NHS Providers

HEMPSONS

CLOSING THE GAP: A GUIDE TO ADDRESSING RACIAL DISCRIMINATION IN DISCIPLINARIES

October 2023

RACE EQUALITY

NHS Providers

HEMPSONS

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ABOUT US

NHS Providers is the membership organisation for the NHS hospital, mental health, community and ambulance services that treat patients and service users in the NHS. It helps those NHS foundation trusts and trusts to deliver high-quality, patient-focused care by enabling them to learn from each other, acting as their public voice and helping shape the system in which they operate.

NHS Providers has all trusts in England in voluntary membership, collectively accounting for £115bn of annual expenditure and employing 1.4 million people.

Race Equality programme

NHS Providers' *Race Equality programme* supports boards to effectively identify and challenge structural race inequality as a core part of the board's business by:

- Creating hearts and minds change through building personal awareness and understanding of racial justice and anti-racism.
- Increasing leaders' confidence and capability to act through sharing evidenced-based practices, empowering leaders to proactively challenge the impact of structural racism and seek opportunities to advance race equality.
- Encouraging leaders to take accountability through sharing accountability mechanisms, enabling leaders to self-reflect, educate, and ensure sustained progress is made with a focus on outcomes.

The programme delivers a range of events for trust leaders, bringing together subject matter experts, examples of evidenced-based practice, and peer learning opportunities. It offers a range of resources, on topics including inclusive recruitment and talent management, data and accountability, and allyship. These resources have equipped leaders to have authentic conversations about race, challenging both themselves and other board members to drive progress and reduce inequality.

Hempsons, a specialist health and social care law firm working across the public, private and third sectors, acts for over 200 NHS organisations nationwide on strategic and operational issues including integrated care, collaborations, service reconfigurations, patient safety, estates projects and workforce.

Delivering trusts the advice, support and guidance needed in today's uncertain and volatile healthcare employment arena, Hempsons' NHS, health and social care employment solicitors offer an exceptional depth of knowledge and experience derived from always having worked within the health and social care sectors.

Hempsons is a longstanding partner of NHS Providers and supports them on a range of activities where legal issues are an important consideration. With its extensive experience in employment law, Hempsons brings a unique legal perspective to understanding and closing the disciplinary gap. Hempsons lawyers are passionate about using their experience to help trusts address this issue which is a crucial part of any organisation's work on anti-racism as well as for promoting diversity, inclusion, and equality within the NHS workforce, and for ensuring that all staff are treated fairly and equitably.

NHS Providers' language

The *NHS Workforce Race Equality Standard* (WRES) report uses the term 'Black and Minority Ethnic' to describe ethnic minority staff. NHS Providers uses the full description 'black, Asian and minority ethnic' or 'ethnic minority' as preferred descriptions to denote the same aggregation where disaggregation into more appropriate, distinct categorisations of ethnicity is not possible.

EXECUTIVE SUMMARY

The NHS would not be able to deliver its services without the ethnic minority staff who work within it. The advantages of a diverse workforce are well evidenced with inclusive and diverse organisations being eight times more likely to achieve better business outcomes (*Diversity Wins*, McKinsey & Company). Workforce diversity is essential for the delivery of high-quality care to all patients (*Long term support for race equality, Dr Habib Naqvi and Yvonne Coghill*, NHS England blog), many of whom are also from diverse backgrounds.

The 'disciplinary gap' is highlighted in the WRES data. This is the relative likelihood of ethnic minority staff entering the formal disciplinary process compared with white staff (WRES metric three).

Despite annual measurement and reporting on this metric since 2015, the disciplinary gap in the NHS persists, with ethnic minority staff being disproportionately likely to enter formal disciplinary processes compared to their white counterparts. In 2022, ethnic minority staff were reported to be 1.14 times more likely, (where 1.0 is equally as likely, and anything above 1 shows inequality) to enter the formal disciplinary process compared to white staff, unchanged from 2021. This inequity, although it has narrowed since 2015, remains a critical concern. Multiple factors contribute to the disciplinary gap, including bias, lack of cultural awareness among managers, disparities in the application of HR processes, wider challenges around organisational culture and systemic patterns of discrimination.

The disciplinary gap has significant implications (*Beyond the snowy white peaks of the NHS?*, Race Equality Foundation), including negative effects on staff wellbeing, loss of talented staff, and the potential negative impact on patient care and satisfaction, alongside the legal and financial consequences and damage to the NHS's reputation.

Reducing the racial disciplinary gap is an essential part of developing an anti-racist and inclusive NHS which supports all staff to thrive and provide the best possible patient care.

This guide aims to support board members to have an increased awareness and understanding of the existing disparity and provides practical advice and examples of how the gap can be reduced. It outlines:

- The data on disciplinaries and the impact of the current inequity in the treatment of white and ethnic minority staff.
- The legal framework and learning from recent cases.
- The practical implementation of strategies outlined in *A fair experience for all* (NHS England and NHS Improvement) for minimising and closing the gap based on case studies from four trusts.
- The role of leadership in addressing the issues.

While the *Equality Act 2010* provides protections against race-based discrimination, imposing a duty on public sector organisations including NHS trusts to eliminate discrimination and advance equality, board leadership is pivotal in addressing the disciplinary gap.

The case studies within the guide share practical interventions implemented by trust leaders that have narrowed the gap and improved the workplace experience for staff. Each case study also contains top tips from trust leaders for action and impact. Though there are a range of strategies that have proved effective, there are a number of common themes which have enabled improvement:

- Strong board and leadership commitment to race equality is crucial in driving change.
- Developing a *restorative, just and learning culture* (Mersey Care NHS Foundation Trust and Northumbria University) that views mistakes as opportunities for growth, minimises the negative impacts and empowers staff to learn from them is foundational.

- Providing anti-racism training, cultural awareness programmes, and leadership development is essential to changing attitudes and behaviours.
- Regularly monitoring and analysing data, especially by ethnicity, helps identify disparities and measure progress.
- Seeking sources of external support and learning, including from trusts that have made progress in this area, can provide practical advice on what drives greatest impact.
- Transparent communication about race equality, even when conversations are 'uncomfortable', is key to progress.

Achieving equity in the NHS workforce's disciplinary processes requires a comprehensive and sustained effort involving leadership commitment, training, data analysis, and fostering an inclusive culture.

Implementing strategies which support organisations on their journey towards closing the disciplinary gap not only improves the experience of ethnic minority staff but improves both workplace experience and the likelihood of entering the formal disciplinary process for all staff.

This publication was originally conceived as an e-publication and references a range of NHS Providers and wider resources noted in italics throughout.

Use the QR code below to access the e-publication's full list of these linked resources.

INTRODUCTION

The NHS is the largest employer in the UK with a workforce of 1.4 million (*NHS Workforce Statistics – March 2023*), and the biggest employer of ethnic minority people in the UK (*NHS Workforce Race Equality Standard report 2021*, NHS Providers). The 2022 WRES data states that 24.2% of the NHS workforce is from an ethnic minority, making the NHS more diverse than ever (*NHS Workforce*, gov.uk). With over 125,000 vacancies and service demand continuing to increase, it is likely that the NHS will continue to increase in diversity with international recruitment being a key component to meeting this demand (*NHS England's Long term Workforce Plan*, NHS Providers) alongside the development of the domestic workforce. It is crucial that increasing diversity is reflected at all levels across the NHS. However, the most recent WRES data also shows that despite an overall increase in whole workforce diversity, the gap between the whole workforce and board diversity is widening, with the largest gap at executive level.

The WRES was introduced by the NHS Equality and Diversity Council (EDC) for all NHS trusts and foundation trusts in April 2015, mandated within the standard operating contract. Comprising nine metrics covering workplace experience and opportunity for different ethnic groups in the NHS workforce, the WRES provides an ability to benchmark progress, identify trends in local, regional and national data and interventions that have supported progress.

The 'disciplinary gap' is highlighted in the WRES data. This is the relative likelihood of ethnic minority staff entering the formal disciplinary process compared with white staff (WRES metric three). Annual reporting against the WRES metrics has highlighted that despite progress in reducing the gap, the disparity in the treatment of white and ethnic minority staff in disciplinaries still persists over eight years later.

Metric three from the WRES reports: 2016 - 2022

	2015-2016	2016-2017	2017-2018	2018-2019	2019-2020	2020-2021	2021-2022
Relative likelihood of BME staff entering the formal disciplinary process compared to white staff	1.56	1.37	1.24	1.22	1.16	1.14	1.14

A further breakdown in the data shows that in 2022 half of trusts were still 1.25 times more likely to see ethnic minority staff enter a formal disciplinary process compared to white staff.

THE DISCRIMINATORY DISCIPLINARY GAP IN THE NHS

While figures for any NHS organisation may fluctuate over time due to a relatively small number of disciplinary cases each year, a persistent likelihood of entering the formal disciplinary process above 1.0 across the entire NHS workforce underlines an ongoing lack of racial equity that should be a concern for all NHS boards.

There are many potential factors (*Disproportionality in NHS Disciplinary Proceedings*, Uduak Archibong, Roger Kline, Cyril Eshareturi, Bryan McIntosh, British Journal of Healthcare Management) that have and continue to contribute to the disciplinary gap, including:

- Conscious and unconscious bias in disciplinary decisions and processes.
- Lack of cultural awareness and sensitivity among managers conducting disciplinary procedures.
- Systemic or structural issues that disadvantage ethnic minority staff, such as lack of advancement opportunities.
- Organisational culture issues which could which could disproportionately impact ethnic minority staff, such as bullying, lack of compassionate leadership and ineffective teams.
- Disparities in other HR/employee relations (ER) processes such as performance management and development opportunities that can feed into the disciplinary process.

Professional regulators have also acknowledged a disciplinary gap in fitness to practise referrals. The General Medical Council (GMC) has recognised the existence of inequalities in fitness to practise referrals for ethnic minority doctors and has set a target to close the disparity by 2026 (*Healthcare leaders must embrace equality, diversity and inclusion*, GMC).

The Nursing and Midwifery Council (NMC) has identified a similar disparity with ethnic minority nurses and midwives being more likely to be referred by their employer than their white counterparts (*Together in practice – Ambitious for change*, NMC).

The disciplinary gap has significant implications for both the NHS and its staff. Some of the key implications for NHS leaders to consider include:

Impact on staff wellbeing: the disproportionate application of disciplinary policies can lead to feelings of stress, anxiety, and depression, which can affect both personal and professional lives.

Risk of losing talented staff: the disciplinary gap can lead to talented ethnic minority staff leaving the NHS. This can result in a loss of valuable skills and experience, as well reducing the diversity of the workforce.

Impact on patient care: there is a strong correlation between how staff are treated and higher staff turnover and absenteeism, higher mortality rates and lower patient satisfaction (*NHS workforce race equality delivers better care, outcomes and performance*, NHS England). Inclusive culture and equity for staff leads to better care for patients and improved patient experience.

Damage to the reputation of the NHS: the disciplinary gap can damage the reputation of the NHS as an employer and as a provider of healthcare services. It can lead to a loss of trust and confidence among staff and patients and can make it more difficult to attract and retain staff from diverse backgrounds. The case of Nurse Amin Abdullah (*Independent investigation report for Imperial College Healthcare NHS Trust*, 2018, Verita), which led to guidance from NHS Improvement Learning Lessons to Improve Our People Practices, illustrated vividly how much damage, both personal and professional, can occur when employee relations processes do not follow best practice.

Legal and financial implications: if ethnic minority staff members are unfairly disciplined, this can lead to legal action being taken against the NHS employer, which can be both time consuming and costly.

Addressing this issue is a crucial part of any organisation's work on anti-racism as well as for promoting equality, diversity, and inclusion (EDI) within the NHS workforce, and for ensuring that all staff are treated fairly and equitably.

The *NHS EDI improvement plan* specifically references the impact of bullying, harassment, discrimination, and physical violence at work on both staff and patients (High impact action 6). In recognition of this, NHS organisations are expected to review their disciplinary and employee relations processes.

Trusts need to review disciplinary and employee relations processes. This may involve obtaining insights on themes and trends from trust solicitors. There should be assurances that all staff who enter into formal processes are treated with compassion, equity and fairness, irrespective of any protected characteristics. Where the data shows inconsistency in approach, immediate steps must be taken to improve this (by March 2024).

High impact action 6, EDI improvement plan
NHS ENGLAND

LEGAL FRAMEWORK AND GOOD PRACTICE

The Equality Act 2010 provides protection for staff against discrimination on the grounds of race, colour, nationality, and ethnic or national origins. This includes protection against direct discrimination, indirect discrimination, harassment and victimisation.

The Equality Act also imposes a general equality duty on public sector organisations to have due regard to the need to eliminate unlawful discrimination, harassment, and victimisation; advance equality of opportunity between people who share a protected characteristic and those who do not; and foster good relations between people who share a protected characteristic and those who do not.

NHS trust leaders have a duty to ensure that their disciplinary procedures are fair and non-discriminatory, and that employees are not unfairly disciplined on the basis of their race or ethnicity. Discrimination, whether direct or indirect, does not have to be intentional to be unlawful.

Learning from recent cases

Recent employment law cases have shone a spotlight on race discrimination within the NHS.

The cases of *Michelle Cox v NHS Commissioning Board, Samira Shaikh v Moorfields Eye Hospital NHS Foundation Trust* and *Ms P Mntonintshi and Ms U Jama v Barking Havering & Redbridge University Hospitals NHS Trust* all received considerable publicity and have focused attention on the practices of their employers. It is difficult to estimate the costs and time involved in defending each high-profile case, but even in cases where the financial remedy may not be high, both will be significant. Running alongside the moral case for taking steps to close the disciplinary gap, high-profile, reputation damaging and expensive cases against NHS organisations provide further incentives to reduce the inequality.

Michelle Cox v NHS Commissioning Board, Samira Shaikh v Moorfields Eye Hospital NHS Foundation Trust and *Kweyama v Central and North West London NHS Foundation Trust* (though not about disciplinary action), illustrate how the employment tribunals approach allegations of discrimination.

In an employment tribunal, once an employee has provided sufficient evidence from which the tribunal could conclude that discrimination has occurred (prima facie), it is for the employer to discharge the burden of proof by providing a sufficient explanation of its action (or inaction) which is not discriminatory. If an employer is not able to do this, the tribunal will infer that discrimination has taken place and the claim will succeed.

For example, in the Michelle Cox case, the employment tribunal, having made findings of fact, inferred discrimination in part because the employer failed to adequately explain the behaviour towards Ms Cox. This included a failure to explain why a grievance panel had not properly considered the possibility of racism towards Ms Cox and her line manager's repeated poor behaviour towards her.

In the context of the disciplinary gap, employers need to adequately explain the basis upon which a disciplinary case was initiated and that it was conducted in a way that was not tainted by discrimination.

In the case of *Hastings v King's College Hospital NHS Trust* (KCH), the tribunal awarded Richard Hastings £1m in relation to his successful claim. Mr Hastings worked as an ICT Infrastructure Analyst for KCH. Following an altercation with three white contractors in the car park on KCH premises, Mr Hastings was taken through a disciplinary process which led to his dismissal for gross misconduct.

The tribunal found that the disciplinary investigation was 'tainted by unconscious racial bias'. It noted that the complainants were referred to as 'victims' and the investigator accepted their evidence without challenge and failed to record that Mr Hastings had been assaulted first by a complainant. There had also been a failure to investigate Mr Hasting's complaints of racial abuse. Mr Hastings succeeded in his unfair dismissal and direct race discrimination claims.

The good practice set out by NHS England in *Learning lessons to improve our people practices*, although not directly aimed at removing the disciplinary gap, provides useful guidance on employee relations processes. As the guidance sets out, ensuring objectivity, focusing on developing a restorative just and learning culture, applying a rigorous decision-making methodology, assigning sufficient resources and ensuring board level oversight are all important elements of good practice.

CASE STUDY: BARKING, HAVERING AND REDBRIDGE UNIVERSITY HOSPITALS NHS TRUST

Barking, Havering and Redbridge University Hospitals NHS Trust (BHRUT) has sought to reduce its disciplinary gap by seeking to cultivate a restorative, just and learning culture which enables staff to have 'conversations that make a difference' and resolve issues informally.

BHRUT provides care to three of London's most diverse boroughs. The acute trust operates at King George's Hospital in Goodmayes and Queen's Hospital in Romford, as well as providing outpatient services across four sites. The trust specialises in neuroscience services to the whole country. BHRUT has a workforce of approximately 7,700, 56% of which are from an ethnic minority background (*WRES Action Plan 2022/2023*, BHRUT).

The trust's annual NHS Workforce Race Equality Standard (WRES) submission for 2021/22 showed that, against metric three (the relative likelihood of ethnic minority staff entering the formal disciplinary process compared to white staff), BHRUT ethnic minority staff were 1.02 times more likely than white staff to enter a formal disciplinary process (where 1.0 is equally as likely), meaning there is no disparity between ethnic minority and white staff entering a formal disciplinary process. This is also lower than the London average (1.47), acute provider average (1.07), and national average (1.14). Previously, the trust reported a figure of 0.51 in 2021, and 1.12 in 2020.

The NHS Providers Race Equality programme and Hempsons team spoke to Janine La Rosa, chief people officer (CPO), and Sara Najjuma, head of equality, diversity and inclusion (EDI), at BHRUT to hear more about the organisation's work to address disparities within the disciplinary process. This case study shares details of the interventions they have implemented, their impact, the challenges faced, and advice they would give to other board members.

Specific interventions

- Cultivating a 'restorative, just and learning culture' (RJLC) that is led by the board and senior leadership.
- Ensuring that all employment relations and EDI staff are trained in facilitating RJLC approaches.
- Reviewing and updating the 'dignity at work' policy to create a clear process and guide for managers to follow, encouraging informal resolution in the first instance and greater specificity about when to trigger a formal grievance. Where a formal process is required, processes have been reviewed to ensure rapid escalation to the appropriate teams, greater clarity of next steps and an increased sense of urgency.
- Investing in external mediation providers so managers can easily access their support to resolve grievances via informal routes.
- Providing 'active bystander' training to support and upskill the workforce, allowing them to take positive steps in challenging discriminatory behaviours from both patients and staff.
- Redesigning the appraisal process to encourage staff to share how they are experiencing the organisation. This includes a private page within the appraisal that goes directly to the CPO's team rather than the line manager. This information is analysed and used to inform the development of targeted organisational development and culture interventions across individual business areas. This data also provides oversight regarding equity of access to development opportunities.
- Revising the organisation's 'corporate welcome day'. The new format will provide a deeper focus on the trust's values and what they expect from their people. Half of the day will be for all new starters and half will be focused on new managers. All new managers must complete this training which introduces line management including how to have 'conversations that make a difference' (previously known as 'uncomfortable conversations'), and equitable application of policies.
- Fostering a culture of psychological safety to enable staff to speak up and raise concerns, highlighting the importance of this feedback in informing improvement. This includes monthly insight meetings between the board and trust Freedom to speak up (FTSU) guardian to review data and key themes from concerns raised. This feedback is considered as part the people and culture committee and twice a year at the trust board.
- The trust is in the process of restructuring the organisation to create clearer objectives and lines of accountability, where every member of the workforce has clarity on what their manager is responsible for and what staff are expected to deliver on. Work has already started at Queen's Hospital, and the executive board members have their key high-level objectives on display for the organisation to view. It is hoped that this transparency will enable staff to hold themselves and each other accountable – reducing the need to enter disciplinary processes.

Implementation

In 2021/22, the trust had separate roles for both the director of EDI and executive director of workforce. In 2022, the responsibilities for both roles as well as the associated resources and budget were amalgamated into a single CPO role, increasing the level of accountability and oversight at an executive and whole board level. The CPO is a member of the executive board with clear objectives focused on recruitment and retention and creating a RJLC. Addressing disparities within the disciplinary process is an integral part of these objectives. The increased budget and resources available to the CPO have supported implementation of identified interventions.

After the tribunal of *Ms P Mntonintshi and Ms U Jama v Barking Havering and Redbridge University Hospitals NHS Trust and Ms C Beck*, BHRUT reviewed its disciplinary processes, identified learning opportunities and strengthened the support offered to line managers.

Impact

In 2022 the trust reported no disparity between ethnic minority staff and white staff entering the formal disciplinary process.

The trust's FTSU data demonstrates that the number of concerns reported has increased, while the proportion of people asking to remain anonymous through the process has reduced. BHRUT feel this reflects an improvement in the culture of speaking up – that people feel safer to raise concerns and are more confident they will be heard.

By taking a learning approach to concerns and grievances, BHRUT are now able to actively identify the hotspots across the trust and provide more targeted and timely support to address identified issues informally through the EDI team and HR business partners.

Challenges

The trust has experienced significant turnover at senior leadership and board level. This has impacted the trust's ability to make sustainable improvements to processes and organisational culture. However, the chief executive, Matthew Trainer, has now been in post for two years and this has provided consistency for the organisation and new members of the board. In addition, for the first time in six years, the trust now has a fully recruited substantive executive team.

The trust has been operating within the financial constraints of being in system oversight framework – segment 4 (*NHS System Oversight Framework 2021/2022*, NHS England) since July 2021, and receives mandated support from NHS England as part of the recovery support programme. Despite the additional scrutiny on the trust budgets, the board recognises the importance of addressing both the disciplinary gap and encouraging a 'confidence to speak up' culture, and the impact these have on both staff and patient safety. The trust has continued to prioritise and invest in this work by creating greater resource (merging the previous director of EDI's budget and responsibilities into the CPO role).

This, paired with the work done in the EDI team to re-engage staff networks, further supports BHRUT's messaging around organisational culture, expected behaviours, and inclusion practices.

A proposed increase to the EDI team's capacity will allow greater focus on community and outreach work, such as their place as an anchor institution. This is important as BHRUT staff are predominately made up of people from the local communities. This work can, in the longer term, have generational impact by ensuring access to good quality jobs, with opportunity to progress – tackling income inequality and inspiring future generations through ensuring diversity at all levels of the organisation.

BHRUT hope their workforce's confidence to raise concerns will continue to improve.

Learning for the board

Leadership from the board is key to driving organisational culture change. Having an executive sponsor for staff networks has allowed the board to be more in tune with the lived experience of staff and allowed them to become more active allies. For example, the chief executive is an executive sponsor for the race, ethnicity and cultural heritage network (REACH) – they regularly attend meetings and help offer solutions to concerns that are raised. This has helped staff feel more confident to speak up and provided an active space to raise concerns, with the hope that this will reduce the need to seek disciplinary action.

BHRUT's top tip for board members

Resist the temptation to be the 'hero' leader. Cultural change requires collaboration and buy-in not just from the board but at all levels. Recognising this transforms the way people work.

CASE STUDY: BLACK COUNTRY HEALTHCARE NHS FOUNDATION TRUST

Black Country Healthcare NHS Foundation Trust (BCHCFT) has reduced disparity within their disciplinary processes by implementing a 'Cultural Ambassador Programme', alongside training for the board, HR team and managers and wider initiatives to support their ambition to become an anti-racist organisation.

BCHCFT was formed in April 2022 after the merger of Black County Partnership NHS Foundation Trust and Dudley and Walsall Mental Health Partnership NHS Trust. With a workforce of over 3,000, of which 30% are from an ethnic minority background, BCHCFT provides specialist mental health, learning disability, and community healthcare services for over a million people across Dudley, Sandwell, Walsall and Wolverhampton. The trust has been awarded the *RACE Equality Code Mark* for its work towards race equality and tackling discrimination in the workplace.

The trust's *2022/23 WRES submission* showed that, against metric three – the relative likelihood of ethnic minority staff entering the formal disciplinary process compared to white staff – BCHCFT ethnic minority staff were 1.24 times more likely than white staff to enter a formal disciplinary process (where 1.0 is equally likely). This is an improvement from 2021/22, where this metric stood at 1.6.

The NHS Providers Race Equality programme and Hempsons team spoke to Ashi Williams, chief people officer (CPO), and Will Cooling, equality, diversity and inclusion (EDI) partner, at BCHCFT to hear more about the organisation's work to address the disparities between ethnic minority and white staff within the disciplinary process. In this case study, we share details of the interventions they have implemented, their impact, challenges faced, and advice they would give to other board members.

Specific interventions

- Revitalising the existing *Cultural Ambassador Programme*, run in partnership with the Royal College of Nursing (RCN), through greater investment and recruitment of new ambassadors from across the trust to build confidence in the disciplinary system. Through the programme, cultural ambassadors aim to challenge unconscious bias and discrimination that may occur for ethnic minority staff entering/during formal HR processes acting as a neutral presence in hearings and investigations.
- Increasing the capacity of the EDI partner by separating workforce and patient EDI into separate roles within the organisation and introducing two additional posts to provide greater support, advice and guidance to managers and staff.
- Providing additional anti-racism training for the HR team to improve understanding of practices and processes.
- Reviewing disciplinary processes and procedures to ensure they meet the aims of a restorative, just and learning culture (RJLC). A RJLC places equal emphasis on accountability and learning when something has not gone as planned, rather than focusing on allocating blame.
- Increased monitoring of disciplinary data by ethnicity, through the trust EDI committee.
- Sourcing support from external consultants such as brap and drawing on the RACE Equality Code to build the board's understanding of anti-racism, what it looks like in an NHS trust, and how governance, systems and policies could be improved to achieve race equality.
- Participation of the associate director of HR in the Health Management Academy's anti-racist leadership programme, enabling an increased awareness and understanding of anti-racism and ability to review disciplinary processes through a race lens.
- Commissioning anti-racism training for the HR team and managers from Show Racism the Red Card.
- Dedicating an hour of the trust's corporate induction to EDI in addition to mandated online training courses on EDI to underline the importance of staff having a good understanding of anti-racism including for example, microaggressions.

Implementation

The work to reduce disparity within the disciplinary processes was undertaken as part of the trust's wider anti-racism journey. The BCHCFT board undertook training with brap to support their understanding of racism, anti-racism and what this looks like in practice within an NHS trust. The trust also signed up to the RACE Equality Code to ensure a strong governance structure underpinned their anti-racism action plan.

Following the merger between the two legacy trusts, BCHCFT reviewed the disciplinary procedures and processes of both trusts and applied a RJLC lens. Through this review, the new HR team were able to refine their ways of working, provide clarity about expected behaviours and communicate this more clearly to the workforce. BCHCFT also created a new organisational development (OD) department. The OD department work closely with teams that are facing challenges when addressing systemic issues and to help restore relationships that may have broken down.

The Cultural Ambassador Programme had been initially implemented by Black Country Partnership NHS Foundation Trust in 2017. Run by the RCN, the programme provides four days of intensive training to ensure new (independent) cultural ambassadors can identify and challenge discrimination and cultural bias. Cultural ambassadors are expected to use these skills in their role as a neutral observer within disciplinary processes, formal investigations and grievance hearings involving ethnic minority staff. Cultural ambassadors are drawn from ethnic minority staff members at any 'Agenda for Change' pay band and are expected to help hold HR and management to account through their oversight of disciplinary and grievance processes. It is the responsibility of the HR team to secure funding for the programme and ensure its integration across the trust.

BCHCFT report on the result of disciplinary processes through their EDI committee – who also report on the progress of the anti-racism action plan. This allows the board to keep abreast of progress against both their WRES and anti-racism commitments, as well thematic issues, as they arise. The board also meet for development sessions to discuss results, receive updates on changes, and agree improvement strategies.

Impact

Over the years, the trust has seen an improvement in the experience of ethnic minority staff members in the following areas:

- The likelihood of ethnic minority staff entering the formal disciplinary process in comparison to white staff improved from 1.6 times more likely to 1.24 times more likely.
- Harassment, bullying or abuse from staff within the last 12 months which improved by 5% (WRES metric 5).
- Discrimination at work from manager/team leader or other colleagues within the last 12 months which improved by 6% (WRES metric 8).

BCHCFT feel these improvements are indicative of staff viewing the trust as a fairer place to work.

Following extra support on anti-racism, the board feels it has made good progress on its commitment, understanding and learning and is now more able to provide proactive leadership to tackle race inequality and create a culture where all staff feel supported.

In 2020, Black County Partnership NHS Foundation Trust's work on training cultural ambassadors and embedding their role into HR processes, led them to win the *Health Service Journal's Value Award for People and Organisational Development Initiative of the Year*. In addition, the successful implementation of the programme has led the Black Country integrated care system to train 10 cultural ambassadors to act in non-NHS organisations within their system. The trust is also looking to expand the role of cultural ambassadors to support bank workers at BCHCFT in the same way they do for other staff.

Through the range of work designed to engage ethnic minority staff, including via the trust's Racial Inclusion and Cultural Heritage staff network, the trust has seen greater appetite among ethnic minority colleagues wanting to engage with workstreams such as the Cultural Ambassador's programme. The trust has worked with staff to develop an internal leadership programme, as well as fund six ethnic minority colleagues to enrol on the *Mary Seacole programme* (NHS Leadership Academy). The trust is also investing in 50 staff to become career coaches with ILM qualifications to provide extra support to ethnic minority staff in progressing in their careers.

Challenges

Ensuring that cultural ambassadors have enough time to fulfil the demands of their new roles alongside their substantive roles is a key challenge.

Maintaining momentum and motivation for the race equality agenda more widely has also been a challenge for BCHCFT. During the pandemic the organisation found staff were galvanised, sharing their lived experiences proactively and engaging in action planning. In contrast, the current perception by some staff is that there is a reduced focus on the race equality agenda due in part to reduced levels of communication. In response to this, the board and HR team have reflected on ways they are communicating about race equality in general, but also ensuring that they are sharing outcomes and changes made as a result of the trust's anti-racism action plan.

Learning for the board

The board have recognised they cannot meet the needs of the diverse communities they serve without prioritising a focus on race equality. As a result, the board have communicated across the trust the importance of proactively seeking out and confronting racial disadvantage and discrimination, raising awareness of how it is essential to their ability to be an effective employer and healthcare provider. The board regularly incorporate discussions on race equality into board, executive team and committee meetings and within their development sessions. Board members have both professional performance related objectives on advancing race equality, as well as personal anti-racism objectives to support them in their active white allyship.

BCHCFT's five top tips for board members

- Focus on wider culture change within the organisation to improve the experience of ethnic minority staff and support the impact of specific interventions such as the Cultural Ambassador' Programme.
- Constantly challenge and avoid being defensive – never stop listening to what staff are telling you.
- Celebrate the successes, whilst understanding that those who still experience disadvantage will rightly demand that work continues until the challenges they face are fully addressed. Likewise, recognise progress can itself raise fresh issues – for example, ethnic minority staff may find themselves encountering new forms of discrimination as they progress into more senior roles.
- Race equality is everyone's responsibility, but the board must play a leadership role.
- Do not lose sight of the race equality agenda when focusing on the operational needs of the organisation – it should be embedded into everything you do.

CASE STUDY: PENNINE CARE NHS FOUNDATION TRUST

Pennine Care NHS Foundation Trust (Pennine Care) has sought to address its disciplinary gap by increasing the capacity of the senior HR team to enable greater scrutiny and oversight, coupled with anti-racism training and education.

Pennine Care provides mental health, learning disability, and autism services to a population of 1.3 million people in parts of Greater Manchester and Derbyshire. The trust has a workforce of approximately 4,000 staff, of which 17.9% are from an ethnic minority background.

Data collected by the trust as part of the annual *WRES submission for 2022/23* showed a decrease against metric three (with ethnic minority staff 1.1 times more likely, where 1 is equally as likely, to be taken through the formal disciplinary process). This was an improvement on the previous year, where ethnic minority staff were three times more likely to enter a formal disciplinary process than their white colleagues.

The NHS Providers Race Equality programme and Hempsons team spoke to Nicky Littler, director of workforce, and Shawnna Gleeson, deputy director of workforce, at Pennine Care to hear more about the organisation's work on this topic. This case study shares details of the interventions they have implemented, their impact, the challenges faced, and advice they would give to other board members.

Specific interventions

- Increased capacity and support in the senior HR team, by appointing a deputy director of workforce who was tasked with strengthening the oversight of cases. They review the employee relations caseload monthly in partnership with the employee relations team and head of workforce. Where disproportionality of ethnic minority staff is identified immediate reviews of these cases are undertaken.
- A review of how employee relations data is monitored and reported by protected characteristic and pay band. This has been in response to data that shows lower banded Agenda for Change staff are more likely to enter a disciplinary process and that there is a higher representation of ethnic minority staff in these bands.
- Applying a person-centred and inclusive lens to the disciplinary and grievance triage processes, examining the cause behind the action/behaviour demonstrated, where previously the focus had been procedure focused.
- Delivering ongoing training to enable HR colleagues to have better conversations about race. This includes programmes ranging from bullying and harassment, neurodiversity awareness, cultural awareness as well as refreshers on supporting fair employment processes.
- Commissioning specialist 'lessons learnt' training from employment tribunals for the HR team delivered by Hempsons. This can involve highlighting procedural failings or a revised approach for a better outcome.
- Increasing support from senior HR leadership to managers and members of the HR team to help navigate power imbalances that occur when a management decision conflicts with HR guidance and advice, for example a management decision to proceed to a disciplinary which a more junior HR advisor or partner may not feel able to sufficiently challenge.
- Mandating trust-wide anti-racism training. This is in addition to mandated equality, diversity, and inclusion (EDI) training. The training is due to be rolled out across the trust and provides clarity on what is unacceptable behaviour and the trust's zero tolerance approach to any form of discrimination.
- Reporting bi-annually on casework at all levels, including at the people and workforce committee and board by protected characteristic, pay band and role type.

Implementation

Increased governance and scrutiny, as well as staff engagement have been key enablers to reducing inequality of experience for ethnic minority staff within the disciplinary process. This includes sharing reports amongst both senior, departmental and team managers. In addition, regular staff engagement, including monthly focus sessions, is undertaken to discuss any thematic issues highlighted by the data.

The trust's Race Equality Network (REN) has been engaged and involved in the development of the EDI action plan. More specifically, the REN lead collaborates with other staff network leads, partnership (union) leads, members of the senior leadership and operational leadership teams in the trust's EDI steering group to coproduce and deliver the EDI action plan.

Increased scrutiny of workforce data and employee relations caseload (by protected characteristic) from the people and workforce committee and board, have ensured that focus on race equality and the WRES is maintained year-round, where any disproportionality is identified and escalated early, and actions are taken to understand and address the cause. Any subsequent learnings are shared across the workforce team and reported into both the trust management board and operational management meetings.

Impact

Prior to this work on improving the disciplinary process, the majority of disciplinary cases received an outcome of, 'no case to answer'. The introduction of case triage and applying a person-centred approach at the start of the process has resulted in fewer cases being taken forward unnecessarily/where there is 'no case to answer.'

Being able to evidence improvement in WRES metric three has helped the trust maintain the engagement and support of ethnic minority staff, and led to more open discussion on the metrics where more time and renewed focus is needed to deliver impact.

As a result of the increased scrutiny there have been some unintended benefits. These include earlier and more appropriate decision making and improvements to wider employee relations processes resulting in fairer outcomes and better experiences for staff.

Challenges

The increased reporting and governance scrutiny has highlighted inconsistencies in both the application of trust policies and processes and behaviours of some operational teams.

Discussion at a local leadership level has identified that this is primarily a result of people feeling a real discomfort when talking about race. In response, over the past year, the trust has supported senior managers and board members on how to have the 'uncomfortable' conversations about race via facilitated workshops. Work to roll out training and support to the operational managers is ongoing, with the importance of this being championed by the chief executive and other board members through conversations at senior management meetings and regular trust-wide communication.

The trust acknowledges that whilst good progress has been made, this has not always been sustained or prioritised. Work to implement a more restorative just and learning culture was paused during the pandemic and has been recently revived by the director of nursing.

Learning for the board

The board recognises that the issue of inequality within the disciplinary process could not be addressed in isolation. It needed to be part of wider work to develop an anti-racist and restorative just and learning culture. They acknowledge previous challenges in being able to maintain progress and recognise the need for ongoing scrutiny by the board. The additional governance and resource for key teams have enabled more measurable progress and are important in sustaining focus and momentum.

Pennine Care NHS Foundation Trust's four top tips for other board members

- Be brave and face the issue. Create safe spaces to have the conversations, challenge each other in an appropriate way and do not let fear of saying the wrong thing prevent you from talking about the issues and taking action.
- Have a strong evidence base – use the data.
- Take a person-centred approach and embed this insight across all your work.
- Be ready to discuss challenging issues and get to the core of what the concern is.

CASE STUDY: YORKSHIRE AMBULANCE SERVICE NHS TRUST

Yorkshire Ambulance Service NHS Trust (YAS) has implemented 'gateways' within its disciplinary and grievance processes along with a focus on education and support for managers to reduce the number of ethnic minority staff being taken through an unnecessary disciplinary process.

YAS covers nearly 6,000 square miles, providing emergency and urgent healthcare services to a population of over five million people across Yorkshire and the Humber. The trust employs more than 7,200 staff, 6.2% of whom are from an ethnic minority.

The trust's *WRES submission for 2021/22* showed a decrease against metric three from 1.98 in 2020/21 to 0.59 (where 1.0 is equally as likely). This means ethnic minority staff are less likely than white staff to enter a formal disciplinary process.

The NHS Providers Race Equality programme and Hempsons team spoke to Nabila Ayub, head of diversity and inclusion, and Alison Cockerill, head of people services at YAS to hear more about the organisation's work to address disparities within the disciplinary process. In this case study, we share details of the interventions they have implemented, their impact, the challenges faced, and advice they would give to other board members.

Specific interventions

- Beginning work towards fostering a restorative, just and learning culture (RJLC) within the trust by supporting staff in key roles such as the head of people services, to participate in RJLC training, and to disseminate their learning across the trust.
- Reviewing disciplinary and grievance policies and processes. This included the introduction of a 'gateway' process which takes place following the commissioning of an investigation, and again prior to a case being taken through to a formal hearing. It involves an independent member of HR, the commissioning manager and supporting HR representative. Within the process, the following are considered:
  - Does the individual going through the disciplinary process pass a substitution test – the likelihood someone else in the same situation would behave in the same way given the circumstances?
  - Were there any points of failure, for example an assumption that all new staff will be familiar with over 60 policies by the end of their probation period, or were they working within an operational context that made it difficult to adhere to the rules?
  - Has the incident or any subsequent action taken to the gateway point been influenced by bias or discriminatory behaviours?
  - Have all informal routes for resolution and learning been considered and exhausted before progression to the next stage of the process is considered?
- Reskilling of managers via an internal 'compassionate leadership training' programme across the trust. This work is being led by the learning and organisational development (OD) team.
- Delivering bespoke support (via the EDI and OD teams) for individual teams at the trust, where the leadership team have identified a need for support, based on intelligence from Freedom to Speak Up (FTSU).

Implementation

Ambulance trusts experience unique challenges (*Leaders must do more to transform the culture within ambulance trusts*, Julian Hartley, HSJ August 2023) in terms of cultural cohesion and staff wellbeing due to the nature of the work that they do. The sector has one of the highest percentages nationally for ethnic minority staff experiencing discrimination at work from other staff in the last 12 months (*WRES*).

YAS is implementing RJLC as a key approach to improving its culture and addressing some of these challenges within the organisation.

YAS began its journey to implement a RJLC in November 2019, with a proposal to support an initial cohort of staff to receive RJLC training. The RJLC programme is delivered by Mersey Care NHS Foundation Trust in partnership with Northumberland University. The board recognised the need to move to a more compassionate, person-centred decision-making culture, and has championed this work by actively supporting the interventions recommended by the head of people services and supporting decisions made in this model when challenged.

On completion, these trained staff members led engagement on the benefits of a RJLC culture across the workforce with a particular focus on the senior and operational leadership teams. The trust is taking a phased approach in applying a RJLC across trust-wide processes with the revised disciplinary, grievance, managing absences and dignity, civility and respect at work processes being implemented in 2023.

Impact

In 2023, despite the increased likelihood of ethnic minority staff entering the formal disciplinary process in comparison to their white colleagues, the trust noted that all disciplinary cases for ethnic minority staff had a case to answer, and therefore formal disciplinary had been an appropriate route of action. Overall, the gateway process has resulted in fewer cases being taken through the formal disciplinary process and reaching an outcome of 'no case to answer'.

The gateway process and ongoing engagement combined with the reduction in cases has led to greater understanding of the benefits of applying a RJLC lens. Feedback from line managers suggests issues are now being resolved through more informal routes and related dialogue has been more person-centred. Both staff and managers have reported greater assurance that learning has been applied and will be acted upon.

The trust has seen an increase in the number of incidents being reported to the FTSU guardian and recognise that this could indicate staff feeling safer to raise concerns. The trust has recently appointed a second FTSU guardian in recognition of the increased reporting and to demonstrate their commitment to acting on staff concerns.

Challenges

Some of the greatest challenges have been around having the capacity to implement solutions and the low number of staff who are trained in RJLC. A wider rollout of training is anticipated to foster increased buy in from trade union partners and managers, as well as provide increased capacity to support case management, provision of advice and guidance, and the ongoing application of RJLC principles to wider HR processes.

The trust recognises the importance of engaging managers in adopting the gateway process. There was an initial challenge from managers, who perceived this work as an erosion of their decision-making autonomy and judgement on their capability. Similarly, some trade union partners felt the decision-making should remain with managers and free of 'HR intervention'. Increased understanding of how a RJLC supports staff and managers to navigate the disciplinary and grievance process, and identify organisational learning, has improved confidence in the revised processes.

Whilst progress has been made through improved processes and the adoption of a more person-centred approach, in their most recent WRES data submission (June 2023), metric three continued to increase, with ethnic minority staff being 2.4 times more likely than white staff to go through a formal disciplinary process. This equates to six cases overall, all of which were found to have a case to answer. The trust is undertaking further work to understand these cases and to maintain an iterative approach to reviewing relevant processes.

Learning for the board

The board recognises that cultural change is everybody's business and needs to be led from the top and with the engagement of diverse staff groups. As such, the interim chief executive officer engages with the trust's networks by regularly meeting with staff network chairs, actively participating in network events and supporting an increase of protected time for networks.

There is increased messaging from senior leaders on the importance of a diverse workforce and inclusive culture across the trust. This, coupled with a greater focus on longer term WRES interventions, is key to making sustainable improvements to the experience of all staff and addressing specific disparities in the experiences of ethnic minority staff. Whilst impact may take longer to become measurable, there are often earlier, more cultural benefits to be had, including increased buy in and engagement from staff.

YAS's four top tips for board members

- Do not be afraid to have what may feel like 'uncomfortable' conversations.
- Be open to criticism and do not become defensive.
- Invest in leadership development for new managers which includes guidance on staff support policies to ensure consistent implementation and how to have coaching conversations.
- Consider how interventions will be replicated across large and disparate organisations rather than collating centrally.

STRATEGIES FOR MINIMISING AND CLOSING THE GAP

The issues existing in the race inequality agenda are ingrained, multifactorial and complex, needing many different, innovative and creative solutions for us to employ in order to ultimately reach the goal of a fully inclusive and fair NHS for all our staff…

A fair experience for all: Closing the ethnicity gap in rates of disciplinary action across the NHS workforce
NHS ENGLAND

The case studies in this guide give examples of strategies used to close the disciplinary gap. They emphasise the need for multiple interventions, long-term as well as short-term, a commitment to continuous improvement, and effective leadership and culture.

The good practice models set out in *A fair experience for all* also provide a useful starting point for NHS organisations.

They are:

1. **Decision tree checklist**: a structured set of questions to guide managers in deciding if formal disciplinary action is necessary or if alternatives may be feasible. This keeps responsibility with managers while providing an evidence-based framework.
2. **Post-action audit**: formal disciplinary decisions reviewed quarterly/biannually to identify any biases or systemic issues. This keeps responsibility with managers and can help embed better practices.
3. **Pre-formal action check by a director level member of staff and/or a panel**: an executive board member or panel reviews cases before formal action to ensure consistency. This reduces manager responsibility but increases objectivity.
4. **Pre-formal action check by a trained lay member**: a trained lay member reviews cases before formal action to reduce bias and increase objectivity. This adds independent scrutiny but may raise confidentiality risks and needs to be managed carefully.

THE ROLE OF LEADERSHIP IN ADDRESSING THE ISSUE

The case studies in this guide underline that leadership plays a crucial role in addressing the disciplinary gap within the NHS. Seven key themes emerge for NHS boards.

Set the tone for the organisation: NHS trust leaders set the culture, values and standards of behaviour within their organisations. The *NHS People Plan*, the *NHS People Promise* and the *NHS equality diversity and inclusion (EDI) improvement plan* all highlight the importance of creating a culture of belonging, where staff feel safe, supported and able to admit mistakes, all factors in the provision of good patient care. For this to happen, staff must be treated equitably and without discrimination. Board members must role model inclusive and compassionate leadership and communicate clearly and regularly the organisation's approach to discrimination and anti-racism, as well as the expected behaviours and values.

Demonstrate leadership commitment and accountability: the NHS EDI improvement plan sets out the requirement for all board members to have EDI objectives that are specific, measurable, achievable, relevant, and timebound (SMART) and be assessed against these as part of their annual appraisal process. Board members may consider a commitment to reviewing disciplinaries and grievance processes and promoting targeted strategies for closing the gap within personal objectives.

Review your data with curiosity: board members have access to multiple data sources which can be triangulated to identify trends and support needs across the organisation. The use of quantitative data from the WRES and other internal sources (such as Freedom to Speak Up data and insights, employee relations data, and staff survey results by ethnicity and outcome) alongside qualitative insights from staff can help identify trends and areas that require support and improvement. Regular scrutiny and oversight of data can support the implementation of early interventions and aid progress towards equity.

Commit to having the 'uncomfortable' conversation: during the scoping of the NHS Providers *Race Equality programme*, trust leaders shared that they experienced discomfort and a lack of confidence to have conversations about race. Fear of saying the wrong thing or avoidance of a possibly 'uncomfortable' conversation can create barriers to embedding a culture of openness. In committing to have the difficult conversations, leaders can develop their own anti-racist practise and white allyship, increasing their awareness to inform their decision-making and behaviours.

Invest in training and education to help drive progress: investing in race equality support for board members and staff can create a more inclusive workplace and better staff and patient experience. This can include how to have conversations about race, how to increase cultural awareness and competence, and how to become an active bystander. This can support the development of inclusive processes, policies and decisions. In turn this can also increase confidence to actively address any issues related to discrimination or bias at an earlier and more informal stage.

Listen to and engage with staff: seek out opportunities to actively listen to the experience and views of staff and key internal stakeholders, including staff networks groups and trade unions, who can often provide valuable insights and support coproduction of interventions. Staff networks in particular, can be a valuable resource to an organisation, acting as a barometer of staff experience, and provide insight into the impact of interventions.

Develop your board diversity: having a diverse and values-driven board that reflects the diversity of your workforce, helps ensure that different perspectives and experiences are considered in decision-making processes. This is essential to the development of

an inclusive culture, with policies and practices that address workforce inequalities such as the disciplinary gap. The latest NHS WRES data shows that 13.2% of board members recorded their ethnicity as black, Asian and minority ethnic (an increase of 38.1% compared to 2021). However, with an increasingly diverse workforce, the gap between board and whole workforce diversity is increasing

The NHS Providers Race Equality programme and the Hempsons team would like to express their thanks to the following trusts who have given their time and expertise to share their case studies and learning to inform the development of this guide:

- Pennine Care NHS Foundation Trust
- Barking Havering and Redbridge University Hospitals NHS Trust
- Yorkshire Ambulance Service NHS Trust
- Black Country Healthcare NHS Foundation Trust

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For further information on how Hempsons can assist you with your discrimination/employment law issues email Andrew Davidson, head of employment at **a.davidson@hempsons.co.uk**

Use the QR code above to access the full e-publication which includes links to the wide range of resources italicised throughout this publication.

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