It arises when people feel they cannot cope’.
* It is important that Managers are alert to the problem of work related stress and where they suspect that it exists, discuss the issues with the individual promptly. Early intervention is important in reducing stress and helping to prevent long term illness.
* As an employer, our setting has a duty to protect the health, safety and welfare of our staff, so far as is reasonably practicable. Once aware of a potential problem, we have an increased duty of care towards an individual.
* Once aware of a potential problem, the owner/manager should discuss the issues with the individual, undertake a risk assessment and act on the findings of the assessment. Wherever possible, the factors causing work related stress should be identified and removed or reduced so that likelihood of illness is removed. Action that could be considered if removal of risk totally is not possible, includes a temporary reduction in hours, flexible working, and special leave.
* Where every effort has been made to resolve the problem and all reasonable options exhausted, persistent sickness absence will have to be addressed thorough this procedure.

1. ***Regular short-term sickness***

* Regular or short-term sickness, particularly where the cause is varied, will be treated in the same way as long-term sickness, or sickness/disability related to a specific cause. Consultation with the owner/manager may be able to identify ways of resolving the problem.
* ‘Back to Work’ interviews will be held following short-term sickness to assess the employee’s suitability to return to their duties.
* Where the problem persists and frequent absence is impairing their performance this policy and the procedures contained within will become effective.

**9. Disciplinary procedures**

Policy Statement

This procedure is designed to help and encourage all employees to achieve and maintain standards of conduct, attendance and job performance. The Staff Code of Conduct and this procedure apply to all employees. The aim is to ensure consistent and fair treatment for all in the organisation.

Key Principles

* Informal action will be considered, where appropriate, to resolve problems.
* No disciplinary action will be taken against an employee until the case has been fully investigated.
* For formal action the employee will be advised of the nature of the complaint against him or her and will be given the opportunity to state his or her case before any decision is made at a disciplinary meeting.
* Employees will be provided, where appropriate, with written copies of evidence and relevant witness statements in advance of a disciplinary meeting.
* At all stages of the procedure the employee will have the right to be accompanied by a trade union representative, or work colleague.
* No employee will be dismissed for a first breach of discipline except in the case of gross misconduct, when the penalty will be dismissal without notice or payment in lieu of notice.
* An employee will have the right to appeal against any disciplinary action.
* The procedure may be implemented at any stage if the employee’s alleged misconduct warrants this.

The Procedure

*First stage of formal procedure*

This will normally be either:

* *A notice to improve for unsatisfactory performance* if performance does not meet acceptable standards. This will set out the performance problem, the improvement that is required, the timescale, any help that may be given and the right of appeal. The individual will be advised that it constitutes the first stage of the formal procedure. A record of the improvement note will be kept for 3 months, but will then be considered spent – subject to achieving and sustaining satisfactory performance *(for more information please see our Capability Policy and Procedure)*

Or

* *A first warning for misconduct* if conduct does not meet acceptable standards. This will be in writing and set out the nature of the misconduct and the change in behaviour required and the right to appeal. The warning will also inform the employee that a final written warning may be considered if there is no sustained satisfactory improvement or change. A record of the warning will be kept, but it will be disregarded for disciplinary purposes after a period of six months.

*Final written warning*

If the offence is sufficiently serious, or if there is further misconduct or a failure to improve performance during the currency of a prior warning, a final written warning may be given to the employee. This will give details of the complaint, the improvement required and the timescale. It will also warn that failure to improve may lead to dismissal and will refer to the right to appeal. A copy of this written warning will be kept by the setting but will be disregarded for disciplinary purposes after twelve months subject to achieving and sustaining satisfactory conduct or performance.

*Dismissal or other sanction*

If there is still further misconduct or failure to improve performance the final step in the procedure may be dismissal or some other action short of dismissal such as demotion or disciplinary suspension. Dismissal decisions can only be taken by the owner/director/chair/manager and the employee will be provided in writing with reasons for dismissal, the date on which the employment will terminate, and the right of appeal.

If some sanction short of dismissal is imposed, the employee will receive details of the complaint, will be warned that dismissal could result if there is no satisfactory improvement, and will be advised of the right of appeal. A copy of the written warning will be kept by the setting but will be disregarded for disciplinary purposes after twelve months subject to achievement and sustainment of satisfactory conduct or performance.

*Gross misconduct*

Examples of such misconduct would be:

* Theft and/or fraud
* Physical violence and/or bullying
* Serious misuse of the setting’s property or name
* Deliberately accessing internet sites containing pornographic, offensive or obscene material
* Serious insubordination
* Unlawful discrimination or harassment
* Bringing the business into serious disrepute
* Serious incapability at work brought on by alcohol or illegal drugs
* Causing loss, damage or injury through serious negligence
* A serious breach of health and safety rules
* Any breaches of confidence.

If you are accused of an act of gross misconduct, you will be suspended from work on full pay, normally for no more than five working days, while the alleged offence is investigated. If, on completion of the investigation and the full disciplinary procedure, the business is satisfied that gross misconduct has occurred, the result will normally be summary dismissal without notice or payment in lieu of notice.

*Appeals*

An employee who wishes to appeal against a disciplinary decision must do so within five working days. The appeal will be heard by a person identified by the business and who has not been involved in the disciplinary action. They will review the case and any disciplinary penalty which has been imposed and report back to the owner/director/chair/manager with their decision. Any decision reached at this stage is final and this will conclude the appeal.

**Grievance Procedures**

Key Principles

This procedure covers all matters which may become a source of grievance, excluding:

* Those concerned with disciplinary action unless the disciplinary action amounts to discrimination, or the action was not taken on the grounds of the employees conduct or capability.
* Decisions on strategic business issues which are taken by the owner/director/chair/manager, but not excluding the operational impact of those decisions.

Employees are encouraged to raise concerns verbally with the manager prior to raising a formal grievance.

Employees are entitled to be accompanied at a grievance meeting and appeal, by a trade union representative or a work colleague.

The Procedure

The setting’s policy is to encourage free interchange and communication between senior management and all staff members. This ensures that questions and problems can be aired and resolved quickly and that grievances are settled informally.

*Dealing with grievances informally*

If you have a grievance or complaint to do with your work or the people you work with you should, wherever possible, start by talking it over with your manager during supervision meetings or by requesting a separate meeting if necessary. You may be able to agree a solution informally between you.

*Formal grievance*

If the matter is serious and/or you wish to raise the matter formally you should set out the grievance in writing to your manager. You should keep this factual and avoid language that is insulting or abusive.

Where your grievance is against your manager and you feel unable to approach him or her you should talk to the owner/director/chair or LADO.

*Grievance hearing*

You will be called to a meeting, normally within five days, to discuss your grievance. You have the right to be accompanied by a trade union representative or a colleague at this meeting if you make a reasonable request.

After the meeting the manager will give you a decision in writing, normally within 24 hours.

*Appeal*

If you are unhappy with the decision and you wish to appeal you should let your manager know.

You will be invited to attend an appeal meeting, normally within five days, and your appeal will be heard by the owner/director/chair. You have the right to be accompanied by a trade union representative or a colleague at this meeting if you make a reasonable request.

After the meeting the owner/director/chair will give you a decision, normally within 24 hours. This decision is final.

Grievances and whistle blowing should be treated differently. For procedures for whistle blowing see our separate policy.

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