**Neurodiversity in the Workplace**

The Employment Equality Acts 1998 to 2021 (as amended) (EEAs) provides a definition of disability as:

*(a) the total or partial absence of a person’s bodily or mental functions, including the absence of a part of a person’s body,*

*(b) the presence in the body of organisms causing, or likely to cause, chronic disease or illness,*

*(c) the malfunction, malformation or disfigurement of a part of a person’s body,*

*(d) a condition or malfunction which results in a person learning differently from a person without the condition or malfunction, or*

*(e) a condition, illness or disease which affects a person’s thought processes, perception of reality, emotions or judgement or which results in disturbed behaviour,*

Given the broad definition of disability provided under the EEAs, Autism and other neurodiverse conditions such as Dyslexia, Dyspraxia, Dyscalculia, Attention Deficit Disorders and Obsessive-compulsive Disorders would almost certainly be considered to fall within that definition.

The Workplace Relations Commission (WRC) has previously found that Autism constitutes a disability within the meaning of the EEAs.

**Reasonable Accommodation**

Section 16 of the EEAs require employers, where their employee has a disability, to provide reasonable accommodation by way of taking appropriate measures to support that employee in performing their duties if that employee would be fully competent and capable of performing their required duties with the benefit of that reasonable accommodation. The reasonable accommodation being provided to an employee with a disability should enable that employee to access, participate or advance in employment or undergo training.

The obligation to provide reasonable accommodation to an employee with a disability exists unless to do so would place a disproportionate burden on the employer. It would be considered a disproportionate burden if the “financial and other costs” of providing the reasonable accommodation were too great, considering the scale and financial resources of the employer’s business and whether public funding or other assistance could be obtained to support the provision of that reasonable accommodation.

The reasonable accommodation that may be necessary will likely differ in each case depending on the specific needs of the employee in question. Reasonable accommodation could involve adapting an office space to suit the needs of an employee with a disability or might involve adapting the employee’s working pattern.

[As I Am](https://asiam.ie/), Ireland’s National Autism Charity, provides suggestions as to the reasonable accommodations that may be suitable for an employee with Autism which, amongst others, include:

* Offering flexible working hours and regular breaks to suit the routine of the employee;
* Providing the employee with a working environment that is free from or has limited fluorescent lighting, loud noises or strong odours;
* Providing access to a quiet space or sensory room;
* Providing the employee with stim toys such as fidget spinners or chewable objects;
* Providing technology to support the employee in their tasks;
* Providing a to-do list of assignments for each day and colour-coding tasks by priority;
* Facilitating the employee to communicate in writing or by speech-to-text software as necessary.

With regard to identifying what special measures might be considered, depending on the nature of the disability under consideration, it may be appropriate to refer the matter to an Occupational Health advisor so that an assessment can be undertaken with any such special measures identified for consideration. Once received, it is vital that an employer consults with the employee on the question of appropriate special measures, to both get their response to any possible measures raised by Occupational Health, any practical concerns the employer might have regarding such measures and indeed to ensure any additional measures which the employee themselves has identified can be considered. That is not to say that the employer will always be able to provide for the measures discussed (bearing mind the “financial or other costs” limitation) but certainly everything should be discussed). Employers should arrange regular follow up meetings with the employee to ensure that any accommodations made are meeting the needs of the employee.

**Discrimination**

Persons with a disability are protected from discrimination by laws at UN, European and local levels. At local level, both the EEAs and the Equal Status Acts 2000 to 2018 (as amended) set out nine protected grounds of discrimination, one being disability. Section 6 of the EEAs provides that discrimination occurs in the workplace where an employer treats an employee less favourably than another based on one or more of nine protected grounds of discrimination; in this case, disability. Section 8 of the EEAs prohibits employers from discriminating against employees in relation to access to employment, conditions of employment, training or experience for or in relation to employment, promotion or re-grading, or classification of posts.

As such, employers should be mindful of actions that may be considered discriminatory in relation to an employee with a disability in every aspect of employment including recruitment, training, promotion and conditions of employment. Refusing to provide reasonable accommodation to an employee with a disability would be considered an act of discrimination unless the employer could show that to provide such reasonable accommodation would place a disproportionate burden on the employer.

**Health and Safety**

Under the Safety, Health and Welfare at Work Act 2005 (as amended), it is the responsibility of the employer to ensure, insofar as it is reasonably practicable, the safety, health and welfare at work of their employees. Further, Regulation 25 of the General Application Regulations under the Safety, Health and Welfare at Work Act provides that employers shall ensure that places of work are organised to take account of persons with disabilities. It is therefore important that employers ensure, when they become aware of a disability of an employee, that the workplace meets the health and safety needs of that employee.

The Health and Safety Authority (HSA) is the body responsible for the enforcement of laws governing workplace health and safety.  The HSA has published [An Employer’s Guide to Implementing Inclusive Health and Safety Practices for Employees with Disabilities](https://www.hsa.ie/eng/publications_and_forms/publications/safety_and_health_management/hsa_disability_guidelines_2021.pdf) in consultation with the National Disability Authority which addresses work-related health and safety for employees with disabilities. The Guide offers practical advice for employers which includes the following:

* It is important to note that employees are not obliged to disclose a disability that they may have. However, by not disclosing a disability, an employer may not be able to ensure that the health and safety needs of that employee are being met. The HSA suggests that creating a supportive, non-judgmental working environment may go a long way towards making an employee feel comfortable in disclosing their disability and therefore, enable the employer to ensure that the health and safety needs of that employee are being met.
* It is mandatory for employers to carry out a risk assessment of their workplace and develop a Safety Statement and control measures based on the results to minimise any risks identified. The HSA suggest that these be done in consultation with organisations that provide services for or work with people with disabilities and the employee themselves to ensure that any control measures put in place are appropriate to the type of disability that the employee has.
* The HSA highlights the importance of planning a safe exit plan from the workplace in case of emergency. As neurodivergent employees may be sensitive to loud noises or strong smells or may feel too overwhelmed in the moment to react to maintain their safety, it may be necessary to develop, in consultation with the employee, a Personal Emergency Egress Plan and to carry out drills to ensure its effectiveness.
* The HSA suggests that arranging disability equality training for all staff and developing a disability equality policy to ensure that all employees are treated equally may be beneficial.

**Case law**

A 2019 decision by the WRC is illustrative of the consequences that may be faced by an employer where they are found to have discriminated against a neurodivergent employee.

In [Stephen Dunne v Sky Handling Partner Limited [ADJ-00017364]](https://www.workplacerelations.ie/en/cases/2019/may/adj-00017364.html) Mr. Dunne had Dyspraxia and brought a claim in respect of discrimination on the grounds of disability under the EEAs in relation to both his dismissal from employment and the failure of his employer to provide him with reasonable accommodation.

Mr. Dunne had been employed as an Aircraft Service Agent with the Respondent in March 2018. Mr. Dunne completed the training for his position but did not pass the driving element of that training and was advised that he could complete that element at a later date. Mr. Dunne disclosed his Dyspraxia at a second medical assessment towards the end of March 2018, at which point he was recommended for employment with “task restrictions”.

Mr. Dunne was informed by the HR Business Partner, in April 2018, that he could not work with the Respondent as he was considered a hazard. A report by the Respondent’s Health & Safety Officer (referred to as Mr. B) concluded that Mr. Dunne was unsuitable for the role due to his Dyspraxia as it may place him at more of a risk by working in a hazardous environment.  Mr. Dunne submitted that he received no formal notice of termination, which occurred just over a month into his employment and the formal reasons for his termination were never provided to him in writing.

In her findings, the Adjudication Officer, Ms. Valerie Murtagh, noted that the Respondent had stated on a few occasions at the hearing that a person with Dyspraxia cannot do the job or work in the environment in which Mr. Dunne had been hired. Ms. Murtagh noted however that the Respondent could not argue that Mr. Dunne would not have been capable of completing the driver training as it did not afford him the opportunity to undergo a further day of training and it did not make the enquiries necessary to conclude that Mr. Dunne was incapable of doing the role. In fact, Ms. Murtagh noted that Mr. Dunne stated at the hearing that he holds a full driver’s licence and drives all the time.

Ms. Murtagh was satisfied that Mr. B’s report was grounded on assumptions and generalisations about persons with Dyspraxia but was not grounded on facts about Mr. Dunne’s specific condition. Indeed, at the hearing, Mr. B confirmed that research for his report involved doing a Google search on Dyspraxia, which Ms. Murtagh commented was “*quite astonishing*”.

Having concluded that the Respondent both failed to provide Mr. Dunne with reasonable accommodation in accordance with Section 16 of the EEAs and discriminatorily dismissed Mr. Dunne on the disability ground, Ms. Murtagh ordered that Mr. Dunne be paid €15,000 by way of compensation for the breaches of the EEAs, representing 18 months’ salary. Ms. Murtagh also ordered that the Respondent conduct a review of its procedures in relation to its employment policies and practices to ensure compliance with the EEAs.

**Takeaways**

* If an employee discloses a condition or diagnosis that falls within the disability ground under the EEAs, an employer must consider providing reasonable accommodations that would support that employee in carrying out their duties. Where appropriate, the matter should be referred to an Occupational Health advisor for assessment.
* Employers should not make assumptions about a specific disability affecting an employee. Instead, employers should obtain expert advice in relation to the disability and consult with the employee themselves on how they feel their disability may affect their work and what reasonable accommodations the employer can provide to support them.
* Employers should ensure that they are aware of their health and safety obligations under the Safety, Health and Welfare at Work Act and, where appropriate, revise any risk assessment, Safety Statement and control measures in place in light of an employee’s disability.
* Employers should be mindful of actions that may be considered discriminatory in relation to that employee in every aspect of employment including recruitment, training, promotion and conditions of employment. Disability is one of the nine protected grounds under the EEAs. Significant awards in compensation can be awarded where breaches of the EEAs are found to have occurred.