

Neurodiversity and the workplace

Karen Baxter and Tom Heys explore the legal and practical issues around employing people with neurodivergent conditions and how employers can develop a more neurodiverse workforce



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Neurodiversity is a concept that has received increased attention in recent years. It refers to the natural range of differences in individual behaviours and brain functions. Most people are 'neurotypical', which means that the brain functions and processes information in the way that would be typically expected. Over 15% of people are 'neurodivergent', meaning their brain will learn, focus and process information in a different way.

Neurodivergent conditions have been stigmatised in the past (take, for instance, the movie *Rain Man*) and it is important, when approaching this issue, to think in terms of difference rather than 'normality'. One style of neurocognitive functioning is no more valid than another: it is merely different.

Neurodivergent conditions

There are many specific neurodivergent conditions (which may occur simultaneously), including the following:

Attention Deficit

Hyperactivity Disorder (ADHD)

Around 4% of the UK population have this condition, which affects the ability to control attention, impulses and concentration. People with ADHD are often good at completing urgent or physically demanding tasks and pushing through setbacks.

Autism (including Asperger's Syndrome)

Autism affects an individual's ability to pick up social clues and interpret them, meaning social interactions can be difficult. About 1-2% of the population are autistic. In the workplace, those on the autistic spectrum are often thorough, punctual and rule observant. They can hold high levels of interest and expertise in particular topics.

Dyslexia

This is a difficulty processing language, which can cause problems with reading, writing and spelling. Those with dyslexia often have good verbal skills and are adept at problem solving and storytelling. Around 10% of the population are dyslexic.

Dyspraxia

This condition, impacting co-ordination and organisation of thought, affects 2-5% of the population. People with dyspraxia often have difficulty with tasks requiring structure, organisation and timekeeping, but they generally have good literacy skills and can be creative and strategic thinkers.

Dyscalculia

Between 2% and 5% of the population have this condition, the mathematical equivalent of dyslexia. For dyscalculic people, numbers make little sense and

A v Z Ltd & anor
[2019] ET case no S/4102808/16
Government Legal Service v Brookes
[2017] UKEAT 0302/16/RN
Hobbs v Senator Security South Ltd
[2019] ET case no 1400267/2017
Kerr v Midland Bluebird Ltd
[2017] ET case no 4105648/2016
Morris v JB Fix Ltd
[2018] ET case no 3201483/2017
Scantlebury-Watson v Architectural Powder Coatings Ltd
[2017] ET case no 2500594/2016
Sherbourne v Npower Ltd
[2019] ET case no 1811601/2018
Wells v Governing Body of Great Yarmouth High School
[2017] ET case no 3401100/2015
X v East Cheshire NHS Trust
[2019] ET case no 2404031/2018

mathematical concepts are difficult to comprehend, but this does not necessarily equate to a problem with reading or writing.

Tourette's syndrome

There are more than 300,000 people living with this condition in the UK, the main feature being involuntary motor and vocal tics. It may be accompanied by one or more other conditions, which might include ADHD and Obsessive-Compulsive Disorder.

Disability discrimination

Neurodivergence is innate and many people think of it as 'just the way I am' – it is not something to be 'cured'. There is therefore a clear contrast with mental health conditions such as depression or anxiety disorder, for which the causes can often be identified and appropriate treatment applied.

The above summary demonstrates that neurodivergent conditions can bring different strengths to the workplace. An autistic person could, for example, have exceptional specialist expertise in a particular field, while someone with dyslexia might be have an important role as a creative problem solver.

It is nonetheless crucial for employers to recognise that an individual's neurodivergent condition will normally have a substantial and long-term effect on their ability to carry out normal day-to-day activities, thereby constituting a disability under the Equality Act 2010. If this is the case, the individual is protected against discrimination and the employer is obliged to make reasonable adjustments to the workplace to remove or minimise any disadvantage to them.

The absence of a medical diagnosis does not mean that someone is not disabled for the purposes of the Equality Act. Many neurodivergent conditions exist on a spectrum – more obvious cases will be diagnosed during childhood, whereas those whose condition manifests more subtly may not realise they have one. A person may have spent their life finding ways to cope and mitigate the impact, whether consciously or not.

The potentially hidden nature of neurodivergent conditions sometimes gives rise to issues over whether employers can be deemed to have knowledge of an employee's disability. An employer is not liable for direct discrimination, discrimination arising from a disability or a failure to make

reasonable adjustments unless it knew, or ought reasonably to have known, that the individual was disabled.

The Equality and Human Rights Commission's Code of Practice on Employment is relevant in this respect, stating (at para 5.14):

Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.

This will apply to many workers with neurodivergent conditions. The code also states that employers must do all that can reasonably be expected to find out if a worker has a disability (para 5.15).

Making adjustments

When addressing the duty of reasonable adjustment in this context, there is no one-size-fits-all approach. Employers should tailor practices and techniques for learning, communicating and working to the individual circumstances. Acas's guidance on neurodiversity in the workplace states:

Having a workplace that is set up to proactively think about what can be done to support the needs of each employee can make it much easier to identify and implement adjustments for neurodivergent staff.

Accordingly, managers need to be aware of how neurodivergent conditions manifest themselves and capable of empathising and devising practical strategies for supporting individual workers' requirements. Effective training is therefore highly important.

Case law

There have been a number of reported and unreported cases illustrating different types of legal disputes arising from neurodivergence in the workplace. A recent appellate case was *Government Legal Service v Brookes* [2017], in which

the employer required a job applicant with Asperger's to sit a multiple-choice test. The Employment Appeal Tribunal upheld the tribunal's decision that the requirement was an unjustified provision, criterion or practice, so this was unlawful indirect disability discrimination. The employer had also breached its duty to make reasonable adjustments by declining to alter the format of the test for the claimant.

Interestingly, the tribunal in *Brookes* not only awarded compensation but also ordered the employer to review its recruitment procedures with a view to providing greater flexibility in the psychometric testing regime.

Numerous other recent cases of employers struggling to accommodate staff with neurodiversity issues can be found in the online database of employment tribunal decisions. Here are a few examples:

- A company was found to have failed to take reasonable steps to understand an employee's autism and implement suitable adjustments, and to have used dismissal to 'rid themselves of a disabled employee' (*Sherbourne v Npower Ltd* [2019]).
- A cleaner with Asperger's won over £6,000 after he was referred to as a 'stupid thick bastard' (*Morris v JB Fix Ltd* [2018]). Workplace harassment and bullying is, predictably, one of the problems commonly faced by employees with conditions such as autism.
- An employer failed to make reasonable adjustments to an absence procedure by not discounting absences arising from Asperger's-related depression (*Wells v Governing Body of Great Yarmouth High School* [2017]).
- A pharmacist was dismissed because her Asperger's was perceived to have an impact on her ability to do her job when it did not. She was diagnosed late

Reference point

Acas guidance: www.acas.org.uk/neurodiversity

CIPD guidance: www.legalease.co.uk/cipd-neurodiversity

in her employment, although the employer had identified issues with her behaviour much earlier on (*X v East Cheshire NHS Trust* [2019]).

- An estate agent with ADHD who was referred to as being ‘high maintenance’ was awarded £7,500 for victimisation and a failure to make reasonable adjustments. The tribunal found that the employer’s decisions were influenced by its extremely limited understanding of the condition based merely on an internet search (*A v Z Ltd* [2019]).

A common theme in such cases seems to be misunderstanding leading to deterioration of the employer-employee relationship and, in turn, outright conflict. This dynamic might be inferred to some degree even in some cases where employers have ultimately been successful in defending the claim.

In *Kerr v Midland Bluebird Ltd* [2017], for example, the tribunal found that a bus driver’s manager had ‘little knowledge’ of Asperger’s Syndrome and incorrectly believed it might affect driving ability. While notifying the DVLA amounted to less favourable treatment for the purposes of a claim of discrimination arising from a disability, the treatment was justified on health and safety grounds.

In another case, an employee dismissed for sending inappropriate emails contended there was a clear connection with the communication issues caused by his dyspraxia. However, the tribunal disagreed and dismissed his claim (*Hobbs v Senator Security South Ltd* [2019]).

In *Scantlebury-Watson v Architectural Powder Coatings Ltd* [2017], a factory worker’s Asperger’s manifested itself in numerous ways, with the worker himself being unaware of some of

these. It is apparent from the tribunal’s decision that the company’s lack of understanding about why the claimant acted as he did was central to the disputes between them.

Much litigation of this nature is arguably avoidable if an organisation’s managers and employees have had a good mutual understanding and dialogue about neurodivergent conditions and how they may affect workplace participation and practices.

What should employers be doing in practice?

According to research by the CIPD, just 10% of HR professionals in the UK say that their organisation includes neurodiversity in its people management practices, so there is significant scope for employers to do more in this area. The box below sets out some suggestions for how employers can adapt to support a neurodiverse workforce. ■

Tips for getting the best out of neurodivergent workers

- Hot-desking and open-plan offices can be an issue for both dyslexic and autistic individuals. Dyslexics find the noise distracting and, for those with autism, change is something to be tolerated rather than embraced. Workspaces for these individuals should be planned and designed accordingly.
- Employers should provide quiet spaces to allow those with dyscalculia and dyslexia to focus on numerical or literacy tasks. Stress can exacerbate the symptoms of these conditions, so they should be allowed as much time as is reasonable without undue pressure.
- People with ADHD might struggle to stick to start and finish times. Where possible, employers should seek to be flexible and consider shifting to (say) 15-minute start and finish windows rather than strict timings.
- People with autism generally favour routines. In the event of an unexpected change in the workplace or the nature of someone’s duties, this should be clearly explained. Conversely, because people with autism are good at following a routine, they may be efficient project managers because they can remind others of deadlines and encourage consistency in their work.
- Those with ADHD can struggle with getting organised. If feasible, managers should offer increased supervision, with more frequent check-ins and feedback. It may be possible to break tasks down into smaller, bite-sized pieces of work that do not require sustained periods of concentration.
- Those with autism might struggle in social situations. The sensory overload of the office party is a pleasure for some, but might be an ordeal for someone with autism. Employers should not hold it against staff if they decline to attend. They should also aim to provide an inclusive range of opportunities during the year for people to socialise in ways that suit them.
- Managers should take special care during performance-management processes. For an autistic individual, clear communication about what is expected – preferably in writing – is vital, with no room for ambiguity. For dyslexic individuals, managers should consider alternative ways of communicating the same information other than in writing.
- Employers should review recruitment processes to avoid letting talented neurodivergent individuals slip through the net. For example, they should consider carefully the skills for which they are hiring – does the successful candidate really need to be a well-rounded generalist or is the true requirement for an extremely able specialist?
- Organisations should critically reappraise recruitment methods, with a view to possible adaptations to accommodate candidates with neurodivergent conditions. For example, can they adjust time limits or provide interview questions in advance?
- Those with autism often have trouble putting themselves in someone else’s position. While this struggle with empathy presents obvious difficulties, their resilience may mean they are well-suited to carrying out jobs which might be ‘too much’ for others, such as conducting an investigation into a particularly unpleasant matter.
- Educating staff is important. Relevant training should cover neurodiversity in sufficient detail, so line managers fully understand the issues. A more comprehensive approach is required than merely a slide or two in a general diversity course.
- If a worker is experiencing difficulties and the employer suspects a neurodivergent condition may be involved, it should consider making a sensitive referral to occupational health (even if the worker has not raised this as a possible cause). This could lead to a diagnosis and guidance on ways to support the worker.