

Looking back, learning lessons and improving

Discrimination in health and care:
learning from a recent fitness to
practise case

November 2021

There's no place for racism in health and care. At the Nursing and Midwifery Council (NMC), we're committed to making positive changes to make sure that we play our part in tackling all forms of discrimination.

The impact that racist and other discriminatory attitudes and behaviours has on people is devastating and we have legal duties as a regulator to protect the public. The values of equality, diversity and human rights are fundamental to what it means to be on our register and are enshrined in **our Code** and professional standards.

The decision made in the case of nurse **Melanie Hayes** caused a great deal of concern for many. We signalled our commitment to learning from this case in May 2021. This report sets out what we've learnt, what we've done and what we plan to do to make sure that we get it right when making decisions in cases concerning racism or any other form of discrimination.

Background

We opened Ms Hayes' case in 2019 after concerns were raised with us about her professional conduct.

This was specifically about racially abusive comments she made between 2012 and 2018 about colleagues and a threatening comment she made about a patient. Following a full investigation, we put the case forward to a panel to be resolved by **consensual panel determination** (CPD).

Ms Hayes admitted all the charges, agreed with our view that her fitness to practise (FtP) was impaired and accepted a six month suspension order. We drafted a provisional consensual panel determination to be considered by an independent fitness to practise panel for approval. The panel accepted the provisional agreement on 10 May 2021.

After we published the panel's decision, some of our colleagues and external stakeholders raised concerns that the sanction might not be sufficient to protect the public. We therefore considered the panel decision at our internal decision review group (DRG) on 20 May 2021. That group decided to refer the case to the Professional Standards Authority (PSA). The PSA could then consider whether to exercise its power to appeal the decision to the High Court on the grounds that the panel's decision might not be sufficient to protect the public, because we hadn't made clear the seriousness of the charges against Ms Hayes. On 13 July 2021 the PSA confirmed that it would exercise that power and the case was referred to the High Court.

Our review

Our internal review started in June 2021 and finished in September 2021. We reviewed the guidance, process documents and training in place for our teams. Our findings are grouped into four areas: the decision, our fitness to practise strategy and guidance, training, and process.

The decision

What we found

If, following an investigation, an independent panel finds that a professional's fitness to practise is impaired, we publish the decision. This decision sets out which allegations have been proved based on the evidence, whether a registered professional's fitness to practise is currently impaired, and what sanction, if any, is appropriate. This decision is made by an independent panel. In this case, the decision was made after a provisional CPD was presented to the panel.

We reviewed the decision and found that it didn't sufficiently weigh up the seriousness and nature of the racial abuse. It didn't properly consider the potential impact on Ms Hayes' clinical practice, nor the public's trust and confidence in the nursing profession.

The decision stated that the registrant's conduct was capable of remediation. However, the reasoning for this is sparse and failed to take into account a number of relevant considerations. These are the main concerns identified by the DRG and shared in our letter on 20 May.

- Neither the CPD agreement nor the decision properly consider the seriousness and nature of the racial abuse. They also don't consider the potential impact on Ms Hayes' clinical practice, as well as on the public's trust and confidence in the nursing profession.
- The four incidents occurred over a period of six years, which indicates an attitude held over a long period of time. Although this is noted in the CPD agreement, the later reference to an "unblemished career" seems to indicate that the panel did not fully grapple with the longstanding attitudinal issues. These were relevant to the seriousness of the conduct and to Ms Hayes' ability to remediate.
- The reasoning as to why Ms Hayes' conduct is considered to be remediable is sparse. We would expect the CPD agreement and the panel to have referred to our guidance on remediation and context, and to have reflected this in their reasons.

Neither the CPD agreement nor the decision properly explain why a six month suspension order is an appropriate sanction in light of the points above. The DRG considered that this is a case in which it's not possible to determine whether the sanction imposed was sufficient to protect the public, in light of the gaps in reasoning relating to misconduct and impairment.

After further review, we are also concerned that:

- there was no direct evidence from Ms Hayes about the circumstances around the misconduct and her level of insight
- due to a lack of evidence, the panel shouldn't have accepted the reasoning in the CPD that attending equality and diversity training had improved the nurse's understanding of racism in the workplace and its effect on the workforce
- the decision failed to appreciate the significance of the absence of a reflective piece or any meaningful training undertaken by the registrant when assessing her ability to remediate, particularly in light of the protracted period over which she had expressed racist views.

The decision also failed to provide adequate reasons to support the conclusion that Ms Hayes' conduct wasn't fundamentally incompatible with remaining on the register.

Our strategic approach to FtP and FtP guidance

Strategic approach to FtP

In 2018, following a public consultation, we launched our new strategic direction for fitness to practise: **Ensuring patient safety, enabling professionalism**.

This new approach focussed on moving away from a culture of blame and punishment when things go wrong in health and social care, and instead moving towards a just culture which promotes learning and safer practice.

We developed **12 principles** which underpin our FtP work and make sure that the decisions we make about professionals' fitness to practise are fair, consistent and transparent.

While we still consider our strategic approach to be the right one, we found that its application to certain types of cases, particularly where the concerns are not about a professional's clinical practice, could be misunderstood by NMC colleagues. In this case, there was a lack of specific guidance on how to approach cases that involve racism and other forms of discrimination, which is addressed in more detail below. The lack of guidance in these areas meant that the strategy principles, taken in isolation, contributed to a decision which didn't fully reflect the seriousness of Ms Hayes' conduct, and its impact on patients and the wider public.

Guidance

We publish guidance on our website which outlines how we investigate FtP concerns and how we prepare cases for hearings. We also publish guidance for our FtP panel members which they follow when making decisions on cases.

While most of our guidance on seriousness is clear, we found that there were opportunities for us to strengthen what we say on this topic. This included our guidance **on what usually amounts to a serious concern**, as well as **how we determine seriousness**, in particular when dealing with discrimination, harassment, and bullying. We also found that we could improve our guidance on **considering sanctions for serious cases** for incidents that demonstrate discriminatory or racist conduct.

Current guidance on **factors to consider before deciding sanctions** helps the panel to approach sanctions. The guidance doesn't reference discrimination, bullying, victimisation or harassment as an aggravating feature. It does, however, reference 'previous good character or history' as a mitigating factor. This can be interpreted as meaning that the absence of any concerns being raised about a registrant's conduct in the past should be weighed in their favour. While this may be appropriate in cases about clinical concerns, the fact that concerns haven't been raised about a registrant behaving in a racist or unprofessional way in the past shouldn't be seen as a mitigating feature of a case.

We currently have no guidance on drafting charges in cases involving bullying, harassment, victimisation or discrimination, and we should have.

Our current guidance on **remediation and insight** is also unclear about whether allegations relating to discrimination are remediable.

What we've done

We've reviewed our **aims and principles for fitness to practise**, as well as our guidance for decision makers, to assess how clearly we articulate that allegations of discrimination, bullying and harassment must be taken seriously. We found that the principles were clear, but the explanatory notes could be strengthened. We've made those changes. We're satisfied that our strategic principles remain appropriate, but should be supported by strengthened guidance. This will help NMC colleagues to understand how these principles apply in cases which raise concerns about racism and discrimination.

We're updating our guidance documents to make sure that we're clear on what we mean by discrimination, bullying, victimisation and harassment, and how seriously allegations of this nature need to be taken. We'll also make clear how and why discriminatory behaviour has particular implications for

patient safety and the wider public interest. We expect to have done this by December 2021.

These updates will make sure we, and our independent panels, consider the nature of racist and discriminatory conduct and its effect on others very carefully. The revised guidance will also make sure that both colleagues and panel members carefully consider whether a professional's reflection, insight, and the steps they've taken to remediate, are genuine and sufficient to address the concerns raised. Where we think it's insufficient, the guidance will make clear what else needs to be done. Our process isn't meant to be punitive, but we need to make sure any evidence of insight given by a professional is genuine.

What we plan to do

We'll develop new guidance on drafting charges for cases involving bullying, harassment, victimisation or discrimination. This guidance will make clear what approach to take when considering both the seriousness of the case and sanction, and make sure we're consistent.

We'll review our guidance on **insight and strengthened practice** to make sure we're clear about whether allegations relating to discrimination can be remediated. We'll outline what factors to consider and what we think sufficient remediation looks like to prevent a similar mistake from happening again.

As part of the second phase of our **Ambitious for Change** work, cases involving discrimination are being independently audited. This audit will look at two issues: how we treat allegations about discrimination from or about professionals with different diversity characteristics, and the differences in how far professionals with different diversity characteristics progress through our process. The findings from that audit will help to identify whether there are further improvements we can make in the future to make sure we make good decisions.

Training

What we found

NMC colleagues must complete equality, diversity and inclusion (EDI) training when they start and refresh it every two years. This training provides definitions of direct and indirect discrimination, victimisation and harassment, guidance on how to avoid stereotypes, and sets out the responsibilities of employees and managers.

We don't think this training is enough and we recognise we need to do more to make sure colleagues understand the impact of discriminatory behaviour on patients and the wider public, and how it can impact on a professional's fitness to practise. The training doesn't cover issues such as unconscious bias and how this could impact our work. It also doesn't make clear how we should respond to cases of this nature so we're compliant with our responsibilities under the Public Sector Equality Duty.

EDI training is also provided annually to panel members. It covers the impact of unconscious bias on decision-making and how to challenge behaviours which don't align with the FtP decision-making principles.

What we've done

All FtP colleagues are receiving additional training on discrimination which covers research, case studies and implications of the Equality Act 2010. It also clearly states our position on discrimination.

We've updated the training for new panel members recently in light of learning from this case. We're also considering how we can introduce more regular learning and development content. This will make sure panel members are provided with regular bite-size learning material relating to high priority issues like equality and discrimination.

We'll develop a comprehensive EDI training package for relevant NMC colleagues, which will include an overview of the Public Sector Equality Duty and our obligations under the Equality Act throughout the regulatory process. This will include case-study led workshops which will help us understand the impact of racism and discrimination on a professional's fitness to practise.

We'll also provide training for decision makers and colleagues in operational teams on our approach to regulating professionals where concerns have been raised about racism or other forms of discrimination. This will include training on our updated guidance, supported by case studies covering a range of FtP issues.

Process

What we found

Teams within the NMC are responsible for agreeing CPDs and presenting the provisional CPD to a panel for approval. The colleagues in these teams are trained and there are procedural guidance and templates in place to provide structure when preparing CPDs. When we looked at these documents, we found that people would have been better supported by including specific links to key decision making guidance.

We found there are good support processes in place for managing complex and sensitive cases. All provisional CPDs have to be signed off by a senior NMC colleague.

What we've done

We've included relevant links in the CPD documents to our FtP principles and guidance on seriousness. We'll train the team on the revised guidance documents in December 2021 when they're finalised. This will give the team a clearer set of guidelines to follow and refer to when making decisions.

Managers are providing additional support to less experienced team members when handling sensitive or complex cases.

Conclusion

There were a number of things that went wrong in this case, mostly due to gaps in our guidance and training. We've already made significant improvements to our guidance and are designing and delivering a comprehensive programme of training to prevent this from happening again. However, we're well aware that there's a great deal more for us to do.

This review has provided the opportunity to scrutinise the training and guidance available for colleagues and our independent FtP panels. While we've identified gaps within existing resources and opportunities to develop new guidance, a key lesson we take away is that as a regulator we must set the tone and lead by example for those on our register, external stakeholders and colleagues. We have a responsibility to stay up-to-date with important societal topics. Their potential impact on the work we carry out as a regulator should guide how we review our training and guidance.

All organisations need to work hard to make sure that their culture and values leave no place for discrimination, and ours is no different.

We'll continue to engage with these issues and proactively address them by reviewing our guidance, developing new guidance, and improving our training and discussions to make sure we don't make the same mistakes again.

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