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Neurodivergence issues: managing performance or conduct



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Question

How much leeway do you have where a neurodivergent condition is raised late, informally or without a formal diagnosis - to explain difficult behaviour or poor performance?



This question touches upon...

- Neurodiversity in the workplace
- Legal risks
- Knowledge – actual and constructive
- Lessons from the case law
- The practical answer
- Q&A

Familiar background

- Neurodiversity describes the natural differences in how our brains behave and process information. It refers to the fact:
  - we all think, learn and act differently and
  - have different strengths and things we find challenging

  (*Neurodiversity at work – ACAS*)
- Neurodivergent is a term often used to describe someone whose brain works differently to what is considered more typical and may include ADHD, ASD, dyslexia, dyspraxia, and dyscalculia
- It is common for someone to have more than one co-occurring condition

Neurodivergence in the workplace

- Up to 20% of the population is considered to be neurodivergent
- A September 2025 study of 135,000 OH referrals revealed that 10% were referred due to a neurodivergent condition
- Claims to the ET involving neurodivergent conditions are sharply rising and have doubled since 2020
- Recognising and supporting neurodivergent conditions in the workplace is a daily occurrence and line managers should be trained to do so

Neurodivergence and disability

- Many neurodivergent workers will not consider themselves disabled (for Equality Act purposes) and may mask conditions
- As neurodivergence exists on a spectrum, the impact it has requires to be considered on an individual case by case basis
- The focus of the statutory test for disability is of course a physical or mental impairment which has a substantial long-term adverse effect on normal day to day activities (or would have such effect without medication to control etc)
- However, “substantial” in practice means “more than minor or trivial” so threshold is not high

The scenario

- So, in our scenario, a worker raises a neurodivergent condition within performance management or a disciplinary process as a mitigating or contributing factor
- The timing of *when the condition is raised* does not materially affect the obligation to reasonably consider its relevance
- Doing so will normally mean a need to obtain details from the individual and to investigate the position, often by seeking either OH advice or other medical input
- Key questions likely to include whether the condition is a disability, whether it has contributed to the concern and advice on any reasonable adjustments needed

Legal risks in this scenario

- **Constructive dismissal**
  - Failing to properly consider neurodivergence relevant to performance or conduct concern could breach obligation of mutual trust and confidence
- **Unfair dismissal**
  - Any decision to dismiss must involve as much investigation as was reasonable in the circumstances and be within the band of reasonable responses
- **Disability discrimination**
  - Action taken for something which arises from disability is discriminatory unless can be shown to be objectively justified
  - Requirement to make reasonable adjustments (including in relation to the process being followed) where individual at substantial disadvantage

What knowledge is required?

- What if the employee in this scenario is vague or informal in what is disclosed to the employer? Or nothing is raised but employer suspects a likely condition?
- If an employer can establish that it does not know and could not reasonably be expected to know of disability, this gives a defence to claims for discrimination arising from disability and/or a failure to make reasonable adjustments
- Note this statutory knowledge defence does not apply to claims of direct discrimination, indirect discrimination, harassment or victimisation

What steps should employers take?

- EHRC Code has key provisions that courts have applied:
  - *5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. 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*
- A Ltd v Z (2019, EAT)
  - *"It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so"*
  - *"Reasonableness, for the purposes of section 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code."*

Dubarry v Sainsbury's (ET, 2019)

- Mr D worked for S for over 25 years keeping car park clean and tidy
- His conditions meant it was more difficult for him to read the emotions of others and respect normal social boundaries, leading to overfamiliar behaviour towards customers such as hugging, high-fives and jokes
- After an initial complaint from a customer, Mr D was given a written warning. Following further complaints from that customer he was dismissed.
- ET upheld his complaints of unfair dismissal, failure to make reasonable adjustments, and discrimination arising from disability. It held S had failed to ensure clear communications with Mr D, to provide him with regular support meetings and a mentor, to reinforce its behavioural standards regularly and for failing to redeploy rather than dismiss him.
- It held that while maintaining high standards of customer service was a legitimate aim that dismissal was not a proportionate response.

Toghill v Lidl GB (ET, 2023)

- Mr T had ADHD and was Deputy Store Manager at a branch of Lidl.
- After moving branch, he was asked to not operate PPTs on the shop floor and to carry out alternative duties. Despite this, he did so on multiple occasions and was dismissed for gross misconduct noting a lack of remorse and a breach of trust arising from deliberate disregard of instructions.
- ET found his dismissal unfair – Lidl had insufficient regard to his disability at the disciplinary hearing.
- It was held also to be discrimination arising from disability – his communication difficulties and the perceived lack of remorse.
- ET also found a failure to make reasonable adjustments to disciplinary hearing process itself including failing to take advice in respect of his ADHD and ensure sufficient breaks

Kaler v Insights ESC (2024, EAT)

- Mrs K worked at a school for children with additional needs
- When first engaged she shared with the principal she was “in the process of being diagnosed” with ASD and that she considered herself disabled.
- She sent a substantial number of abusive and threatening emails to colleagues over a pay dispute and refused to stop doing so
- She was also accused of sending sexually inappropriate texts to a colleague
- She was summarily dismissed for gross misconduct and brought a claim of discrimination arising from disability against the school.
- ET accepted her ASD was a disability but rejected her claim on the basis that her conduct did not arise from her disability, and if they were wrong in this respect, that her conduct was so serious that dismissal was justified.
- EAT upheld this decision

Practical answer

- A neuroinclusive culture supported by line manager awareness and training is key in avoiding risk
- Employers cannot ignore obvious signs/symptoms and must make reasonable enquiries as to the condition, its impact and reasonable adjustments. No formal diagnosis is required.
- It is possible, albeit often tricky, to argue an employer could not reasonably be expected to know
- In other scenarios, particularly of serious gross misconduct, dismissal *may* be justified as being a proportionate response even where the conduct arises out of disability – take advice

Further information

- Employment: Code of Practice (EHRC)
- Neuroinclusion at work | CIPD
- Understanding neurodiversity - Neurodiversity at work – Acas
- National Autistic Society: A guide
- Expert Academic Panel on Neurodiversity: Final Report and Recommendations - GOV.UK (2 October 2026)

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