

The Law and Neurodiversity at Work



THINKING DIFFERENTLY AT WORK

Disclaimer

This guide is intended to serve as an introduction to some of the key legal concepts that relate to neurodiversity, as well as examples of how those principles have been interpreted by Employment Tribunals.

It is not an alternative to, or a substitute for, specialist legal advice.

GMB members can access legal support through their regional office, which will be supported by our own union firm, Unionline.

Note on language

The word 'Section' in this document refers to the relevant Section of the Equality Act 2010.

Numbered references to the statutory employment Code of Practice relate to the chapters and paragraphs of that document.

In this guide the words 'worker' and 'employer' mean people who perform work, and the organisation for which they perform work. The use of these terms is not intended to reflect technical distinctions between workers, employees, and other legal categories of employment.

Note on Northern Ireland

This guide focuses on the Equality Act 2010, which is in force in England, Wales, and Scotland.

Equalities legislation in Northern Ireland is set out in a number of unconsolidated Acts and Regulations. Although the fundamental principles of disability discrimination law are similar, there are a large number of small differences and these mean that separate guidance should be consulted for matters arising in Northern Ireland.

Thinking Differently at Work

Further materials related to neurodiversity in the workplace can be found on GMB's campaign website: www.gmb.org.uk/thinking-differently-at-work

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DISABILITY AND THE LAW

Not all neurodivergent workers will consider themselves to be disabled. Workers have the right to identify (or not identify) with the term as they see fit.

Under the Equality Act 2010, neurodivergent workers are, however, likely to meet the legal definition of disability. This provides them with important rights to reasonable adjustments, and protections against discrimination, harassment, and victimisation. There are also additional duties on public sector employers.

The Government's statutory guidance to the Equality Act states that:

*'A disability can arise from a wide range of impairments which can be ... developmental, such as autistic spectrum disorders (ASD), dyslexia and dyspraxia.'*¹

Workers are also protected against 'discrimination by association.' This may arise when a worker is treated less favourably because they have a dependent with a neurodivergent condition (e.g. parents or carers).

Disability has a specific legal definition, and claims of discrimination and failure to make reasonable adjustments will be assessed against the criteria that definition sets out.

Workers should nevertheless be cautious about making statements to the effect of 'I don't consider myself to be disabled,' as such remarks may be quoted back at them by a hostile employer.

For some claims to succeed, it is necessary to demonstrate that the employer knew, or should have known, about a person's disability (depending on the category of discrimination).

When an employer disputes the fact that a person has a disability under the Equality Act, the burden of proof falls on the claimant. For invisible disabilities, such as neurodivergent conditions, this is likely to involve the providing or commissioning of expert evidence.

These issues are explored in this guide.

INTRODUCTION TO THE EQUALITY ACT

Legislation

The key legislation that relates to neurodiversity in the workplace is the Equality Act 2010. This Act consolidated and expanded previous employment equalities legislation (including the Disability Discrimination Act 1995).

Neurodivergent workers are likely to be found to be disabled within the meaning of the Equality Act. Disability is a protected characteristic.

This provides them with legal protection against **discrimination**, **harassment** and **victimisation** that relates to their condition. Employers also have a duty to make 'reasonable adjustments'.

The Act places additional duties on public sector employers (the **public sector equality duty**).

Code of Practice

Tribunals have a duty to have regard to the Equality and Human Rights Commission's statutory Employment Code of Practice. The Code of Practice can be accessed at: <https://www.equalityhumanrights.com/sites/default/files/employercode.pdf>

DEFINING DISABILITY

Section 6

To amount to a disability under the Equality Act, a condition must be a **'physical or mental impairment'** that **'has a substantial and long term adverse effect'** on a person's **'ability to carry out normal day-to-day activities.'** Each aspect of this definition must be met to enable a claim of disability related discrimination to be put in front of a Tribunal. If a worker cannot establish that their condition meets the definition then a claim that discriminatory treatment is because of a disability must fall.

Defining the terms

For the purposes of the Act:

- **'Long-term'** means a condition that has lasted, or is likely to last, for 12 months or more. Neurodivergent workers are likely to automatically satisfy this aspect of the definition as the conditions covered by this toolkit are lifelong in nature.
- A **'substantial effect'** means something that is more than minor or trivial.
- There is no comprehensive list of **'normal day-to-day activities'** and Tribunals tend to adopt a broad definition of what this may mean.

Key points to remember include:

- Dependent on the circumstances of each case, neurodivergent conditions (including ADHD, autism, dyspraxia, dyslexia, and dyscalculia) have all been recognised as 'disabilities' by past Tribunal judgements.
- As lifelong cognitive differences, neurodivergent conditions are likely to automatically meet the legal definition of 'long-term'.
- Under Section 109, an employer is liable for all unlawful acts by its employees (including managers) during the course of employment, unless the employment can show that 'all reasonable steps' have been taken to prevent it. It does not matter if discrimination took place without the employer's direct knowledge or approval. This concept of vicarious liability is a powerful incentive for employers to establish clear policies and procedures in relation to neurodiversity.
- International law (including EU law) also has a bearing on how Tribunals should interpret the Equality Act's definition of disability. For more information, see the section of this document on the law and the social model of disability.

REASONABLE ADJUSTMENTS

Section 20

The duty to make reasonable adjustments has been described as a 'cornerstone' of the Equality Act by the EHRC (Code of Practice, 6.2).

Adjustments are usually simple and inexpensive. They can significantly improve workers' happiness and performance. Making adjustments can also help prevent discriminatory conduct which would have a serious adverse impact on both workers and employers.

The duty to make reasonable adjustments applies to both current workers and job applicants.

What the law says

Section 20 states that, where a disabled person is placed at a '**substantial disadvantage ... in comparison with persons who are not disabled**', an employer has a duty to '**take such steps as are reasonable**' to remedy that disadvantage.

Substantial disadvantage

Substantial disadvantage has the same meaning that it does elsewhere in the Act – it means something that is more than minor or trivial. Weakness in short-term, working memory (relative to the average) is an example of a substantial disadvantage that is frequently cited in cases involving neurodivergent conditions.

Comparison with persons who are not disabled

As discussed in the section below on direct discrimination, an appropriate **comparison** may be with an actual worker in the same or a closely similar role or circumstances within the same employer. If a real comparator cannot be identified then the Tribunal will establish a hypothetical comparator and consider what treatment they would have received based on the employer's usual implementation of its policies and practices.

The comparator's circumstances should be the same, or not be materially different, from that of the worker making the complaint. The EHRC's statutory code advises that 'an appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person' (3.29).

Reasonable

There is no single definition of what is **reasonable**. It will depend on the

context of the case.

Factors that can be taken into account include: the effectiveness of a proposed adjustment at removing a disadvantage; health and safety; the practicability of making an adjustment; cost; affordability; and any potential disruption.

The size and resources of the employer are also factors that may be taken into account.

If an employer intends to rely on cost as a reason for refusing to make an adjustment, then it should demonstrate that options for securing external finance (ie, through Access to Work) have been exhausted, and that the potential costs and benefits of an adjustment have been carefully evaluated.

The Code of Practice warns that:

6.25 ‘Even if an adjustment has a significant cost associated with it, it may still be cost-effective in overall terms – for example compared with the costs of recruiting and training a new member of staff – and so may still be a reasonable adjustment to have to make’;

And also that:

6.38 ‘It may be unreasonable for an employer to decide not to make an adjustment based on its cost before finding out whether financial assistance for the adjustment is available from Access to Work or another source.’

If an adjustment is found to be ‘reasonable’ within the meaning of the Act then an employer has no defence for not carrying it out.

The meaning of ‘steps’

The actions that form a reasonable adjustment fall into three broad categories that are defined in Section 20:

- 1.** An employer’s **provision, criterion or practice** – this covers a broad range of workplace policies (ie. this could mean a requirement to sit certain written tests)
- 2.** A **physical feature** – this could cover physical features that cause inappropriate noise, heat, or lighting levels
- 3.** The provision of an **auxiliary aid** – this could mean speech-to-text software, or ergonomic keyboards, or other assistive technology.

An adjustment under principles 1 and 3 can take the form of providing accessible information. This could mean, for example, producing documents in large type on thick coloured paper, if such adjustments were helpful for a dyslexic worker.

Some examples of potential reasonable adjustments for neurodivergent workers include:

- Structuring breaks into long meetings for a worker with ADHD
- Providing a second computer screen for a dyslexic worker
- Agreeing a later start and finish time for an autistic worker to avoid the rush hour
- Varying a dress code for a dyspraxic worker
- Providing noise-cancelling headphones to workers who are hypersensitive to sound
- Varying role responsibilities or agreeing a transfer to a similar post, where appropriate
- Providing coaching or a mentor system
- Funding the purchase of, and training in, assistive technology (such as time management or speech-to-text software)

As can be seen above, most reasonable adjustments are inexpensive. Many do not incur any costs at all.

A more detailed EHRC list of potential reasonable adjustments can be found below. GMB has also published a copy of the Civil Service's list of common workplace adjustments on its Thinking Differently at Work webpages.

A reasonable adjustment can require changes to other workers' practices. It is management's responsibility to ensure that these changes are adhered to. The Code of Practice gives a specific example:

An employer ensures that a worker with autism has a structured working day as a reasonable adjustment. As part of this adjustment, it is the responsibility of the employer to ensure that other workers co-operate with this arrangement.

Code of Practice – 6.33

Failure to comply with duty to make reasonable adjustments

Section 21

Failure to make reasonable adjustments constitutes a separate category of unlawful conduct.

If a worker is dismissed and reasonable adjustments have not been made, or if insufficient time has passed for those adjustments to take effect, that the dismissal is likely to be unfair.

Example: Reasonable adjustments were recommended by an external consultant and Access to Work to assist a dyspraxic data entry worker. The employer failed to implement one recommendation, and it did not allow enough time to pass for the effects of another recommendation to be evaluated. The worker was then dismissed on capability grounds.

The Tribunal found that the worker had been unfairly dismissed because the employer had failed to comply with its duty to make reasonable adjustments (South Staffordshire & Shropshire Healthcare NHS Foundation Trust v Billingsley 2016).

Exceptions to an employer's duty to make reasonable adjustments

An employer is not obliged to make reasonable adjustments if a worker is not disabled within the meaning of the Act. If this issue is disputed, then ultimately the burden of proving that they are disabled falls on the worker.

An employer is only obliged to make reasonable adjustments if it knew, or should have known, that a worker was disabled.

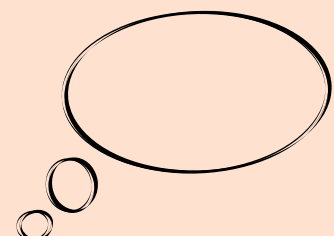
Employers do not have a duty to make reasonable adjustments because of a worker's association with someone who is disabled (Hainsworth v Ministry of Defence, 2014).

The significance of these exceptions is explored later in this document.

Identifying potential reasonable adjustments

In some cases, reasonable adjustments can be suggested by an appropriately qualified and experienced person (such as an external consultant, an Access to Work workplace needs assessor, or an Occupational Health specialist).

It should be stressed, though, that many workers already have a good understanding of their own needs, and they



will not require an external assessment to be made. The employer should always consult with the worker before making reasonable adjustments, and reasonable adjustments should not be made without the consent of the disabled worker.

More detailed information on identifying potential reasonable adjustments can be found in GMB's toolkit on neurodiversity in the workplace:

www.gmb.org.uk/neurodiversity_workplace_toolkit.pdf

Funding reasonable adjustments

Under Section 20(7), employers are not allowed to require a disabled person to pay any of the costs of making a reasonable adjustment. If an employer is genuinely unable to fund an adjustment then the worker may be eligible for support under the Access to Work scheme.

List of potential reasonable adjustments

A list of possible categories of reasonable adjustments is published in the EHRC's statutory Code of Practice (under paragraph 6.33).

The list includes:

- making adjustments to premises
- providing information in accessible formats
- allocating some of the worker's duties to another person
- transferring the worker to fill an existing vacancy
- altering the worker's hours of working or training
- assigning the worker to a different place of work or training or allowing home working
- allowing the worker to be absent during working or training hours for rehabilitation, assessment or treatment
- allowing the worker to take a period of disability leave
- giving, or arranging for, training or mentoring (whether for the disabled worker or any other person)
- acquiring or modifying equipment
- modifying procedures for testing or assessment
- providing a reader or interpreter
- providing supervision or other support
- employing a support worker to assist a disabled worker
- modifying disciplinary or grievance procedures
- modifying performance-related pay arrangements
- adjusting redundancy selection criteria
- participating in supported employment schemes

GMB has also published the UK Government civil service list of common reasonable adjustments, which has been obtained under the Freedom of Information Act. This document can be found at:

www.gmb.org.uk/list_of_common_workplace_adjustments.pdf

DISCRIMINATION, HARASSMENT AND VICTIMISATION

This section provides an introduction to the different categories of disability discrimination under the Equality Act (apart from failure to make reasonable adjustments, which is dealt with separately), including practical examples of how these principles have been applied by Tribunals where possible.

Direct discrimination

Section 13

A disabled worker is directly discriminated against if, because of their disability, the employer treats them less favourably than they would treat other workers.

To satisfy this test, it is necessary to establish a 'comparator.' The comparator may be an actual worker in the same or closely similar role or circumstances. If a real comparator cannot be identified then the Tribunal will consider a hypothetical comparator based on the employer's policies and practices.

The comparator's circumstances should be the same, or not be materially different, from that of the worker making the complaint. The EHRC's statutory code advises that 'an appropriate comparator will be a person who does not have the disabled person's impairment but who has the same abilities or skills as the disabled person.'

The Act says that less favourable treatment of a worker because of their disability is direct discrimination.. Successive Tribunals have recognised that it can be very difficult in practice to prove that an employer's intentions were to discriminate on the grounds of disability. Discrimination may therefore arise subconsciously or consciously. If an employer acts outside of their established policies, or cannot adequately explain their decision-making process, then a Tribunal may infer that less favourable treatment arose because the worker was disabled.

Example: A worker with ADHD is singled out for capability proceedings after disappointing performance results for their team. All their co-workers have similar responsibilities but only the worker with ADHD has been placed on capability. The employer cannot justify this treatment when challenged. A Tribunal is likely to find that this employer has directly discriminated against the worker because of a disability.

Direct discrimination can also arise because of a person's association with someone else who is disabled.

Example: A parent of a child with ADHD and autism requests a career break because of her caring responsibilities. Her request is denied. A colleague is granted a similar request for the purpose of travelling. An Employment Tribunal finds that the employer has directly discriminated against the worker because of her association with someone who is disabled (*McLeod v Royal Bank of Scotland plc 2016*).

Indirect discrimination

Section 19

Indirect discrimination occurs when an employer adopts an apparently neutral **provision, criterion or practice** which puts a neurodivergent worker at a particular disadvantage.

Four criteria must be met to establish that indirect discrimination has taken place:

1. The employer applies, or would apply, the provision, criterion or practice to all workers within the relevant group;
2. The provision, criterion or practice puts, or would put, people who share a protected characteristic at a particular disadvantage;
3. The provision, criterion or practice puts the individual with the protected characteristic at a particular disadvantage; and
4. The employer cannot show that the provision, criterion or practice is a proportionate means of achieving a legitimate aim.

To give practical example, an employer requires certain paperwork to be handwritten by all employees. This policy likely places dyspraxic workers at a disadvantage. For a claim to succeed, an individual must demonstrate that the policy discriminates against dyspraxic workers as a group and also against them as an individual.

The term 'provision, criterion or practice' is not defined, but it encompasses a broad range of an employer's formal and informal policies.

As with direct discrimination, a claim of indirect discrimination requires a comparator exercise to be undertaken. Statistical evidence can be used to help prove that a provision, criterion or practice places a group of workers at a particular disadvantage.

Example: An employer required all applicants for a particular post to pass a psychometric test. An autistic applicant said that the test discriminated against people with autistic spectrum conditions. The employer's own equality and diversity monitoring data showed that only one self-declared autistic applicant had previously passed the test. The claim of discrimination succeeded at Tribunal (*Brookes v the Government Legal Service 2017*).

The employer can defend claims of indirect discrimination by arguing that a provision, criterion or practice is a proportionate means of achieving a legitimate aim. A legitimate aim may include health and safety considerations. An indirectly discriminatory policy may be 'proportionate' if there are no reasonable alternative means for realising the legitimate aim.

Example: A dyslexic employee is required to transcribe fridge temperature readings in a coffee shop. The Tribunal concluded that the practice did place a dyslexic worker at a disadvantage, but it also found that investigating the way temperatures were recorded for health and safety reasons was a proportionate means of achieving a legitimate aim. The claim succeeded on other grounds (*Kumulchew v Starbucks Coffee Company UK Ltd*).

Discrimination arising from a disability

Section 15

Under the Act, the prohibited conduct category of 'discrimination arising from a disability' is additional to direct discrimination and indirect discrimination.

This category of discrimination occurs if:

- (a). An employer treats a worker unfavourably because of something arising in consequence of that worker's disability, and
- (b). The employer cannot show that the treatment is a proportionate means of achieving a legitimate aim.

These provisions have subtle but important differences from the previous two categories of direct discrimination and indirect discrimination.

For discrimination arising from disability, the question is whether the disabled person has been treated unfavourably because of something

arising in consequence of their disability. This means that there must be a connection between whatever led to the unfavourable treatment and the disability.

Example: A worker was dismissed for sickness absence caused by depression and anxiety. The Tribunal concluded that the worker's anxiety and depression was linked to autism/Asperger's Syndrome. The employer was found to have treated the worker unfavourably because of something arising in consequence of his disability by dismissing him, and that this act was not a proportionate means of achieving a legitimate aim. (*Wells v the Governing Body of Great Yarmouth High School 2017*).

A second difference to this category is that the worker only has to show that they have been treated unfavourably. In principle, this entails a different burden of proof than establishing that they have been treated less favourably than a comparator group.

As a consequence of this provision, no comparator exercise is required for a claim under this category – it is sufficient to show that unfavourable treatment has occurred, or will occur.

Harassment

Section 26

Harassment has a precise meaning under the Equality Act. It occurs in relation to specified 'relevant protected characteristics,' which include disability.

Under the Act, an employer engages in unwanted conduct related to a neurodivergent condition, and the conduct has the purpose or effect of:

- (i) Violating a worker's dignity, or
- (ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker.

'Unwanted conduct' covers a wide range of behaviours. The EHRC's Code of Practice says that 'unwanted conduct ... [can include] spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.'

Example: A manager incorrectly assumes, based on flawed stereotypes, that a neurodivergent worker is unable to complete certain tasks. They repeat this view to other workers and make patronising comments regarding the neurodivergent worker's capabilities. This behaviour is likely to constitute harassment.

Because unwanted conduct is 'related to' a disability, it can refer to something that arises from a person's condition.

Example: A worker has medication prescribed following a diagnosis of ADHD. A manager becomes aware of this, and refers to that worker being 'off their meds.' The taking of medication is related to their protected characteristic. The manager's behaviour is likely to constitute harassment.

Important points to remember when assessing the likelihood that harassment has occurred include:

- Harassment can be a regular occurrence – it can also be a one-off incident;
- Protection is provided when there is a 'connection' to a protected characteristic. This would protect a worker who has a neurodivergent child from derogatory comments about that child, or other forms of unwanted conduct relating to that child's disability;
- A claim for harassment can be brought by someone who does not have a relevant protected characteristic. For example: a manager abuses a neurodivergent worker. That worker's non-neurodivergent colleague can bring a claim of disability harassment.
- Harassment arises from either purpose or effect. If it is proved that an employer intended to harass a neurodivergent worker then it is not necessary to prove effect. At the same time, a claim may succeed because of the effect of the harassment on a neurodivergent worker, even if the employer did not have a discriminatory intent (or if that intent cannot be proved).

Tribunals will assess claims of harassment against three criteria:

1. The perception of the neurodivergent worker – did the worker regard the conduct as a violation their dignity, or as creating an intimidating, hostile, degrading, humiliating or offensive environment?
2. The circumstances of the case – this a broad criteria which can encompass the personal circumstances of the worker, cultural norms, and the environment in which the conduct takes place
3. Whether it was 'reasonable' for the conduct to have that effect on the worker. The EHRC advises that 'a tribunal is unlikely to find unwanted conduct has the effect ... of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended.'

Victimisation

Section 27

A worker will have been victimised if their employer subjects them to a 'detriment' because they have performed a 'protected act.'

'Detriment' has a broad meaning and could be the denial of promotion, opportunities to train, or being subject to disciplinary or capability proceedings.

The protected acts are defined in Section 27 as:

- (a) bringing proceedings under the Equality Act;
- (b) giving evidence or information in connection with proceedings under the Equality Act;
- (c) doing any other thing for the purposes of or in connection with the Equality Act;
- (d) making an allegation that an individual or employer has contravened the Equality Act.

Example: A dyslexic worker initiates early conciliation with Acas on the grounds that their employer has not made reasonable adjustments. After the issue is resolved, the employer changes the worker's place of work – forcing them to undertake a longer commute. When they complain, a manager comments that 'well you caused us trouble.'

The Act also provides protection against victimisation for making a 'relevant pay disclosure,' which is defined under Section 77. A relevant pay disclosure is an act of providing, or seeking, information on pay levels to establish that pay rates are not lower for neurodivergent workers. This provision applies to all protected characteristics and cannot be overridden by employer policies.

Someone who assists a neurodivergent worker in bringing a claim (or performing another activity under the Equality Act) is also protected from victimisation.

Example: A GMB rep supports a neurodivergent colleague who brings a Tribunal case against their employer. Some time later, the rep fails to obtain a promotion. They request copies of the interview notes. An entry in the notes says 'concerns about loyalty to the company (tribunal)'. The rep will therefore have been victimised because of their activities on behalf of someone with a protected characteristic.

PROMOTIONS, PROGRESSION AND HIRING

Neurodivergent workers are protected against discrimination arising from a disability. Employers also have a duty to make reasonable adjustments to interview processes.

These principles are well established in case law, statutory guidelines and the Equality Act itself. The protections apply to both external and internal applicants.

Unfortunately, many recruitment processes unconsciously discriminate against neurodivergent applicants. The Westminster Achievability Commission recently warned that ‘most neurodivergent people are able and skilled – it is recruitment processes that disable them.’²

Person specifications

One example of potential discrimination is the inclusion of requirements within person specifications that are not essential to the role being advertised.

The EHRC’s statutory Code of Practice gives a specific example:

6.33 ‘An employer uses a person specification for an accountant’s post that states ‘employees must be confident in dealing with external clients’ when in fact the job in question does not involve liaising directly with external clients. This requirement is unnecessary and could lead to discrimination against disabled people who have difficulty interacting with others, such as some people with autism.’

Reasonable adjustments and tests

An employer will be acting unlawfully if it fails to make reasonable adjustments for neurodivergent job applicants, such as giving extra time to dyslexic applicants to complete exams (Paterson v Commissioner of Police of the Metropolis, 2007).

The use of psychometric tests to screen applicants is another area of potentially discriminatory conduct. Such tests have rarely been designed with neurodivergent cognitive profiles in mind.

In a recent case, the Government Legal Service was found to have acted unlawfully because it failed to make reasonable adjustments when administering a screening test that was shown to discriminate against autism spectrum candidates (Brookes v the Government Legal Service, 2017).

Steps that employers can take to make recruitment processes more inclusive might include:

- Removing potentially discriminatory requirements from job specifications where they are not integral to the role
- Giving applicants a clear opportunity to request reasonable adjustments
- Putting processes in place to avoid discrimination against applicants who request reasonable adjustments
- Informing applicants of any tests that form part of the assessment process in advance
- Considering the sensory environment in which any interviews or assessment days take place (this could mean avoiding interviews in rooms with harsh artificial lighting or noisy air-conditioning units)
- Offering alternatives to traditional interviews, such as work trials (for more information about work trials see <https://www.gov.uk/jobcentre-plus-help-for-recruiters/work-trials>)
- Providing clear and honest feedback to unsuccessful neurodivergent applicants if requested

THE PUBLIC SECTOR EQUALITY DUTY

Section 149

Public sector employers have to meet additional duties that relate to neurodiversity.

Under the Public Sector Equality Duty, employers must have 'due regard to the need to':

- (a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under [the Equality Act];
- (b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
- (c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The relevant protected characteristics include disability.

Section 147(3) also imposes specific duties on public sector employers to remove or minimise disadvantages faced by disabled workers, take steps to meet their needs, and encourage disabled workers to participate in public life or in any other activity in which their participation is disproportionately low.

The public sector equality duty can be a powerful tool for changing employers' practices. In practical terms, it means that:

- i. There is a duty on public sector employers to proactively remove barriers faced by neurodivergent workers. It is not enough for the employer to simply react as concerns are raised.
- ii. Public sector employers must prove that it has taken the needs of neurodivergent workers into account when making decisions. For example, if an employer introduces a new policy that negatively and specifically affects neurodivergent workers, then the employer may be acting unlawfully.

PROVING THAT AN EMPLOYER KNEW, OR SHOULD HAVE KNOWN, THAT A WORKER IS DISABLED

If a claim is brought under some categories of unlawful conduct, including direct discrimination and a failure to make reasonable adjustments, then it will be necessary to show that an employer knew, or should have known, that a worker had a protected characteristic.

There is no legal or professional duty to disclose a neurodivergent condition to an employer. The uncomfortable reality is that negative consequences can arise from both a decision to disclose and a decision not to disclose. GMB encourages its reps to use their own judgement, sensitivity, and knowledge of the employer in such cases. This question is explored in more depth in GMB's toolkit on neurodiversity in the workplace.

Under the Act (and the statutory Code of Practice), employers have a clear incentive for establishing a disclosure procedure.

If it is known by people who are acting on the employer's behalf are aware of a disability, but they fail to relay that information to the appropriate person (such as a line manager), then a Tribunal may find that the employer knew about the worker's condition.

The Code of Practice states that:

6.21. 'If an employer's agent or employee (such as an occupational health adviser, a HR officer or a recruitment agent) knows, in that capacity, of a worker's or applicant's or potential applicant's disability, the employer will not usually be able to claim that they do not know of the disability.'

A worker may not have disclosed that they have a neurodivergent condition, or they may not know themselves that they have a neurodivergent condition.

However, if an employer has reasonable grounds to believe that a person may have a neurodivergent condition, and fails to investigate that possibility, then a Tribunal may find that the employer should have known about the condition.

The Code of Practice advises that, for the purposes of making reasonable adjustments:

6.19. The employer must ... do all they can reasonably be expected to do to find out whether [a worker is disabled and subject to a substantial disadvantage]. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially.

Example: A dyslexic worker receives both verbal and written instructions. The employer's annual performance reports consistently record that the worker's verbal comprehension and output appears to be of a higher quality than their written work. It is noted that they appear to have challenges with spelling and the pronunciation of new words. In this case, a Tribunal may conclude that the employer should have known that the worker had a disability within the meaning of the Act.

PROVING THAT A WORKER IS DISABLED

Neurodivergent conditions are hidden differences (or hidden disabilities). In practice, this can cause problems for workers who wish to bring a claim.

Neurodivergent conditions are not automatically treated as disabilities by Tribunals: it must be demonstrated that the worker's condition meets the statutory definition, if the fact they are disabled is disputed by the employer.

Although neurodivergent conditions are likely to automatically satisfy the 'long-term' aspect of the definition, due to their life-long nature, a 'substantial ... adverse effect ... [on a person's] ability to carry out normal day-to-day activities' must also be demonstrated.

In some cases, a worker will already have paperwork that demonstrates that they have a disability (although reports drawn up before the person was 16 are not always accepted). Where new proof of a disability is required, it is increasingly taking the form of expert reports compiled by an appropriately qualified person.

Legal advice funded by the Equality and Human Rights Commission and the Nuffield Foundation states that:

'The [Equality Act] only protects workers if they have a disability which meets the complex definition in the Act. This has become a big problem in practice, with a high percentage of claims failing because the worker cannot prove s/he meets every stage of the definition.'

(Central London Law Centre, Proving disability and reasonable adjustments: A worker's guide to evidence under the Equality Act 2010).

Is expert evidence always required?

External evidence is not an absolute requirement. In practice, however, the opinion of an expert is increasingly being sought by Tribunals.

The Tribunals' Presidential Guidance Note for England and Wales advises that:

'A claimant who relies upon the protected characteristic of disability may be able to provide much of the information required without medical reports. A claimant may be able to describe their impairment and its effects on their ability to carry out normal day to day activities. [However] sometimes medical evidence may be required.'

It should be noted that many employers will not require a formal diagnosis. GCHQ, which is held up as a model of best practice for neurodiversity employment, does not require a diagnosis before making reasonable adjustments.

The alternative adversarial approach, under which an employer will not comply with their duties until an extensive report is provided, is officially discouraged on the grounds that it may lead to discriminatory conduct.

The Code of Practice states that:

6.9. ‘In order to avoid discrimination, it would be sensible for employers not to attempt to make a fine judgment as to whether a particular individual falls within the statutory definition of disability, but to focus instead on meeting the needs of each worker and job applicant.’

Who should provide evidence, and what form should it take?

A neurodivergent worker may already have sufficient proof that they have a certain condition. This may take the form an NHS diagnosis of an autism spectrum condition, an assessment carried out by an appropriately qualified consultant when that person was in a previous role, an Educational Psychologist’s report, a Statement of Special Educational Needs, or an Education, Health and Care Plan (EHCP).

When external evidence is required, it usually takes the form of a written report (although verbal evidence may be required in some cases.)

A GP can help provide evidence, although the potential limitations of evidence from a medical practitioner who is not a specialist in a particular condition should be considered.

Employment Tribunals can be protective of their right to interpret the tests set out by the Equality Act. To this end, it can be counter-productive for a report to offer an opinion on whether a condition meets the statutory definition of disability. On the other hand, the Labour Research Department advises that:

‘Any expert report must be checked carefully to make sure it covers every aspect of the statutory test, and any uncertainty should be taken up with the expert well before the hearing.’

Labour Research Department, Law at Work 2018 (page 194)

For evidence on neurodivergent conditions, an appropriately qualified expert does not need to be a medical professional, as long as they have relevant experience and professional standing. This principle was established in the case of a dyslexic worker who commissioned an opinion from an Educational Psychologist in *Dunham v Ashford Windows*, 2005.

Where a worker is taking medication in relation to their condition, the likely effects of the withdrawal of that medication may be explored at a Tribunal. This may be an issue, as an example, for a worker with ADHD who takes medication.

Disclosure of personal records

Claimants may have to disclose personal medical records as part of the Tribunal process. An application can be made to limit the circulation of this information. The Tribunals' Guidance Notes (for England and Wales) advise that:

'Few people would be happy to disclose all of their medical records or for disclosure to be given to too many people. Employment Judges are used to such difficulties. They will often limit the documents to be disclosed and the people to whom disclosure should be made. Disclosure is generally for use only in the proceedings and not for sharing with third parties.'

Meeting the costs of expert reports

If an employer continues to dispute the fact that a worker is disabled, then the commissioning of expert evidence can incur substantial costs.

At this point, the Presidential Guidance for England and Wales outlines three courses of action that may follow, although other possibility might exist:

1. The Claimant has to agree to undergo medical examination by a doctor or specialist chosen and paid for by the Employer.
2. The Claimant agrees to provide further medical evidence at their own expense.
3. The Claimant and the Employer agree to fund a report jointly. That would involve sharing the decision as to who to appoint, the instructions to be given and the cost of any report. This may be the most effective course, but neither party may in the end be bound by the findings of the report, even if they agree to this course of action.

From: Employment Tribunals (England and Wales) – Presidential Guidance Note 4: Disability

Limited financial assistance may be available to help meet the cost of funding expert evidence. An application for such assistance can be made to the manager of the relevant Employment Tribunal office.

If an employer solely funds an assessment, then the claimant should co-operate with that process (although they are not obliged to accept the conclusions of the resulting report). 'Unreasonable non-cooperation' can lead to an order to pay some of all of the employer's costs, or even dismissal of the claim.

THE LAW AND THE SOCIAL MODEL OF DISABILITY

The legal meaning of ‘disability’ is not defined solely by the Equality Act. International law is also a relevant factor that Tribunals should have regard to.

These additional sources of law incorporate elements of the social model of disability – the recognition that people are disabled by inappropriate environmental and attitudinal barriers.

The social model is a core part of the United Nations Convention on the Rights of Persons with Disabilities, to which the UK is a signatory. The Convention recognises that:

‘Disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.’³

The UN Convention has also been incorporated into European case law by the European Court of Justice’s decision in the **Ring v Dansk almennyttigt Boligselskab** case (C-335/11 and C-337/11, 2013).⁴

That judgement introduced a new definition of disability, which reads as follows:

‘The concept of ‘disability’ ... must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or psychological impairments **which in interaction with various barriers** may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one.’ [Emphasis added.]

In principle, this definition goes further than that set out in the Equality Act because it recognises that societal barriers can have a disabling effect on workers.

The UK Government has however argued that the Equality Act as it stands is consistent with the social model:

‘While the definition [in the Equality Act] was indeed focused on impairment, the Act included reasonable adjustment provisions for the public sector that required officials to consider and, where possible, remove social and environmental barriers for disabled people. The legislation as a whole was thus in line with the social model of disability.’¹⁵

Be that interpretation as it may, the social model is not explicitly reflected in the text of the Equality Act. Nevertheless, Tribunals should have due regard to the social model by virtue of its inclusion in the Convention and EU case law.

FURTHER READING AND RESOURCES

GMB

Thinking Differently at Work

www.gmb.org.uk/thinking-differently-at-work

Employment Tribunals (England and Wales)

Presidential Guidance Note 4: Disability (pages 13 and 14)

<https://www.judiciary.uk/wp-content/uploads/2013/08/presidential-guidance-general-case-management-20180122.pdf>

Equality and Human Rights Commission

Employment: Statutory Code of Practice

<https://www.equalityhumanrights.com/sites/default/files/employercode.pdf>

Central London Law Centre

Proving disability and reasonable adjustments: A worker's guide to evidence under the Equality Act 2010

https://www.equalityhumanrights.com/sites/default/files/proving_disability_and_reasonable_adjustments.pdf

Labour Research Department

Law at Work 2018: The trade union guide to employment law

<https://www.lrdpublications.org.uk/> (login details for GMB members can be obtained by contacting laurence.turner@gmb.org.uk)

Office for Disability Issues (DWP)

Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/570382/Equality_Act_2010-disability_definition.pdf

USEFUL TRIBUNAL PRECEDENTS

Name: Patterson v the Commissioner of the Police of the Metropolis (2007)

Reference: UKEAT/0635/06

Keywords: Dyslexia, promotions, exams and assessments, comparators

This landmark case was brought by a chief inspector of the Metropolitan Police, who was diagnosed with dyslexia following a long and successful career. Mr Patterson (the Claimant) said that his employer had not made sufficient reasonable adjustments to written tests that he had to pass to obtain the rank of superintendent.

The initial Tribunal accepted that the Claimant was dyslexic but that he was not disabled within the meaning of the DDA 1995, because examinations for promotions were not a 'normal day-to-day activity.'

The Tribunal also concluded that, although the Claimant was placed at a disadvantage compared to other workers in comparable roles, the effects of the Claimant's dyslexia were not 'substantial' enough to meet the legal threshold (despite medical reports which suggested 'a significant weakness of phonological processing' and recommended 25% extra time be made available for examinations).

Despite accepting that 'the Claimant will continue to be at a definite disadvantage in the high pressure and we believe by no means day to day situation of a high pressure exam at a substantial disadvantage to his non dyslexic colleagues,' the Tribunal believed that this disadvantage 'is well capable of being compensated for within the Respondent's own procedures and proper good industrial practice by a large employer.'

The Tribunal also found that, although the Claimant may be at a disadvantage compared to other candidates for a senior post, 'the correct "comparator" assessment is with the ordinary average norm of the population as a whole.'

In submitting an appeal, the legal representatives Mr Patterson (the Appellant) argued that these conclusions would have a 'devastating effect' on disability discrimination provisions.

The initial Tribunal judgement was successfully overturned on appeal. The Employment Appeal Tribunal (EAT) found that the Tribunal's findings had been 'perverse,' and that:

- 'Carrying out an assessment or examination is properly described as a normal day to day activity.'
- 'Once the Tribunal had accepted that the appellant was disadvantaged to the extent of requiring 25% extra time to do the assessment ... then it inevitably followed that there was a substantial adverse effect on normal day-to-day activities.'

The EAT consequently found that the Appellant was a disabled person within the meaning of disability discrimination legislation.

Name: Brookes v the Government Legal Service (2017)

Reference: UKEAT/0302/16/RN

Keywords: Autism / Asperger's Syndrome, recruitment, indirect discrimination, failure to make reasonable adjustments, discrimination arising from a disability

In this case, the Claimant (Ms Brookes) was an external applicant for a role with the Government Legal Service. She had a diagnosis of Asperger's Syndrome – an autistic spectrum condition.

The Employer required all applicants to sit and pass a multiple choice test called the Situational Judgement Test. Its guaranteed interview scheme for disabled applicants was conditional on passing this test.

The Claimant asked the Employer, disclosed that she was autistic, and asked if she could make short narrative responses as an alternative to the multiple choice test. This was made as a request for a reasonable adjustment.

This request for an adjustment was rejected. The Claimant then narrowly fell short of the pass standard when she sat the test in a multiple choice format.

The Employer's own equality and diversity monitoring data found that only one previous applicant who had self-declared themselves to be autistic had passed the test.

The Employer argued that the test was not discriminatory against people with an autistic spectrum condition, and that – even if it had been discriminatory – the test was objectively justified as a proportionate means of achieving the legitimate aim of recruiting the best candidates.

The Tribunal found that the Employer had indirectly discriminated against

the claimant, had failed to comply with the duty to make reasonable adjustments, and had treated her unfavourably because of something arising in consequence of her disability.

The Government Legal Service was ordered to pay £860 compensation and the Tribunal recommended that it (a) issued an apology, and (b) reviewed its procedures in relation to people with a disability applying for employment, with a view to greater flexibility in the psychometric testing regime.

These findings were upheld at appeal.

Name: Parker v Picturehouse Cinemas Limited (2017)

Reference: 3322866/2016 and 3347085/2016

Keywords: Establishing that a person is disabled, dyspraxia, dyslexia

An employment judge was asked to rule on whether the Claimant was a disabled person as part of a claim of unfair treatment.

The Claimant underwent an assessment by the Claimant's Occupational Health Advisers following allegations of inappropriate behaviour towards colleagues. The Claimant was diagnosed as having dyslexia and dyspraxia.

The assessment concluded that:

- 'An individual with dyspraxia can have difficulty picking up social clues which can potentially lead to misunderstandings such as being unsure whether the other person is asking a rhetorical question'; and that
- '[The Claimant's] difficulties related to dyslexia and dyspraxia affect his auditory short-term memory (working memory) visual short-term memory (processing speed) and he shows difficulties with fine motor co-ordination.'

At the hearing, the Employer questioned whether these difficulties qualified as 'substantial,' and suggested that the Claimant may have manipulated the diagnostic tests.

These arguments were rejected by the Tribunal. It found that the Claimant did satisfy the tests of substantiality and long-term adverse effect[s] on normal day to day activities, especially in regard to working memory.

The Claimant was ruled to be a disabled person for the purpose of an unfair dismissal case.

Name: Kumulchew v Starbucks Coffee Company UK Ltd

Reference: 2301217/2014

Keywords: Dyslexia, discrimination, disciplinary procedures

In this high-profile case, the Claimant, who worked as a shift supervisor at a Starbucks store, had previously disclosed that she was dyslexic to her line manager and her district manager.

Following a store inspection, the Claimant was accused of falsifying documentation regarding fridge temperatures. She responded that an incorrect entry was as a result of her dyslexia. The Claimant was accused of deliberately making up information, despite the availability of CCTV footage that proved she had taken fridge temperature readings.

The Claimant was given a final warning (later downgraded to a first warning) for the alleged 'falsification of company records.' During the disciplinary process, written documentation was provided in handwriting in an extremely small font and in single spacing. The Claimant was expected to read, approve and sign these notes at the end of each meeting.

The Claimant believed that she was being discriminated against because of her disability and that she was being victimised for making a public interest disclosure (she had raised concerns about health and safety and allegedly inappropriate behaviour by a colleague).

The Tribunal did not uphold every part of the complaint. It found, for example, that requiring the Claimant to take and record fridge temperature readings did place her at a substantial disadvantage, but that the disadvantage was objectively justified as a means of achieving a legitimate aim.

The Tribunal did find that the Employer should have presented disciplinary materials in an accessible format, and that the decision to initiate disciplinary proceedings and issuing a final warning (later downgraded) amounted to discrimination arising out of a disability. The Tribunal found that the Employer had demonstrated a 'wholly unsatisfactory consideration or understanding of the claimant's disability.' Claims of sex discrimination and discrimination for making a protected disclosure were also upheld.

The case resulted in substantial adverse publicity for Starbucks.

Name: South Staffordshire & Shropshire Healthcare NHS Foundation Trust v Billingsley (2016)

Reference: UKEAT/0341/15/DM

Keywords: Direct discrimination, dyspraxia, failure to make reasonable adjustments, capability, unfair dismissal

The Claimant in this case, who had a childhood diagnosis of dyspraxia, was employed as a Data Input Clerk. According to the Employment Appeal Tribunal, dyspraxia ‘impaired her ability to absorb, retain and process information ... it [also] made her slower and more error prone than her non-disabled colleagues.’

A report was commissioned by the Employer from an external consultant. They recommended that a number of reasonable adjustments be made, including training sessions with a specialist tutor with an initial program of 50 hours, and the provision of technical aids.

An Access to Work assessment also made similar recommendations.

The employer did not provide the technical aids within the timescale recommended by the report, and no more than 20 hours of specialist training were ever provided.

Nevertheless, the partial provision of reasonable adjustments led to a significant improvement in the Claimant’s error rate, and she now scored within the specified target range. However, her error rate rose again after a change of supervisor. Capability proceedings were then initiated, which culminated in the Claimant being dismissed on capability grounds.

The Employment Tribunal found that the employer had failed in its duty to make reasonable adjustments, and that ‘it was not reasonably necessary to dismiss the claimant until all reasonable adjustments had been implemented, which may have enabled her to avoid dismissal.’

Although the claim for failure to make reasonable adjustments had timed out, the fact that the employer had not complied with the duty contributed to a finding that disability discrimination had occurred (and consequently that the dismissal had been unfair). This finding was upheld at appeal.

Name: McLeod v the Royal Bank of Scotland plc (2016)

Reference: S/4110836/2015

Keywords: Disability discrimination by association, autism, ADHD, unfair dismissal

The Claimant, who was employed in an RBS branch, had caring responsibilities towards a pre-school child with multiple and complex needs, including autism and ADHD. The fact that her child qualified as a disabled person under the EA 2010 was not disputed by the Employer.

While she was on maternity leave, the Claimant became concerned that she might not be able to balance a return to work with her caring responsibilities. Acting on the advice of her GP, she requested a career break from her Employer.

Her line manager advised her to request a career break of a year, which would have suited the Claimant's circumstances. Despite this initially positive conversation, the request was refused and the Employer told her that 'a year was not feasible, and that her son's condition could deteriorate and 1 year could lead to 3 years, and 3 years to 5 years.' Her line manager also told her that 'if she did not want to return to work, in reality the only option she had was to resign.'

The Employer's Leave Policy stated that employees could request 'employment breaks for a minimum of 8 weeks and up to 26 weeks.' Despite this, a colleague of the Claimant had been granted a career break of 10 months to travel. The Claimant would have accepted a six month career break.

The Claimant subsequently received a P45 from her Employer. She had not written a letter of resignation. Her line manager interpreted text messages regarding a leaving date as a statement that she was resigning.

The Employment Tribunal (Scotland) concluded that:

- The Employer had discriminated against the Claimant by refusing her request for a career break because of her association with a disabled person. This was demonstrated by:
 - (i) The fact that the Employer's policy allowed requests for up to six months to be made but established no criteria upon which decisions would be made, from which the Tribunal inferred that such requests would normally be granted, and her Employer's decision to grant a comparator colleague a 10 month career break.

- (ii) The Claimant's line manager's belief that the Claimant's son's condition could deteriorate as grounds for refusing her request.
- The Claimant had not resigned her position and as such was wrongfully dismissed.

The Tribunal ruled that damages should be awarded.

REFERENCES

1. Office for Disability Issues (DWP), Equality Act 2010 Guidance: Guidance on matters to be taken into account in determining questions relating to the definition of disability, pages 8 and 9 - https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/570382/Equality_Act_2010-disability_definition.pdf
2. <http://www.achieveability.org.uk/files/1515926733/wac-news-release-2.pdf>
3. United Nations Convention on the Rights of Persons with Disabilities, 06 December 2006, http://www.un.org/disabilities/documents/convention/convention_accessible_pdf.pdf
4. Judgement: <http://curia.europa.eu/juris/document/document.jsf?text=&docid=136161&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=191680>
5. Comments made by a UK Government official in discussion with the UN Committee on the Rights of Persons with Disabilities, 23 August 2017, https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fSR.348&Lang=en

The logo for GMB Union, featuring the letters 'GMB' in white on an orange square background.

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U N I O N

This guide was produced with GMB Neurodivergent Activists by the GMB Equality Through Inclusion department, the Industrial Research and Policy team and the Legal Department.

Thinking differently at work: The Law and Neurodiversity at Work
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