

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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Reform promises to “repeal” the Equality Act 2010 on Day 1 if elected.

On 17 February 2026, Reform Party MP Suella Braverman announced that her party planned to repeal the Equality Act 2010 on the first day of a Reform government. We analyse the background to this announcement, what Reform has said it intends to do and whether the criticisms made of positive action in particular are valid.

Where has the backlash against equality law come from?

To understand the origins of the Reform Party’s stance, we only have to look across the pond.

Back in January 2025, President Trump signed two executive orders targeting diversity, equity and inclusion (DEI) measures (the **Executive Orders**). The first directed federal

agencies to dismantle all DEI programs within the Federal Government. The second prohibited private organisations from implementing DEI employment programs for positions funded by federal contracts.

President Trump also instructed the US Attorney General's office to look into ways that the private sector may be regulated or encouraged *"..to end illegal discrimination and preferences, including DEI"*.

In any event, this strong anti-DEI stance led to an immediate chilling effect within the private sector in the US. Many major organisations pre-emptively dropped their DEI policies following his Presidential win (including the likes of Walmart, Amazon, McDonalds and Meta) with more following suit after the issuance of the Executive Orders (including PepsiCo, Alphabet, Disney, Accenture and Deloitte to name a few).

Did America sneeze and the UK catch a cold?

Within months of President Trump's actions, evidence of a private sector rollback of DEI policies was emerging among some major UK employers. For example:

- British Telecommunications plc removed DEI targets from its annual bonus awards.
- Lloyds Banking Group plc reduced diversity targets affecting its annual bonus awards.

- GSK plc removed diversity targets for leadership roles and suppliers.
- WPP removed all references to diversity, equity and inclusion from its annual report.
- Accenture began a global rollback of DEI including in the UK.

But set against concerns about this apparent ripple effect, it remained the case that UK employers were operating in a different political and legal eco-system to their US counterparts. In July 2024, a Labour Government had been elected on a mandate of strengthening equality law protection. And the UK's advanced equality law framework (set out primarily in the Equality Act 2010 (the **Act**) but supplemented by various corporate governance and reporting rules), restricted the extent to which equality in the workplace could be attacked.

However, since the rollback of DEI in the US, there has been a distinct shift in the discussion of equality law by some UK politicians.

Kemi Badenoch MP, Leader of the Conservative Party, made no bones about her dislike of DEI, having previously referred to workplace DEI training as "*snake oil*." In February 2025, she spoke at the right-wing Alliance for Responsible Citizenship convention and said: "*Whether it's pronouns or DEI or climate activism – these issues aren't about kindness, they're about*

control.”

In March 2025, the GB News presenter and former Conservative MP and Minister Jacob Rees-Mogg described the Act as a codification of “*woke ideology*” which had created “*...a wasteful and racist DEI industry*”.

On 27 March 2025, Nigel Farage MP, the Leader of the Reform Party, praised President Trump’s attack on DEI and said: “*...the lunacies of DEI policy, of employing people on the basis of their colour, or their chosen sexuality...is coming to an end. We’re seeing the tide turning...and we’re moving more towards a system based on meritocracy than based on identity*”.

What is the Reform Party’s latest stance?

Fast forward a year, and the UK’s cold appears to be at risk of developing into full-blown flu.

On 17 February 2026, Reform MP Suella Braverman said that Britain was “*being ripped apart*” by DEI policies and she promised that Reform would repeal the Act on Day 1 if Reform wins the next general election. She said: “*...we will repeal the Equality Act, because we are going to work to build a country defined by meritocracy not tokenism, personal responsibility not victimhood, excellence not mediocrity, and unity not division*” and “*scrapping the Equality Act means getting rid of the pernicious, divisive notion of protected characteristics.*”

Later interviews given by Reform MPs Zia Yusuf and Robert Jenrick homed in specifically on the positive action provisions in the Act as the key area of concern (these are the provisions which tend to underpin DEI measures). Zia Yusuf MP said: *“The current Equalities Act (sic) requires discrimination in the name of ‘positive action’. It costs the economy billions of pounds and has become a lawyer’s charter to print money. It has destroyed meritocracy, spread division and led to exclusion for some in majority groups.”*

Adopting a slightly more moderate tone, Robert Jenrick MP said Reform intended to *“pass on”* important workplace rights to future generations, such as equal pay and disability discrimination rights. However, he asserted that other aspects of the Act, namely the Public Sector Equality Duty (the **PSED**) and the positive action provisions, were *“harmful”* to government, the economy and society.

It is not entirely clear whether Reform intends to repeal the entirety of the Act or just the positive action and PSED provisions. Clearly, the former is far more radical and would result in an extraordinary degradation of workplace rights in the UK.

Is Reform right about positive action?

Reform says the positive action provisions in the Act require discrimination and are exclusionary, divisive and harmful. So, what exactly are the positive action provisions?

In the main, the Act prohibits various forms of discrimination (i.e. direct and indirect discrimination, harassment,

victimisation and discrimination arising from a disability) connected to certain protected characteristics, as opposed to requiring an employer to take active measures to remove disadvantage. However, there are some limited exceptions to this including the duty to make reasonable adjustments for disabled workers and the duty to take reasonable steps to prevent sexual harassment.

Beyond this, the Act permits, but does not require, employers to take “positive action” measures in certain defined circumstances. Two types of positive action are permitted: general positive action under s.158 and positive action in recruitment and promotion under s.159. Although positive action is voluntary for private sector employers, public sector employers do have a separate duty to consider taking positive action measures as part of the PSED arising under s.149 of the Act.

General positive action

General positive action may only be used where an employer reasonably thinks that persons sharing a protected characteristic suffer a disadvantage, have different needs and/or have disproportionately low participation, when compared to others. Where this is the case, the employer may elect (but is not required) to take action aimed at resolving these issues.

The Act does not prescribe what action is permitted and, in fact, there is no limit on the types of measures that may be taken. Common examples include:

- targeting advertising at specific disadvantaged groups;
- providing opportunities exclusively to the target group to learn more about particular types of work with the employer;
- creation of a work-based support group for members of staff who share a protected characteristic and who may have workplace experiences or needs that are different from other staff; and
- setting aspirational targets for increasing participation within a particular timescale;

Importantly, identifying the disadvantage, need or underrepresentation and the proposed positive action is not simply the end of the story. The employer is also expected to ensure that the proposed action is a proportionate means of achieving the relevant aim. Proportionality involves a very careful balancing of competing relevant factors. The kinds of questions an employer will need to answer are:

- how serious is the disadvantage, need or underrepresentation?;
- is the action appropriate to achieve the stated aim?;
- if so, is the proposed action reasonably necessary to achieve the aim, or would it be possible to achieve the aim as effectively by other means less likely to result

in less favourable treatment of others?;

- if there is an adverse impact on others, what steps are being taken to mitigate that adverse impact?;
- does the measure rely on objective and transparent criteria?; and
- is there a procedure in place for reviewing the impact of, and need for, the measure? Here, the EHRC Code cautions against taking positive action indefinitely without review since the steps taken may remedy the situation meaning it is no longer proportionate to continue the action.

What is clear is that an employer must undertake considerable groundwork before rolling out any general positive action measures. It is not something the Act envisages being undertaken lightly or without a compelling rationale.

Positive action in recruitment

Section 159 has the potential for a more dramatic impact in that it allows employers to take positive action at the point of recruitment, i.e. to favour a candidate from a protected group over others. However, it may only do this where it reasonably thinks that persons from the protected group suffer a disadvantage or have disproportionately low participation. Once that disadvantage or underrepresentation has been identified, an employer may then only use s.159 where:

- the candidate A (from the target group) is as qualified as candidate B to be recruited or promoted;
- the employer does not operate a blanket policy of positive action; and
- the action is a proportionate means of achieving the legitimate aim.

The “as qualified as” restriction is a very significant limitation on the scope of the provision. It means that if an employer recruits or promotes someone from a protected group over a *better qualified* candidate they will commit unlawful positive discrimination (rather than lawful positive action).

The result is that positive action in recruitment is used extremely rarely by employers who fear getting it wrong and inviting so-called “reverse discrimination” claims from those in the majority groups. Given that there is no obligation to do it, employers generally do not use s.159 measures. Indeed, until 2019, there were no decided cases in England and Wales at all on the application of s.159 – today, there are only two.

In February 2019, the Liverpool Employment Tribunal handed down its judgment in the case of Furlong v The Chief Constable of Cheshire Police. In that case, the Respondent misapplied s.159 by setting the bar too low when it came to treating candidates as equally qualified. This resulted in discrimination against a white, heterosexual, male applicant

who won his case, brought under the very legislation that is now being criticised by Reform. In 2022, In Turner-Robson and others v Chief Constable of Thames Valley Police an Employment Tribunal held that the decision to promote a minority ethnic Police Sergeant into a Detective Inspector role without undertaking any competitive exercise was unlawful race discrimination.

Does the Act require discrimination and is positive action exclusionary, divisive and harmful?

Reform claim that the Act “requires” discrimination in the name of positive action is incorrect. Employers are not required to take positive action. And positive action measures in recruitment (the tiebreaker) are used vanishingly rarely. The claim that positive action has “destroyed meritocracy” does not withstand scrutiny.

By its very nature, action aimed at improving the position for those belonging to a specific disadvantaged group *will* exclude those outside that group. Yet the logic is that this only rebalances advantage in the workplace and offers opportunities to all to succeed on their own merit. Whether or not this should be regarded as “divisive” and “harmful” turns on whether you believe this is the right thing to do.

There have been a few examples where poorly judged DEI messaging has led to negative fallout for UK employers (for example, Wickes, Aviva and John Lewis). Placing the spotlight on DEI may provoke a re-evaluation by employers of their approach to ensure that positive action measures are transparent, proportionate and lawful.

Repealing the Equality Act 2010: a licence for positive discrimination?

It is worth remembering, with the exception of disabled individuals and pregnant workers, the Equality Act provides protection from discrimination for everyone symmetrically whether they belong to a historically disadvantaged group or not. White workers, as well as Black and Asian workers, are protected from discrimination because of race. Men as well as women are protected from discrimination because of sex. The philosophical underpinning of the law prohibiting direct discrimination is that each person deserves to be judged as an individual on the basis of what they contribute, and not on the basis of any prejudice or stereotype related to their protected characteristics. Positive action and the law prohibiting indirect discrimination balances this out with a view that goes beyond the individual to the group and recognises that the playing field is not, or has not always been, level.

The irony of Reform's proposal to repeal the Act is that there would no longer be any legal impediment to employers rolling out "positive discrimination" measures for underrepresented and marginalised groups, the very measures Reform has criticised.

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Tribunal considers reasonable adjustments to standard processes and the application of “zero tolerance” policies for neurodivergent employees

In *Halstead v JD Wetherspoons plc*, the Employment Tribunal has considered whether an employer failed to make reasonable adjustments to their processes and the way in which they applied a “zero tolerance” policy to an employee with autism, and whether that failure amounted to disability-related harassment.

What happened in *Halstead*?

Facts

Mr Halstead started his employment with Wetherspoons as a kitchen porter in late 2018 in Berkhamsted. Although he left for a short period, he returned to work for the same branch in May 2019 and later, in 2021, moved to the Wetherspoons in Trowbridge. He had been diagnosed with autism at the age of two and had informed the Berkhamsted branch of this, however this information was not shared with Trowbridge at the time of his transfer.

In August 2023, Mr Halstead and his mother went for a family meal at a Wetherspoons pub along with five visiting family members. Mr Halstead, assisted by his mother, placed the order through the Wetherspoons app and ticked the box to confirm that he accepted the employee discount policy and privacy policy. As a result, Mr Halstead's employee discount of 20% was applied to the entire order, even though the policy said the discount was only permitted to be used for groups of up to four people.

Mr Halstead was investigated and subjected to a disciplinary process in relation to his use of the discount and potential breaches of Wetherspoons' data protection and confidentiality policies (because he permitted his mother to access the app). During the investigation, the impact of Mr Halstead's autism on his day-to-day activities was discussed, including a requirement that someone directs him to read necessary documents (ideally sitting him down to go through any document with him). They explained that delay would highly impact his anxiety and that the process was causing him significant distress. Despite this, Wetherspoons did not make any adjustments to the disciplinary process.

Mr Halstead subsequently went off sick from work, and a long-term sickness meeting was arranged prior to obtaining the outcome of his occupational health referral. The occupational health report set out clear adjustments that should be made. These included giving 1-2-1 explanations of important documents, and confirming the extent to which his mother needed to be involved in his meetings and day-to-day tasks. It also emphasised the need for additional notice and other adjustments to meetings.

Contrary to the occupational health advice, no adjustments

were made to the meeting for Mr Halstead's grievance, which he had raised about his treatment. An adjusted meeting was eventually arranged, following his mother's objections. There had also been no update on the disciplinary process, Mr Halstead had not been having his appraisals, and had not been paid correctly, all of which contributed to his anxiety.

In December 2023, Wetherspoons invited Mr Halstead to a "some other substantial reason" (**SOSR**) hearing to discuss what they asserted was a breakdown in the employment relationship and his apparent failure to attend meetings about his long-term sickness and his grievance. For this hearing, Wetherspoons offered numerous adjustments including the questions being sent in advance, an option for written submissions, an option to change the meeting time and location, confirmation of his mother's eligibility as companion and an open invitation to suggest any other adjustments in advance. This meeting was successful and in January 2024, Wetherspoons ended the SOSR process and instead invited Mr Halstead to an informal meeting to enable his return to work. In March 2024, Mr Halstead returned to work with several practical adjustments to support him.

Mr Halstead had approached ACAS for early conciliation during his grievance process and, whilst he had successfully returned to work, Wetherspoons had declined to offer him any financial compensation for the prior treatment. He therefore brought a claim under the Equality Act 2010 (**EqA**) for a failure to make reasonable adjustments (Section 20 and 21) and disability-related harassment (Section 26). It was accepted that his condition amounted to a disability under Section 6 EqA, and that Wetherspoons had known about it at the relevant time.

Tribunal's Decision

The Tribunal upheld Mr Halstead's claim of a failure to make reasonable adjustments, but did not find that Wetherspoons' actions had amounted to harassment. Their key observations were as follows:

- Wetherspoons had failed to adjust its investigation, disciplinary, grievance and long-term sickness processes to accommodate Mr Halstead's needs as an autistic person. In each case they had applied their standard process, including standard notice periods, template letters and options of companion at meetings, and had not permitted the Claimant's mother to attend the majority of the meetings with him. They had also applied their standard categorisation of the breach as gross misconduct and suspended him during investigation, despite there being no apparent risk to the company of him working.
- In the disciplinary letter, Wetherspoons had also referred to Mr Halstead's conduct as "dishonesty" and "abuse", which had caused Mr Halstead undue distress. They remarked that this was notable given that a typical feature of autism was a strong desire to adhere to rules, and that there was no evidence of dishonesty; Mr Halstead had admitted to the breach, had explained the misunderstanding, and had confirmed it would not happen again now that he understood the rule.
- Mr Halstead had therefore been placed at a substantial disadvantage in these procedures compared to someone without his condition. The Tribunal considered that once it had been established that the breach had been caused by his condition, the matter should have been dealt with

informally and not as a disciplinary matter at all.

- From December 2023 onwards, it was clear that the company had taken on board their positive duty to make adjustments. The Tribunal described their approach from this point on as “exemplary”.
- Whilst it had clearly been distressing for Mr Halstead, the Tribunal did not consider that Wetherspoons’ conduct had amounted to harassment. The company had addressed the conduct in a standard manner which was inherently stressful and challenging for those involved, but this did not meet the threshold of intimidation (otherwise employers would never be able to conduct performance management).

Mr Halstead was awarded £25,412, the majority of the award being made for injury to feelings.

What can employers learn from this case?

The decision in *Halstead* offers a clear demonstration of the positive impact that making reasonable adjustments can have and, conversely, the negative impact that a failure to make them can have on a neurodivergent employee’s wellbeing and their ability to participate in standard processes.

Given the Tribunal’s commentary regarding the “exemplary” nature of the approach taken by Wetherspoons from December

2023 onwards, the judgment can serve as a helpful guide for employers as to the type of adjustments which can be made to support neurodivergent employees. Examples include:

- Providing longer notice periods for meetings, including investigation meetings. If notice would not usually be given for fact-finding meetings, consider whether this can be adjusted to allow them sufficient time to prepare without compromising the investigation.
- Giving clear explanations of the purpose of meetings, allegations made and the potential consequences (including agendas for meetings, where possible). Ensure that the employee understands the nature of the meeting and (if applicable) the seriousness, including the next steps after the meeting and potential outcomes.
- Allowing flexibility with the options of who can accompany the employee to meetings. This may require the employer to go beyond the standard categories of trade union or colleague companions.
- Minimising delays as much as possible and offering regular updates.
- Carefully wording allegations to ensure that they do not inappropriately presume guilt, dishonesty or cause unnecessary distress.
- Remaining open to any other adjustments suggested by occupational health providers or the employee themselves, and implementing them unless there is a very

good reason not to.

Adjustments should also be considered more widely during employment to ensure that neurodivergent employees are placed on an equal footing with their colleagues. Employers should ensure that, where they know an employee has a condition that affects them at work, this is tracked through their employment journey and information is shared (with their consent) to enable proper support. This will be particularly relevant for employees whose conditions may lead to challenges in asking for support.

In addition, this case highlights for employers the danger of enforcing “zero tolerance” policies. The Tribunal was critical of such policies, suggesting that they can be problematic if applied on a blanket basis because they fail to consider the diverse needs of employees. Whilst the employer may consider a policy breach to be serious enough for suspension and potentially dismissal, they may nevertheless need to consider adjusting the standard applied to employees whose conditions may affect their understanding of the relevant policy or ability to comply with it. This may be surprising to some employers, as the concept of reasonable adjustments is commonly thought of in terms of processes rather than substantive expectations. However, it is clear from this case that applying policies in a one-size-fits-all manner could result in a failure to make necessary adjustments for disabled employees.

Finally, employers should note that it will not always be sufficient to rely on a contractual requirement to abide by

all of their policies. They need to take active steps to ensure their policies are understood: this could include training, written communication and, where necessary, individual explanation.

[Halstead v JD Wetherspoons plc](#)

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BDBF Webinar – Handle with care: Avoiding pitfalls in redundancy exercises affecting pregnant employees and those on maternity, adoption or shared parental leave – 22 July 2025

In this 1-hour webinar, BDBF Principal Knowledge Lawyer [Amanda Steadman](#) and Senior Associate [Connie Berry](#) explore the key legal pitfalls to avoid in redundancy exercises affecting

pregnant employees and those on maternity, adoption or shared parental leave. This webinar was originally delivered on 22 July 2025 and reflects our understanding as of that date. Do get in contact with either of the speakers if you would like to discuss any of the issues raised.

To view the PDF webinar slides please click on the image below, or view the recording of the webinar:



**HANDLE WITH CARE: AVOIDING PITFALLS IN
REDUNDANCY EXERCISES AFFECTING EMPLOYEES WHO
ARE PREGNANT OR ON MATERNITY, ADOPTION OR
SHARED PARENTAL LEAVE**

22 July 2025



<https://youtu.be/kPTyoNudbMk>

Please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk),
Connie Berry (ConnieBerry@bdbf.co.uk) or your usual BDBF
contact, for further advice.

Workers do not need to allege

discrimination explicitly to acquire protection from victimisation

In *Kokomane v Boots Management Services Ltd* the EAT has underlined that workers may be protected from victimisation where they raise complaints which do not clearly refer to discriminatory treatment. The key question is what the employer would have reasonably understood the worker to mean, considering both what was said and the relevant background context.

What happened in this case?

The Claimant began working for the Respondent in January 2001. She was the only non-white member of staff employed on a full-time basis at the particular store where she worked.

In April 2020, she raised grievances about her treatment by a colleague, Ms Suteu. She alleged that Ms Suteu had bullied, harassed and victimised her and treated her differently to other workers. In particular, she referred to an incident where Ms Suteu had accused her of shouting and chastised her for doing so. However, the grievances did not state that the Claimant believed she was treated this way because of her race.

A grievance hearing was held in March 2021. When discussing the shouting incident, the Claimant appeared to suggest that she had been chastised by Ms Suteu because of a stereotype

that Black women are loud. She said, *"I called out for CD and Corolla responded "Stop shouting, not allowed"...Black girl woman, we are known to be loud."*

Two months later, the Claimant was made redundant. She brought claims alleging that her selection for redundancy and dismissal amounted to victimisation, because she had complained about race discrimination in her grievance (constituting a "protected act"). However, the Employment Tribunal dismissed the claim on the basis that there had been no specific complaint of race discrimination and so no protected act.

The Claimant appealed to the Employment Appeal Tribunal (the EAT).

What was decided?

The EAT considered previous case authorities, which had taken a more nuanced approach to the question of whether a protected act has occurred. For example, in *Waters v Commissioner of Police of Metropolis* (1997) it was stated that *"...the allegation relied on need not state explicitly that an act of discrimination has occurred... All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer."*

In the later cases of *Durrani v London Borough of Ealing* (2012) and *Fullah v Medical Research Council* (2012) it was accepted that the specific type of discrimination does not have to be expressly stated, but there must be something present to indicate that it is a complaint of discrimination.

Summing up the law, the EAT said that Tribunals must:

- take account of all of the factors that are provided in the information given by the employee to the employer; and
- consider that information on the basis of how it would have been reasonably understood by the employer in context, including general facts about the employee and the place of work.

Here, the Respondent knew that the Claimant was the only Black employee in the workplace, and she had complained about having been treated differently to others, including the accusation of shouting. It was also aware that she had drawn a link between that accusation and the stereotype that Black women are loud. It was not clear that the Tribunal has approached its decision with this wider contextual information in mind when determining whether or not a protected act had occurred. Instead, the Tribunal had focused on whether a specific complaint of race discrimination had been raised.

The EAT upheld the Claimant's appeal and remitted the case back to the Employment Tribunal to be considered again.

What does this mean for employers?

This case underlines that protection from victimisation may be

engaged even where a written complaint or grievance does not expressly refer to discrimination. What matters is what the employer would have reasonably understood the worker to mean, taking into account the surrounding context, which might include comments made in a grievance hearing, as was the case here. In other words, more complaints might amount to protected acts than initially thought. This is important because a failure to spot a protected act means the opportunity to safeguard against subsequent detrimental treatment is lost and risks an uncapped victimisation claim.

Line managers and HR will need to take care to decipher whether informal and formal complaints of apparently non-discriminatory treatment (e.g. unfairness or bullying) could, in fact, amount to complaints of discrimination when set against the background context. As this requires a good understanding not only of the relevant facts but of discrimination law, it is important that these stakeholders receive sufficient training on handling grievances and equality law. If you need help delivering such training programmes, please get in touch with us at BDBF.

[Kokomane v Boots Management Services Ltd](#)

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.

Discriminatory changes made by a parent company to a group-wide LTIP award: was the subsidiary employer liable?

A senior executive missed out on a valuable LTIP award after the rules were amended by his ex-employer's parent company. He alleged the changes amounted to indirect age discrimination and argued that his ex-employer was liable for the discriminatory actions of its "agent" – the parent company. The Court of Appeal rejected the claim, finding no agency relationship between the two entities and concluding that, in any event, the amended LTIP rules were a proportionate means of pursuing the legitimate aim of retaining key staff during a turbulent time for the business.

What happened in this case?

The Claimant was employed by Reckitt Benckiser Health Ltd (**RB Health**), a wholly owned subsidiary of Reckitt Benckiser Group plc (**RB Group**). The Claimant was entitled to participate in a group-wide long-term incentive plan (**LTIP**), operated and administered by RB Group. The 2017 LTIP award was due to vest on 31 December 2019, conditional upon a certain level of growth of RB Group's earnings per share.

The Claimant entered into a settlement agreement with RB Health, under which he would retire on 30 June 2019. However, it was agreed that he would be treated as a “good leaver” for the purposes of the 2017 LTIP award and his award would vest post-termination, provided the vesting conditions were met. The vesting conditions were not met; therefore, no awards were made. This was a problem for RB Health as the LTIP awards promoted staff retention. The absence of any award risked senior employees leaving the business.

On 18 September 2019, the Remuneration Committee of RB Group resolved to amend the vesting conditions of the 2017 LTIP award. The amendment provided that 50% of the award would vest regardless of the performance of RB Group’s shares, although the vesting was delayed from 31 December 2019 to May 2020. However, receipt of an award was made contingent on being employed on both 18 September 2019 and on the May 2020 vesting date, rendering the Claimant ineligible to receive an award.

The Claimant claimed that being deprived of the 2017 LTIP award was indirect age discrimination, on the basis that older people were more likely to have left the business by the new vesting date. He brought the claim against his ex-employer, RB Health, and against RB Group, arguing that it was the “agent” of RB Health. If this was correct, RB Health could be liable for the discriminatory actions of RB Group and RB Group could also be liable as the agent.

What was decided?

Decisions of the Employment Tribunal and EAT

The Employment Tribunal agreed that RB Group had acted as an agent for RB Health. However, it went on to dismiss the age discrimination claim. Although it found that the requirement for LTIP participants to be employed on 18 September 2019 indirectly discriminated against those aged over 57 (including the Claimant), it was a proportionate means of achieving the legitimate aim of retaining staff.

The Claimant appealed the discrimination decision, while RB Health and RB Group cross-appealed the agency decision. The EAT upheld both appeals – meaning that the Claimant still lost. It found that the requirement to be employed on 18 September 2019 could not contribute to the retention of staff. It held that it was not a means of achieving that aim at all, let alone a proportionate means, because “good leaver” beneficiaries like the Claimant had already left employment and could not be retained. However, it ruled against the Claimant on the agency point, finding that RB Group was *not* acting as agent for RB Health since RB Health had no control over RB Group’s actions or decisions regarding the LTIP and nor was there any basis to say that RB Health had authorised RB Group to act on its behalf in relation to the LTIP.

Again, both parties appealed, this time the Claimant on the agency decision and RB Health and RB Group on the discrimination decision.

Decision of the Court of Appeal

On the agency point, the Court decided that RB Group was *not* an agent of RB Health. One of the reasons the Tribunal had concluded that RB Group was acting as an agent was because RB Health’s employees would benefit from the LTIP – but that was

not enough on its own. There was no basis to say that RB Health had authorised RB Group to act on its behalf in relation to the LTIP, nor any evidence of express or implied assent by RB Group to act as an agent. Further, there was no evidence that RB Health had any control over RB Group in making or amending the LTIP. Instead, RB Group's powers derived from the rules adopted by its shareholders and directors. In addition, they were separate legal entities, and the Courts have generally rejected the notion that agency relationships exist between different legal entities within the same group.

On the objective justification point, the Court agreed with the Tribunal, ruling that there was no age discrimination.

The requirement that LTIP participants had to be employed on 18 September 2019 was a proportionate means of achieving the legitimate aim of keeping staff in post between 18 September 2019 and May 2020. The EAT had also overlooked the wider context in which this requirement had operated, namely the desire to retain the top layer of senior employees during a period of turbulence for the business.

What does this mean for employers?

This ruling provides clarity for employers – especially those operating in group structures – on three key fronts:

- **Employers are not automatically responsible for the actions of a parent company.** HR teams in group structures should note that a parent company's decisions

will not automatically make a subsidiary liable unless there is a clear agency relationship. Shared group policies or benefits alone are insufficient to establish liability.

- **Design and operate incentive plans with care.** When administering LTIPs or similar schemes across a group, it is crucial to be clear about which entity is making decisions and how those decisions impact different employee populations. This may help to defeat an argument that a parent (or another group company) is acting as an agent for the employer entity.

- **Post-termination exclusions may be justified.** Excluding “good leaver” former employees from incentive schemes may be contentious but it should not be discriminatory if it supports legitimate business aims, such as retaining key talent, and is applied consistently and proportionately. However, it should be remembered that a disgruntled ex-employee in this position may be able to pursue other legal avenues, such as a breach of contract claim, which underlines the need for careful application of any changes.

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BDBF success at the EAT in the case of Prahł & Others v Lapinski

BDBF represents Mr Lapinski in a claim for disability discrimination under the Equality Act 2010 brought against Triton Investment Advisers LLP and several individual respondents, including three non-UK-domiciled individuals referred to as the “Swedish respondents”. The Swedish Respondents challenged the Employment Tribunal’s international jurisdiction over them. At a Preliminary Hearing on the issue, the Tribunal held that it had jurisdiction. The Swedish Respondents’ appeal against that decision was dismissed by the EAT.

The Tribunal’s Decision

The Tribunal concluded that there was no failure in serving the claim upon the Swedish Respondents. The Employment Tribunals Rules of Procedure 2013 (the **ET Rules 2013**) in respect of service of claims were followed, and the claims were delivered to their attention. The Civil Procedure Rules in respect of service did not apply.

The Tribunal also determined that Mr Lapinski, who had been a member of Triton Investments Advisers LLP, had a good arguable case that he was an “employee” for the purposes of section 15C of the Civil Jurisdiction and Judgments Act 1982 (the **1982 Act**), which was intended to preserve the principles of the Brussels Recast Regulation post-Brexit (the **Brussels Regulation**). The Brussels Regulation is protective of the rights of employees (in the broad European sense) to pursue litigation in the jurisdiction in which they habitually carry out their work, including in cases involving overseas respondents, with a view to avoiding a multiplicity of claims and the uncertainty that would bring.

Grounds of Appeal

The Swedish Respondents argued that the ET Rules 2013 in respect of service of claims did not confer international jurisdiction. They contended that either service on them in person while they were present in England or an application to the High Court for permission to serve out of the jurisdiction was required.

They also argued that section 15C of the 1982 Act did not apply as Mr Lapinski was not an employee, and, in any event, the Swedish Respondents were not his employer.

EAT Judgment

The EAT upheld the Tribunal’s judgment and dismissed all the grounds of appeal.

HHJ Auerbach held that the claim had been served correctly on the Swedish Respondents. The ET Rules 2013 provided a complete code for service, and no additional steps were required to establish jurisdiction over the Swedish Respondents.

He went on to hold that sections 15C and 15E of the 1982 Act were intended to maintain the protective approach of the Brussels Regulation for employment claims, ensuring that

employees are not worse off post-Brexit. The Tribunal's conclusion that Mr Lapinski had a good arguable case that he was an employee (in the broad European sense) by reference to the substance of the relationship between the parties, rather than the legal structure, was correct. As to the argument that the Swedish Respondents were not his employer in any event, section 110 of the Equality Act 2010 expressly provides for individual co-liability of employees and agents who do something that is treated as being done by their employer or principal.

In considering the appeal, HHJ Auerbach referred to the recent EAT decision of Kerr J in *Cable News International Inc v Bhatti* [2025] EAT 61, as well as *Simpson v Intralinks* [2012] ICR 1343, *Powell v OMC Exploration & Production Ltd* [2014] ICR 63 and *Stena Drilling PTE Ltd v Smith* [2024] EAT 57.

Comment

This decision is important for multinational organisations who frequently have UK staff working with, or reporting to, colleagues overseas. The judgment makes it clear that those overseas colleagues may be easily included as respondents to Tribunal claims for discrimination through compliance with the Employment Tribunal's rules for service (here, under the ET Rules 2013 and, from 6 January 2025, under the Employment Tribunal Procedure Rules 2024). It will also be of interest to LLPs and LLP members since it makes it clear that LLP members may be within the scope of 15C of the 1982 Act.

BDBF instructed Daniel Stilitz KC and Patrick Halliday of 11KBW in the EAT.

<https://caselaw.nationalarchives.gov.uk/eat/2025/77>

Understanding the judgment in For Women Scotland Ltd v The Scottish Ministers: what is the meaning of “sex” in the Equality Act 2010?

In the case of For Women Scotland Ltd v The Scottish Ministers the Supreme Court was tasked with determining the interpretation of “woman” in the Equality Act 2010 and whether this definition includes a trans woman with a Gender Recognition Certificate. In this briefing, we consider the decision and what it means for employers.

What happened in this case?

In determining this question, the Supreme Court recognised that women have historically suffered from discrimination and that the trans community has historically been, and remains, a vulnerable community. It also confirmed that it was not the job of the Supreme Court to determine the meaning of the word “woman” in any other context than the specific context of the Equality Act 2010 (**the Act**), nor *“to adjudicate on the arguments in the public domain on the meaning of gender or sex.”* Instead, the Court’s task was to interpret the words used by Parliament in the Act, considering the context and purpose of the legislation.

The Act defines “sex” as binary, referring to “man” and “woman”. The Gender Recognition Act 2004 states that a

person's gender becomes the acquired gender for all purposes upon receiving a full Gender Recognition Certificate (GRC), however, this remains subject to other legislation. Therefore, the Court had to decide whether "sex" in the Act excluded this effect of the Gender Recognition Act 2004.

What was decided?

The Supreme Court considered various provisions throughout the Act to decide what Parliament had intended "woman" to mean.

It did not accept that there could be different definitions in relation to different parts of the Act, unless this had been specifically stated within the Act itself, which it was not. The Court emphasised the importance of a clear and predictable interpretation of statutory provisions, which could apply throughout the Act. It therefore found that because some provisions cannot mean anything other than biological sex (the sex assigned at birth), this must be true throughout the Act.

For example, the Court considered the provisions in relation to pregnancy, sex and maternity discrimination. It concluded the word "woman" within these provisions could only relate to *biological* women (which could include trans men), because it was not possible for a man or a trans woman to become pregnant, give birth, take statutory maternity leave or breastfeed. If a certificated sex meaning were used, this would exclude trans men, who may still be able to become pregnant, give birth and breastfeed, from protection.

The Court went on to consider single sex spaces and other provisions which allow for services to be provided only to one sex. It found that it could not include trans people with a

GRC because, in some cases, such as providing cervical screening to women and prostate checks to men, including trans people with their certificated sex would be illogical because they would require the test for their biological sex.

It also found that single sex spaces would no longer be single sex spaces, within the context of the Act, because allowing someone to enter based on their certificated sex would then mean that there were *both* sexes present (according to biological sex) and it could no longer be a single sex space. It also held that including those with a GRC was not workable because organisations were not permitted to ask for a GRC, which is a confidential document, and therefore could not have the information required to determine who should be allowed and who should not. This would also create a two-tier system in that one trans woman who for whatever reason did not hold a GRC would not be admitted but another who did would.

The Court noted that trans people still have protection under the Act by both the protected characteristic of gender reassignment and also sex, through perceived discrimination (where someone is discriminated against because they are believed to have a protected characteristic) or associative discrimination (where someone is discriminated against because they are associated with someone who has a particular protected characteristic).

What does this mean for employers?

The Equality and Human Rights Commission has issued [updated interim guidance](#) in light of this case and is due to consult on updating its Code of Practice (the consultation will take place in the final two weeks of May). In the meantime,

employers should consider taking the steps below.

- **Review policies and procedures:** review policies and procedures to ensure they align with the Court's interpretation of "sex" as biological sex, particularly if there are policies regarding single sex changing rooms and toilets. It may also affect policies related to maternity leave, pregnancy, gender identity and menopause.
- **Training and awareness:** provide training to staff on the implications of the judgment. Ensure that employees understand the distinction between biological sex and gender reassignment and how this affects workplace policies and practices. All staff should be treated with dignity and fairness and employers should ensure that employees are protected from discrimination and harassment.
- **Data collection and analysis:** if subject to the Public Sector Equality Duty, ensure that data collection and analysis are based on biological sex.

- **Communication and support:** communicate workplace changes and their implications clearly to all employees. Provide support to those who may be affected by the changes, ensuring a respectful and inclusive workplace environment.

[For Women Scotland Ltd \(Appellant\) v The Scottish Ministers \(Respondent\) – UK Supreme Court](#)

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Abusive language, disability, dismissal, and justification: a view through the prism of disability discrimination law

Is a disabled employee's use of abusive and offensive language towards colleagues a sufficient ground to justify dismissal where there is a link between the employee's behaviour and their disability? In *Duncan v Fujitsu Services*, the

Employment Appeal Tribunal (EAT) agreed with the Employment Tribunal that, in this case, the answer was “yes” and the EAT dismissed the appeal.

What happened in this case?

The Claimant was employed by Fujitsu from September 2017 until April 2021 when he was dismissed for gross misconduct. Fujitsu had knowledge of the Claimant’s two disabilities: attention deficit hyperactivity disorder (**ADHD**) and autistic spectrum disorder (**ASD**).

During employment, the Claimant raised three grievances, all of which were dismissed. As part of the third grievance, he disclosed “chat logs” which contained messages between himself and two other colleagues which had been exchanged on Fujitsu’s Slack communication system. These communications contained abusive and offensive language towards other colleagues, such as: “*stab, stab, stab*”, “*imma f***in kill you*”, “*I just can’t believe how much of a c*** he is*”, and “*room had been full of business c****s*” (redactions by BDBF LLP).

In response, Fujitsu invited the Claimant to attend a disciplinary hearing on 1 March 2021. On 24 February 2021, he emailed Fujitsu stating that he did not plan to attend the disciplinary hearing, but that it should proceed in his absence. He sent a document containing his mitigating factors, which included his submission that there was a link between his disability and his use of the offensive language.

On 3 March 2021, the investigating manager emailed the Claimant with 12 questions. On the same day, he responded

stating “*I would appreciate no further questions regarding my disabilities*”. On 16 April 2021, the Claimant was dismissed without notice. The investigating manager found that the comments were inappropriate and offensive, and she dealt with each of the mitigation points that had been raised.

Whilst the investigating manager considered (to the extent possible on the limited information before her) the issue of a potential link between the disability and the offensive behaviour, she concluded that the behaviour was deliberate, repeated, and hateful towards other colleagues. As such, she considered that the only appropriate sanction in the circumstances was dismissal for cause.

The Claimant appealed that decision but said he would be unable to meet with the appeal manager. The appeal hearing proceeded in his absence and was, ultimately, dismissed.

The Claimant went on to bring claims of disability discrimination and unfair dismissal.

What was decided?

The Claimant lost his claims and raised one ground of appeal which contained two limbs in the EAT.

The first limb was that the Tribunal should have considered whether the offensive language arose *directly* from his disability. The Claimant argued that he suffered from an “*involuntary loss of control of emotion*” and that he did “*not understand social rules*”. The question for the EAT was

whether the Claimant had advanced this argument before the Tribunal. The EAT found that he had not. Amongst other matters which persuaded the EAT of this, the Claimant had not led medical evidence on this point. The EAT considered that the Claimant had, instead, brought his claim based on the basis of their being an *indirect* link. As such, Mr Duncan failed on this first limb.

The second limb of appeal was that the Tribunal had insufficiently analysed whether his dismissal was a proportionate means of achieving a legitimate aim – if it was not it would amount to disability discrimination. For example, it was argued that the Tribunal did not appear to have considered whether there were options short of dismissal that would have reduced the discriminatory effect on him.

The EAT reiterated that this was an objective test. It held that certain of Fujitsu's legitimate aims were valid, including, for example, preventing the use of threatening language about managers and colleagues, preventing harassment and other behaviour that leads to a hostile working environment and preventing threats of violence against colleagues (expressed to other colleagues but directed repeatedly and forcefully at colleagues and managers) in any work-related context.

The EAT held that the words used were very strong examples of foul and abusive language towards colleagues and there was no evidence that assured Fujitsu that the offensive remarks would not be repeated. The EAT found that the Tribunal had carried out its own assessment of proportionality and was entitled to find that the dismissal was justified. In particular, the Tribunal had considered legitimate aims and found that, on the basis of at least some these, the decision to dismiss because

of the abusive communications was a proportionate response with respect to achieving Fujitsu's legitimate aims. Accordingly, the second limb of appeal also failed.

What does this mean for employers?

Employer clients should be mindful of employees' disabilities when subjecting them to disciplinary sanctions. Even where there is no obvious direct link between an employee's behaviour and their disability, there may be an indirect link that proves problematic.

Where that is the case, employers should consider the justification defence and, in particular, whether a lesser sanction than dismissal is appropriate in the circumstances with respect to achieving a particular legitimate aim.

If a sanction short of dismissal would enable an employer to achieve that legitimate aim, an Employment Tribunal may conclude, once it has done its own analysis, that the decision to dismiss was not proportionate, in which case the employer would be liable for discrimination arising from disability.

[Duncan v Fujitsu Services Ltd](#)

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Failure to take adequate steps to deal with a pregnant employee's grievance emails was discrimination but did not warrant a £10,000 injury to feelings award.

In the recent case of *Eddie Stobart Ltd v Graham*, the EAT overturned an Employment Tribunal's award of £10,000 for injury to feelings for an act of pregnancy and maternity discrimination. The EAT found the award to be "manifestly excessive" given that the act in question was failing to adequately deal with the claimant's grievance.

What happened in this case?

The claimant worked for Eddie Stobart as a Planner and announced her pregnancy in October 2021. Shortly before she was due to commence her maternity leave, her employer began a redundancy process. The claimant was aware that she had a preferential right to be offered a suitable alternative vacancy ahead of other employees. There was an open position for a Transport Shift Manager (TSM), however, her employer did not agree that this was a suitable alternative role for her.

She, therefore, had to apply for the role and take part in a competitive interview process once on maternity leave. She was

unsuccessful and a redundancy consultation began.

During the redundancy consultation period, the claimant sought to raise a grievance about the redundancy process. However, her email was blocked by the employer's firewall. She brought this up at her redundancy consultation meeting and was advised to resend the email, but it was again blocked by the firewall. After her dismissal, she raised the issue of the failure to acknowledge her grievance for a second time, but there was no response from the employer.

The claimant went on to bring claims of automatic unfair dismissal, unlawful detriment, pregnancy and maternity discrimination and victimisation.

What was decided?

The Employment Tribunal's decision

The Employment Tribunal agreed with the employer that the TSM role was not suitable and rejected most of the claimant's claims. However, it held that the failure to take adequate steps to deal with the grievance was materially influenced by the claimant's maternity leave absence and amounted to unlawful detriment and discrimination. By way of remedy, the Tribunal awarded £10,000 for injury to feelings.

An injury to feelings award is a type of compensation that can be awarded in successful discrimination claims. It is intended to be compensatory to the innocent party and not to punish the party in the wrong. The leading case of *Vento v Chief*

Constable of West Yorkshire Police (No 2) set guidelines known as “Vento bands”, used by tribunals to apply the severity of the discrimination suffered by claimants into one of three bands (which are now amended in line with inflation each year). An award in the top Vento band will be given in circumstances where there has been a sustained campaign of discrimination and cases in which there has been an isolated incident will fall into the bottom band. In this case, the claimant’s award fell at the lower end of the middle Vento band.

The Employment Appeal Tribunal’s decision

The employer appealed to the EAT on two grounds, namely, that the award was excessive, and that the Tribunal had not given sufficient reasons for awarding such an amount.

The EAT found that the only proper and reasonable conclusion was that the employer’s failure to deal with the grievance was limited in its scope and impact. It upheld the appeal on both grounds and substituted an injury to feelings award of £2,000 plus interest. It noted that it would have awarded a lower amount, save for the fact that the claimant was forced to chase up her grievance when she was on maternity leave, and this would have caused her particular distress as an expectant mother.

What does this mean for employers?

The judgment laid out considerations that will be taken into account when a Tribunal decides to include an injury to feelings award. In every case of discrimination, it is likely

there will be some injury to feelings, but the key takeaway is that tribunals will focus on the effect of discrimination on the particular individual.

The Vento bands will be used as a guide to place cases of discrimination into the relevant level of severity. If the discrimination is overt, it will be more likely to cause distress and humiliation. Similarly, if the discrimination was enacted in front of colleagues, then the degree of harm will be higher due to the humiliation caused. Tribunals may also look to acts such as threats of disciplinary action or exclusion in the workplace, which can show an imbalance of power and influence and increase the harm caused. The EAT also highlighted that in cases of pregnancy and maternity discrimination involving an unborn child, there will be additional stress placed on the expectant mother and thus the upset is increased.

Tribunals will scrutinise each situation on a case-by-case basis and may find that employees who appear relatively stoic about the situation may indeed be struggling to fully describe the effect that the discrimination has had on them. Conversely, some employees may be more vulnerable to upset and so be impacted more greatly by lesser discriminatory acts.

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Embracing neurodiversity in the workplace: insights from the new Acas guidance

New Acas guidance on neurodiversity highlights the importance of fostering inclusive workplaces that support workers with conditions like ADHD, autism, dyslexia, and dyspraxia. By understanding the unique strengths and challenges of neurodivergent workers, businesses can create environments where all workers thrive, at the same time as avoiding costly discrimination claims. We explore below the topics set out in the guidance, including understanding neurodivergence, key strategies for promoting neuroinclusion and what to consider when dealing with performance or capability procedures.

Understanding neurodiversity in the workplace

Neurodiversity describes that individuals think, learn, and behave differently, highlighting the natural variations in how people's brains work and process information. Neurodivergent individuals may have unique strengths and challenges, and understanding these differences can create more inclusive workplaces.

Some common neurodivergent conditions include (further details are available by following the links):

- [Attention Deficit Hyperactivity Disorder \(ADHD\)](#)
- [Autism](#)
- [Dyslexia](#)
- [Dyspraxia](#)

Each of these conditions have a range of strengths and challenges and not all individuals will experience each condition in the same way.

It is quite common for neurodivergent people to suffer from mental health problems. Some of these are caused by them trying fit in and behave in a neurotypical way. This is known as “masking” and can lead to exhaustion and isolation, as well as mental health problems such as depression and anxiety. Creating a neuroinclusive work environment where workers feel supported and accepted can reduce the need for masking and improve mental well-being.

Disability rights

While some neurodivergent individuals do not see themselves as disabled, neurodivergence may qualify as a disability under the Equality Act 2010, which, in turn, triggers the duty to make reasonable adjustments and protects workers from disability discrimination. Disabled workers may also be able to get support from Access to Work, a Government scheme aimed

at supporting people to get or remain in work.

Talking about neurodiversity in a sensitive way can help prevent workplace problems and create an inclusive environment where all workers feel supported. Workers are not required to disclose their neurodivergence but if they choose to do so, it should be on their terms. They may hesitate to do so for fear of negative reactions or stereotyping. Employers should offer support, regardless of when the disclosure happens or whether there is a formal diagnosis.

If an employer suspects a worker is neurodivergent, they should approach the situation sensitively and focus on discussing potential support and adjustments. Using appropriate language around neurodiversity is essential to avoid distress. Employers should avoid terms like “*suffering from*” or “*symptoms*”, which suggest an illness. Language preferences can vary, so it is helpful to ask the worker what terms they prefer and listen to them. For example, some people may prefer to say, “*I have autism*” rather than “*I am autistic*”.

Performance, conduct and capability

Employers must not discriminate against neurodivergent workers when addressing performance issues. Before initiating formal procedures, employers must ensure they have done everything reasonably possible to support the worker. Failing to offer support first can lead to unnecessary time and effort spent on internal processes and legal claims, while also negatively impacting an worker’s wellbeing.

The Acas guidance gives the example of Sam, who struggles with distractions and meeting deadlines, and is suspected of having ADHD. Sam and his manager discuss possible support and agree on reasonable adjustments, including a quiet space and regular check-ins, which improve Sam's performance. A formal procedure could have caused stress and would have failed to address the underlying issue.

However, there are situations where formal procedures may be necessary, such as persistent performance issues despite support or reasons not related to their neurodivergence. During these procedures, employers must ensure they make reasonable adjustments to the process for neurodivergent workers, such as providing clear meeting records for someone with autism or talking through written correspondence with a worker with dyslexia. It is usually most helpful to discuss with the worker what support would help them, rather than making an assumption based upon their condition.

Making your organisation neuroinclusive

Neuroinclusion involves actively including neurodivergent workers and many helpful changes can be made which are not necessarily costly or complicated. Some possible steps include:

- **Adjusting recruitment processes:** employers should review their recruitment processes and consider taking steps such as offering different ways to complete application forms, providing interview questions in advance and ensuring interviews are conducted in quiet spaces.

- **Providing training:** training and supporting managers to handle neurodiverse teams, including providing guidance on reasonable adjustments and discrimination, is also essential.

- **Raising awareness:** raising awareness of neurodiversity throughout the wider organisation through training, awareness days and campaigns can also help normalise conversations about it. Setting up a staff network may be a measure which supports workers to share their experiences.

- **Policy guidance:** creating a dedicated Neurodiversity Policy can be very helpful, outlining the organisation's commitment to inclusion, available support and legal responsibilities.

- **Making workplace adjustments:** employers can also make support available for all workers, such as offering noise-cancelling headphones or quiet spaces, which can assist neurodivergent workers without requiring them to disclose their condition.

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Court of Appeal rules that dismissal for reposting gender critical and anti-same-sex marriage Facebook posts was unlawful belief discrimination

What is the background law?

The Equality Act 2010 protects individuals from discrimination because of religion and belief, which encompasses the manifestation of such beliefs. Individuals also have fundamental rights to freedom of belief and freedom of expression of information and ideas under Articles 9 and 10 of the European Convention on Human Rights (the **Convention**).

Individuals also have a right to *manifest* their beliefs, for example, through worship, teaching, practice and words.

Since the manifestation of a belief and the expression of information and ideas may impact others, these rights may be limited to the extent necessary in pursuit of other legitimate aims (a process known as “objective justification”). Legitimate aims could include, for example, protecting an employer’s reputation or preventing discrimination against others.

The Convention is incorporated into UK law by way of the Human Rights Act 1998. So far as it is possible to do so, UK legislation, such as the Equality Act 2010, must be read and given effect to in a way that is compatible with the Convention.

What happened in this case?

Ms Higgs is a Christian and she worked as a pastoral administrator and work experience manager at a secondary school (the **School**). In 2018, the School received a complaint from a parent at the School about a post that Ms Higgs had made on her personal Facebook account. She had reposted a Facebook post written by someone else about same sex relationships and gender fluidity, adding the comment: *“Please read this! They are brainwashing our children!”*. It later emerged that Ms Higgs had reposted other Facebook posts which had referred to gender fluidity as a *“perverted vision”* and which had said the *“...LGBT crowd with the assistance of progressive school systems are destroying the minds of normal children by promoting mental illness”*.

Ms Higgs was dismissed for gross misconduct on the basis that her posts:

- amounted to harassment of the complainant parent on the grounds of sexual orientation and/or gender reassignment;
- risked harming the School's reputation; and
- breached the School's Code of Conduct (namely that the posts may demean or humiliate LGBT pupils and cause concern about her suitability to work with children and that her online persona was not consistent with the professional image expected of someone working in a school).

Ms Higgs claimed she had suffered direct discrimination and harassment in relation to her beliefs, including that marriage is a divinely instituted life-long union between a man and woman, a lack of belief in same-sex marriage, a lack of belief in gender fluidity and a lack of belief that someone could change their biological sex.

The Employment Tribunal accepted that Ms Higgs' beliefs were protected under the Equality Act 2010, however, it dismissed her claims. It held that that the School had dismissed her because it had concluded that the language used in the Facebook posts could lead someone to reasonably believe that she was homophobic and transphobic. Ms Higgs appealed to the EAT.

What did the EAT decide?

The EAT decided that the Tribunal had failed to address the question of whether the School's actions were because of, or related to, a manifestation of her protected beliefs. The EAT held that there was a sufficiently close or direct nexus between Ms Higgs' protected beliefs and her Facebook posts, such that they amounted to a manifestation of her beliefs.

Accordingly, the next question was whether the dismissal was in response to a *legitimate* manifestation of the protected beliefs (which would be unlawful belief discrimination), or to the objectionable manifestation of the beliefs? If the latter, the dismissal could *potentially* be lawful if the School was able to show that it was a proportionate step designed to achieve a legitimate aim (i.e. it could "objectively justify" the dismissal).

Since there was more than one possible answer, the EAT remitted the claims to the Employment Tribunal. However, the EAT went on to offer detailed guidance on the principles to be taken in account when assessing the proportionality of any interference with freedom of religion and belief and freedom of expression.

Ms Higgs believed that the EAT should have gone further and held that her claims succeeded, rather than remitting them to the Tribunal. Therefore, she appealed to the Court of Appeal.

What did the Court of Appeal decide?

The Court concluded that the Tribunal was bound to find that Ms Higgs' dismissal was *not* objectively justified, meaning that it amounted to unlawful belief discrimination. Even assuming that the School was entitled to take objection to the Facebook posts, dismissal was "*unquestionably a disproportionate response*" for the following reasons:

1. Even if the language used in the posts was objectionable, it was not *grossly* offensive and it was not primarily intended to incite hatred or disgust for LGBT people. Rather, the content contained derogatory sneers and rhetorical exaggeration.
2. The offensive language used was not written by Ms Higgs (save for the repetition of the word "brainwashing"). Rather, she was reposting the messages of others. She had made it clear to the school that she did not condone the language, and this was relevant to the question of the degree of culpability.
3. There was no evidence that the reputation of the School had, in fact, been damaged. Indeed, the dismissal letter had accepted that the concern was about *potential* damage in the future. The dismissal letter had also accepted that there was no possibility that readers would believe that the posts represented the views of the School. The only reputational damage was that people *might* fear that Ms Higgs would express homophobic or transphobic attitudes at work. The Court accepted that if that belief became widespread then it could harm the School's reputation, however, the risk of such widespread circulation was "*speculative at best*". The posts were made on a personal Facebook account in Miss Higgs maiden name and with no reference to the School.

After the posts were made, only one person (the parent who had complained) was known to have recognised who she was.

4. Even if people who saw the posts feared that she would let her views influence her work, neither the School, nor the Tribunal, believed that she would do so. Ms Higgs had made it clear that she was specifically concerned about the content of sex education in primary schools and that she would not bring these views into the School and nor would she treat LGBT pupils differently. There had been no complaints about any aspect of Ms Higgs' work during her employment. It would have been open to the School to have issued a statement making it clear that it was confident that there was no risk that Ms Higgs' views would affect her attitude towards LGBT pupils or parents.

While the Court accepted that Ms Higgs had acted unwisely in reposting the material, this did not justify her dismissal, especially since she was a long-serving employee with an unblemished work record.

The Court also addressed the issue that the School was concerned that Ms Higgs lacked insight into the consequences of her actions and had refused to take the posts down. The Court acknowledged that in some cases a lack of insight might justify dismissal over a less severe sanction but that is not a universal rule. The Court said that if the case is not one that would otherwise justify dismissal then it was hard to see that it should be "*marked up in seriousness*" because of a failure to acknowledge a fault which the employee would

genuinely find difficult to do (because it was a manifestation of an important belief).

Separately, the Court said that although the School had been entitled to investigate the complaint made by the parent, it was debatable whether this needed to be disciplinary in nature and whether it had been necessary to suspend Ms Higgs.

What does this mean for employers?

This decision makes it clear that it will not be open to employers to argue that the dismissal of an employee for the objectionable way in which they have manifested a protected belief is entirely separable from their rights to hold and manifest a belief and, therefore, not discriminatory. The objectionable manifestation cannot be viewed in isolation. Instead, the route to safety for the employer is to show that the dismissal is objectively justified – this requires the employer to show that they have acted proportionately in advancing one or more legitimate objectives. This is notable since it introduces the concept of objective justification into direct belief discrimination claims (whereas on the face of the Equality Act 2010, this is reserved for indirect discrimination and discrimination arising from disability claims only). Although helpful to employers to some extent, discharging the burden of objective justification will not be easy, particularly in light of the fundamental importance of an individual's right to hold and manifest a belief and express information ideas.

What are the key practical lessons for employers considering taking action against an employee in connection with the expression of their beliefs or views?

Before doing anything, consider which legal rights are engaged

- Seek legal advice on whether what has been said or done relates to a protected belief held by the employee. If it does, this is likely to engage discrimination protection under the Equality Act 2010 and the right to freedom of thought, conscience and religion under Article 9 of the Convention. Of course, it will not always be possible to make a complete assessment, since you may well not know what beliefs are held by the employee nor the strength of them.
- Even where you are confident that there is no connection with an underlying protected belief, remember that the right to freedom of expression under Article 10 of the Convention will usually be engaged (save where what is said concerns the expression of certain extreme beliefs). If Article 10 is engaged, then this will be taken into consideration in other types of claim, for example, unfair dismissal claims.
- Ordinarily, employees need two years' service to acquire the right not to be unfairly dismissed. However, it should be noted that where the sole or principal reason for the dismissal is, or relates to, an employee's *political opinions or affiliations*, the two-year service requirement is dispensed with, meaning it becomes a Day 1 employment right.

Focus on precisely why the expression of the belief or view amounts to misconduct

- Caution is needed – the key point emerging from this decision is that employers should avoid overreaching. These cases are complex and the balancing exercise that you need to undertake is nuanced. Helpfully, the Court of Appeal endorsed the guidance set down by the EAT in this case and this should be used as a guide in future cases. For example, ask yourself the following questions:
 - What has the employee said or done? If it is something done on social media, be mindful that there is a hierarchy of wrongdoing. “Liking” does not hold the same weight as reposting something or creating a post (as noted by the European Court of Human Rights in the case of *Melike v Turkey*). And as the Court of Appeal noted in this case, reposting is not the same as creating a post.
 - What is the statement or post in question considered to be objectionable? You need to show that the expression was objectionable. Even if it seems offensive on its face, remember that there is no general right not to be offended. The objectionable nature must go further and jeopardise a legitimate aim of the business. This may include actions which have led to the harassment of others or damaged the reputation of the business (or could do so). However, as this case underlines, you must take great care not to overstate such risks. What is the extent and nature of the intrusion on the rights of others? Has actual damage been done to the business, or is it genuinely likely?

- Did the employee make it clear that the views expressed were personal, or could they be seen as representing the views of the business? Where views are expressed on private social media accounts and there is no link to the employer, this risk is likely to be lower.

Do not jump straight to suspension and disciplinary action

- As the Court said in this case, while it was understandable that the employer wished to investigate the complaint, it was questionable whether suspension was needed or that the process had to be disciplinary in nature from the start. Consult the [Acas Guidance on suspension](#) before you take a decision to suspend and keep any suspension as short as possible and under review.
- If disciplinary action is needed, the disciplinary process should be fair and conducted in line with the Acas Code of Practice on disciplinary and grievance procedures. Careful investigation looking at evidence on both sides will be needed and you should ensure that the people who run the process are non-partisan.
- Once disciplinary action is started, be prepared for a

grievance to be lodged in response. If the employee has manifested a protected belief, that grievance will probably allege that the disciplinary action is discriminatory – and that complaint will be a protected act. This means you will need to be careful to avoid any subsequent detrimental treatment as this could give rise to a victimisation claim.

- If the conclusion is that the employee should be sanctioned for their actions, remember that the interference in the expression of a protected belief should always be done in the least intrusive way possible to achieve the objective in question. Is dismissal really necessary? For example, would a request to take down the post and not repeat with similar posts and the provision of training be enough? In this case, the Court noted that one alternative course of action open to the employer would have been to issue a statement reassuring the community that it had confidence that Ms Higgs' views would not negatively affect her work.
- Be careful not to allow a lack of remorse or remedial action by the employee to swing your decision on sanction. As the Court noted here, if the employee's actions would not justify dismissal in the first place, it is unlikely that a lack of insight will tip the balance towards dismissal. This is especially true in belief cases where the employee's actions will relate to a something they believe in and is of importance to them.

- Bear in mind that even if you do not dismiss, issuing any disciplinary sanction for the manifestation of a protected belief may be viewed as an act of discrimination by the employee and could also be used as a basis for constructive dismissal.

[Higgs v Farmor's School](#)

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