A photograph of three business professionals (two men and one woman) sitting around a table in a modern office or cafe at night. They are engaged in a discussion, with laptops open in front of them. The scene is lit with warm, ambient lighting, and large windows in the background show a cityscape at night. The overall mood is professional and collaborative.

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# White Paper Conference

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5 December 2024

Neurodiversity in the workplace

# Neurodiversity in the workplace

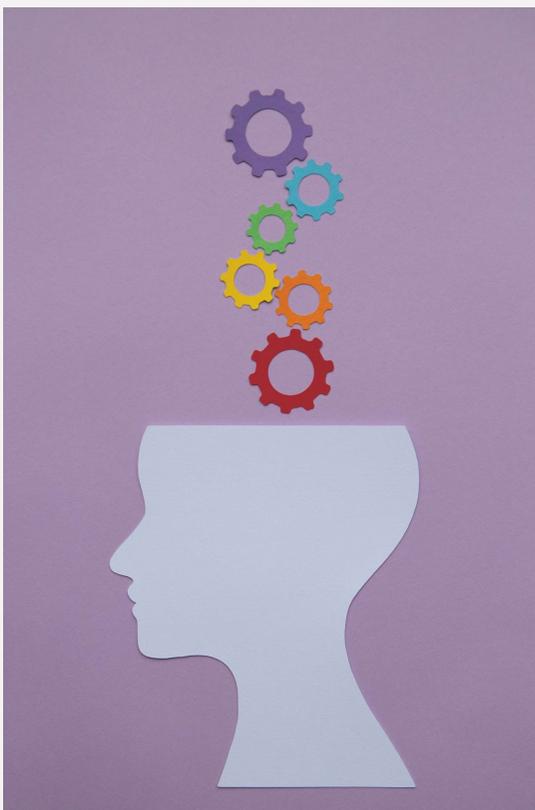
*What is 'reasonable' when it comes to (1) an employee's struggle with executive function and maintaining consistent productivity and (2) behaviours or mannerisms that may be upsetting to colleagues?*

# Neurodiversity in the workplace

## Agenda

- What is neurodiversity?
- Neurodiversity in the workplace
- Legal requirements and risks
- Case law
- Lessons learnt
- Questions

# What is neurodiversity?



- Neurodiversity is an umbrella term which refers to the fact that people's brains work differently and that all minds are unique
- Neurodiversity can cover a range of neurological differences, including:
  - Autism
  - Dyslexia
  - Attention Deficit Hyperactivity Disorder (ADHD or ADD)

# Neurodiversity in the workplace

- The CIPD estimates that **one in five** people identify as neurodivergent, although some may not have a formal diagnosis and that **around 30% of employees** who identify as neurodivergent have not told their employer
- Increase in number of diagnoses increased by **787%** between 1998 and 2018
- Increase in litigation – e.g. ET judgments referring to “dyslexia” increased from **0 in 2015 to 111 in 2023**

# Neurodiversity in the workplace



Creating an inclusive workplace for all neurotypes can produce real benefits for business, by ensuring diversity of thought and spurring innovation and creativity.



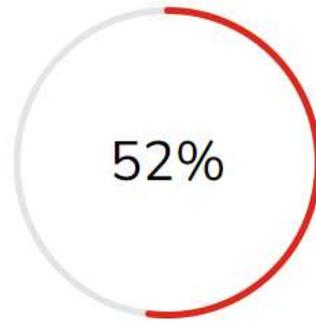
Workplaces have historically been geared towards people with the most common preferences and traits; usually those who could be considered “neurotypical”.



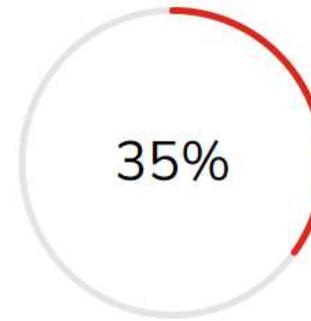
This can create challenges and barriers for neurodivergent employees, both when applying for roles and during employment.

# Neurodiversity in the Workplace

## 2024 City and Guilds Neurodiversity Index Report



of organisations reported  
having adapted  
recruitment practices in  
2023



of organisations have  
had one or more senior  
leaders sharing they  
were neurodivergent



of people had been off  
work during the last year  
because of  
neurodivergent related  
challenges

# Legal requirements and risks



# Neurodiversity and disability discrimination

- EqA 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**
  - Many forms of neurodiversity are experienced along a spectrum - the same condition may not always amount to a disability
  - A person may also experience more than one type of neurodivergence, which may have a cumulative effect

# Neurodiversity and disability discrimination

- The EqA 2010 requires an employer:
  - Not to treat an employee less favourably because of their disability (Direct discrimination)
  - Not to treat them unfavourably for a reason arising from their disability (unfavourable treatment) unless justified
  - Not to subject them to unlawful harassment, unjustified indirect discrimination or victimisation
  - To make reasonable adjustments

# Neurodiversity and disability discrimination

- Knowledge of disability required for direct discrimination, discrimination arising from disability and failure to make reasonable adjustments
- 63% of neurodivergent workers believe employers view neurodiversity as a red flag
- 47% of adults hide their condition from prospective employers

# Neurodiversity and disability discrimination

- Imputed or constructive knowledge is all that is required
- Were there clues that should have put the employer on enquiry?
- Should the employer reasonably have known that the performance or conduct was the result of a disability?

# Neurodiversity and disability discrimination

Actual or constructive knowledge - *Godfrey v NatWest Market plc*  
[2024] EAT 81

G was not diagnosed with Asperger's until many years after his employment ended  
He brought disability discrimination claims after unsuccessfully applying for further roles  
G argued that those who worked with him would have been aware of his social interaction difficulties  
EAT upheld tribunal's decision that there was no actual or constructive knowledge of disability

Test was not whether they might reasonably have known that G had an autistic spectrum disorder, but rather that they might reasonably have known he had a mental impairment generally with the requisite adverse effects

# Neurodiversity and disability discrimination

ACAS suggests that employers ask themselves the following questions when considering whether their workplace is set up to support neurodiversity:

- Can I do more to make sure my workplace understands neurodiversity?
- Do my managers have the skills to manage neurodiverse staff?
- Can I reduce distractions in my workplace?
- What internal assistance and support can I provide for my neurodivergent employees?
- Could I offer diagnostic and workplace needs assessments?
- How do I design job roles that get the best out of my staff?
- Is my recruitment process inclusive?
- Am I encouraging neurodivergent talent in my organisation?
- Do I know where to go for further information and support?



# Case Law

# McQueen v General Optical Council ([2023] EAT 36)

- Here the EAT considered whether M's inappropriate conduct in the workplace amounted to “something arising in consequence of his disability”
- M had autism, dyslexia and hearing loss and became involved in a number challenging interactions with his colleagues
- M had been examined by Occupational Health, a psychologist and a psychiatrist.
- The medical evidence indicated that in situations involving, stress, conflict or anxiety M tended to raise his voice and adopt mannerisms suggestive of aggression, with inappropriate speech and tone.

# McQueen v General Optical Council

- In April 2015 M's line manager asked him to prioritise certain work. M Responded by becoming rude and disrespectful, using aggressive gestures and inappropriate body language
- In April 2016 further confrontations with colleagues occurred
- M was disciplined and brought a claim for discrimination arising from his disability

# McQueen v General Optical Council

- GOC argued that M's aggressive attitude did not arise from his disabilities
- ET considered medical evidence and determined that M's behaviour **arose from his short temper and resentment at being told what to do, not from his disabilities**
- M appealed and the EAT found that the ET had considered the medical evidence carefully and appropriately
- EAT provided guidance on what to consider in a claim for unfavourable treatment for a reason arising from disability

# Morgan v Buckinghamshire Council ([2022] EAT 160)

- M was a social worker in the fostering team of BC
- M had **autism and dyslexia**
- BC's code of conduct outlined the procedures to be followed if gifts were given to children
- M was dismissed for failing to follow the code of conduct
- M appealed advising of her conditions and that they may have contributed to her decisions
- BC requested that M take part in an occupational health assessment which M refused
- BC dismissed the appeal indicating in the outcome letter 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

# Morgan v Buckinghamshire Council

- M claimed unfair dismissal, discrimination arising from disability and that the appeal manager's comment was an act of harassment
- ET found that M had not been unfairly dismissed or subjected to discrimination arising from her disability as the dismissal was objectively justified
- ET found that M had been subject to harassment from the manager due to the comments in the outcome letter
- Both M and BC appealed
- The EAT upheld the original decision finding that:
  - BC had reasonably formed a 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 which she reasonably took as suggesting she was deceitful which violated her dignity

# Lessons Learnt



Educate your workforce – recognise behaviours, make adjustments, be more inclusive

Actual knowledge not required for many types of claim - ought reasonably to have known

Medical advice – to establish effects of the condition and to justify treatment

Reasonable adjustments – critical to consider whether there are any before any action is taken

# Lessons Learnt

- *What is 'reasonable' when it comes to (1) an employee's struggle with executive function and maintaining consistent productivity and (2) behaviours or mannerisms that may be upsetting to colleagues?*

Any questions?



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# Thank You

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