

White Paper Conference on Dismissal

Neurodiversity

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The Question

How do you manage a potentially neurodiverse colleague who refuses to seek help and continues to work, on amended duties, staying below absence triggers with no prospects of improvement in sight?



Background

What do we mean by “neurodiversity”?

- Neurodivergence – *having a mind that functions in ways which diverge significantly from the dominant societal standards of “normal”*
- Umbrella term covering a range of neurological differences, including:
 - autism
 - dyspraxia
 - dyslexia
 - ADHD or ADD
- CIPD guide on neuroinclusion at work, February 2024
- Labour’s *Plan to Make Work Pay* – pledge to raise awareness of neurodiversity in workplace and wider society

Neurodiversity at work

- CIPD estimates that 1 in 5 people identify as neurodivergent in some way
- Increase in number of diagnoses (autism diagnoses increased by 787% between 1998 and 2018)
- Workplaces designed for “neurotypical” employees create difficulties for neurodivergent employees, e.g.
 - interview arrangements on recruitment/promotion
 - hot desking
- Increase in litigation – e.g. ET judgments referring to “dyslexia” increased from 0 in 2015 to 111 in 2023

CIPD – seven key principles for creating a neuroinclusive organisation

- Understand where you are now and commit to a long-term plan of action
- Focus on creating an open and supportive culture where people feel comfortable talking about neurodiversity
- Proactively consider neurodiversity in all people management interactions
- Allow individuals to be masters of their own journey
- Embrace flexible working to enable everybody to thrive
- Practice ongoing attention to wellbeing
- Empower neurodivergent voices

Legal Risks

Neurodiversity and disability discrimination

— Equality Act 2010 definition:

A person has a disability if they have a mental or physical impairment and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day to day activities

— Potential claims:

- direct discrimination
- indirect discrimination
- discrimination arising from disability
- failure to make reasonable adjustments
- harassment
- victimisation

Possible reasonable adjustments for neurodivergent employees

- Equipment (e.g. noise cancelling headphones)
- Specialist software
- Proofreading support
- Working environment (e.g. designated desks, quiet workspaces)
- Working from home
- Working schedules
- Regular breaks
- Feedback/check-ins/mentoring
- Providing meeting notes

Key Cases

Key cases

Bulloss v Shelter (2017/18)

- B worked as adviser for Shelter on their telephone helpline working nights and weekends
- B was given a four-week trial on their webchat team
- Team leader spotted several grammatical and spelling errors in his discussions with the site's users, but otherwise his work was good
- B said he did not want to return to the helpline as he didn't want to work nights and weekends
- B given further time to improve
- B was then moved back to telephone helpline
- B took a month off due to anxiety and then revealed he had been diagnosed with dyslexia
- B inquired whether his dyslexia was reason he could not return to webchat

Key cases

Bulloss v Shelter (2017/18)

- Operations manager emailed union rep to say, *“why would we invest money for reasonable adjustments that are not necessary because his dyslexia does not affect his ability to perform effectively on the phone”*
- Shelter told B that no adjustments had been made for his dyslexia as there had been no diagnosis at the relevant time, but that he would not be moved back to the webchat
- B resigned and brought claims for unfair dismissal and disability discrimination (failure to make reasonable adjustments)
- ET upheld claims and found that reasonable adjustments might have included specialist software, proofreading support, written confirmation of verbal instructions and provision of quiet workspace
- ET said, *“While the employer had a discretion to deploy the claimant where it thought fit, it is clear from the internal correspondence that the respondent wished to avoid its duty by simply returning the claimant to voice work”*

Key cases

Rackham v Judicial Appointments Commission (2023)

- R had Autism Spectrum Disorder and had difficulty with one-to-one communication and in imagining and dealing with hypothetical situations
- R applied for judicial role with JAC and requested several adjustments to its selection process
- JAC agreed to allow R assistance with completing application form, additional time to submit it and allowed R to submit it offline or by email
- But JAC refused to:
 - provide R with simplified questions
 - assign R a trained autism facilitator to assist him during application process
 - allow R to complete a mock scenario task relating to the role rather than completing application form

Key cases

Rackham v Judicial Appointments Commission (2023)

- R brought claim in the ET alleging:
 - indirect discrimination
 - failure to make reasonable adjustments
- ET held that JAC had not failed in its duty to make reasonable adjustments
 - the whole point of the test (which was designed to replicate the role R had applied for) would be undermined if R had been given simplified questions
 - JAC had been entitled to rely on National Autistic Society advice that it was better for R to have someone known to him to assist with the application than trained autism facilitator
 - it was not reasonable nor realistic for JAC to provide the mock scenario-based task proposed by R

Key cases

McQueen v General Optical Council (2023)

- M was employed by GOC as registration officer. He had dyslexia and some symptoms of Asperger's Syndrome which caused some difficulties with his interactions in office
- M had been examined by OH, psychologist and psychiatrist
- Medical evidence indicated that in situations of stress, anxiety or conflict, M would raise his voice and become aggressive
- In April 2015 M challenged instruction from senior colleague (P) in rude and disrespectful manner. M referred to OH
- In April 2016 second confrontation between M and P which was followed by further incidents with other colleagues
- In June 2017 M disciplined for performance issue and then brought grievance
- M then brought ET claims alleging discrimination arising from disability

Key cases

McQueen v General Optical Council (2023)

- GOC accepted that M needed written instructions to back up verbal communications and some physical adjustments to workplace
- GOC argued that M's aggressive attitude (including standing up at his desk) did not arise from disabilities
- ET considered medical evidence and found that:
 - standing up arose from habit, not disabilities
 - disagreements over instructions arose from his short temper and resentment at being told what to do, not disabilities
- EAT dismissed M's appeal
 - ET was aware of medical evidence and summarised it carefully and fairly

Key cases

Morgan v Buckinghamshire Council

- M was social worker in fostering team at BC. She had autism and dyslexia
- M dismissed for:
 - giving gifts to a child for whom she was responsible without manager's authority
 - writing an inappropriate case note largely consisting of her own thoughts and feelings
- M appealed dismissal. Appeal manager stated that it was a matter of serious concern that M had chosen to "mask" her autism throughout much of her employment putting vulnerable children at risk
- M claimed unfair dismissal and discrimination arising from disability and that appeal manager's comment was act of harassment

Key cases

Morgan v Buckinghamshire Council

- ET found that M had not been unfairly dismissed or been subjected to discrimination arising from disability as dismissal was justified
- ET found that M had been subjected to harassment – it was offensive for appeal manager to suggest that M had been deceitful
- M and BC both appealed
- EAT upheld ET's decisions:
 - BC had reasonably formed view that M had breached professional boundaries and that it could not be confident she would not do so again
 - M had known that she needed authority to give gifts and she knew that breach of policy could lead to dismissal
 - Appeal manager's comment was a considered observation in a formal letter and could reach high threshold required of harassment claim

Case study

Case Study

- You are the HR director of D-Day Communications, a PR agency
- Colin has been employed as the company's financial controller for the last three years
- Colin has difficulty communicating verbally with colleagues and you have noticed that he avoids attending meetings. He also tends to get frustrated by relatively minor issues
- Colin's line manager is the CFO, Roger. Colin has never disclosed any condition, but Roger is always joking at Exco meetings that Colin is "on the spectrum"
- Colin has one direct report, Hannah, who joined about six months ago
- Hannah has recently complained to you that Colin does not delegate, does not supervise her work and never gives her any feedback. She says that she is considering leaving
- What would you do next?

Case Study

- You speak to Colin and discuss Hannah's complaints with him on an informal basis. Colin is visibly upset by what you have to say
- You explain that you have noticed that Colin sometimes has difficulties in communicating with colleagues and that it may be beneficial for you to get advice on how best you can support him
- However, when you suggest that it may be advisable for him to see Occupational Health, Colin becomes quite angry and very emotional. He insists that there is nothing wrong with him and leaves the meeting
- What do you do now?

Case Study

- You decide to arrange a further meeting with Colin
- You explain to him that you will not require him to meet with OH if he does not want to, but that you need to see improvements in his communications with colleagues, particularly in his management of Hannah
- You arrange to meet him again in a month's time to review progress. However, shortly after the meeting Colin is signed off with anxiety and low mood
- His fit note states that Colin should be fit to return in a month's time *"if adjustments are made to his working environment to relieve the stresses that Colin is under"*
- What would you do now?

Case Study

1. What would you do next?
2. Would you refer Colin to OH?
3. What adjustments do you think might be appropriate?
4. Would you consider offering Colin a settlement to leave?
5. What would the possible advantages and disadvantages be of doing that?

Case Study

- You have a Teams call with Colin to discuss what support the company can offer to help him return to work
- Colin's only suggestion is that he works from home five days per week rather than the company policy of two days
- You say that Colin can work from home for two weeks on his return to work but that he then needs to build back up to attending the office three days a week because he needs to discharge his management responsibilities
- Six weeks after Colin returns, Hannah resigns. In her resignation letter she says that she loves the company but cannot work for a manager who constantly ignores her
- What do you do now?

Case Study

1. Have another informal discussion with Colin about his performance?
2. Accept that Colin will never make a good manager so remove his management responsibilities and have Hannah's replacement report into Roger?
3. Refer Colin to OH?
4. Institute the formal performance management process?
5. Have a confidential/without prejudice discussion with Colin and offer him a severance package?

Key points

- Consider whether you have actual/constructive knowledge that the employee may be neurodiverse and whether this may amount to a disability
- Seek advice from OH/other medical experts
- Identify clearly how any neurodiverse conditions affect the employee's performance
- Consider what adjustments may be appropriate to assist employee
- Adjust performance management procedures to make allowances for employee's condition
- Set clear objectives through the performance management process and follow up regularly orally and in writing



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