

Discrimination and disability: failing to actively consider impact of neurodiversity can render a disciplinary dismissal unfair

In [Madden v Commissioner of Police of the Metropolis](#), the Employment Tribunal concluded that an employee with ADHD was unfairly dismissed and discriminated against for making jokes containing sexual innuendos, as his employer had failed to consider the impact of his condition before making its decision.

What happened in this case?

Mr Madden was employed as a Quality Control Officer with the Police from November 2001 and had a clean disciplinary record until his dismissal in February 2024. He suffered from stress and anxiety from October 2021 onwards, including a mental health crisis, and was referred to Occupational Health by his employer. Mr Madden received counselling and was subsequently diagnosed with ADHD in October 2022, as well as several conditions related to his ADHD which are known to cause significant difficulties with interpersonal relationships.

In September 2022, Mr Madden's line manager emailed him raising concerns about several messages from him which she felt had been "*forward*". She acknowledged that he was having counselling and explained that whilst she was happy to have a

laugh, she felt a line had been crossed. In subsequent emails, Mr Madden explained that whilst he had meant the comments as a joke, he could not risk this misunderstanding happening again so would keep things work-related in future. The Tribunal later acknowledged that, from this point on, the relationship remained on a more professional footing.

In October 2022, Mr Madden shared his diagnostic report with his manager, and in November 2022 they discussed the fact that he would not yet be able to start medication for his ADHD until his high blood pressure was under control.

In April 2023, Mr Madden had several allegations against him brought to his attention by an unexpected Teams call. He was referred to a message that he had sent to a female colleague about a “*joystick*” but was not given details of any of the other allegations. Mr Madden responded in writing apologising for the message, which he explained had been sent outside of work, noting that his ADHD blurred boundaries of what might be appropriate and caused impulsive behaviour.

Mr Madden was subsequently investigated in relation to allegations of inappropriate behaviour towards several female colleagues, specifically unwanted attention, inappropriate conversation and comments containing sexual innuendo.

During the investigation, Mr Madden explained that only one of the colleagues (his manager) had raised concerns with him and that he had stopped making jokes with her after this. He had considered the colleagues to be friends and joked with them as he would in his personal life, but having accepted that he may have interpreted this incorrectly, he was mortified to have upset them. Overall, Mr Madden was remorseful and accepted

responsibility for his actions but asked that they be viewed in the context of his ADHD, which caused impulsive speaking / typing and difficulty with social cues and interactions. He also provided his diagnostic report.

Despite their original investigative report stating there was not a sufficient case for gross misconduct (only misconduct), Mr Madden's employer proceeded with a disciplinary process for potential gross misconduct. He again raised the impact of his ADHD and, by this point, he also had engaged a solicitor who sent a letter to the case manager for the disciplinary hearing. This letter set out Mr Madden's health conditions, the impact of the prolonged disciplinary process, the causal link between the conduct and his ADHD, potential premeditation of the process and a range of procedural flaws. It also highlighted his 22-year unblemished record and that because he struggled to pick up on social cues, the incidents could largely have been avoided if the concerns (which were by this point historic) had been raised earlier. This letter from his solicitor, plus a supporting statement from his psychiatrist, were not included in the disciplinary bundle and were not before the disciplinary panel.

The hearing took place by way of written submissions as a reasonable adjustment for Mr Madden, and his responses were read out to the panel by the Chair. The panel unanimously decided that Mr Madden should be dismissed without notice, concluding that the behaviour was a sufficiently serious breach of the expected standards that the breakdown in confidence was irretrievable. They did not consider the risk of recurring behaviour or mention Mr Madden's disability.

Mr Madden appealed his dismissal, providing additional evidence from his original diagnosing psychiatrist, as well as

again sending both the letter from his solicitor and supporting psychiatric statement. His employer sought Occupational Health advice and made the adjustment of permitting a virtual appeal hearing with his wife attending as companion, as well as permitting written answers to questions. The appeal was unsuccessful, with the Appeal Chair noting that they were satisfied that medical evidence had been properly considered by the original panel and that the new evidence did not change this.

Mr Madden therefore brought claims under the Equality Act 2010 (**EqA**) for a failure to make reasonable adjustments (Section 20 and 21), discrimination arising from disability (Section 15) and indirect disability discrimination (Section 19). He also brought a claim for unfair dismissal. It was accepted by the employer that his condition amounted to a disability under Section 6 EqA.

What was decided?

The Employment Tribunal upheld Mr Madden's claims of unfair dismissal and of a failure to make reasonable adjustments on the following grounds:

- With regards to unfair dismissal, there had been several elements of substantive and procedural unfairness in the dismissal process rendering it unfair. In particular, the Tribunal considered:
 - There had been significant delays in the process, which had caused substantial distress to Mr Madden.

- The employer had failed to offer virtual attendance (with his wife permitted to be present) as an adjustment at the original disciplinary stage, rather than just on appeal. The Tribunal concluded that there was no good reason why this wasn't originally offered, it was unreasonable not to have done so, and that only permitting written attendance deprived Mr Madden of the ability to challenge evidence and present his case.
- The employer had failed to consider the solicitor's letter and psychotherapist's statement at the disciplinary hearing, which had set out his case clearly and explained the behavioural work that Mr Madden had undergone in recent months. The Tribunal considered that these could have altered the outcome, particularly in a case where the investigative report had not found sufficient evidence for gross misconduct. This rendered the substantive decision unsafe.
- There had been no consideration of Mr Madden's disability prior to disciplinary action (contrary to the employer's own standard operating procedures) and the lack of reference to this in the minutes of the hearing meant it was likely that this was given little, if any, weight.
- The impact on the complainants had been exaggerated in the investigative report compared with their actual evidence, and this factual inaccuracy was carried through to the disciplinary panel's reasoning.
- There had been no actual reputational damage

evidenced, so the panel's purported concern about potential damage was purely speculative.

- The appeal had not rectified these defects as they had not conducted any form of rehearing, meaning they couldn't have balanced the conduct and mitigation to the extent required.

The Tribunal therefore concluded that whilst there had been a genuine belief in misconduct after a proportionate investigation, in all the circumstances of the case it was not fair and reasonable (or within the band of reasonable responses) to have dismissed Mr Madden.

- The Tribunal considered that Mr Madden's struggle to communicate with colleagues and adhere to social norms arose in consequence of his disability (ADHD). They concluded that the comments he had made were an element of this, as his social boundaries were blurred and he did not appreciate that his actions were inappropriate in a workplace (or realise their potential impact). His dismissal for the comments in question was therefore unfavourable treatment because of something arising from his disability. This could not in their view be justified with reference to the legitimate aims relied on by the employer, which included appropriate management of resources and effective management of employee behaviour (including upholding relevant standards).

However, the Tribunal did not find that the employer's action amounted to a failure to make reasonable adjustments or indirect discrimination. In particular:

- It was not clearly established that the employer had a practice of not considering ADHD or making sufficient reasonable adjustments for employees in gross misconduct disciplinary processes.
- It would not have been a reasonable adjustment, as argued by Mr Madden, to allow him to be represented by a proxy at the disciplinary hearing. This was not something that was permitted by the employer and, despite any disadvantage, it was not reasonable to expect them to do so.

The remedy judgment for the Tribunal's decision has not yet been published.

What can employers learn from this case?

This decision highlights the real issues that employers can encounter if they fail to give proper attention to an employee's disability during a disciplinary process.

Neurodiverse conditions, such as ADHD, are not automatically classed as disabilities under the EqA 2010. Each employee's circumstances will therefore be subject to the usual test of whether the condition causes an impairment that has a substantial and long-term adverse effect on the employee's ability to carry out normal day-to-day activities. However, where an employer becomes aware of an employee having been diagnosed with a condition, it will likely be wise to approach with caution and assume that the employee *may* qualify for legal protection.

During a disciplinary process (or by analogy, any grievance or other formal process), employers dealing with a neurodiverse employee should consider the following:

- Employment-related decisions will always be highly fact-specific, and Tribunal cases such as these do not mean that employers can never dismiss employees who have a disability. They nevertheless serve as a helpful reminder that employers must always pay proper attention to employees' disabilities, and document this appropriately. This applies both to the disciplinary process that they follow (and any adjustments that the employee might need to that process), and the substantive decision on the conduct and appropriate sanction. Taking occupational health advice at the earliest opportunity can really help to inform this assessment, as this ensures that the employee's condition and its impact is clearly set out at the start.

- A policy or business aim to uphold high standards of behaviour, or perhaps even a zero-tolerance stance on certain types of conduct, can be legitimate and understandable. However, applying it on a blanket basis to all employees, without considering whether the behaviour is linked to a disability, puts employers in danger of breaching their legal obligations. Any case of potential misconduct should always be considered on its own merits, and employers should be wary of treating all breaches as equal without regard to the circumstances.
- Decision-makers should always be made aware (with the employee's consent) of any relevant conditions, and actively consider any explanations provided by the employee that indicate a causal link between their conduct and their condition. Even if a breach of policy is proven, when deciding on the appropriate sanction they will need to consciously assess whether the association with the disability provides any mitigation. For example, if the employee's explanation is that their disability impacted their ability to understand that their conduct was prohibited or inappropriate, using a warning rather than dismissal may be advisable to clearly set out expectations of behaviour and offer a chance to improve. If the conduct is repeated, an employer is then in a much safer position to dismiss. Conversely, if the decision-maker feels that the conduct is not mitigated by the condition, they should clearly explain their reasoning to the employee.

- It is always advisable to offer an appeal process, particularly as this demonstrates compliance with the ACAS Code of Practice and can permit the employer to rectify any procedural issues with the original process. However, if the appeal does not offer any actual examination of the evidence or issues, it won't necessarily assist the employer if the substantive decision is found to be unfair. In *Madden*, the Tribunal felt that in order to "*cure the defects, and undertake a sound balancing exercise between conduct and mitigation, the panel would have needed to reconsider the matter de novo*" – as the employer had insisted the appeal was "*not a rehearing*" and did not do so, the flaws in the decision weren't corrected.

- During any formal process, employers should remain open to adjustments even if they are outside of their usual policy. As noted above, the employer in *Madden* was criticised by the Tribunal for failing to offer virtual attendance options or companions outside of the usual categories at the disciplinary stage. This was despite other adjustments (written submissions) having been offered and accepted. If any adjustments are genuinely not reasonable, it would be wise to remain consistent in this regard; any later accommodation of such a request (as happened in *Madden*) could end up as evidence that it would have been reasonable for them to do all along.

- Managers and colleagues of neurodiverse staff should

also bear in mind the potential impact of that condition in their dealings with them outside of any formal process. The extent to which this is possible will of course vary depending on the information shared, and it would rarely be appropriate to make assumptions about whether an employee has a condition or how it might affect them. However, where someone is on notice of a potential impact, the proactive duty to make reasonable adjustments will apply even if no request has been made by the employee. This could include, for instance, addressing conduct informally at an earlier stage to ensure the employee understands the implications of their behaviour and how it is being perceived. Such an approach will of course require a careful balancing of duties towards the employee and their colleagues, particularly if the conduct concerns sexual harassment.

- For all employees, including those with disabilities, employers should ensure that they consider any efforts made by the employee to improve or learn from their behaviour. This is particularly crucial where the sanction decision turns on whether the actions are likely to recur (which can often be the line between a warning and dismissal). If, as in *Madden*, the employer concludes that they can't have confidence that the conduct wouldn't happen again, this will be hard to justify as fair if there is demonstrable evidence of them taking accountability and/or changing their ways.

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