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Neurodivergence and workplace issues  
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# Neurodivergence and workplace issues

***When** and **how** can you encourage a **diagnosis** if you **strongly suspect** neurodivergence as a **reason** for an employee's poor **performance or behaviour**, and what if it will take months because of NHS waiting lists?*

To which you might add

*Even if you can get a diagnosis, do you need one? Will it help you legally?*

# This session

## Understanding the issues:

- “Neurodiversity”;
- The legal test for “disability”;
- Is a neurodiverse employee ‘disabled’;
- Types of disability discrimination.

## Is a medical diagnosis required or helpful?

- Is it necessary?
- Do you mitigate the risk if you do not have knowledge?
- On the contrary, is it helpful to have knowledge...?

## How to get a diagnosis/medical input

- Options for input
- How to get the best possible support
- When to seek that support

# What do we mean by 'neurodiversity'?

*“an umbrella term used to describe natural differences in how individuals’ brains’ think and process information”*

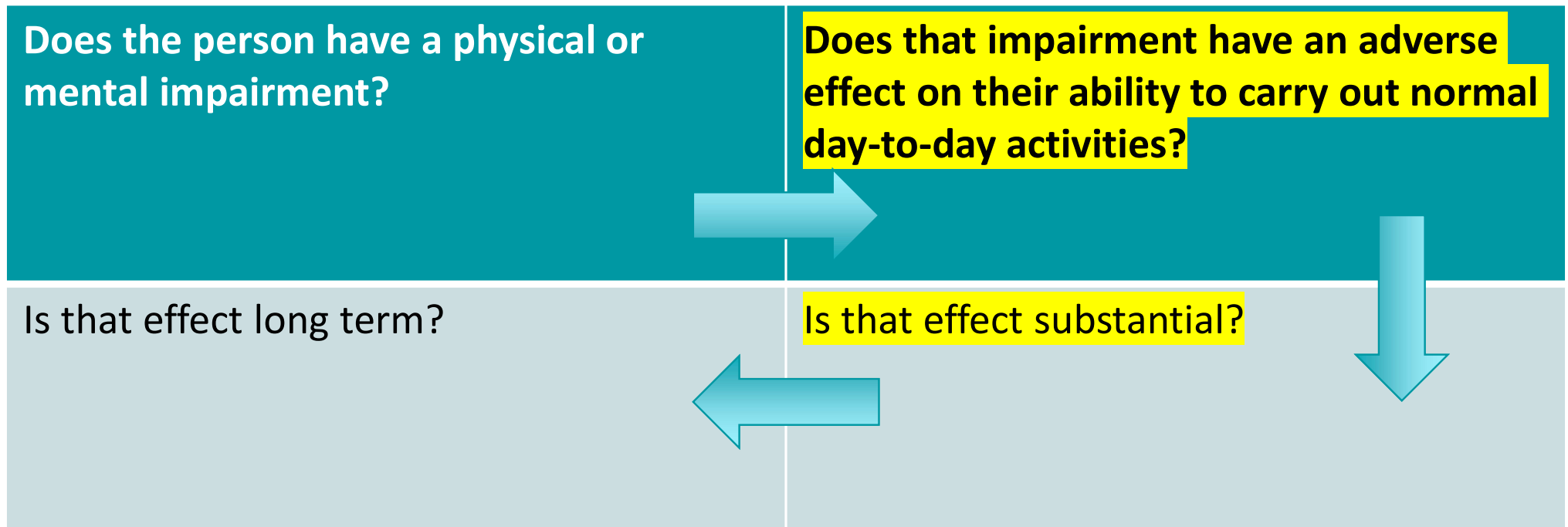
Judy Singer 1990

# The legal test to establish disability

*“A person (P) has a disability if—  
P has a physical or mental impairment, and  
the impairment has a substantial and long-term  
adverse effect on P's ability to carry out normal day-  
to-day activities”*

s.6 Equality Act 2010

# Breaking down the test for establishing disability:



# Is that effect substantial?

“More than minor or trivial”

Focus is on what the employee cannot do, or can only do with difficulty rather than what they still can do

Disregarding measures which ameliorate the effect

# Are neurodiverse conditions disabilities?





# Types of disability discrimination

Direct  
discrimination

Discrimination  
arising from  
disability

Indirect  
discrimination

Failure to make  
reasonable  
adjustments

Harassment

Victimisation

# Features of different types of discrimination

Type of discrimination	Description	Comparator	Knowledge of disability required?	Justifiable
<b>Direct</b>	Less favourable treatment because of disability	Yes – real or hypothetical	No, can be based on perception or association	No
<b>Arising from</b>	Unfavourable treatment because of something arising from disability	No	Yes (but can be fixed with constructive knowledge – i.e. ought to have known)	Yes (proportionate means of achieving a legitimate aim)
<b>Indirect</b>	PCP which puts a group with a disability at a disadvantage	Comparison to a group	No, can be based on suffering the “same disadvantage” as disabled group	Yes

# Features of different types of discrimination

Type of discrimination	Description	Comparator	Knowledge of disability	Justifiable
<b>Failure to make reasonable adjustments</b>	<ul style="list-style-type: none"><li>• PCP puts a group at a substantial disadvantage</li><li>• Failure to make reasonable adjustments</li></ul>	Comparison of PCP to a different group	Yes (but can be fixed with constructive knowledge)	No (but consideration of what is “reasonable”)
<b>Harassment</b>	<ul style="list-style-type: none"><li>• Unwanted conduct</li><li>• Purpose or effect of creating intimidating, hostile, degrading, humiliating or offensive environment</li></ul>	No	No, can be based on perception or association	No (but consideration of whether it was reasonable for conduct to have the effect complained of)
<b>Victimisation</b>	<ul style="list-style-type: none"><li>• A detriment because of a “protected act”</li></ul>	No	N/A	No

# Where are we?

- Understanding the issues:
  - What is neurodiversity;
  - What is a disability;
  - Is a neurodiverse employee 'disabled';
  - Types of disability discrimination.
- Is a medical diagnosis required or helpful?
- When and how to get a diagnosis/medical input

# Is a medical diagnosis required or helpful?

Absence of diagnosis doesn't mitigate the risk because...	Medical diagnosis/advice may mitigate the risk because...
Absence of diagnosis and/or knowledge is irrelevant when considering the issue of disability status	Understanding the condition (which may be complex) helps to understand the issues and what is and is not disability related
Constructive knowledge of disability is sufficient to fix employer with liability for some discrimination claims	Helps to identify reasonable adjustments so they can be considered and implemented and or justify why not

# The different advice options

NHS GP or  
consultant

Access to Work  
scheme

WorkWell service

In-house  
company doctor

Independent  
occupational  
health adviser

Independent  
specialist doctor

# Asking the employee



- Offence taken/claim of harassment made?
- If the employee disagrees or has never thought about it before, what can you actually do with the information?
  - assume it is true
  - seek medical input
- Is this actually going to help you or just alert an employee to their rights?

## Watch this space...

- ACAS Campaign launched January 2025 – a new Code of Practice
- Department of Work and Pensions expert Panel running to Summer 2025 – recommendations forthcoming
- Greater awareness – rise in neurodiversity-related employment tribunal claims
- Neurodiversity Inclusion Policies



## Conclusions

- Awareness and profile of neurodiversity in society has increased significantly in recent years, so your antennae should be up.
- Where someone appears neurodiverse, turn your mind to the question of disability.
- If you have not reached the constructive knowledge point, think carefully if there are benefits of exploring it further – it varies on the type of discrimination claim you are trying to manage.
- Broach any discussion with the employee with particular care
- Gaining understanding of the condition is more important (and realistic) than speedy and reliable diagnosis.
- Consider seeking Occupational Health and other sources of input when seeking to identify possible adjustments or causes of poor performance etc.
- BUT diagnosis/recognition does not have to mean acceptance of poor performance/behaviour. It may be justifiable to discipline/manage out employees nevertheless.
- Keep your eye out for future developments.

# Contact details



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