

Disability discrimination: Harnessing the benefits of a neurodiverse workplace

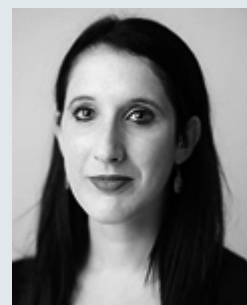
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The logo for Fox & Partners Solicitors LLP, featuring the word "FOX" in a bold, blue, sans-serif font.

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The Cambridge Dictionary defines neurodiversity as:

The idea that people having a range of different types of brain, including those with and without autism, should be regarded as part of normal human life.

Neurological differences are becoming more widely recognised and embraced like any other human variation, instead of being seen as outside 'normal' human behaviour. The term for people with these differences in how their brains work is 'neurodivergent', while those who are not neurodivergent are 'neurotypical'. Common neurodivergent conditions include autism, Asperger's, ADHD and dyslexia.

When viewed through the employment law lens, some neurodivergent conditions qualify as disabilities under the Equality Act 2010 because they result in physical or (usually) mental impairments which have a substantial and long-term adverse effect on a person's ability to carry out normal day-to-day activities.

Reference to 'disability' in this article is to the legal term under the Equality Act. Disabilities that meet the Act's definition attract a series of protections in the workplace.

Earlier this year, Fox & Partners published research which showed employment tribunal claims involving neurodivergence discrimination had increased by a third in the past year. Claims involving autism rose by a stark 40%, Asperger's by 31% and dyslexia by 14%.

This rise could be symptomatic of both an increased awareness of neurodivergent conditions and a growing confidence to speak up when neurodivergence results in adverse treatment or inadequate support or adjustments.

Employers who want to foster a more inclusive, diverse workforce, give balance to teams and advance their organisation's offering need to do more than simply employ people who are less neurotypical: this needs to be coupled with a shift in mindset and approach.

Hidden disabilities

It is essential that employers understand that neurodivergent disabilities belong to the family of hidden disabilities, meaning that the person's condition is often not immediately visible by looking at or talking to the person. Recent studies have shown that a staggering 90% of disabilities in the UK are hidden.

The question of knowledge is often central to discrimination claims in the workplace and there is considerable scope for employers to fall foul of their duties when an impairment is not obvious.

Under the Equality Act, an employer cannot be liable for discrimination arising from disability or a failure to make reasonable adjustments unless it knew, or could reasonably be expected to know, that the person had a disability. In the case of the duty to make reasonable adjustments, the employer must also have known that the disability was liable to place the employee at a substantial disadvantage. In some instances, information known by an employer's employee or agent (such as an occupational health adviser) can be imputed to the employer. However, where the agent obtains information through the provision of services to the employee independently, and not on the employer's behalf, the agent's knowledge will not usually be imputed to the employer.

Further, employers would be remiss to assume that the absence of a definitive diagnosis of a disability will always result in a lack of requisite knowledge: they may nevertheless have sufficient evidence from which they ought reasonably to have known the employee met the legal test of being disabled. Employers are encouraged to apply their own mind to decide whether the test has been met and should not rubber-stamp an external opinion (*Gallop v Newport City Council* [2013]).

When the impairment is immediately visible, it can be easier for employers to identify whether the requirements of the workplace conflict with the disability and what reasonable adjustments may be needed. With a hidden condition, the reverse is often true: adjustments that are effective are not always obvious. Employers may want to contact charities specialising in neurodivergent conditions for guidance or consider a referral to occupational health.

A further complication is that sometimes an individual may be unaware they have a disability or may not want to discuss it.

In June, primary schools took part in Learning Disability Week with a focus on living with a learning disability. Educational settings are expected to take an anticipatory approach to accommodate differing learning needs, promote inclusivity and remove barriers to learning throughout the education system, from as early as nursery through to school and onwards to university. They might, for example, give extra time to complete exams, additional equipment or dedicated special educational needs co-ordinators. Students are encouraged to say what their individual needs are and ask for additional measures so that their academic potential doesn't suffer.

The rise in neurodivergent disability claims suggests that workplaces are lagging behind in these efforts and there are still barriers for neurodivergent people in the workplace, particularly when trying to progress into leadership roles. Although we have seen an increase in changes to workplaces to provide accessibility for staff with physical

impairments, making adjustments for workers with neurodivergent disabilities is a different challenge, which requires a change of mindset and approach, sometimes at every level of interaction. This requires a partnership between employer and employee to close the gap between the needs of the organisation and the individual.

Lessons from recent case law

Employers can garner some useful pointers from *Patel v Lucy A Raymond & Sons Ltd* [2022], in which the employment tribunal held the dismissal of an employee with dyslexia was an act of discrimination arising from his disability.

In this case, the firm's managing director had set up a dyslexia charity, so she had a personal interest in the condition. In fact, she admitted she had hired Mr Patel as an accountant *because* he was dyslexic, even though he did not have the experience or qualifications sought in the job advert.

At interview stage, Mr Patel disclosed that he had dyslexia and had even offered to provide diagnostic material which would explain the impact his condition would have on him in the workplace. The employer declined.

A month into the role, there was growing frustration with the pace at which Mr Patel was progressing through his training and concerns about his ability to follow instructions. Ultimately, the company dismissed Mr Patel.

The tribunal criticised the managing director for viewing Mr Patel's condition entirely through the lens of her personal experience and failing:

... to enquire how the claimant's dyslexia affected him as an individual and what specific requirements he might have and what the respondent could do to address any needs.

Open dialogue

This case emphasises the importance of early dialogue, especially when the disability is known. Employers should prioritise discussing with the individual how their condition might manifest itself in the workplace, what the triggers or pressure points are and what steps the employer can take to mitigate the impact of these on the employee and help them to thrive. For example, it might be helpful to allow the employee longer to complete projects or, in the case of someone with dyslexia, to confirm written instructions in a follow-up conversation each time. However, conversations about possible adjustments need to be handled with care, as claims can also arise when someone is perceived to have a condition, when in fact they do not.

At the pre-employment stage, employers also need to be aware of the restrictions on asking about a job applicant's health. Such health-related enquiries must fall within one of six exceptions to be lawful. For example, it is permissible to ask whether an applicant is capable of carrying out a function that is intrinsic to the role or whether they require reasonable adjustments to the recruitment process.

When disabilities are hidden, the task is even more challenging, as there is significant scope for conditions to be missed. It is incumbent on employers not to ignore patterns of behaviour which mean they ought reasonably to have known that the employee has a disability. In this situation, even if the employee has not raised the issue, employers should be prepared to ask whether the employee's health is affecting their day-to-day function. The Equality and Human Rights Commission's Employment Statutory Code of Practice advises that:

An employer must do all they can reasonably be expected to do to find out if a worker has a disability.

It also cautions that employers:

... should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

The mask that isn't easy to remove

This case is also an important lesson that the effects of neurodivergent conditions often masquerade as poor performance. For example, the employee may take longer to carry out tasks, show inattention to detail, have difficulty following instructions or have difficulty communicating with colleagues. Employers ought to proceed with care and be aware that there might be an alternative, neurological explanation for certain behaviours. If there is, they will need to be less quick to progress to performance management or risk claims of discrimination arising from a disability.

Who else needs to know?

Once the employer understands the effects of the impairment on the individual's work and reasonable adjustments have been explored and agreed, it is important to discuss with the worker whether anyone else, apart from HR or their manager, needs to know any of this information. This could head off the potential issue of disgruntled co-workers developing a misguided perception of poor performance. In the case of a worker who has dyslexia, this might extend to including a notification in their email signature alerting the recipient to the possibility of drafting inaccuracies.

Diversity in metrics

Employers can make a meaningful impact in their drive for inclusivity by introducing diversity considerations into their performance metrics. They should move away from measuring workers' performance and contribution against uniform and inflexible standards or key performance indicators. The duty to make reasonable adjustments is not only about making modifications to how the individual carries out their work, but can also extend to adjustments to how the business appraises the individual's output. Failure to make such changes can also be indirect discrimination, which does not require knowledge of the condition.

Record your rationale

Patel is also a reminder that, when faced with a claim, it will be easier for an employer to establish that its acts or omissions were not discriminatory if it can provide consistent, contemporaneous, documented reasons for its actions that back up its position. Here, there was a lack of documented decision making, which was unhelpful to the employer's case.

Benefits

While one might hope that employers will be driven by equality values, coupled with the need to remain compliant with equality laws to avoid costly litigation, the wider benefits of nurturing a neurodiverse workforce are also well documented. These benefits can include increased productivity, better attention to detail, loyalty and strides in innovation. Business leaders like Richard Branson and Elon Musk have been open about how being neurodivergent has helped them to succeed. A workplace where employees can offer their different perspectives freely and play to their strengths, in the knowledge that they will receive support in areas which they find more challenging, is likely to be all the richer. Businesses globally are waking up to the fact that great minds don't always think alike and are starting to harness these potential competitive advantages in their own organisations. For example, specific neurodiversity hiring programmes have been instituted at Goldman Sachs and EY. Smaller companies where a large-scale HR initiative may not be achievable can still adapt their hiring practices and carefully consider what adjustments are reasonable.

Much to gain

Aside from avoiding legal claims, it is undoubtedly the case that employers have much to gain from harnessing a neurodiverse workforce and much to lose by failing to treat people as individuals and support them to be successful at work. Wise employers will continually assess their ways of working and metrics for successful performance.

Practical steps

For an employer who is daunted by what changes might be needed, there are many excellent sources of information available on specific conditions. The National Autistic Society website, for example, contains easily accessible information about employing people on the autism spectrum, covering topics such as job adverts and giving feedback.

Once employers have reviewed the relevant specialist advice, they may feel empowered to ask employees directly what type of support they need. Fear of causing offence can hamper a manager's efforts to have a direct conversation with a staff member they suspect is having a tough time. However, asking an open question and leaving the door ajar for the employee to disclose information about their condition (or not) is a neutral way to approach the situation. Employers may well find that the changes a person needs are much more easily accommodated than they had anticipated, such as printing meeting notes in a different colour to make them easier to read for someone with dyslexia. Providing interview questions on paper at the same time as asking them during a job interview is another simple but effective adjustment.

The persistence of stereotypes about neurodivergence is a key area to be mindful of. An employee with autism may experience it very differently from depictions we are used to seeing on TV and film, which are often driven by tropes. Women with autism, for instance, are more likely to have been diagnosed later in life and the condition could affect them at work differently to a colleague who received a diagnosis in childhood. Specialist training is a useful tool to raise an organisation's literacy about neurodiversity.

Cases Referenced

- Gallop v Newport City Council [2013] EWCA Civ 1583
- Patel v Lucy A Raymond & Sons Ltd [2022] ET/2201738/2021

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