

Neurodiversity in the workplace



Siobhra Rush and Sinead Likely of Lewis Silkin explore the legal and practical issues around employing people with neurodivergent conditions and how employers in the retail sector can develop a more neurodiverse workforce.

THE week of March 13-19 marked Neurodiversity Celebration Week, a worldwide initiative aimed at challenging stereotypes and misconceptions about neurological differences. While the concept of neurodiversity is certainly not new, it is an area that is becoming more of a hot topic in employment law in recent years and a recent decision in the UK highlights the importance of employers' awareness and understanding when managing employees with neuroatypical conditions.

As part of their growing ESG (environmental, social and governance) agenda, many employers are already embracing their obligations under the heading of DEI (diversity, equity and inclusion). Indeed, many are seeing the benefits of adopting more inclusive hiring and recruitment practices and the depth of talent, diverse thinking and creativity that this can bring. Some retail employers will already have seen the benefit of putting support structures and services in place for their neurodivergent customers. For example, retail employers like Penney's, Lidl and SuperValu introduced autism-

friendly shopping hubs and experiences. Many recent studies and surveys have shown that it's not only customers that prefer socially inclusive companies; this is an important factor for today's jobseekers too. Given the overall prevalence of neurodivergent people, applying socially inclusive initiatives and approaches to their talent acquisition and retention policies makes sense for retailers.

What is neurodiversity?

Most people are 'neurotypical', which means that the brain functions and processes information in the way that would be typically expected. However, over 15% of people are 'neurodivergent', meaning their brains will learn, focus and process information in a different way. Neurodiversity can include a range of neurological differences, including autism, dyslexia, dyspraxia and attention deficit hyperactivity disorder (ADHD or ADD). Such conditions can often present concurrently as well as alongside mental health conditions such as anxiety and depression. It is, of course, also the case that not all

people who are neurodivergent have a clinical diagnosis, or they may not realise that they have such a condition.

How can it impact management of employees in the workplace?

Retail employers should ensure that they are prepared for any additional management requirements for employees who are neurodivergent. It's likely that neurodiversity will encapsulate a condition which, in many cases, will be protected as a disability under the Employment Equality Acts 1998-2008 (EEAs). The definition of disability includes a condition which results in a person learning differently from a person without the condition, or which affects a person's thought processes, perception of reality, emotions or judgement. This can include a disability which exists at present, or which previously existed but no longer exists, or which may exist in the future or which is imputed to a person. It is also important to be aware that the absence of a medical diagnosis does not mean that someone is not disabled for the purpose of the EEAs.

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What does the law require retail employers to do?

The law does not require an employer to continue to employ an employee in a role that they are not fully competent and capable of performing. However, if their disability limits them, the employer is firstly required to consider what reasonable accommodations might be required to assist the employee in performing their duties, including to the standards required. There is simply no 'one size fits all' approach to this and managers need to consider how neurodivergent conditions manifest themselves to devise practical strategies for supporting individual workers' requirements. Effective training is, therefore, highly important.

There is an exception to the requirement to provide reasonable accommodation where this would give rise to a disproportionate burden for the employer. The consideration of what constitutes a disproportionate burden includes looking at the cost of implementation, so for larger retail employers, who might be seen as having an ability to absorb those costs, it could be difficult to show that they could not reasonably afford the measures proposed or recommended.

What are the practical implications?

Typically, retail employers might come across this issue when an employee is not performing to the standard required, or

has behaved inappropriately, and discloses that they are neurodivergent and that the behaviour complained of (or the poor performance) is by reason of their condition or medication that they may be taking connected with it. In such circumstances, an employer must consider whether any measures of reasonable accommodation are required, and this duty requires an employer to:

1. Ensure it is fully informed by up-to-date expert medical advice;
2. Identify and evaluate all reasonable accommodations which could be put in place to assist the employee in carrying out their role to the standard required;
3. Assess whether those accommodations would impose a disproportionate burden on the employer, having regard to the costs involved, the resources available to the employer and the possibility of obtaining public funding or other assistance;
4. Engage in meaningful consultation with the employee throughout the process before a decision is made.

If the employer has followed the above steps and an employee is still not performing to the standards expected of their role or continues to behave in an inappropriate manner, they may wish

to consider disciplinary action, or a performance improvement process, which ultimately may result in termination of the employee's employment. An employer would likely be expected to give the employee a reasonable amount of time to improve once the supports were put in place, and to actively engage with the employee during that time to establish whether any additional supports could be put in place prior to making any decision to dismiss the employee.

It can be particularly difficult if a neurotypical employee conducts themselves inappropriately and then makes the case that this was linked to neurodiversity. In our experience, cases of this nature are becoming more common. It may still be appropriate to dismiss, but it requires more consideration and care than a situation which does not involve a disability.

As always, dismissal should be a last resort and other options such as giving a final warning, moving the employee to a different team and/or alternate working patterns or arrangements should be considered first. In summary, such situations should be approached carefully.

A reported UK case

A UK employer recently successfully defended a claim of discrimination on the grounds of disability, but failed to defend a concurrent claim of disability-related

harassment, which could cover making offensive remarks about neurodivergence (Source: Morgan v Buckinghamshire County Council – full judgment available at www.bailii.org.uk/cases/UKCAT/2022/160.html).

The employee, who had autism, dyslexia and other neurological conditions, was a supervising social worker in the fostering team. She was dismissed for giving gifts to a child without permission from her manager and because of an inappropriate case note she had written. She brought a claim for unfair dismissal and discrimination arising from disability, mainly on the basis that her autism had impacted her judgment and understanding in relation to the gift-giving policy and appropriateness of the case note. The employer accepted that the claimant was disabled on the basis of her neurodivergences, and it was determined that the conduct for which she was dismissed resulted from her disabilities. However, she had refused to participate in an occupational health assessment, and this negatively impacted her claim, because in the absence of any medical advice, it was determined that dismissal was within the range of reasonable responses for the employer. It must be noted that this was one of two factors which are particular to the defence of UK discrimination claims, not Irish claims under the EEA.

Separately, however, the employee succeeded in a claim for disability-related harassment, because in a letter, the employer stated that she withheld her autism by 'masking' throughout much of her employment, potentially putting vulnerable children that she was working with at risk. The employee took this as a suggestion that she had been deceitful, when she had in fact simply learned behaviours which led to her masking her autism, and that she reasonably felt her dignity to have been violated.

The UK Tribunal held that although it was a one-off comment, this did not mean it could not amount to harassment, especially as this was a considered

observation in a formal letter rather than an unscripted, heat-of-the-moment remark.

How can we take a positive approach for neurodiverse employees?

Naturally, every situation will depend on the facts. However, when an employee explains that they have any disability, including neurodivergent conditions, it is generally advisable to talk to them and discuss whether it's necessary to refer them for an occupational health appointment.

An occupational health report can support an understanding of what reasonable accommodation may be needed. Where reasonable accommodation is made, it is sensible to have regular check-ins with the employee to ensure that this accommodation remains suitable and find out whether they require any further support. Further occupational health assessments might be needed, especially when an employee's disability is subject to fluctuation, for example, in times of stress or if their medication changes.

Coaching and mentoring can be useful aids in supporting a neurodivergent employee. This can help an employee understand their role and fit into the team. Additionally, if there is misconduct from an employee, suitable coaching may assist in understanding the situation and reducing the risk of the misconduct happening again. Much litigation involving neurodivergent employees is arguably avoidable if an organisation's managers and employees have had a good mutual understanding and dialogue about neurodivergent conditions and how they may affect workplace participation and practices. Educating and training retail managers on neurodiversity and how it can present in individuals within the work environment is, therefore, key.

A recent UK study which was released to coincide with Neurodiversity Celebration Week found that only 29%

of senior leaders surveyed had specific training in relation to neurodiversity, despite nearly 80% recognising that disability inclusion policies are important.

A comprehensive approach to training will ensure that managers can provide open and safe environments for their neurodivergent employees and will boost engagement and productivity amongst those individuals, making them more successful in their work. As seen from the recent UK case highlighted above, all staff should also be reminded that even one-off comments can constitute harassment and to be considerate towards colleagues.

About the authors

FOR further information on this topic please contact Siobhra Rush (Siobhra.Rush@lewisilk.com), or Sinead Likely (Sinead.Likely@lewisilk.com), from Lewis Silk. This article is for general guidance and does not constitute legal advice. Legal advice should be sought in any given set of circumstances.



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