



Episode 20 – Neurodiversity at work (Part 2): The law, HR considerations and wellbeing, with Kelly Thomson and Victoria Othen

Ellie: Hi and welcome to the Work Couch Podcast, your fortnightly deep dive into all things employment. Brought to you by the award-winning employment team at law firm RPC, we discuss the whole spectrum of employment law with the emphasis firmly on people. My name is Ellie Gelder. I'm a senior editor in the employment equality and engagement team here at RPC and I'll be your host as we explore the constantly evolving and consistently challenging world of employment law and all the curveballs that it brings to businesses today. We hope by the end of the podcast that you'll feel better prepared to respond to these people challenges in a practical, commercial and inclusive way.

Ellie: Today, in the second part of our three-part neurodiversity mini-series, we're going to discuss the law, the HR considerations and wellbeing issues in relation to neurodiversity and how these can arise at each stage of the employment life cycle. And with me to share their expertise, I'm delighted to be joined by two of RPC's employment law experts, Kelly Thomson and Victoria Othen. Kelly is a partner and is also the firm's ESG strategy lead and Victoria is a consultant employment lawyer. Both Kelly and Victoria are frequently advising employers on disability discrimination claims, an increasing number of which involve neurodivergence. So hi both, thanks for joining me today on the Work Couch.

Kelly: Hi Ellie. Victoria, do you ever not have a spot on the Work Couch?

Victoria: I've got nothing else to do.

Ellie: Victoria is our frequent guest, frequent flyer. It's lovely to have you back. So on that note, Victoria, as I mentioned in my intro, we are increasingly seeing employment tribunal litigation that involves neurodivergence and various types of disability discrimination claim. So first of all, can you just give us an overview of how a person's neurodivergence might meet that legal definition of disability.

Victoria: Yeah, so I think it's probably worth just a couple of words about this whole term of disability and the premise of the word disability, because it means different things in different contexts. So you've obviously got your medical model of disability or social model. And we're talking here about the legal definition of disability because, and we touched on this in episode 1. It's really worth remembering that many neurodiverse people don't regard themselves as disabled and may in fact be a little offended by the term disability when applied to themselves. Because neurodiversity is a natural brain function, it affects many people. So it's worth remembering that when thinking about the term disability. But nonetheless, disability discrimination is an issue which arises a lot in workplaces and there's no avoiding that people with neurodiverse conditions are faced by particular challenges in society and in the workplace in particular. So the question of disability and who is disabled depends on the legal definition under the Equality Act and the burden of proof is on the employee to establish whether or not they are regarded as disabled. And disability is based on a particular term called an impairment. So the first criteria or criterion that an employee must establish is that they have a physical or mental impairment. Again, unfortunate phrasing when some people are thinking about their conditions because they don't consider that their brains have a particular impairment, but nonetheless, that's the phrase that's used. So we're talking about whether that employee has a particular impairment, whether it has then a substantial effect on their ability to do day-to-day activities, and whether or not that condition is long-term. So impairment, effect on day-to-day activities, whether that effect is substantial, and whether it's long-term.

It's worth bearing in mind as well. It's a pretty low bar overall when you're thinking about disability because substantial is described in terms of meaning more than minor or trivial. That's the first thing to remember. Also worth remembering is that the focus by any employment tribunal will be on the effect of conditions and not the cause. And we'll think about that a little later on. And finally, tribunals can consider cumulative effects of conditions both concurrently, so conditions at the same

time and consecutively over a period of time. Again, we'll discuss that a little later on, but all that means that many people with neurodivergent conditions will be deemed to have a disability under the Equality Act.

Ellie: And in the case of neurodivergence then, let's look at an example of how a particular condition might satisfy that criteria you've just set out.

Victoria: Yeah, so we might consider someone perhaps with autism or ADHD. We're not going to have really an issue about whether those conditions are long term because people with neurodiverse conditions, they're lifelong conditions. The focus usually is on whether there's an impairment at all, particularly if the person, the employee doesn't have a diagnosis and whether or not the effect of that condition is substantial on their day-to-day activities. And particular problems can arise with people who don't have a formal diagnosis. Again, we touched on this in episode one when we discussed the huge problems that there are currently in accessing assessment and diagnosis in the NHS. There's growing numbers of adults who were missed in childhood and they're now awaiting assessment or they may not be able to access assessment at all. It takes many years. They may self-diagnose or they may tell managers or employers that they have a condition, but they don't have proof of that condition, clinical proof. But that does not preclude them from being able to establish that they have a disability because the focus is on effect and not cause. You don't have to have a diagnosed condition. So in exactly the way as some people with mental health conditions such as anxiety or depression or physical conditions such as chronic pain, they might not have a formal diagnosis - that doesn't preclude a determination that they have a disability because of ADHD or perhaps dyslexia or autism. It may make a determination more difficult. There's no doubting that, but it doesn't stop them. And that's often something that employers are confused or misinformed about. And then there may be coexisting conditions. So it may be impossible, for example, to identify whether anxiety is a condition in its own right or is a symptom of ADHD, for example. But it won't matter. The focus is on effect rather than cause.

Ellie: Okay, so Kelly, provided that legal definition of disability is met, what legal protections then come into play?

Kelly: Yeah, thanks, Ellie. So there are a few different types of discrimination. The key ones that we see come up time and time again in the workplace context are direct discrimination, less commonly actually, indirect disability discrimination, protection from discrimination arising from a disability, and failure to make reasonable adjustments. So just very kind of quickly cantering through what they mean. So direct disability discrimination is essentially where somebody is treated less favourably and it's because of their disability. We see that come up less frequently these days, thankfully. That tends to be the more blatant, obvious form of discrimination. Indirect disability discrimination comes up much more frequently and that's essentially where you've got in your organisation a neutral policy or a procedure, something that on the face of it looks neutral, but actually in reality the effect of that neutral policy condition, et cetera, is less favourable for people with a particular disability and for an individual. So the way I always think of indirect discrimination, it's like the treatment might be equal, but the outcome isn't. Disproportionately impacts a particular protected group. Disability discrimination has got this own subcategory called discrimination arising from disability. And it's peculiar to disability discrimination. You don't find it in relation to any other types of discrimination, gender, race, ethnicity, et cetera. And this is where there's something that arises in consequence of someone's disability. And it's as a result of that thing that arises that the person faces less favourable treatment. So for example, if you instigated as an employer a performance management process because somebody in your administrative team is too slow at document production, then if that person had dyslexia and as a result, in consequence of their dyslexia, their speed of producing documents was encumbered, then you might find yourself in that discrimination arising from disability sort of arena. And then the one I think that comes up most commonly in practice is, the one where employers often struggle, is the duty to make reasonable adjustments. So where you've got a provision, a criteria, a practice, a physical feature of your premises as an employer, and it places a disabled person at a particular disadvantage, then this proactive duty to make reasonable adjustments to sort of alleviate that disadvantage kicks in. The thing just to mention really quickly is that, particularly in relation to neurodiversity, individuals themselves may not be always be aware that they have a particular condition. So from an employer's perspective, that can make it even more difficult for you as an employer to know whether you do or don't have that knowledge from a legal perspective. The way the law works for the duty to make reasonable adjustments, for direct disability discrimination, and for discrimination arising from disability is that you are only fixed with those obligations, those kind of duties, those restrictions, if you knew that somebody was disabled or you ought reasonably to be expected to know. So there's some kind of guidance around what that actually means, but ultimately you can't as an organisation just close your eyes to whether or not somebody might have a disability, you're supposed to do all you reasonably can be expected to do to find out. And what is reasonable, as always, depends on the circumstances. So it always needs to be looked at on a case by case basis. And often the conversations we're having with employers is where they say, "I know there is something here, I can't put my finger on what it is, I want to support my employee, but I don't quite know how to get into that conversation". And that can be where a lot of challenges arise in practice.

Ellie: Okay, so let's apply that then to the working environment and sort of the whole employment life cycle to get an idea of how these legal risks might crop up at each stage. So starting at the beginning of that cycle: recruitment, this is a big one, isn't it, Kelly? Especially when it comes to that duty to make reasonable adjustments, which you just outlined.

Kelly: Absolutely. I think, you know, it's always worth reminding ourselves that job applicants have the same protections against discrimination as existing employees do. And in many ways, it can be more challenging to discharge some of those obligations, particularly the duty to make reasonable adjustments, because it's a proactive obligation. You can't just kind of wait for somebody to call you up as an employer and say, "please can I have the following adjustment". I think it's also worth, as well as the reasonable adjustments piece, thinking about indirect discrimination and thinking, are there any apparently neutral practices that we have through our recruitment that might have a disproportionately negative impact on people. So for example, you know, a traditional interview process would involve a kind of one-on-one fairly intense interview. And on the face of it, well, cool, that's something you're applying for everybody. That's a level playing field, isn't it? But actually it may put a particular autistic person, for example, at a disadvantage if they exhibit differences in social interaction or in communication. And Autism at Work actually kind of talk about this particular example on their website and they suggest that you might want to replace that kind of one-on-one with a mix of skills-based assessments, informal conversations, group activities, options to try to enable people to kind of be their best selves in that environment. And it's for me, the reasonable adjustments piece is about, as I say, thinking proactively about what can you do to remove barriers that might put a neurodivergent candidate at a disadvantage. That recruitment process, it's inherently stressful, right? It's often really uncertain, even opaque, I would say. That can be challenging for everybody, but particularly can be for somebody with a neurodivergence. How are you making sure that people can access your adverts, people of all different backgrounds and with all different experiences and including people with neurodivergence, are they going to be accessing your adverts or are you actually kind of counting out certain groups by where you're placing them and how you're placing them? Is your job description objectively clear? And also, think about whether your job description goes beyond what you actually definitely need in terms of skills, experience, et cetera. Because if you stray into sort of "nice to haves", just bear in mind that some people, particularly if this is relevant to their particular condition, might take that job description literally and think, well, I'm not going to apply for that job if I can't do every single element of it. So thinking about that sort of thing before you even put the advert out there can be helpful. Thinking about whether you can remove uncertainty about the recruitment process, for example, producing maps or video kind of footage that makes it really clear. This is how you get from the train station to the office, taking some of that uncertainty and stress out of it, providing interview questions in advance. John Lewis got a lot of press coverage recently for doing that, providing them to everybody. But what it does particularly for people with particular neurodivergent conditions is it removes some of that uncertainty about what is going to be expected of me. And thinking about selection criteria, what are they? How are they applied? Do the criteria themselves or the kind of the way in which they're applied and assessed has it put particular people at a disadvantage? For example, we often test things like communication and presentation skills, but how are we testing them to ensure that we're not putting in place a barrier that makes it much harder for our talented neurodivergent potential colleagues to kind of get through the door? And I think what's really interesting just outlining some of those examples, and this is so often the case with diversity, inclusion initiatives and interventions. By identifying removing barriers that we just described that might particularly face the neurodivergent community, we actually benefit everybody as well because everybody could benefit from more certainty around an interview process and more clarity around what the job actually entails.

Ellie: Absolutely. In our next and concluding instalment in this mini-series, we'll look in a bit more detail on how employers can adopt a neuro-inclusive recruitment process. Victoria, let's move on now to performance management, which I know is an area that you often see in practice where an employee is neurodivergent. So what are the risks here?

Victoria: That's right, Ellie. It's something we see all the time. Performance issues are really difficult areas for line managers. So I think because addressing underperformance implies, obviously by its very definition, personal criticism and failure. And addressing those issues requires really clear communication and understanding about what's expected about how it is the employee's underperforming. Communication is something which often goes awry with neurodevelopmental employees we see that a lot. So line managers may not understand the worker or vice versa. What's obvious to one party in that relationship may not be obvious to the other party. So perhaps thinking about things such as what amounts to good customer care or what's deemed to be rude or abrupt. What efficiency is, what amounts to being efficient or inefficient or what's good timekeeping or what's the right attitude, these are all subjective terms. So unless that's explained or addressed really, really clear with specific examples, it can result in misunderstanding, offence and then possible dispute. It's important to remember that a lot of neurodiverse people often have difficulties with key executive functioning skills that neurotypical people take for granted. So things like organisation or time management, emotional regulation or social skills. So something as easy as doing a particular thing on time. We may deem that as something easy, but we forget about the number of steps which are required to meet that outcome, and with which neurotypical people may struggle. Something else to bear in mind is inconsistent performance. So again, this is something which comes up a lot. So there may be employees who have very fluctuating

performance. They may perform very well and may achieve targets or whatever on one day, but not on another. And that may be interpreted by a line manager as a sign of laziness or motivation, poor application, but it may just be that there are genuine reasons why someone who is neurodivergent may not be able to perform on some days and may on others. It may be that they are just overwhelmed on certain days. There may be environmental factors, which mean that they're struggling with performance on some days. So that's something else to bear in mind. It's worth thinking about the indications for performance and the evidence for good performance or poor performance. I'm thinking particularly about target driven environments. It may not be realistic, for example, to expect someone with a neurodivergent condition, which affects their visual processing skills to handle the same number of written communications as other employees within the team. And it may be that employers have to adjust those targets in reflection of those difficulties because of the requirement to make reasonable adjustments that Kelly mentioned earlier. And then when you get into this territory of what is reasonable, who determines what is reasonable, what are the factors which should be taken into account? We see issues a lot with clear and good quality medical evidence and a lot of the time employers come to us with occupational health reports which just aren't clear or specific enough. They don't help employers to help their employees or to know how to offer those reasonable adjustments. So obtaining really clear and specific medical evidence is often key. There can be adjustments which are required to specific equipment, often IT equipment. We see that a lot and it may be difficult for employers to identify what equipment's needed, where they should get it from and then to get that equipment really quickly and to install. And finally, how to address performance issues. So some employees may take things like performance improvement plans very personally. They may handle that implied criticism or may take it to heart far more seriously than other neurotypical employees because they may lack the executive functioning skills to process that criticism and to regulate their emotional response to it. So that can result in sickness absence. It often does and we see cases where it does quite often in the workplace. And then there's the problem of that employee who's off sick, a broken relationship, a possible dispute and a possible claim, which is not good to anyone.

Ellie: Kelly, I guess another key one where employers may get caught out by the disability discrimination provisions is attendance or sickness absence, which Victoria just touched on so how might that play out?

Kelly: Yeah, we see it quite often in relation to sickness absence policies and particularly trigger points in those sorts of policies for kind of more interventionist management of repeated sort of sickness absence. And for many employees with a particular kind of neurodivergent condition, I'm really conscious that it's necessary for brevity that Vic and I are sort of lumping things together by describing them as kind of neurodiversity, neurodivergence, there are so many conditions and experiences that fall under that particular umbrella. And, you know, by no means are we suggesting that each of those conditions is interchangeable, nor are we suggesting that each individual who has any one particular condition is the same as any other person with that. But just for the interest of brevity, I think it's reasonable to say people with neurodivergent conditions may be more likely to be off work with sickness absence, not least because of the stress, anxiety, et cetera, that can flow from kind of trying to manage life with the barriers that face a person with that kind of condition. And Vic's going to talk a little bit about some of that, I think, in a bit. But if you've got sort of very black and white triggers in your sickness absence management policy and you don't make any adjustment to those, you may find that people who have a neurodivergent condition are ending up being subjected to kind of warnings and effectively disciplinary process in relation to sickness absence, which in and of itself could exacerbate any existing kind of mental health challenges, pressures, can lead to sort of a cycle of somebody perpetually being off sick, just trying to sort of manage their existing conditions and then what's happening as a result of those conditions. And ultimately, if it all goes wrong, that can end up not just in an end of the relationship, but with potential legal risks as well and the cost etc that flows from all of that and just to mention in case it doesn't come up in any of your later questions Ellie that the thing about disability discrimination claims from a purely sort of financial legal perspective is that compensation is not capped in the way that for example unfair dismissal claims are. It's potentially unlimited.

The highest award that I know of was for £4.6 million in the UK employment tribunal. And that was for an individual who was dismissed on sick leave. They had ADHD and post-traumatic stress disorder. And in that case, the effects of her dismissal were really severe. She'd effectively been unable to work again following the dismissal and her health deteriorated. So it's that cycle that I was mentioning. Even just from that fairly narrow but clearly important financial lens, the risks of getting it wrong can be really high.

Ellie: Yep, thank you for that reminder, Kelly. And let's look at wellbeing and mental health, which are obviously really important issues for the whole workforce. So, Victoria, can you just explain a bit more about the interplay between neurodivergence and mental health and how that could lead to disability discrimination risks?

Victoria: Yes, so we have touched on this a few times so far. There is a really high correlation between neurodivergence and mental ill health. I can't actually think of a case where I have seen neurodivergence on its own without a mental health condition running alongside it. And taking into account what Kelly just said about not generalising, but neurodiverse people in general find that living in a neuro-typical world is more stressful and it takes its toll. There's an awful lot of masking goes on, which we talked about in episode one. So overall, and again, we're speaking in general terms because it's helpful in this particular episode, someone with a neurodivergent condition is more likely to be affected by mental ill health than those without those conditions. In the same way as evidence shows that those with physical disabilities are more likely to suffer from mental ill health.

And Kelly has explained already how this can result in disability discrimination claims in relation to sickness absence procedures. But it will also may result in those claims regarding other processes and environments, for example, change programmes, which I think we're going to look at a little bit later on, or investigations. Neurodivergent employees may need a little bit more time or support, or a family member to attend perhaps internal meetings or they may want to participate remotely or in writing. So these are all things to take account of when thinking about the interplay between neurodivergent conditions and mental ill health in the workplace.

Ellie: Thank you, Victoria. So as we go through that employment life cycle, the next step might be promotion and career progression. So Kelly, can you run through the risks and also the HR considerations that might come into play where somebody's neurodivergent?

Kelly: Of course, I think just reiterating what we've both been saying that it's that kind of same principle that applies, I think, in relation to any area of diversity is that not every person acts in the same way. We wrote this line into our DEIB strategy here, which is that great minds don't all think alike. And I think actually that can be really important when we're thinking about promotion and progression. To not fall into the trap of thinking there's only one way or there's only a narrow way of displaying confidence, ambition, whatever is the kind of characteristic that we're thinking of in relation to people who we might want to support in ascending through the organisation. And it's about, for me, taking a more kind of conscious proactive effort to identify whether you've got untapped talent in your business. And that's, you know, necessary if you want to be genuinely kind of inclusive and ultimately diverse. So it's not making assumptions as well about individuals. So for example, don't think, you know, this is a senior role, it involves public speaking. That person's autistic, they won't want to do that. For example, assumptions are where so much goes wrong in the DEI field and in the sort of discrimination field. That whole point, we had an amazing talk from a brilliant guy called Alex Manners who said, "Look, if you've met one autistic person, you've met one autistic person". And I think that kind of applies across the whole range of neurodiversity. There is no substitute as a manager or a lead in your business for knowing each of your people as the individuals that they are. Having said that, I think it's worth recognising, I guess, some themes. For example, you might find that for a neurodivergent person, there's a particular challenge that might present itself for them at the point of promotion, because they may well have been displaying, without you even knowing potentially if you're their manager, coping behaviours that they have learned and developed in order to excel in their current role to the point where you're considering promoting them. Those coping mechanisms might not work in the context of a new role. So as well as adjusting to sort of the specific demands of a promotion, they may well also be having to think about how do they operate in the work environment more generally, so it's like an additional layer of work. You know, your amazing salesperson might need time and support to adjust to being an amazing manager, I guess is what I'm saying. And again, isn't that really interesting because that's not just something that applies in the neurodivergent context, but is relevant to anybody. And I think we, as organisations, we could probably focus on some of that a little bit more supporting people once they've reached a higher level in their organisation to actually adjust to and excel in those roles.

Ellie: Absolutely. And finally, Victoria, let's look at the end of the employment life cycle, which you did mention earlier. So specifically, a business reorganisation. How might disability discrimination become a risk where there are neurodivergent employees who are at risk of redundancy?

Victoria: Yeah, so I think it's generally recognised that reorganisation programmes result in a lot of uncertainty for all employees. But again, uncertainty and I'm thinking particularly of autism here, transition and uncertainty is something which can affect a lot of people with autism and ADHD to some extent. The lack of control, the lack of being able to visualise the outcome and the transition from one thing to another can be huge triggers for those with neurodivergence and mental ill health. So it's important to be aware that the impact of such programmes may fall disproportionately for those employees to bear. And it's really important to consider, I'd say, well before any such change programmes what additional support and time may be needed to help employees like that to process the change and to visualise what's going to happen between the start and the finish, the outcome of that programme. The risk if you don't do that, and again, we've seen this happen time and time again, is that those employees will go off sick and they will be unable to process what's happening to them effectively or at all.

Victoria: That may result in them being unable to participate in any consultation process. And purely from an efficiency perspective, not looking or thinking about the psychological impact or any other impact, if you have a change programme, which is dependent on a consultation process taking place within a certain timeframe, and you can't execute that consultation process because employees are off sick and are unable to participate, then that's going to result in delay, disruption, increased cost. So it's really worth putting that additional work in at the start to avoid that from happening. And finally, just to think about, as Kelly's already set this out in some detail, anything really which involves selection, whether it's at the recruitment stage, at a promotional stage or at potential redundancy stage involves selection criteria. It's really important to think about what those criteria are and how to apply them and whether adjustments are needed so that they don't adversely impact people with neurodevelopmental conditions.

Ellie: Well, thank you so much, Kelly and Victoria. We packed an awful lot into that episode and you've explained the potential legal risks and HR considerations in relation to neurodivergence at each stage of the whole employment life cycle. So thank you so much for running us through those.

Victoria: Thanks, Ellie.

Kelly: Thanks for having us, Ellie.

Ellie: Do join us next time for our concluding part of this mini-series, which I mentioned we will look at the practical steps employers can take to not only mitigate those risks which we've outlined today, but also implement effective neuro-inclusion at work, which can benefit the whole workforce, as Kelly mentioned.

If you would like to revisit anything we discussed today, you can access transcripts of every episode of The Work Couch podcast by going to our website: www.rpc.co.uk/theworkcouch. Or, if you have questions for me or Kelly or Victoria, or perhaps suggestions of topics you would like us to cover on a future episode of The Work Couch, please get in touch by emailing us at theworkcouch@rpc.co.uk – we would love to hear from you.

Thank you all for listening and we hope you'll join us again next time.



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