

gunnercooke

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Question

- When - and how - do you draw the line when undiagnosed neurodivergence is said to be a contributing factor, but reasonable adjustments are not making the required difference?



This is a question of capability

* 5 potentially fair reasons for dismissal:

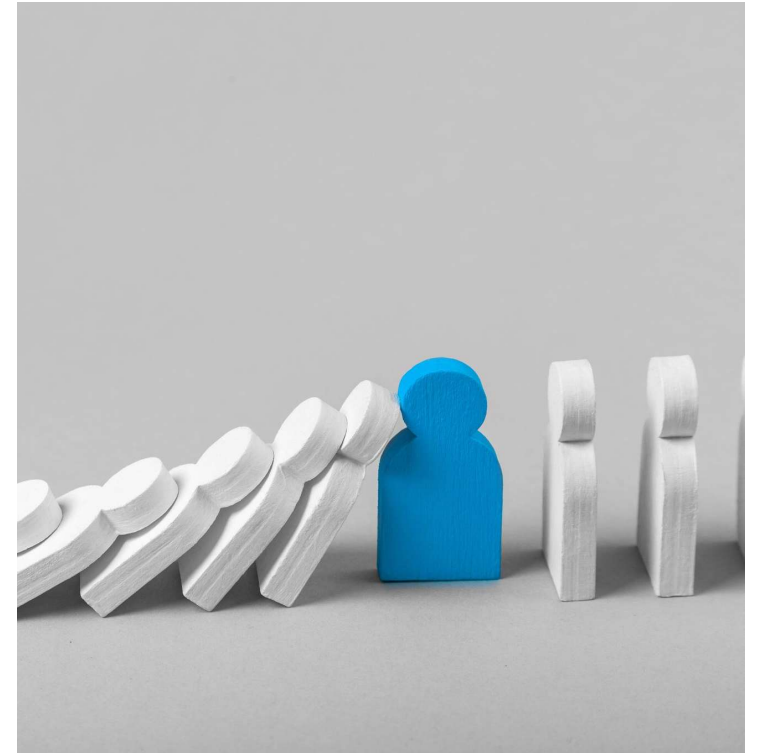
- Conduct
- Capability
- Redundancy
- Illegality
- Some Other Substantial Reason (SOSR)



Capability - employee is underperforming due to lack of skill, ability, aptitude, or due to impact of a health condition

Capability

- Employer is entitled to expect the employee to do the job they are contracted to do, and to an acceptable standard.
 - An employer is entitled to and should address concerns about capability.
 - Unaddressed performance issues can reduce efficiency, increase errors, and lower overall work quality.
 - Reduces risk and liability
 - Supports development and progression and prevents escalation
- Under performance (and its impact) can cause resentment in other employees.



Equality Act 2010

- Neurodivergence may qualify as a disability
- Equality Act 2010 applies
- Medical information can be used establish the nature of the condition
- Duty to consider reasonable adjustments may be triggered



Equality Act 2010

- When does an employer “know” someone has a disability?
 - Actual knowledge
 - Constructive knowledge

***Gallop v Newport City Council* [2014] IRLR 211, CA** - An employer does not need to know that an employee is legally disabled before they have actual or constructive knowledge.

Eg: An employee begins to have frequent absences for “stress”, is displaying unusual(for them) behaviour such as crying easily and their work performance suddenly dips. The employee does not declare a condition but arguably the employer has constructive knowledge of an underlying condition which could be a disability.

Question

- Are you entitled to ask for evidence of neurodivergence? Or must you trust the employee's word?

Answer

An employer must make reasonable enquiry of a potential disability. What is reasonable will depend on the circumstances.

An employer can ask for permission to access medical records and/or seek a medical report

If the employee refuses to co-operate, an employer may not be fixed with knowledge of an employee's disability.

Cox v Essex County Fire and Rescue Service
UKEAT 0162/13

Question

- Is it right that you do not have to make or consider adjustments until a diagnosis is confirmed?

Answer

An employer has a duty to consider adjustments when it knows the employee has a disability or they could reasonably be expected to know the employee has a disability.

Jennings v Barts and the London NHS Trust EAT 0056/12

It is safer to consider making adjustments whilst you take steps to understand the condition further.

Question

Must you accommodate a disability no matter the cost and impact to the employer?

The test of the 'reasonableness' of any step an employer may take is an objective one and will depend on the circumstances of the case.

Potential Factors:

- the practicability of the step;
- the financial and other costs of making the adjustment and the extent of any disruption caused;
- the extent of the employer's financial or other resources; and
- whether taking any particular steps would be effective in preventing the substantial disadvantage

Question cont...

- If, after adjustments and review:
 - the employee cannot perform the essential duties to an acceptable standard, and
 - no further reasonable adjustments or redeployment exist,

the employer may be in a position to dismiss for capability.



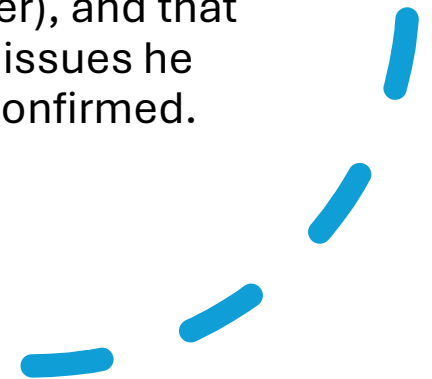
Scenario

You have an accounts manager, Steve, who works at your manufacturing plant. He has worked for you for 5 months.

You notice Steve's performance is inconsistent. His attention to detail is not good. He forgets to complete tasks, his reports frequently contain incorrect figures and he often fails to comply with deadlines. This is a significant problem for the business as the accounts team is small, and issues with invoicing can lead to costly production delays.

You inform Steve you intend to place him on a Performance Improvement Plan (PIP). Steve discloses he believes he has ADHD (Attention Deficit Hyperactivity Disorder), and that condition is responsible for the performance issues he experiences. He has not had this condition confirmed.

How do you respond?



Press on with the PIP ?

Tell Steve that if he gets a diagnosis then he can come back to you but until then you cannot simply put up with this underperformance.

Set him targets and if he fails to meet them, the performance management process will take its course.

Next Steps

Initial reaction

- Thank Steve for sharing the information – it is not always easy for employees to discuss private health matters.
 - Don't question the legitimacy of the condition just because there is no formal diagnosis in place.
 - Focus on understanding what specific challenges Steve says he has in relation to his role. Record as much information as you can.
 - You don't need to scrap the PIP as performance still needs to be managed. Pause it to see if adjustments help.

Focus on Support



Providing appropriate support early on may solve the problem and negate the need for a capability process



For example, Steve may say he needs a quiet space to work and would benefit from regular, short check-ins with his manager to keep him on track.



These are easy to implement and improve performance.




The employer has complied with its duty to consider reasonable adjustments, and has avoided a time consuming, costly and stressful capability process.

If the problems continue

Seek Steve's consent to request a medical report from the GP or a relevant specialist, aiming to gain clarity on whether Steve has ADHD or any other neurodivergence, and

..how any neurodivergence affects Steve's role and what workplace adjustments might help?



If reasonable adjustments are not making a difference?



Meet with Steve and put the evidence of continued performance issues to him. Does he agree adjustments have been ineffective?



Review the medical advice and check it is up to date



Consider whether there is any alternative employment available to offer to Steve.



If Steve cannot perform the essential duties, and no further reasonable adjustments or redeployment exist, the employer may potentially dismiss for capability.

Fair process

- Any dismissal must be :
 - procedurally fair (invitation to meetings in writing, right to be accompanied, provided with all relevant evidence, right to appeal)
 - evidence based (be prepared to support your assertions with tangible, fact-based evidence)
 - Ensure your process is well documented

Notes Notes Notes!



Summary

- Lots of people self diagnose – focus in on the specific challenges the employee says they are experiencing. Ask for as much detail as possible.
- You are entitled to ask for further medical information however, you arguably have constructive knowledge of a disability from this point, so do not wait for a report or diagnosis before taking action.
- Look for the easy wins – relatively simple adjustments that could address issues.
- Continue carefully monitoring performance and if initial adjustments make no difference, seek medical advice

Summary

- Consider reasonable adjustments in full.
- If adjustments are ineffective consider alternative employment.
- Ultimately if there is no improvement in performance you will be in a position to dismiss.

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