

Anna Bond: Hello everyone and welcome. You're listening to a podcast from the employment team at Lewis Silkin. I'm Anna Bond, my pronouns are she/her, and I'm joined today by my colleague, Jen Kingsmill.

Jen Kingsmill: Hi Anna and hello everyone. It's great to be here. My pronouns are also she/her. I'm an associate in the employment team with an interest in advice related to neurodiversity and I also have dyspraxia with ADHD and dyslexia, which I think we're going to be discussing in bit more detail as we come on.

Anna Bond: Thanks, Jen. And we're also delighted to have two guests joining us for our discussion today: welcome to Professor Amanda Kirby and Mel Francis from [Do-IT Solutions](#).

Do-IT Solutions is an internationally recognised tech-for-good company that provides neurodiversity screening and web-based support tools. And that's the focus of today's podcast - we'll be discussing neurodiversity in the workplace and whether we need to think differently about thinking differently.

So, thank you so much Mel and Amanda for joining us. We're really excited to have the benefit of your expertise in this area.

Amanda Kirby: Thanks very much for inviting us, we're really excited to be here today.

Mel Francis: Yeah, thank you. Really, really excited for this conversation.

Anna Bond: Now this is a topic where we at Lewis Silken have seen a huge increase in client queries and we could probably have a whole series of podcasts on it, but today we're going to cover the key topics. So we'll talk about what we mean by the term neurodiversity, why it's becoming such a hot topic for employers. We'll discuss the law, considering how neurodiversity is treated under the Equality Act 2010 and the legal definitions of concepts like "disability" and "reasonable adjustments". And then finally, we're going to think about how to get the most out of a neurodiverse team. What steps might employers consider not only on an individual level, but on a workplace level, to ease integration?

So, I'm going to hand over to Jen to kick us off.

Jen Kingsmill: Thanks very much, Anna.

To tackle this first part of our podcast - and what is neurodiversity and why does it matter - I'm very lucky to be joined by Professor Amanda Kirby who is the CEO of Do-IT Solutions.

Amanda has worked in this field for over 25 years and is recognised internationally for her expertise. She has written 10 books on the topic of neurodiversity and is the Chair of the ADHD Foundation. And of course, we'll come on to a talk a bit later about some of the work that Amanda does with employers through her organisation.

So, I wonder, Amanda, if we should start by explaining what we mean by neurodiversity?

Amanda Kirby: Yes, that's a really good starting point.

So neurodiversity, well we're all neurodiverse - this is important. And often we talk about people who are neurodiverse but we're all neurodiverse: it's the different ways we think, act, process, communicate and move. And generally, people do it in a certain sort of way because society is set up in that sort of way. But some people do the way we think, act, process and communicate, we do differently from the "average person", whoever is an average person, I've never met an average person.

And the reality is we have billions of brain cells connecting in billions of different ways and we've got lots of different types of brain cells. So when often we talk about neurodiversity, actually we should be talking about diverging from this typical or what's perceived as average way of doing things.

I think it's really interesting that sometimes we don't have a conversation because we're worried about saying the wrong thing. And that can be a reason why employers don't start a conversation with somebody or

somebody who perceives themselves to be neurodivergent or always worried about how to express it doesn't have a conversation in the other direction.

And what I've seen over the last 15, 20 years is changing language that's happening. We're talking about neurodiversity, neurodivergent, conditions, types, traits, disorders, deficits, lots of words which are quite emotive. We've got people talking about autism and dyspraxia or developmental co-ordination disorder and different people giving those labels and new things emerging like 'neuro-spicy', even. And I think the importance of all of that is to have a conversation and be respectful and curious and that the person's framing is their framing. And I think it's not an employer's role to go, "that's not right" or "that's wrong" because it is that person's framing, but it's important to listen and be respectful and remain curious because as I've seen, language is constantly changing, and our framing and understanding is changing as well.

Jen Kingsmill: Thank you so much, Amanda. That's really, really useful and personally, I find very interesting. When I talk to employers about the issue, I always try and emphasise that it's a question of difference rather than validity. Is that something that you'd agree with?

Amanda Kirby: Yeah, I think it is, it's a different way. So if you think of the way that employment is set up, even in an interview, we have an expectation - you ask me a question, I'll respond in a certain pace and if I take a bit longer, then that's different from your expectations so we're diverging away from the expectation of the way the business is run day-to-day. And we might do it quicker, so I might be really quick at answering and jump in because I've already worked out the question you've asked me and I'm giving you the response right away. Or the other end is I might need longer to process the information, think about the response, and there might be a pause and a gap, and that might be diverging both ways. So again, it's sort of an expectation of difference rather than disorder. And I don't like that sort of framing in a way of people feeling they are disordered or there's a deficit because it's actually a difference, a different way you're processing and moving and doing things. We've just got an expectation of society that we'll do it in a certain sort of way.

Jen Kingsmill: And I think even just from that example, it's a really good way to show how difficult it can be for people who do diverge from the norm to sort of handle different situations in society and the workplace as well. So thank you so much for that.

I think this topic also matters to a lot of employers as we're seeing an increase in diversity initiatives that are focused on neurodiversity. And I think this reflects a sort of greater awareness around neurodiversity across society generally.

I think that also complements the fact that there are a lot more diagnoses happening, which is really positive. But at the same time, you know, there is also a delay with formal diagnosis that we'll talk about later. Formal diagnoses are still quite common in children and that's obviously impacting the workplace as well as these people are getting older and joining the workforce. But also, parents seeing their children getting diagnosed and then suddenly thinking, well, "I have those traits, is that something that I might have?" and therefore looking for diagnosis as well.

Amanda Kirby: Yeah, so I think the first thing is that there is a sort of bias in types of diagnoses. So in adults, we are seeing that increase in diagnosis in autism, ADHD. We're not seeing the same increase in diagnosis in some other conditions - you mentioned dyspraxia or developmental co-ordination disorder (one of the Cinderellas of the neurodivergent world, not going to the ball yet!), developmental language disorder, which is three times more common than autism spectrum disorder.

And for people, adults who've got specific characteristic traits, strengths and challenges, gaining a diagnosis of some conditions is incredibly difficult. So the autism lobby, like you say, Jen, has increased and that was a parental lobby that drove that awareness to say people are being missed. We've got to recognise that these diagnostic boxes are vague-ish, so one person with autism spectrum could be nonverbal, another person could be hyperverbal - huge variations. And I think this is really important when we're talking from a workplace perspective, is understanding the person, you know, rather than the label, because in actual fact,

we see with females, lots of females are popping up now in adult life who weren't diagnosed in childhood. I think that's the catch up often as well, we're seeing parents being missed or misdiagnosed. So again, gaining a diagnosis in childhood of X, but now seeing it's Y because we've got a broader landscape and understanding. So I think there are a number of factors.

I think we've just got to be careful in a workplace we don't need a diagnosis to have support. And I think if we do this sort of boxed "ADHD people have this" and "autistic people have that" there's a challenge there for employees that they're going to give the wrong adjustments and they're not going to give the right advice because they're seeing a sort of boxed approach to providing adjustments which doesn't meet the needs of the person who's in front of you and the job they're doing.

Jen Kingsmill: You raise so many really good points there, Amanda. And I think, you know, they also reflect my own personal experience. I wasn't diagnosed until I was 21 years old at the end of university, which can be very common, especially with dyspraxia because it lies under the radar. Additionally, with getting diagnosed with dyspraxia, I had to go to a specialist dyspraxia practice because as you say, a lot of places don't really recognise dyspraxia and therefore don't pick up on it for diagnosis so I was recommended specially to go to this dyspraxia practice.

And talking about sort of diagnostic trends and this growing awareness of the benefits of having a neurodiverse workforce, but also some other - arguably less positive - things that we're seeing is there has been an increase in employment tribunal claims that are citing neurodiversity.

Our research on this point sort of as a firm, but also you can sort of see it in articles across the board is that this trend is very much going upwards. Is that something that you've noticed as well, Amanda?

Amanda Kirby: Yeah, I'm interested in it because of trying to support people in an anticipatory fashion. I think it's really important.

We've actually seen, if you look from up to August this year, we've had the same number of tribunal claims now that were for the whole of last year. So it's going in that direction. And that's a reflection of greater awareness and people coming forward, I think feeling more comfortable to share information because of that awareness. And a catch up with employers to go, what do I need to do? And it goes back to that the problem we've got is people are going for a single, "what have I got?" rather than "what do I need?".

Jen Kingsmill: It's important to remember that most workplaces are doing their best - they're really well intentioned - but it's just making sure that there's these little things that we can do that can make such a big difference to individuals and also across the workplace.

And it's important to keep in mind that the majority of these claims are disability discrimination claims, which many sort of focus on the link between the claimant's condition and their behaviour at work.

Anna and I are now going to focus on the legal side of things, and we're going to briefly look at how neurodiversity sits under the Equality Act and how these conditions would be treated within that framework.

Anna Bond: Thanks, Jen.

So a lot of the employment tribunal cases which we have relating to neurodiversity don't in fact turn on whether the claimant has a disability under the Equality Act. But nevertheless, how we define disability for legal purposes is a good place to start when we're talking about the law.

So, as I'm sure many of our listeners will know, neurodiversity isn't automatically a disability under the Equality Act, but it can be. It comes down to the legal test for disability and the wording of that legal test is: does the person have a physical or mental impairment with a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities? And we'd note, of course, that many people wouldn't consider their neurotype to be an impairment, but that's the language we have in the Act.

So to meet that test, the neurodiversity needs to have a substantial adverse effect on day-to-day activities, which would include things such as social interaction, communication, planning, emotional regulation - just to give a few examples - it's a really broad test.

Jen Kingsmill: And I think that's something that Amanda raised earlier, but is worth sort of drawing like to again, is that there's no need for a formal diagnosis for something to amount to a disability under the Equality Act. The key focus for a tribunal is on the effect of the condition rather than the exact medical diagnosis.

Anna Bond: Thanks, Jen. I think that's a really good point, and that comes through in the case law we have as well.

Another really key point to note when we're assessing disability is employers need to bear in mind that the effect of any medical treatment is disregarded for the purposes of that test whether an employee has a disability or not. So just to give an example, if somebody with ADHD is on daily medication which massively ameliorates its negative impacts, but without that medication, the negative impacts on their day-to-day life would be substantial, the assessment will be of their ADHD without that medication. And that's the case even if they are taking the medication over the relevant period.

Thinking a bit more about the law, there are five separate types of disability discrimination, and that includes direct discrimination, indirect discrimination, harassment. And the three we think are perhaps most likely to be relevant here are discrimination arising from disability, failure to make reasonable adjustments, and harassment. And we'll come on to talk about those in a bit more detail shortly.

Jen Kingsmill: I think another really techy but very important point is what's relevant with these types of claim is the level of knowledge that employer needs to have about an individual's condition in order for them to be potentially liable for discrimination.

An employer can't be liable if it does not know or could not reasonably be expected to know that a person is disabled. This is what we call 'actual or constructive' knowledge.

The concept of what an employer could 'reasonably be expected to know' means that it isn't always necessary for an individual to inform their employer of their disability - an employer can be deemed to know if there were clues or warning signs that sort of weren't followed up on. So it can be a little bit of a minefield.

Anna Bond: Yeah, and that can be tricky for employers in practice, given that some neurodiversities can be described as 'invisible' disabilities. So essentially what this means is, if there are signs suggesting that an employee might have a disability of any nature, it's on the employer essentially to investigate that further and make sure that they're finding out what they need to know in order to support the employee. And that brings us on to talk about reasonable adjustments.

Jen Kingsmill: Yes, reasonable adjustments, those two very important words. If a duty is triggered, the employer has a duty to make adjustments to accommodate a disabled person's (remember 'disability' under the Equality Act), needs to help them participate effectively in the workplace.

I think it's important to keep in mind that there is a balance to be drawn here to make sure that adjustments relate to an individual, they're helping them carry out fundamental requirements of their role, but they're also proportionate to the business.

In terms of adjustments for a new member staff, you need to take sort of an individualised approach, as Amanda discussed earlier, and make sure this is person-centred to suit their needs for their specific role.

Anna Bond: Thanks, Jen. And I'm just going to finish off this section by touching on discrimination because of something arising from disability. So this is unfavourable treatment because of something arising in consequence of an individual's disability. And it's intended to cover a really broad range of issues, and it does.

So generally, the 'something' which arises from disability in the test needs only quite a loose connection to the disability - it's not a high hurdle for an individual to meet. So, for example, something like communication style, issues with timekeeping, issues with deadline management, spelling and grammar errors - these could all be likely to arise from neurodiversities.

And to bring this to life, I'll give a couple of examples from case law. So in *Borg-Neal v Lloyds Banking*, the claimant was dismissed because he used a racist term during a diversity training session in the course of asking a question. And the claimant said - and the tribunal agreed - that this arose from his neurodiversity, dyslexia in his case, and that this meant he had, "a tendency to spurt things out before having reflected fully on them". So in this case, that was the 'something' which arose from his dyslexia.

And in practice, what that meant is that employers have to have a higher level of tolerance, essentially, to conduct which, absent a connection to a disability, it may consider unacceptable. And in this case, it was found to be disproportionate to dismiss the claimants in relation to that 'something' which arose from his dyslexia.

We do have a case which goes against the grain on this point and that's *McQueen v General Optical Council*, which was heard in the EAT (the Employment Appeal Tribunal) last year. In this case an employee with autism was disciplined for rude and aggressive behaviour, but the tribunal concluded that this was down to his short temper and personality rather than anything which arose from his disability. And quite surprisingly, that was then upheld by the Employment Appeal Tribunal - our general advice on that would be it's a difficult distinction to draw. Challenging behaviour that impacts on team dynamics may well be sufficiently linked to a neurodiversity to meet the legal test.

We're going to come on now to look a bit more about the question of team dynamics. So *McQueen*, that last case I mentioned, is an illustration of a sort of worst case scenario in terms of the outcomes of managing a difficult situation at work, i.e., where you have a conflict that goes all the way to the employment tribunals. But we also want to look at this more positively and think about what employers can do to anticipate challenges a neurodivergent team member may have themselves, or may pose to colleagues, and what can be done to ease integration and ensure inclusivity.

And on this, I'm delighted to draw Mel's experience, both as an experienced HR professional and an expert on neurodiversity. So as we've said, Mel, employers must consider the question of adjustments by reference to a specific individual and their role. But is there any overarching advice that you would give to employers trying to ensure that their team is neuro-inclusive, Mel?

Mel Francis: Yes, lots of advice and I'm sure we could talk for hours about this. But I think the two key words I'm just going to pull out of your question are around 'individual' and 'role'.

So firstly, who is the individual? Who are we talking about, thinking about our neurodiversity, the fact that we are all neurodiverse and we're all going to approach things, communicate, behave, act differently. So this kind of one-size-fits-all approach is something we need to come away from and really help us to focus in on: who is Mel, who is Anna, who is the person that we're speaking to and how can we really help them to shine and thrive in their role within our organisation - so understanding and appreciating individuals.

Also helping organisations, line managers, teams to understand and appreciate that too, to understand and appreciate that we are all different and that we're all going to come at things from a different perspective. And we can put that under the banner of neurodiversity through awareness sessions, through making information available and accessible. Training people in our organisations to be neurodiversity champions is a great way of being able to signal that we have people available who can talk to us, who can give us further information or signpost us to information and provide support to.

And going back to what we were talking about earlier in the principles of universal design, we can bring those back into what we're applying here to ensure that all of our processes and practices are created, are revised, are implemented taking an inclusive approach rather than an exclusive approach.

Anna Bond: Thank you, Mel. I completely agree with that. And that also chimes a lot with what we say from a sort of legal advice point of view when we're discussing this with clients and helping them work out how they can limit legal risk in this area as well.

Coming on to talk a bit more about specific strategies to aid integration, there are some common things that we in the team often discuss with clients in terms of adaptations to the environment and process. So something that comes up an awful lot is questions around providing interview questions to candidates in advance and supplying tech - we've mentioned noise cancelling headphones, things like that - as well as broader steps like the one you just mentioned there about putting in place a neurodiversity champion. A question I'd love to ask you: in an ideal world, what initiative would you love to see at a workforce level to help with integration?

Mel Francis: Gosh, just one? Is that my limit of one? There are so many. I think what we've seen and certainly through the work that we're doing at Do-IT, we're working with lots of organisations who are on a journey to neuro-inclusion, and I use that really intentionally. When organisations run an awareness session, a one-off, that sometimes doesn't go far enough to help to really emphasise the point of neuro-inclusion. And what we're seeing certainly from the [City & Guilds Neurodiversity Index report](#), we are hearing that people are, you know, significant numbers in the 70% of people are saying that they don't disclose that they're neurodivergent because they're worried about the impact that's going to have on their career, on their application etc.

So as employers, I think we have to anticipate that lots of people are, as we've said, we're neurodiverse. Some people will be neurodivergent with diagnoses or not, or have specific challenges but also specific strengths that we have to help people to really shine and bring out through these processes.

So we are training lots of people on neurodiversity, neurodiversity awareness, how to be neuro-inclusive throughout the employment life cycle. And that for us comes through our HR masterclass, the champions that I've already mentioned but also running sessions for line managers so that they can understand communication differences and utilising the Do-IT Profiler across organisations too.

And the Do -IT Profiler is an amazing tool that Professor Amanda Kirby has created which is a neurodiversity screening tool. And I think the most important thing about the Do -IT Profiler is really the identification of strengths and challenges which then when you put that into the work context can really help to identify what adjustments and accommodations might be particularly useful for that individual to really shine. So really, there is no one-size-fits-all and yet our workplaces, our processes can sometimes be set up in that way.

Anna Bond: Thank you so much. That is about all we've got time for today so I'd just like to extend our thanks once again to Professor Amanda Kirby and Mel Francis from Do-IT Solutions. It's been enormously beneficial to have your expertise on this podcast, thank you so much for joining us. Would you like to let our listeners know where they can find out more about Do-IT Solutions?

Amanda Kirby: Yep, if you want to go to doitprofiler.com and you're going to find all our range of products, training, consultancy, advice, guidance and resources. So let us know if you want to find more about us.

Anna Bond: Thank you all again for listening to this podcast from the employment team at Lewis Silkin. We hope you found it useful and informative and please join us next month for another episode.