

Neurodiversity

How do you manage a potentially neurodivergent colleague who refuses to seek help or accept amended duties, staying below absence triggers but with no prospects of improvement in sight?

“Potentially neurodivergent”

- What is neurodivergence?

RCN:

“Neurodiversity refers to the natural diversity in human brains. Neurodivergence is the term for when someone’s brain processes, learns, and/or behaves differently from what is considered “typical”. Some neurodivergent conditions include-

Dyslexia, Dyspraxia, Attention Deficit Hyperactivity Disorder, Autism Spectrum Condition.

These conditions very often co-occur and many symptoms overlap....”

What is Dyslexia?

The British Dyslexia Association:

“Dyslexia is a specific learning difficulty which primarily affects reading and writing skills. However, it does not only affect these skills. Dyslexia is actually about information processing. Dyslexic people may have difficulty processing and remembering information they see and hear, which can affect learning and the acquisition of literacy skills. Dyslexia can also impact on other areas such as organisational skills.”

- What is dyspraxia?

Sometimes called Development Co-ordination Disorder

NHS:

Dyspraxia “is a common disorder that affects movement and co-ordination. Dyspraxia does not affect your intelligence. It can affect your co-ordination skills – such as tasks requiring balance, playing sports or learning to drive a car. Dyspraxia can also affect your fine motor skills, such as writing or using small objects.”

“May affect daily living skills, such as dressing or preparing meals, ability to write, type, grasp small objects, dealing with emotions and social situations, time management, planning and personal organisation skills.”

What is ADHD?

Seems to be some difficulty universally defining ADHD but there is consensus that ADHD is a condition affecting behaviour. People can be restless, have trouble concentrating, may act impulsively, also possibly sleep and anxiety problems.

What is Autism Spectrum Disorder?

National Institute of Mental Health:

“Autism spectrum disorder (ASD) is a neurological and developmental disorder that affects how people interact with others, communicate, learn, and behave.”

So neurodivergence may be exhibited in many ways but the themes are that people may have trouble with normal tasks, time management, relating to other people, organisational tasks, reading and writing.

Many of the above might be regarded as normal day to day activities.

Two points to note-

1. in relation to dyslexia the British Dyslexia Association states "*there are positives to thinking differently*"

2. it seems all these symptoms vary in severity and impact.

Definition of disability

S6 Equality Act

- A person (P) has a disability if—
 - (a) P has a physical or mental impairment, and
 - (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Physical or mental impairment

We have seen that there can be a behavioural aspect to neurodiversity which can appear as a physical impairment (clumsiness in dyspraxia, difficulty writing in dyslexia) but in the mix we have emotional and social interaction issues which could amount to mental impairments.

So in some cases this aspect of the definition will be present.

Some points to note-

No requirement in the legislation that the impairment be clinically well recognised.

Tribunals have resisted defining “impairment” – use the natural and ordinary meaning – possibly something like “not working properly”, so a relatively low bar.

The Statutory Guidance “The term mental or physical impairment should be given its ordinary meaning. It is not necessary for the cause of the impairment to be established, nor does the impairment have to be the result of an illness. In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition and in particular whether they are long-term.”

Substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Generally accepted that, whilst neurodiversity conditions can be managed to an extent and some progress can be made, the conditions are likely to be around for a long time, certainly more than 12 months.

“substantial adverse effect” - The Statutory Guidance states the effect has to be more than minor or trivial. The time taken to perform tasks can be relevant. Further the effect of treatment is to be ignored.

“normal day to day activities” - not defined but generally understood to be the sorts of things people do on a regular or daily basis.

The Guidance states- “examples include shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities. Normal day-to-day activities can include general work-related activities, and study and education-related activities, such as interacting with colleagues, following instructions, using a computer, driving, carrying out interviews, preparing written documents, and keeping to a timetable or a shift pattern.

- Litigation on increase
- In 2015 there were zero judgments from GB ETs involving dyslexia but in 2023 there were 111.

Advice on how to create a neuroinclusive workforce is offered by CIPD on www.cipd.org/uk/knowledge/guides/neuroinclusion-work

- Key points from CIPD-
- “Neuroinclusion is a journey, not a box to be ticked”; “every team member is neurodiverse by definition - no two brains are alike”; the need for training; review recruitment processes (**Government Legal Service v Brooke** (2016) autism, requirement to sit multiple choice test. EAT held this was an unjustified practice amounting to indirect discrimination and breach of the duty to make reasonable adjustments. **Aecom v Mallon** (2023) requiring information about dyspraxia by email rather than by phone)

Aecom v Mallon 2023

Applicant was required to apply orally rather than online due to his dyspraxia. But employer emailed for more details and got no response. EAT held it would have been reasonable to phone applicant and ask about adjustments. Not reasonable to ask Mr M to explain his difficulties by email.

Duncan v Fujitsu (2023)

- In Mallon the criticism was requiring online communication instead of oral. This case is the other way around. D refused to speak and went off sick. He wanted to restrict communication to email. Employer found this too restrictive and tried to force a call. ET found this to be unwanted conduct but fell short of being harassment (page 107) Autism and ADHD
- ET's judgment is 159 pages long. Multiple separate complaints including a failure to break down tasks into bite sizes, deciding that D's failure to complete time sheets was a performance issue, failing to give sufficient notice of a meeting being set up, cancelled and rescheduled.
- This case is a good example of how challenging managing neurodivergence can be.

Back to our question-

How do you manage a **potentially** neurodivergent colleague who refuses to seek help or accept amended duties, staying below absence triggers but with no prospects of improvement in sight?

“Potentially”

This words suggests we do not know whether the person has a disability.

S15 Equality Act states that “A discriminates against a disabled person (B) if A treats B unfavourably because of something arising in consequence of B’s disability....”

But the above does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

So potentially a “get out of jail free card” but...

There is a duty to inform yourselves of the true medical facts.

“Unless there are wholly exceptional circumstances, before an employee is dismissed on the ground of ill-health it is necessary that he should be consulted and the matter discussed with him, and that in one way or another steps should be taken by the employer to discover the true medical position.” “East Lindsey District Council v Daubney”

BS v Dundee City Council-

The investigation should be judged by the standards of the reasonable employer.

The test is not whether more enquiry could have been made. It is not a “leave no stone unturned” test.

In Morgan v Buckinghamshire Council (2022) Ms M refused an OH assessment (she was a social worker with autism and gave a gift to a child with whom she had professional involvement); the refusal to cooperate with OH was key to showing that the unfavourable treatment was justified.

Assuming disabled person...

The question states that the employee “refuses to seek help or accept amended duties”. This presupposes that the employer has ascertained at least some medical facts and has come up with potential solutions including reasonable adjustments but is faced with a point blank refusal.

Worth noting that the refusal itself could be result of the disability in which case it is in itself “something arising in consequence of B’s disability” (Section 15 again) and therefore protected from unfavourable treatment.

- Whilst S15 makes unlawful unfavourable treatment because of something arising from disability there is a justification defence.

So were the employer to commence a process against the person because of the impact of the neurodivergence upon work, and were the employee to say that the process is in itself unfavourable treatment, the employer could seek to argue that the process is a proportionate means of achieving a legitimate aim.

The legitimate aim could be the effective management of behaviours in the work force so as to achieve a business objective.

And it could be said that when everything else has been tried, proceeding with a process is a proportionate way of achieving that end.

And the above could be argued if dismissal resulted from that process.

Reasonable Adjustments

Putting the employee through a process could of course in itself be said to be a breach of the duty to take reasonable adjustments.

There is a duty “Where a provision, criterion or practice of the employer's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, **to take such steps as it is reasonable** to have to take to avoid the disadvantage.”

So there is a duty to consider whether a process is necessary. Our question proceeds on the basis that there has been prior discussion which has not worked. So it might be argued that avoiding a process would not be in itself a reasonable step.

And ultimately the same applies were dismissal to result. It may be open to the employer to argue that there were no reasonable alternatives because of the lack of cooperation.

My Answer to the Question

I would advise a medical investigation - the standard is that of a reasonable employer (BS v Dundee City Council)- invite the employee to take part in medical examination. If refusal, then into Morgan territory (refusal to cooperate was key to showing that the unfavourable treatment was justified).

Design a process which is thought to be consistent with employee's needs (reasonable adjustments to PCPs).

Address the consequences to the business of the behaviours; offer amended duties once again explaining the consequences of not accepting these and the lack (or otherwise) of alternatives. Why is it not reasonable to carry on as we are? Full, documented discussion.

- Risk assess S15 duty and the justification defence; risk assess the duty to make reasonable adjustments.
- Proceed with termination.