

# Neurodiversity and the Law

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# Disability discrimination?

- People on the autistic spectrum (including Asperger, ADHD, dyslexia, dyspraxia, Tourette's syndrome) may be disabled under the Equality Act 2010. **Note that a formal diagnosis is not needed for a disability to be established. It is a question of functional capacity.**
- The definition of disability is a physical/mental impairment, which is long-term, and has a substantial adverse effect on ability to carry out normal day-to-day activities(including work activities)
- The autistic spectrum runs from birth to death and is therefore long-term
- It is a mental impairment
- It may substantially adversely affect normal day-to-day activities

# Normal day to day activities

- The EU Court decided in 2006 that the concept of disability (in the directive) ‘must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in his professional life’.
- Paterson v Commissioner of Metropolitan Police (2007)(dyslexia)
- See Equality Act 2010 (Amendment) Regs 2003, Reg 5A. References to a person’s ability to carry out normal day to day activities are to be taken as including references to the person’s ability to participate fully and effectively in working life on an equal basis with other workers.

# Can OH recommend adjustments even if there has not been a specialist diagnosis?

- OH is usually competent to assess an individual by means of a Workplace Needs Assessment
- It is not obligatory to obtain a specialist diagnosis and the employer has no legal obligation to pay for one, but it is good practice to offer to pay (though expensive!)
- Should OH recommend a specialist diagnosis?

# Role of occupational health

- SOM Guidance
- Evaluating and supporting Neurodifferences at work
- Suggests OH initial screening conversation followed by adjustments eg remote working, technology, coaching; if insufficient, specialist review; if insufficient, workplace needs assessment in situ (involving both employer and employee); if insufficient and formal diagnosis not yet made, recommend diagnosis
- Points out that the cost of adjustments may be less than the cost of the assessment
- Recommends to skip to workplace needs/diagnostic assessment if imminent risk of job loss or safety risk

# Elliott v Dorset County Council (2021) EAT

- E, IT systems manager, had difficulty in communicating with others, found it difficult to work in an office, needed clear written instructions, set routines, but satisfactorily completed his tasks. Employed 1984-2018. Previous manager allowed him to work at home part of the time, but records said that he worked in the office. New manager accused him of falsely recording working time. Activated disciplinary procedure.
- E accepted voluntary redundancy to avoid procedure.
- TU representative suggested that he obtain autism assessment.
- Nurse Specialist in the Community Adult Asperger Service diagnosed Autistic Spectrum Disorder and Asperger's.

# Elliott v Dorset County Council

- ET judge held E not disabled. Referred to the Guidance on matters to be taken into account in determining questions relating to the definition of disability (2011) and EHRC Statutory Code of Practice on Employment.
- Guidance, B1: The requirement that an adverse effect should be substantial reflects the general understanding of disability as a **limitation going beyond the normal differences in ability which may exist among people.**

Held that E was not substantially affected compared with people who are not ASD but not good at communicating with others etc

# Elliott v Dorset County Council

- EAT held that decision wrong. Judge should apply the words of the statute. If they conflicted with the Guidance or Code the latter must be disregarded. They are guidance only. The statute is the law.
- The Equality Act does not compare a person claiming to be disabled with people in general.
- The ET must concentrate on what the person cannot do, or only do with difficulty, not what they can do. Disabled people develop coping mechanisms and avoid tasks they find difficult.
- **The comparison in E's case should be with someone of his skills and intelligence who was not autistic, ie his own innate abilities if he did not have an impairment. E was disabled.**



# Does the employer know about the disability?

- If the allegation is of direct or disability-related (section 15) discrimination, or a failure to make reasonable adjustments, the employer is not liable if they do not know and cannot reasonably be expected to know (constructive knowledge) of the disability.
- Q v L (2019) Employment Appeal Tribunal
- Q applied for an office job with an employer L. Referred to OH for an assessment of fitness for work. Q had been diagnosed with Tourette's and disclosed this to OH. OH reported fit, did not mention the Tourette's. Shortly after commencing work Q's problems became obvious from his behaviour and requests for adjustments.

# Q v L (2019) EAT

- Held that the employer did not have actual knowledge of the disability from OH because OH merely advised that he was fit and had not obtained consent to disclose the potential disability. **Employer not imputed with the knowledge of OH.**
- “ The consent was limited to the disclosure of the opinion and did not include the medical opinion on which it was based”.
- NB The judge referred to WRITTEN consent but not legally required.
- BUT the employer had constructive knowledge from Q’s behaviour soon after he was employed. They should have sought further OH advice and whether reasonable adjustments would assist Q to work more effectively.

# Should a job applicant/employee disclose their disability?

- There is no legal obligation, but it may be advisable to make disclosure because an employer then has a duty of reasonable adjustment to recruitment procedures and the physical environment and terms and conditions of employment.
- Morgan v Northamptonshire Teaching Primary Care Trust (2009) ET
- Job applicant disclosed recent NHS diagnosis of Asperger's. Offered the job subject to satisfactory references and OH clearance. Reference poor, withdrew offer without waiting for OH report on his abilities. Held failure to make a reasonable adjustment. Previous performance may have been affected by his Asperger's.

# Can an employer ask health questions pre-employment?

- Section 60 Equality Act 2010 the employer must not ask health questions pre-job offer (which can be conditional on satisfactory OH clearance), except where it may be relevant to making adjustments to the recruitment procedure, or relates to an intrinsic function of the job (eg climbing ladders for scaffolders)
- (There are other exceptions but no time to give detail!)
- May be in the applicant's interest to disclose eg may be given more time for written tests, adjustments to the recruitment procedures

# Employer's duty towards disabled person

- The employer must not reject them just because of the disability but may reject because of the effects of the disability, eg if the job demands someone with skills in reading and producing documents, or someone in a customer-facing role, they may reject a job applicant on the autistic spectrum who lacks the necessary skills for those jobs.
- BUT they must first consider whether reasonable adjustments may assist in enabling the person with a disability to do the job.
- Important to examine recruitment tests and procedures.
- BT v Meier (2019) Northern Irish Court of Appeal (automated situational strengths test)
- Government Legal Services v Brookes (2017) EAT (MCQ test)

# Crawford v Chief Constable of the Cumbria Constabulary (2023) ET

- PC first appointed 2016 after obtaining 1<sup>st</sup> Class degree in policing. Disclosed that she had dyslexia and ASD. Passed by OH. Excellent record. Positive reports from all her superiors. Applied for firearms training. Passed all the tests, including fitness, confidential screening, advanced driving, use of taser, fire shooting session. Referred to OH. FMA reported that no medical condition that could bar her from AFO duties but “the decision comes down to the risk the organisation is prepared to accept”. Deputy Chief Constable decided to remove her from firearms training course despite evidence from all her superiors and the College of Policing.
- Held direct and indirect discrimination, disability-related discrimination and failure to make reasonable adjustments (allowing her to attend course as an assessment).

# AECOM v Mallon (2023) EAT

- Employer required job applicant to fill in online application form. C sent his CV stating that he had dyspraxia and asking to fill in the form on the phone because of difficulty completing documents.
- Manager emailed more than once asking for details of his disability, but M did not reply. Held that a reasonable employer, when faced with an individual with a dyspraxia diagnosis asking for an adjustment, would have telephoned him asking for more details about his difficulties. Given M's problems with written communication, his failure to explain by email was reasonable. However, the issue of whether M was a genuine job applicant sent back to ET. Many similar successful claims made against employers!

# Section 15 EqA discrimination related to disability

- Where the employer treats the disabled person unfavourably because of something arising in consequence of the disability he is liable unless he can prove either that he did not know or could not reasonably be expected to know of the disability or that what he did was a proportionate means of achieving a legitimate aim
- McQueen v General Optical Council (2023) EAT
- M had dyslexia, Aspergers, 'neurodiverse traits', hearing loss. Provided with several reasonable adjustments but continued challenging behaviour, eg 'meltdowns', habit of standing and shouting at colleagues. Medical advice that personality problem not related to neurodiversity. Warned that could face dismissal. GOC not liable (but liable for victimisation for not dealing with grievance).



# Excluded conditions

- Equality Act 2010 (Disability) Regulations 2010
- ‘tendency to physical or sexual abuse of other persons’ is an excluded condition and cannot be treated as an impairment, but see
- C and C v Governing Body of a School, Sec of State for Education, National Autistic Society (2018) Upper Tribunal
- 11 year old autistic child aggressive to other pupils and hit teaching assistant and pulled her hair. Fixed term exclusion
- Held Regs conflicted with ECHR right to education and void. Duty of reasonable adjustment. Violence a manifestation of the very condition that called for special educational provision
- House of Lords Select Committee recommended that regs be amended
- Compare McQueen case: found that aggression not related to disability
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# Borg-Neal v Lloyds (2023) on appeal to the EAT

- Manager with excellent long-term service used an offensive racial term (rather than the first letter of the word) when asking a question in a race awareness training session, not deliberately to insult anyone but as a quotation of what he had heard people from that ethnic group use when speaking to each other and in 'rap' music, and which might be used by such a person in the workplace. Apologised but dismissed. BN had dyslexia and the tribunal accepted that this caused him to reformulate questions and to speak in haste before he lost his train of thought, contributing to the way he expressed himself in the session.
- Held unfair dismissal; not within a reasonable range of management responses. Disability discrimination; not proportionate to dismiss long-standing good employee for this one mistake made without malice.