

# Capability (Performance) Policy

## (Excludes Teachers)

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## POLICY TITLE

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3	April 2018	Inserted new paragraphs in section 1 due to GDPR changes/ Appendix flowchart added
4	February 2022	Hybrid Working and Smarter Ways of Working
4.1	February 2022	Updated Equalities-related information
4.2	May 2022	Information regarding access to Redeployment Register clarified

## Capability (Performance) Policy

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## 1. Policy Statement

The purpose of this policy is to ensure Council staff work to high and consistent standards in accordance with their job description, person specification, core qualities, leadership qualities (if appropriate) and within the Solihull MBC Behavioural Framework. The Council is responsible for ensuring that employees are provided with the opportunity, support and encouragement to recover their performance when it fails to meet the required standards.

This Policy and Procedure applies to all employees except those who are employed on JNC and teachers' terms and conditions for whom separate procedures are in place.

The policy aims to ensure that the reasons for any performance or capability issues are explored fully and plans are put in place to overcome issues. The ultimate aim of the process is to see an improvement in the individual's effectiveness by adopting a supportive approach. The formal process should be applied once all informal options have been exhausted.

A written record of all meetings conducted under this procedure will be made, either by the person holding the meeting or by an additional person arranged by the Council/school to take notes. The Council/school processes any personal data collected during the Capability policy in accordance with its data protection policy. Any data collected is held securely and accessed by, and disclosed to, individuals only for the purposes of completing the capability policy. Inappropriate access or disclosure of employee data constitutes a data breach and should be reported in accordance with the Council's/school's data protection policy. It may also constitute a disciplinary offence, which will be dealt with under the Council's/school's disciplinary policy.

Audio or visual recordings of proceedings by the employee or their representative are not acceptable at any stage of this process. Please also refer to the Council's [Video Conferencing guidance](#) and [Electronic Communications and Guidance](#).

## 2. Definition

A performance or capability issue is defined as any decline in normal levels of performance, or the inability to reach satisfactory levels of competence, which may be due to lack of knowledge, skill, ability or the use of inappropriate behaviours.

This policy should be used where there is an underlying lack of capability, rather than a deliberate failure on the part of the employee to perform to required standards, in which case the disciplinary policy would be appropriate. Any performance issues that emerge during an employee's probationary period should be addressed under the Probationary policy.

It is important that disability and other diversity related issues are taken into account when dealing with any performance issue.

NOTE: Unless specified otherwise in this document the term "manager" is used generally to include line manager, Headteacher, supervisor, team leader, manager,

senior manager or senior member of staff.

### **3. Purpose**

The Capability Policy provides a 3 stage process for identifying, understanding, managing and resolving shortfalls in an individual's performance where this falls below the standard normally expected.

The overall aim of the policy is to:

- Ensure that any concerns about an employee's ability to achieve acceptable standards of work are addressed effectively through a clear and supportive process.
- Ensure that supervision, training, counselling and support measures are deployed appropriately to help employees achieve acceptable standards of work.
- Provide a clear procedure for the termination of employment in cases where an employee does not reach a satisfactory and acceptable level of performance after appropriate support has been offered.
- Bring performance to a level at which an employee becomes effective in their job role. Acceptable levels of performance are normally identified through the requirements and objectives agreed for the role as part of the performance review discussions between the employee and manager and as defined for the role within job description and person specification.

### **4. Equality Considerations**

Managers/Headteachers must not contravene any of the principles laid out in the Equality Act 2010 when applying any aspect of this policy. Managers/Headteachers should take particular care to ensure employees with a disability are not unfairly discriminated or disadvantaged against. Required formats or reasonable adjustments will depend on an individual's needs, personal preferences and access to technology and may, for example, include large print, audio tape, and British Sign Language (BSL) or Braille. Any reasonable adjustments must be made to enable an employee with a disability to undertake the role and responsibilities of their post. Consideration must also be given to the provision of translation and interpreting services to employees whose first language is not English.

### **5. Principles**

- 5.1 Managers/Headteachers should ensure that any individual whose performance is unsatisfactory is clear about the:
- level of concern;
  - evidence used to reach this conclusion;
  - expected level of performance required;
  - type of support available; and
  - consequences of failing to improve their performance.

- 5.2 A manager/Headteacher contemplating using this policy beyond the informal stage must seek advice from their HR Advisor.
- 5.3 Performance issues should not be viewed in isolation and should be considered in the overall context of the performance management framework. Objectives and development needs are discussed and agreed during the Performance Development Review. Managers should not wait until this meeting to highlight issues of poor performance but address these as they arise or through 1:1s.
- 5.4 It will normally be appropriate to apply all the stages specified below, but in certain circumstances it may be necessary to accelerate the process. This will depend upon the severity of the capability concerns highlighted and whether the consequences could have a serious impact on the Council.
- 5.5 If it is considered that hybrid working arrangements are contributing towards poor performance, the hybrid working pattern may be amended (for example, through closer supervision) or withdrawn as part of an appropriate performance improvement plan.
- 5.6 At each stage of the process, an employee will be informed about the shortfall in performance and given an opportunity to provide an explanation before any action is taken.
- 5.7 At all formal stages employees have the right to be accompanied by a Trade Union Representative, or work colleague. Some employees may require peer support where there is a specific and agreed need, i.e. from organisations representing employees with disabilities, such as MIND. Managers must take account of this in their approach to applying the procedure at all stages.
- 5.8 An employee is responsible for arranging their own representation for formal meetings. If the employee or their work colleague/representative is unable to attend a meeting on the date proposed, the meeting will be rearranged once and an alternative date mutually agreed. The alternative date should be within five working days of the original date. The rearranged meeting may take place in the employee's absence, with a decision made on the information available at the time, if the employee does not attend without sufficient justification approved by the panel Chair.
- 5.9 At all times an individual's right to confidentiality will be respected. A breach of the Council's Data Protection policy may result in the instigation of disciplinary proceedings.
- 5.10 In the event of any action being proposed under this policy against a Trade Union Representative, HR must be informed and the appropriate Regional Officer of that Trade Union should be notified prior to the procedure being implemented.
- 5.11 The employee, or any person acting on their behalf, is not permitted to covertly record any informal or formal video meeting held by the Council. Any breach of this provision may lead to disciplinary action against the employee, up to and including dismissal. This is on the basis that we expect employees to be open and honest and to treat colleagues with dignity and respect, and making secret

recordings undermines trust between individuals. Anyone making such recordings in contravention of this would also be personally responsible for any breach of Data Protection legislation. There is a potential that the use of non-covert audio recording devices may be allowed as a reasonable adjustment to accommodate a health condition where previously deemed appropriate by Occupational Health or an employee's GP/Medical Practitioner; this will be with the express consent of everyone present.

## 6. Responsibilities

- 6.1 It is the manager/Headteacher's responsibility to:
- monitor and address performance issues as early as possible;
  - set objectives and expectations in accordance with the individual's job role that are specific (clear and objective), measurable (evidence-based, in terms of performance), achievable (fair) realistic (in relation to the job) and timebound (achievable in a reasonable amount of time). If targets are not within this scope they may be deemed inequitable;
  - provide ongoing training and support, including signposting where appropriate to relevant support services;
  - ensure that the employee is aware and understands when the Capability policy has been instigated;
  - work collaboratively with the employee to establish and agree appropriate objectives to inform the Performance Improvement Plan; and
  - conduct the informal and formal stages of this policy.
- 6.2 It is an employee's responsibility to:
- take ownership of their development needs and participate actively in the process by working collaboratively with their line manager to identify suitable objectives for their Performance Improvement Plan;
  - achieve objectives and targets as required by Solihull MBC;
  - work towards supporting the Council's expected behaviours;
  - perform to the best of their ability;
  - bring to their line manager's attention any issues which may be impacting negatively on their performance; and
  - acknowledge where they need help and to seek appropriate support to assist with any difficulties they may experience while this process is applied.
- 6.3 It is the responsibility of HR to:
- provide technical and procedural advice and guidance to managers and employees to ensure that the capability procedure is followed correctly;
  - support managers/Headteachers, as necessary.
- 6.4 It is the responsibility of recognised Trade Union Representatives to support and advise an employee throughout the application of the process, accompanying at formal meetings where requested.

## 7. Procedure

The three stages of the procedure are:

- Performance Improvement Support (Informal Stage).
- Formal Capability (Stage 1).
- Formal Capability (Final) Hearing (Stage 2).

### 7.1 Performance Improvement Support (Informal Stage)

Where an employee displays an inability to perform their duties satisfactorily, the Council/School will attempt to resolve the matter informally in a meeting between the line manager/Headteacher and employee. Any shortfalls in performance require the manager/Headteacher to inform the employee in a constructive and supportive way about the nature of the unsatisfactory performance and how such performance will need to improve. It should be made clear that the meeting is informal.

Under the Council's hybrid working practices any of the meetings referenced in this policy may take place in person or remotely via video conferencing.

Where the informal meetings are to be held remotely, the manager will ensure that the employee is aware in advance that the nature of the conversation is private to allow them time to find a confidential space to take the meeting. It is acceptable to conduct a meeting remotely if the employee has access to and is comfortable using the technology being adopted.

The issues should be discussed promptly with the employee concerned and the causes of the shortfall identified. Examples of the shortfalls should be provided to the employee and consideration should be given as to whether the employee requires further training, supervision, support, such as a referral to Occupational Health or the EAP (Employee Assistance Programme) or guidance. If appropriate, measures should be taken to provide additional support and a Performance Improvement Plan drawn up.

The aim of this stage is to support the employee at the earliest possible opportunity in order to improve their performance to the standard required. This may include:

- Increased supervision sessions
- Additional Training
- Feedback
- Support
- Guidance
- Work Shadowing
- Coaching
- Mentoring
- Temporary alteration of duties that do not affect the nature of the job but enable the employee to develop



It is recommended that the informal capability procedure is initially undertaken for a period of four weeks. Performance should be reviewed by the manager/Headteacher and the employee on a weekly basis (or more frequently if necessary).

At the end of four weeks, a discussion will take place between the manager/Headteacher and employee to review the progress being made and to specify any aspects of the performance improvement plan that have not been achieved and remain outstanding, exploring the reasons for these. A further period of four weeks will be allowed to achieve these improvements.

At the end of eight weeks, the informal stage can be extended further but only where the employee can demonstrate and evidence a significant improvement in their performance and is making progress towards achieving their improvement plan. This can only be extended for a further period not exceeding four weeks (i.e. the total review period is 12 weeks maximum).

In many situations, a constructive discussion around shortfalls in performance with a focus on the standards required will bring about improvements. If, however, such improvements are not forthcoming within the above timescales, the individual will be informed that their performance will progress to and be managed in accordance with Stage 1 of the formal part of the policy.

Throughout the process it is vital that all meetings are fully documented and that all parties receive a copy of the notes.

Individuals who are being managed in accordance with this policy are unlikely to receive any pay progression.

## 7.2 Formal Capability (Stage 1)

If, following conclusion of the informal stage, there has been no significant improvement then stage 1 of the formal process should commence.

The manager/Headteacher must write to the employee informing them that a formal Stage 1 meeting will be held, giving at least 5 working days' notice and providing them with a copy of the policy. The employee should be advised that they may be accompanied by a recognised Trade Union Representative or a workplace colleague at this meeting. This applies whether the meeting is held in person or remotely via video conferencing.

An HR representative may attend the Stage 1 meeting to provide advice and guidance to the line manager regarding the application of this procedure.

Discussions at the meeting should focus on clarifying the performance shortfalls, understanding any underlying causes, reviewing and agreeing a clear performance improvement plan, with outcomes and timescales detailing how the objectives should be achieved.

At the meeting the manager will:

- Remind the employee that this is a formal stage in the Council's capability procedure and continued failure to make the required improvements may lead to dismissal.
- Explain how the expected performance standards are not being met and confirm what the expected performance standard is.
- Seek to establish the causes for the continued unsatisfactory performance and agree the ways in which these can be effectively addressed.
- Review the performance improvement plan drafted in the informal stage and amend as required.
- Ensure that detailed notes of all meetings are kept and a letter confirming the outcome of the meeting is sent to the employee.

If the outcome of the Stage 1 meeting is that the required performance improvements have either not been met or not sustained the employee will be given a further opportunity of up to four weeks to make the required improvements. The improvement period will usually be 4 weeks, however, there may be circumstances in which this needs to be extended, for example because of annual leave or sickness absence, to enable specific relevant training to be arranged or because of the complexity of the relevant issues and their potential adverse impact on service delivery.

The employee will also be advised at the end of the Stage 1 meeting that if the improvements are not forthcoming, there will be no alternative other than to proceed to the final stage (stage 2) and this may result in their dismissal.

At the end of the improvement period (usually four weeks) a Stage 1 review meeting will take place between the manager and the employee. The employee will be informed that they have either achieved the improvement required or that the matter will proceed to the final stage (stage 2).

If the employee has achieved the targets agreed within their performance improvement plan and reached the standards required, this should be recorded and placed on the employee's HR file. If no further action is required, the record will remain live for 12 months. If, however, during this 12-month period, there is a further lapse in performance this will be resumed at the stage in the procedure where it previously ceased. Depending upon the lapse in performance, however, it may be appropriate to move immediately to the Final Hearing Stage.

Where employees possess a professional qualification, the Council has a responsibility to notify the appropriate professional body if there are serious concerns about an individual's ability to carry out their professional role and where there may be a danger to the public, for example the Health and Care Professional Council (HCPC) or Social Work England (SWE) for social care workers. This notification may occur at any stage of the capability process, if deemed necessary.

### 7.3 Formal Capability (Final) Hearing (Stage 2)

If the employee has not achieved the required improvement by the Stage 1 review meeting, a Stage 2 hearing will be arranged. The employee will be given written notification, at least five working days in advance, of the date, time, place and format of the hearing. This notification should outline the reasons for the hearing and include all relevant documents, e.g. copies of improvement plans. The employee should be advised that they may be accompanied by a recognised Trade Union Representative or a workplace colleague. This applies whether the meeting is to be held in person or remotely via video conferencing.

### 7.4 The Panel

a) *Non-Schools:*

The hearing will be conducted by a panel consisting of two members, comprising a SMBC Manager, who understands the business needs of the service area, will chair proceedings and have overall responsibility for decision-making, and a representative from HR, neither of whom will have previously been involved in the case.

b) *Schools:*

A panel of three Governors will be convened, one of whom will act as panel chairperson, and a representative from HR to provide professional advice and guidance. The panel of governors may decide on matters that could potentially result in a dismissal.

If the employee fails to attend the hearing arrangements will be made to reconvene the hearing within five working days. The rearranged meeting may take place in the employee's absence, with a decision made on the information available at the time, if the employee is unable to attend and clear justification is not presented to the panel beforehand and approved by the Chair.

The employee's manager/Headteacher will provide evidence of the performance shortfalls and the panel will seek to establish if and why the performance improvements have not been met; ascertain whether the standards expected are reasonable; and determine whether appropriate training and support measures have been implemented to assist the employee. In certain circumstances, the Chair may deem it necessary to adjourn the hearing to allow time for additional evidence to be presented to the Panel.

If a decision is made to impose a sanction on the basis of the evidence offered, the employee will be informed accordingly. The decision will be confirmed in writing to the employee within five working days.

At the end of the hearing the following may be considered:

- Improvement period extended
- Alternative work\* (downgrading/ transfer to an appropriate role).
- Redeployment
- Retraining
- Dismissal on the grounds of Capability with the requisite period of notice in accordance with the employee's contract

\*This sanction can only be considered where a suitable alternative vacancy exists.

The record of the Hearing, and any sanction applied, will normally be retained on the employee's personal file, located in HR, for a period of 12 months.

## **8. Alternatives to Dismissal/Redeployment**

As an alternative to dismissal the employee may be transferred to a single, specified post available at the time that they would be deemed competent to undertake. The employee would automatically serve a six month probationary period and if demoted to a post at a lower grade would not receive pay protection. The recording of the decision would remain on the employee's HR file for 12 months.

Or

The Chair of the panel may authorise an extension of the improvement period for four weeks. A timetable outlining support and supervision measures will be produced and the manager will continue to monitor the employee's performance to determine whether agreed targets have been met. If the employee has fulfilled the objectives required, this should be recorded and placed on their HR file where it will remain live for 12 months. If, however, at the end of an agreed extended improvement period, there is evidence of insufficient improvement or further examples of poor performance, the Formal Capability (Final) Stage 2 (Hearing) will be reconvened.

The availability of alternative work must be considered wherever possible before action is taken to dismiss an employee. The employee may also be eligible to access the Redeployment Register, which contains the positions available within the Council for individuals whose employment with the Authority is at risk, for the duration of their notice period as set out in their contract of employment. The employee will not be required to attend work during this time. There may be other suitable job vacancies within the organisation for which the employee has the appropriate skills, though a period of pay protection will not be afforded if a lower-graded role is attained. If at the end of the period no suitable vacancies have arisen or an employee has unreasonably refused alternative employment, the employee's contract will be terminated on the grounds of capability.

Where a trial period has been agreed this will normally be for four weeks and may be extended briefly through agreement between the manager and employee on the basis that further training may be necessary. An employee's notice period will not be considered as active during any trial to secure an alternative role.

The existence of a long-term illness or disability, whilst not being material to the reason for invoking the Capability policy, may need to be considered when identifying alternative employment. There is a requirement to consider reasonable adjustments to take account of the impairment but not any capability problem that is not related to the impairment.

## **9. Appeals Procedure**

An employee who wishes to appeal against any formal action should complete the Appeal Form (Appendix 2) and send this to the Head of Human Resources or, for schools, the Chair of Governors.

An appeal against dismissal should be sent to the Head of Democratic Services. Appeals should be sent within five working days of receiving written confirmation of any sanction.

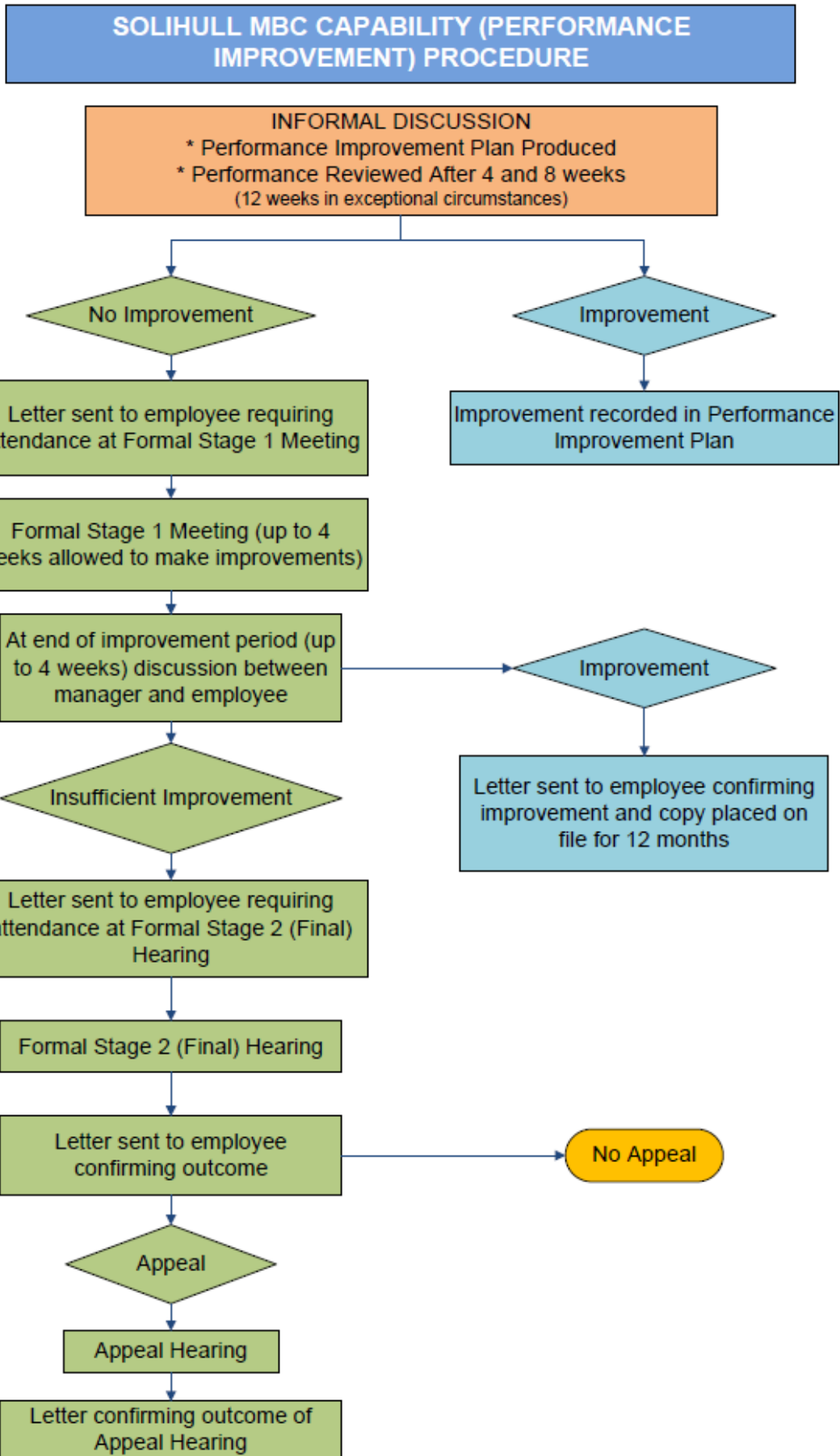
The sanction imposed as a result of the original hearing will remain in force unless it is modified as the result of the appeal.

The appeal will normally be arranged within ten working days of the receipt of the request. The employee will be given notification of the date, time, place and format of the appeal hearing and will be entitled to be accompanied by a recognised Trade Union Representative, someone nominated by them or work colleague.

Appeals against sanctions other than dismissal will be heard by a SMBC Manager, who has had no previous involvement in the case and is more senior to the person who made the original decision, together with a representative from HR. Appeals against dismissal will be heard by the Appeals sub-committee. The purpose of an appeal is to review whether the outcome of any sanction enforced was fair and if the employee received appropriate additional training and support during the process.

In schools this will be determined by the governance arrangements for hearing appeals.

The employee will be notified of the outcome of the Appeal in writing within five working days.





## APPEAL AGAINST FORMAL ACTION

I wish to submit an appeal against the decision made following formal action being taken in connection with the Council's Capability (Performance) Policy.

### *Personal Details*

<b>Full Name:</b>	
<b>Employee No.:</b>	
<b>Job Title:</b>	
<b>Directorate:/School</b>	
<b>Name of Trade Union (if applicable):</b>	
<b>Representative's Name:</b>	

### *Details of Action Taken*

<b>Decision, e.g. dismissal</b>	
<b>Name of Manager making decision:</b>	
<b>Date of receipt of written decision:</b>	

***Grounds of Appeal (You should explain why you feel the process applied was unfair and give detail around additional measures you believe could have been made available to assist you)***

My grounds of appeal are as follows:

*(continue on a separate sheet, if necessary)*



<b>Signature of employee appealing:</b>	
<b>Date:</b>	

**NOTE:**

If you are appealing against **dismissal** please send this form marked for the attention of the Head of Legal and Democratic Services at [demserv@solihull.gov.uk](mailto:demserv@solihull.gov.uk) or to:

Council House  
 Manor Square  
 Solihull  
 B91 3QB

within **5 working days** of receipt of the decision.

If you are appealing against **any other sanctions** applied, please send this form to Adrian Cattell, Head of Human Resources, at [acattell@solihull.gov.uk](mailto:acattell@solihull.gov.uk) or to :

Council House  
 Manor Square  
 Solihull  
 B91 3QB.

**Schools:**

In the case of any Appeal, please send this completed form to the Chair of Governors for the school involved.

**DATA PROTECTION  
 FAIR PROCESSING NOTICE**

All information supplied on this form may be held and used as detailed:

The form is sent to the Head of HR or Democratic Services Manager / Chairperson of the School Governing Body and retained until the capability process has been completed. A copy of the form will also be shared with Human Resources to ensure the appeal process is correctly followed, and with members of the independent appeal panel (SMBC senior employees/school governors) as part of a confidential 'bundle' of evidence heard at an appeal meeting, or to an Employment Tribunal and legal representatives should a case progress that far.

The information you provide may also be shared with third parties of professional bodies such as the Department for Education, Teaching Regulation Agency or the Health and Care Professions Council should there be a need for the Council/school to make a referral.

For further information about how we use your information please refer to the Council's Data Protection Policy on the [Intranet](#) /School's [Extranet](#) and Privacy Statement on [www.solihull.gov.uk](http://www.solihull.gov.uk).