

Aggregated Legal Information for Excluded Neurodivergents

This guide is concerned primarily with the legality of the exclusion of autistic people from, or the restriction of their access to, services and associations as a consequence of conduct that is a consequence of their autism.

Autistic individuals bringing an equality act (2010) case to court as litigants in person may find it useful. The focus is very much on cases relating to part 3 and 7 of the act. Individuals wishing to challenge decisions about employment, landlord's decisions, exclusions from schools or universities may find this document less useful.

This document is the opinion of a lay person who has done a great deal of research and should not be taken as formal legal advice or a substitute for professional legal help. I am not a lawyer. I have no insurance to cover you losing money by relying upon anything in this guide. If you rely upon the information in this guide you do so at your own risk. Please don't sue me.

Contents

[Contents](#)

[Resources](#)

[Review of Relevant Legislation](#)

[Is autism a disability?](#)

[Discrimination arising from disability](#)

[Unfavorable treatment](#)

[Causation](#)

[Objective Justification](#)

[Legitimacy](#)

[Rationality / Effectiveness](#)

[Minimality](#)

[Impact](#)

[Ignorance Defence](#)

[Failure to make reasonable adjustments](#)

[Comparison?](#)

[Provisions criteria and practices](#)

[What is a substantial disadvantage?](#)

[Auxiliary aids](#)

[What is reasonable?](#)

[Indirect discrimination](#)

[Differences between indirect discrimination and discrimination arising from disability](#)

[Differences between reasonable adjustments \(services\) and indirect discrimination.](#)

[Indirect discrimination as a form of harassment protection](#)

[Distinction between services and associations](#)

[Enforcement](#)

[Harassment under the equality act](#)

[The protection from harassment act](#)

[Autism's effect on interpretation](#)

[The service provider as a harasser](#)

[The significance of criminality](#)

[Data protection act](#)

[References](#)

Resources

It would not have been possible to make this guide without relying on some excellent online resources.

- The text of the [Equality Act \(2010\)](#) online provided by the uk government.
- The [British and Irish Legal Information Institute](#) archive of case law judgments.
- The [StammeringLaw website](#) which offers a well organized collection of legal analysis of uk disability law (statute and case law)
- The [Disability Attitude Readjustment Tool \(DART\)](#) a guide on bringing a disability discrimination claim to the county court on the small claims track.
- The [Civil Procedure Rules](#). Basically the lawyers rule book as set out by the ministry of justice as to how civil cases are conducted.
- The equality and human rights commissions guide, [Services, Public functions and Associations: Statutory Code of Practice](#).

Review of Relevant Legislation

Is autism a disability?

We are mostly concerned with the equality act 2010 which defines a disability as follows

Equality Act 2010 (section 6 subsection 1)
<p>6 Disability</p> <p>(1) A person (P) has a disability if—</p> <p>(a) P has a physical or mental impairment, and</p>

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.
Equality Act 2010 (schedule 1 section 5(1))
<p>5</p> <p>(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities if—</p> <p>(a) measures are being taken to treat or correct it, and</p> <p>(b) but for that, it would be likely to have that effect.</p>

Autism, as a mental impairment clearly satisfies 6(1)(a) and as a congenital life long condition satisfies the long term element of section 6(1)(b). In many cases it will be obvious that autism affects the ability to carry out normal day to day activities if the autistic person is non verbal or needs help to wash, clothe or feed themselves. However many autistic people are so-called high functioning autistic people with average or above average intelligence. They may be able to hold down a job, live independently, many have advanced qualifications, degrees, PhDs, considerable professional skills. So the question arises are autistic people always disabled?

While it's impossible to give a definitive answer the case of Elliott v Dorset County Council [1] is highly instructive. Elliott was autistic and appeared to have general difficulties in communicating with his new manager and specific difficulties with a change in recording his working hours the manager insisted on. However the issue at appeal was did Mr Elliott's autism amount to a disability. The employment judge had taken the view that because Mr Elliott had adopted some effective coping strategies that usually enabled him to comply with the changes requested of him the impact on his day to day activities was minor. The definition of substantial in the act is 'anything more than minor or trivial' [6].

The appeal judge disagreed finding a number of faults in the employment judges legal reasoning

- They did not take a proper inventory of the day to day activities, including work activities, that Mr Elliott could not do, or could only do with difficulty. Instead focusing on what he could do.
- They focused on coping strategies failing to take into account
 - That such coping strategies may amount to measures under schedule 1 section 5(1),
 - That the strategies may in themselves involve avoiding certain day to day activities,
 - That coping strategies may breakdown - and
 - That exercising a coping strategy may cause the autistic person considerable stress.
- They relied on a comparison of Mr Elliott with the general population when the proper test was was there a substantial (more than minor) adverse impact on his ability to do specific day to day activities. The test to be applied was, what was the impact on what Mr Elliot could not do, relative to what he'd be able to do if he were not autistic. [2 p68]

This last point is quite important. A disabled athlete does not cease to be disabled because they can do things ordinary people can't and use their athletic prowess to overcome some of their disabilities limitations. In much the same way an intelligent autistic person does not cease to be disabled if they have found ways to use their intellect to partially compensate for their deficits in communication, social skills and other issues.

Discrimination arising from disability

Before discussing discrimination arising from disability it is appropriate to discuss the case of *Lewisham LBC v Malcolm* [3] that helped to prompt the creation of this law. Here a schizophrenic man sublet his council house contrary to council rules. When the council sought to evict this man a lawsuit for disability arose alleging disability discrimination on the basis that he had only sublet his home because of his schizophrenic state of mind. The House of Lords eventually ruled on this case determining that the important questions under the law were whether the council had his disability in mind when deciding to evict him and that the appropriate comparison was would they have treated a non schizophrenic man who sublet his house in the same way.

This was largely held to strip necessary protection from disabled people and so with the equality act a new law against discrimination arising from disability was introduced.

The important point being from its inception discrimination arising from disability was always intended to offer protection for disabled people who's disability's effect on their mind might cause them to break the written and unwritten rules of society. This of course includes autistic people.

Equality Act 2010 (section 15)

15 Discrimination arising from disability

- (1) A person (A) discriminates against a disabled person (B) if—
 - (a) A treats B unfavourably because of something arising in consequence of B's disability, and
 - (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
- (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Unfavorable treatment

In order for something to be discriminatory under section 15 it must first be unfavourable. The notion of unfavourable is used in an absolute sense rather than in comparison to any other standard of treatment. So for example treatment that is favourable but less favourable than some people think it should be falls outside of the scope of this law. [4 p.28] By the same token

treatment that is unfavourable but more favourable than some people might think is deserved is still unfavourable for the purpose of section 15.

Unfavourable treatment includes any kind of disadvantage potentially even if the disadvantage is somewhat subjective such as say being refused the opportunity to be a volunteer for a task that is usually considered undesirable. Even if a service provider believes the treatment is in the autistic person's best interest it may still be unfavourable.

Examples of unfavourable treatment might include

- An autistic club member is banned from a particular event the club runs (or the club) because some members consider their behavior 'creepy.'
- An autistic person is prohibited from joining in with certain kinds of discussions, topics or activities because some members find their behavior to be insensitive.
- An autistic person in a book club is banned from submitting reading suggestions to the book club because previous suggestions have been controversial.
- An autistic person playing in a club's dungeons and dragons game is told they must adhere to rules that apply only to them, restricting their style of play because other players have previously found their style of play annoying.
- A club runs a PR event to encourage more members to join and an autistic member is told not to attend in case they put off potential members by being 'weird.'
- Someone makes a complaint against an autistic person but the organisation gives the complainant assurances their identity won't be revealed. In order to conceal this identity relevant information may be redacted or withheld. Putting an autistic person in the position of having to defend themselves without all the relevant information.

Unfavourable treatment may also include not doing something that, had circumstances been otherwise, you ordinarily would [5 p61 & p77] [6 ss(2)]

Causation

The question of whether unfavourable treatment is 'because of something arising in consequence of B's disability' has been defined in case law as a 2 part one. The first question is what incident or issue motivated the unfavourable treatment, which is a question of A's mental state. The second question is a purely objective test. Was this incident or issue caused by a disability? There is no defence of claiming you didn't know that the disability could give rise to the particular type of issue or that you weren't aware of circumstances that indicated the connection between the disability and the incident. [7 p45-47] The law supposes that it is A's responsibility to educate themselves enough about autism and to perform as much investigation as necessary into the circumstances of incidents so as to avoid breaking this law.

In particular, claiming that it was not possible to ask the autistic person about the state of mind that precipitated a particular incident, whether that be due to cost or complexity or confidentiality issues, will not invalidate an assessment that an incident arose as a consequence of autism.

The causation of the incident or issue by the disability need not be direct. [5 p65] Nor does disability need to be the only causative factor. [8 p18] It is enough that had B not been autistic the incident or issue was significantly less likely to arise.

Risby v London Borough of Waltham Forest [8] is a particularly instructive case where a disabled man subjected his boss to verbal abuse when he discovered training organised by work was in a venue that was inaccessible due to his disability. The court accepted that the verbal abuse was the reason he was sacked and that verbal abuse was not directly caused by his disability but found that there was an indirect chain of causation from his disability to the verbal abuse via his frustration at the failure to provide an accessible venue. And the court held this to be the case even though the disabled man had a reputation for being short tempered which the court accepted was also a contributing factor.

Examples of ways an issue or incident might arise from a person's autism include.

- An organisation has a rule prohibiting service users from causing each other offence even unintentionally. Autistic people struggle to read non verbal cues that might indicate distress or offence and also struggle to predict the thought process of others, including those processes giving rise to feelings of offence. Because of this any offence caused is likely to be a consequence of autism.
- An organisation has a simple rule that autistic people can easily interpret. However the organisation only enforces the rule selectively because interpreted literally it prohibits activity they never intended to prevent. As a consequence the autistic person feels isolated not being allowed to join in with their peers and also frustrated observing others infringe this rule without consequence. Consequently they ignore the rule in a way the organisation considers unacceptable. The autistic person's general rigid thinking and inability to understand the basis upon which rules are enforced selectively is arguably the underlying cause for the infraction which is therefore a consequence of autism.
- An organisation has a clear rule they consistently enforce but only when complaints are made. However this rule is frequently broken by service users collectively who do not complain when this rule is broken. An autistic person breaks this rule and service users complain. On account of his autism the autistic person was unaware that other service users would view his breaches of the rule differently to their own or that some service users might wish to use a complaint as a pretext to expel him. In this way the complaint was caused by autism.
- An organisation receives a number of complaints about an autistic person behaving in a weird or aggravating way. No rule against this conduct exists but they decide to create a rule or impose a special condition on the autistic person. As peculiar behavior and a lack of awareness of how it affects others is often a consequence of autism the complaints are themselves likely to be considered a consequence of autism.

Of course by extension a disciplinary procedure is a consequence of a complaint or perceived infraction of the rules so if a complaint or infraction is caused by autism any treatment within the disciplinary process that is unfavorable is also within the scope of this law.

Objective Justification

Organisations can subject autistic people to unfavourable treatment if they can justify it as a “proportionate means of achieving a legitimate aim.” The courts have laid down a systematic approach to assessing this. [10 p28]

The 4 tests are:

- There must be a legitimate aim sufficiently important to justify limiting a fundamental right.
- The unfavourable treatment must be rationally connected to this aim.
- The unfavourable treatment must be no more than necessary to achieve the legitimate aim
- The disadvantages caused must not outweigh the benefits of the legitimate aim

Legitimacy

The legitimate aim by definition addresses the future not the past and can not be discriminatory in itself. So for example in and of itself ensuring punishment for past behaviour caused by disability is unlikely to be a legitimate aim although deterring future behaviour may be.

Additionally legitimate aims should be general not personal in scope. For example it may be legitimate to aim to prevent some form of undesirable behaviour but not one particular person's undesirable behaviour.

Legitimate aims in cases involving autism are often controversial in themselves. Common examples of things that may be claimed as legitimate aims include.

- Prevention of harassment.
 - Including harassment of a complainant in retaliation for making a complaint.
- Prevention of disruption.
- Maintaining the reputation of and confidence in the organisation.

Whether these aims are legitimate may often be controversial. Harassment for example as defined in the protection of harassment act is a crime but the definitions of harassment organisations use are typically much broader than the law and it's unclear if preventing harassment more generally, harassment not amounting to a crime, will be a legitimate aim, particularly if the alleged harassment is deemed to fall under lawful freedom of expression as defined in article 10 of the human rights act. [11]

It's noteworthy that the legitimate aim of preventing harassment in retaliation for a complaint is often raised in connection to the unfavourable treatment of not telling an autistic person who made the complaint against them and by extension what they are actually accused of.

Similarly avoiding disruption that prevents or makes it very hard for an organisation to provide its services is likely to be a legitimate aim. It's not clear if preventing disruption that merely amounts to autistic people acting in a peculiar way that creates an uneasy environment for other

service users collectively can be a legitimate aim. Particularly if their unease lacks a rational basis.

To illustrate this the appropriate comparison may actually be with people who have facial disfigurements. Facial disfigurements are defined by the act as a disability even though generally they do not affect people's mental or physical abilities. [12] They do however affect people's social abilities as many people feel uncomfortable interacting with people with facial disfigurements. For this reason they are protected under disability law even at the cost of making some people around them uncomfortable. Likewise the discomfort some people may experience interacting with autistic people is genuinely felt but often not rational and not in the interest of society to encourage.

Likewise maintaining a reputation as an organisation for taking the wellbeing of your services users very seriously is likely to be a legitimate aim but maintaining a reputation as an organisation that insulates service users from the discomfort they may experience interacting with disabled service users is very unlikely to be a legitimate aim even if that's something the majority of service users desire.

Rationality / Effectiveness

The next important question is whether the unfavourable treatment is rationally connected to the aim. Generally speaking the less effective a measure is in achieving a legitimate aim the harder it will be to justify as proportionate and if it's completely ineffectual it is no longer 'rationally connected' to the aim.

For example, if the claimed legitimate aim is to prevent a particular prohibited action, say disruptive behaviour as defined in an organisation's rules, even if it is assumed this is a legitimate aim, selective enforcement of the rule associated with the aim, or the inability to enforce it generally, will undermine the rational connection to the aim. The measure may be effective in preventing the autistic person from breaking the rule in future but very ineffective at ensuring the rule is kept more generally since the exceptional circumstances of the autistic person's punishment are unlikely to make it an effective deterrent for the rule in general.

In this case an organisation may have to adopt a narrower legitimate aim of preventing certain types of behaviour more specific than those defined in their rules or preventing those breaches that service users find most objectionable. But in this case it invites the court to re-examine whether the aim remains legitimate and a narrower aim may make it harder to justify unfavourable treatment as proportionate.

In the particular case of concealing relevant information about a complaint to prevent retaliatory harassment there is a legitimate question as to whether this is "rationally connected to the aim". An autistic person acting maliciously against a specific person is likely to be able to infer who has made a complaint and an autistic person whose behaviour was not maliciously motivated is much less likely to respond with retaliatory harassment. Whether concealing the information is significantly reducing the likelihood of retaliatory harassment is debatable.

Minimality

The third and arguably most important consideration is whether the unfavourable treatment is no more than needed to achieve the legitimate aim. Organisations often suffer a lack of motivation to employ imaginative thinking when considering how to deal with autistic people.

The defence that something was a proportionate means of achieving a legitimate aim is an objective defence not a subjective one. It does not matter whether the action appeared proportionate to an organisation at the time it must actually have been proportionate.

If an organisation needs to justify its actions as proportionate the responsibility is upon it to sufficiently investigate alternatives to ensure there is no less unfavorable course of action available.

This aspect of proportionality often aligns quite closely with reasonable adjustments as one should consider if reasonable adjustments were to be made would the situation that the legitimate aim seeks to avoid be likely to reoccur.

However the reasonable adjustment duty typically operates in an anticipatory fashion and discrimination arising from disability is retrospective. There may be situations in which something that it would not be reasonable to anticipate occurs and an organisation must consider if some adjustment could still be made to prevent this from reoccurring without needlessly disadvantaging the autistic person. [13 p79-81]

In particular it may be very difficult to justify unfavourable treatment on the basis of applying so-called zero tolerance policies or any provision of a rule that removes from consideration the circumstances of an incident or the intentions and state of mind of the autistic person. In order to justify this an organization would have to show that making an exception where the circumstances, intentions and state of mind of the autistic persons were taken into account would significantly undermine a policy's effectiveness in achieving a legitimate aim (presumably deterrence) and that there was no realistic way to mitigate this reduced effectiveness.

Various alternatives that an organisation may need to consider regarding the outcomes of disciplinary / expulsion processes include

- Whether the rules need to be re written
 - To ensure they don't prohibit behaviour outside of the scope of the legitimate aim
 - To make them more objective and so easier to systematically interpret (even if that makes them more complex)
 - To ensure literal interpretation of the rules doesn't prohibit things the organisation does not intend to use enforcement to prevent.
 - To avoid prohibiting conduct that is commonplace and that the organisation lacks either the means or intention to prevent with enforcement.
 - To make the circumstances of events and the intentions and mental state of autistic people factors in determining whether rules are broken and what the outcomes should be.

- Providing feedback to autistic people about specific incidents where they have upset people explaining clearly and in detail why they were upset.
- Engaging other service users in dialogue to help them understand an autistic person's behaviour.
- Ensuring an autistic person has an impartial contact sympathetic to their own inclusion whom they can ask for confidential advice about their own behaviour.
- Asking an autistic person to avoid contact with a specific person as much as is practically possible while still fully participating.
- Asking (probably as a last resort) an autistic person not to participate in certain activities or events where further incidents are particularly likely to occur.

When unfavorable treatment relates to the disciplinary process itself potentially more proportionate alternatives that may need to be considered include.

- Ensuring that the autistic person is notified in writing of, and given ample time to respond in writing to, the details of any disciplinary matter being considered.
- Ensuring that the autistic person is informed of the details of specific incidents being considered.
- Attempting mediation or some other form of facilitated dialog with a go between or mediator between an autistic person and complainant to assist them in understanding each other's actions and feelings.
- Asking the autistic person about how different disciplinary outcomes would be likely to affect them and taking this into consideration.

Many of these alternatives might be considered under the reasonable adjustments duty however even if some might not be considered reasonable in an anticipatory sense they may still be reasonable retrospectively. [13 p79-82]

Impact

The final point to be considered in terms of proportionality is whether the disadvantages caused outweigh the benefits of the legitimate aim. Organizations must ensure the negative impact of unfavourable treatment does not outweigh the benefits for others. The practical effect of this rule is two fold. There may be some cases where no reasonable adjustment could have prevented an incident or is likely to prevent future incidents but where unfavourable treatment is still discriminatory. Even if the impact of failing to achieve a legitimate aim is severe, if the negative impact on the disabled person is even more severe and there is no other way to meet the aim the law prohibits unfavorable treatment.

The second notable effect is that it's entirely possible for there to be two autistic people involved in two apparently identical cases but for one case to amount to discrimination and the other not. If one autistic person is going to be much more severely effected by unfavourable treatment than the other even with all other factors being equal this can make the difference between whether or not unfavourable treatment amounts to discrimination.

Organisations do need to investigate and take into account the impact of unfavourable treatment on a personal level on a case by case basis in order to be sure of avoiding discrimination. Again it should be remembered proportionality is an objective test. Arguing that

the organisation was unaware of an unusually negative impact of unfavorable treatment in a specific case is not a defence.

Organisations would be well advised to consider the impact of excluding an autistic person from a group, activity or event. NICE guidelines [14 p1.4.5-1.4.6] recommend, “for adults with autism without a learning disability ..., who are socially isolated or have restricted social contact. ... a group-based structured leisure activity programme.” And emphasise it should have, “a focus on the interests and abilities of the participant,” and, “regular meetings for a valued leisure activity.”

It is clear from this wording that if an autistic chess enthusiast is thrown out of the chess club you can't assume sending him to the football club is an adequate way to address his social needs. A major feature of autism is highly restricted interests. It's entirely possible that in some cases that a particular special interest group may be the one and only option for meeting NICE's guidance for a particular autistic person and exclusion is likely to greatly exacerbate their social isolation.

An organisation that finds this to be the case is likely to find it harder to justify an exclusion or ban.

Ignorance Defence

While justification and whether an issue or incident arose from disability are purely objective considerations where an organisation can not rely on ignorance as a defence; section 15 does create one specific ignorance defence where an organisation can show it was completely unaware and couldn't be expected to know of the disability of a person they treated unfavorably. This can be problematic for autistic people because it is largely a hidden disability especially for those autistic people with good verbal skills and without intellectual disability.

Some organisations have the practice of resolving the kinds of issues that lead to the unfavorable treatment of autistic people very rapidly. Often without much consultation with the autistic person. It is quite possible that they will not become aware that a person is autistic until shortly before or even after an autistic person may have been sanctioned or expelled.

This may be a defence for their treatment of the autistic person up to that point. However it is likely that in such cases it will be considered a reasonable adjustment to repeat all or part of a process that leads to unfavorable treatment to reconsider its outcome in the context of an autistic person's disability.

It should also be noted that a formal diagnosis of autism is not necessary for section 15 to apply. According to section 6 of the equality act, for an impairment, such as autism, to qualify as a disability it must have a substantial and long-term adverse effect on the autistic person's ability to carry out normal day-to-day activities. A diagnosis of autism is usually held to be a disability by this standard but a court is free to infer that a person has an autism-like disability without formal diagnosis if it is satisfied there is a mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

Normal day to day activities of course includes maintaining an active social life and a normal range of relationships with friends and family.

Even if a court considers that it requires medical evidence to establish a disability, the fact that an undiagnosed autistic person has informed an organisation that they believe themselves to be autistic is likely to invalidate an ignorance defence.

Failure to make reasonable adjustments

Equality Act 2010 (sections 20 (abridged) and 21)
<p>20 Duty to make adjustments</p> <ul style="list-style-type: none"> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A. (2) The duty comprises the following three requirements. (3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. (4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage. (5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid. (6) Where the first or third requirement relates to the provision of information, the steps which it is reasonable for A to have to take include steps for ensuring that in the circumstances concerned the information is provided in an accessible format. (7) A person (A) who is subject to a duty to make reasonable adjustments is not (subject to express provision to the contrary) entitled to require a disabled person, in relation to whom A is required to comply with the duty, to pay to any extent A's costs of complying with the duty. (11) A reference in this section, section 21 or 22 or an applicable Schedule to an auxiliary aid includes a reference to an auxiliary service.
<p>21 Failure to comply with duty</p> <ul style="list-style-type: none"> (1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

- (2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.
- (3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

Equality Act 2010 (schedule 2 sections 1 to 2)

- 1
 - (1) This Schedule applies where a duty to make reasonable adjustments is imposed on A by this Part.
- 2
 - (1) A must comply with the first, second and third requirements.
 - (2) For the purposes of this paragraph, the reference in section 20(3), (4) or (5) to a disabled person is to disabled persons generally.
 - (3) Section 20 has effect as if, in subsection (4), for “to avoid the disadvantage” there were substituted—
 - (a) to avoid the disadvantage, or
 - (b) to adopt a reasonable alternative method of providing the service or exercising the function.”
 - (4) In relation to each requirement, the relevant matter is the provision of the service, or the exercise of the function, by A.
 - (5) Being placed at a substantial disadvantage in relation to the exercise of a function means—
 - (a) if a benefit is or may be conferred in the exercise of the function, being placed at a substantial disadvantage in relation to the conferment of the benefit, or
 - (b) if a person is or may be subjected to a detriment in the exercise of the function, suffering an unreasonably adverse experience when being subjected to the detriment.

The provision for reasonable adjustments predates the equality act. It was previously a provision with the disability discrimination act and courts take into account cases under that act when reaching decisions.

The effect of section 20-21 read with schedule 2 is to create a duty on service providers to anticipate the disadvantages autistic people may experience on account of their autism and make all reasonable adjustments to prevent those disadvantages. In relation to the services they provide.

The principal is that the service should be provided in such a way as to put autistic people on the same footing as neurotypical people. The requirement is not just to make the reasonable adjustments necessary to give autistic people access to the service but to give them access to a service of the same quality, nature and terms as non autistic people enjoy. [15 ss(7)] [16 p30]

If further reasonable adjustments could provide for autistic people a service that is as extensive; confers the same benefits; and as lacking in limitations and drawbacks as that non autistic people experience. If any such reasonable adjustments could be made and haven't then the organisation will have been deemed not to have gone far enough.

Even under the terms of the disability discrimination act it was established caselaw that making reasonable adjustments for disabled people may involve treating them more favourably than non disabled people. For example by transferring a disabled person unable to do his current job to a better paid job regardless of whether he was the best qualified candidate. [17 p19]

The kinds of adjustments that can be required fall into 3 categories.

- Adjustments to avoid disadvantages caused by provisions, criteria or practices (effectively written and unwritten rules) usually in the form of changes to the rules and procedures of the organisation in question.
- Adjustments to avoid disadvantages caused by physical features, usually of buildings. Often involving the modification of a physical feature. (Eg installations of ramps / lifts)
- Adjustments to provide an auxiliary aid or service to help alleviate a disadvantage. (For example in some circumstances it may be appropriate to provide autistic people a mentor or advisor who wouldn't normally be available to non disabled persons)

The modification of physical features is not often relevant to autistic people and so will not be discussed further.

Comparison?

In assessing disadvantage the comparison in the case of services is not between individuals but between non disabled people vs a group of disabled people in this case a group of autistic people. [18 p43] Consequently this duty is anticipatory and continuing.

Organisations should consider what reasonable adjustments are needed prior to being presented with a situation involving an autistic person but they should also keep their reasonable adjustments under review in case changing practicalities and needs make previously unreasonable adjustments reasonable.

Since reasonable adjustments are considered for a group rather than a specific disabled person it's unclear to what degree an organisation is obliged to make an ad hoc adjustment tailored to the specific needs of an autistic person. The statutory code of practice [19 s7.26] indicates that some additional responsibility to make tailored adjustments may occur when a specific autistic person presents themselves with a need for a specific adjustment. Case law has demonstrated apparently contradictory approaches to this issue [20] [21]. However if the disadvantage also amounts to unfavourable treatment under section 15 it's likely any lack of reasonable adjustments can still be addressed under section 15 no matter how ad hoc those adjustments might need to be.

It should be noted that the comparison between the group of autistic people and non autistic people may and often will be between groups where the circumstances of the groups are quite different. [13]

In the case of autistic people very often the relevant comparison may include material differences between autistic and non autistic groups. These differences may include:

- Whether or not they have kept the rules
- The extremes to which autistic people have to go to be sure of keeping the rules
- Whether or not they are viewed with suspicion or hostility by a subsection of other service users.
- Whether or not they are able to find sensitive ways to express their feelings and opinions.
- Whether or not they are able to infer without being explicitly told what incident may have prompted a complaint about them.
- Whether or not the thinking behind their behaviour can be reliably inferred without asking them about it in detail.
- The degree of difficulty they have in communicating or explaining themselves 'on the spot' in a face to face situation.

In short the rationale behind reasonable adjustments is that disabled people are different from non disabled people in important ways and therefore need to be treated differently. It would arguably be perverse to reject a comparison between a group of autistic people and non disabled people on the grounds of a material difference that arises as a consequence of their disability.

In this way the question of whether not something arises as a consequence of disability lies within the choice of the appropriate comparator groups although it's not explicitly referenced as in discrimination arising from disability.

Provisions criteria and practices

One of the 3 strands of the failure to make reasonable adjustments is the failure to make reasonable adjustments in relation to substantial disadvantage caused by a provision, criterion or practice (commonly abbreviated PCP). This could be something on paper like a written rule or technical definition that disadvantages autistic people or it could be something unwritten and even unofficial like a common habit an organisation has when dealing with certain situations. It could even be a one off action an organisation has taken in an exceptional case if the court is persuaded the organisation would be likely to behave in a similar way if other similar situations had occurred. [22 p38]

However it is necessary for one or more PCPs to be identified. For this strand it is not enough to point out autistic people experience a disadvantage without specifying a contributing PCP alongside the disadvantage caused. [23 p16] [24 p8-9]

It should be noted that the possibility that a PCP may be varied on an ad hoc basis to take account of disability is not necessarily enough to justify it. In the Griffiths case the PCP was formulated as “the employee must maintain a certain level of attendance at work in order not to be subject to the risk of disciplinary sanctions” [13 p46-47]. The apparent risk of sanction can give rise to substantial disadvantage in itself even if no actual sanctions would occur.

PCPs that are likely to cause disadvantage to autistic people include:

- Rules or Codes of conduct that are worded ambiguously or may have multiple interpretations in any given situation. Since the interpretation an autistic person adopts is less likely to align with the ‘common sense’ interpretation of the rule maker.
- Rules or codes of conduct that define breaking the rule with a subjective test that hinges on how someone perceived or felt about the autistic person's actions. This is something autistic people often struggle to predict, often withdrawing from social interaction will be the only sure way for them to avoid breaking the rule unintentionally.
- The practice of setting a rule or code of conduct that prohibits a wide range of behaviour but enforcing it selectively. Autistic people tend to interpret rules literally and if they see rules that are not enforced may conclude that they are not expected to follow them or feel socially excluded as a consequence of following rules others don't.
- The practice of limiting lawful discussion of controversial topics or expressing views on sensitive issues. Autistic people often have peculiar interests or unusual points of view and often find it hard to approach topics in a way others consider sensitive. Restrictions like this limit the freedom of expression of autistic people relative to non autistic peers.
- A rule or code of conduct that does not take into account the autistic person's state of mind and intentions or the practice of not enquiring about or giving sufficient opportunity for an autistic person to explain their state of mind. Autistic people are more likely to offend or upset people unintentionally than their non autistic peers. More prone to being misinterpreted. And more likely to misinterpret a rule.
- A rule or practice of concealing the identity of the accuser or details of the accusation from an autistic person subject to investigation or disciplinary process. Autistic people are both less likely to be able to infer the incident or person from context and less able to offer a defence without knowing the context. In fact arguing the context juxtaposed with their autism makes their actions excusable is likely their best defence.
- The practice of not providing feedback to autistic people when the organisation or service users object to their behaviour regardless of what if any other action is taken. Autistic people are more likely to break rules unintentionally and unknowingly. Without feedback there is no opportunity for them to change their behaviour.
- The practice of not encouraging and facilitating dialog between an autistic person and a complainant. Either direct communication or through an intermediary. Complaints against autistic people are more likely to arise as a consequence of miscommunication or misunderstanding, potentially in both directions. Helping both sides achieve clarity may lead to the complaint being dropped or reduce the probability of a recurrence.
- The practice of not investigating or considering whether a complaint was made as a consequence of hostility engendered by autism. Many autistic people make enemies and

engender hostility because their autistic behaviour generally is viewed as weird or suspicious. They are more at risk of targeted complaints as a form of bullying or subconscious bias.

- The practice of refusing to revisit or repeat stages of a disciplinary procedure after it becomes evident that the subject is autistic so that the procedure can be modified taking their autism into account. Autism is often a hidden disability and autistic people don't always see the connection between issues they face and their own autism. Autistic people are at risk of going through all or most of a disciplinary process without their autism being considered which is more likely to lead to an adverse outcome.
- The practice of requiring an autistic person to respond to an accusation 'on the spot' rather than by writing. Autistic people are more prone to misunderstanding and being misunderstood especially in stressful situations. With written material they may take time to reread it, their responses and seek support from 3rd parties.
- A zero tolerance policy that prevents a person's autism being considered as defence or mitigation for breaches of the organisation's rules or otherwise rules out outcomes that might be more appropriate given the involvement of autism in the situation. The zero tolerance policy is in and of itself a rule limiting reasonable adjustments.

The law requires organisations must "take such steps as it is reasonable to have to take to avoid the disadvantage." It might be tempting to think that formulaically the strand applies only to acts not omissions but this is not the case. [6 ss(2)] The practice of not doing something or the absence of a particular rule can still be a PCP. Generally if an organisation is already carrying out a particular type of activity, such as applying a disciplinary policy or a policy on banning certain types of customers, any modification will amount to steps in relation to a PCP even if that PCP is a policy or practice they don't have but should.

It remains open to the court to decide that a particular modification so fundamentally changes an activity, such as carrying out disciplinary action, that the nature of the activity is fundamentally different but under these conditions it's also open to the court to find the modification falls under the 3rd strand of providing an auxiliary service.

It should also be noted that the definition of a 'step' in this context is reasonably broad. "Any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP is in principle capable of amounting to a relevant step." [13 p64-65]

There is very little autism specific case law on adjusting disciplinary procedures for autistic people. Consequently even though it is an employment tribunal case it is instructive to examine in detail the case of *Bowerman v B & Q* [25] where a young man with Asperger's syndrome (a form of autism) challenged his dismissal for causing unintentional sexual harassment to another employee.

It was the judges observation that the workplace was one where “employees often engaged in banter and horseplay, some of this was of a sexual nature.” And accepted that Mr Bowerman’s autism would make it hard for him to judge what was appropriate in such an environment.

The judge accepted Mr Bowerman’s contention that he requested and should have been provided with a mentor saying, “A reasonable adjustment was the provision of a mentor to assist with his understanding and to support him. The mentor would have acted as a filter for both the claimant and his colleagues so that issues and misunderstanding could be resolved before a crisis arose. The appointment of a mentor would have been likely to have assisted both claimant and his colleagues in understanding each other’s respective position and therefore less likely to lead to inappropriate behaviour by the claimant towards them. On the evidence before me there was no action taken by the first respondent to seek the co-operation of the claimant’s colleagues in the way that they communicated with him.”

The judge also accepted Mr Bowerman’s contention that failing to modify the disciplinary process so that the incident being caused by his autism could act as a defence amounted to a failure to make reasonable adjustments. In the judges words, “There appears to be no adequate consideration as to whether an adjustment should have been made in the claimant’s particular circumstances, ie his disability, having been the effective cause of the conduct”

The judge went on to say, “I find that the respondent’s application of the disciplinary policy which classified unintentional sexual harassment as gross misconduct, which would ultimately lead to dismissal amounted to a provision or practice, which placed the claimant at a substantial disadvantage in comparison with persons who do not have Asperger’s Syndrome. His disability is likely to result in the misunderstanding of signals from others which could lead to inappropriate behaviour from him.”

Although it’s only a singular judgment of the employment tribunal the approach suggested by the tribunal might be adapted to infractions by and complaints against service users. It might be unrealistic to appoint a mentor to all autistic service users especially as an organisation might not be aware of their autism until after the complaint. However many of the functions the court ascribes to a mentor would also fit well with the role of mediator. Appointing a mediator and encouraging both complainant and the autistic person to engage in a facilitated dialog may well be a reasonable adjustment.

This could be adapted to a variety of situations. For a venue open to the public it might involve the staff taking the extra time to act as a go between conveying responses back and forth a few times between autistic person and a complainant.

For a club with a recorded membership and a formal disciplinary process it’s more likely to take the form of facilitated face to face meetings or some form of written exchanges.

In both cases the information gathered on the role autism may have played ultimately being fed into any later decision on potential bans.

It should be noted the common practice of granting complainants anonymity from those they accuse is largely incompatible with this type of adjustment. It's very difficult to engage in mediation of meaningful dialogue with an anonymous party. It's also the case that if such an anonymous dialog was successful in helping an autistic person understand why their behaviour had been upsetting it's quite likely it would also imply the complainants identity in the process.

In this way the practice of granting anonymity itself disadvantages autistic people both directly by making it harder for them to defend themselves and indirectly by excluding processes like mediation that could reduce the likelihood of undesirable situations reoccurring without resorting to some form of ban.

What is a substantial disadvantage?

The equality act defines a substantial disadvantage as anything more than minor or trivial. It would be fair to say that society itself puts autistic people at substantial disadvantage especially society's unwritten rules which so often feel so perfectly designed to trip the autistic person up.

As a consequence many autistic people experience severe social isolation and crippling anxiety about their own actions that considerably limits their self expression.

It is when service providers attempt to codify or otherwise enforce society's unwritten rules, when they choose to act as a proxy for those who wish to punish autistic people for not following those rules, that they can easily become guilty of discriminatory behaviour towards autistic people.

Autistic people struggle to predict how others will respond to their actions and are more likely to end up speaking with people at cross purposes or miss understanding the way others view their relationship with them. They struggle with subtext and non verbal communication. If someone is becoming upset, angry, uncomfortable, during an interaction with an autistic person the autistic person may not see the signs if they are communicated nonverbally. If something an autistic person says can be interpreted several different ways or may be seen to have negative subtext the autistic person may be unaware of this. The autistic person quite often sees only the one interpretation he intended carrying only the subtext he intended. Predicting how others may interpret his words differently than he intended is a hard thing for many autistic people to do. Many autistic people feel the need to 'mask' constantly when interacting with others. To take additional time, compared to non autistic people, to consider what they say and do before they say it and attempt to logically infer how non autistic peers will respond. In a fast paced conversation or a rowdy bourdy environment this leaves autistic people at a disadvantage because if there is anyone present in a group who is likely to be the one who takes a joke too far or makes a point insensitively it's much more likely to be the autistic person than anyone else.

When you juxtapose this with a service provider trying to enforce normal, non autistic, behaviour or satisfy the expectations of other service users regarding such behaviour the disadvantages to autistic people are obvious. They are more likely to be the subject of malicious or genuine complaints. More likely to be perceived, accurately or inaccurately, as breaking rules. Less able to offer a sympathetic defence within the cookie cutter disciplinary process and ultimately more likely to be excluded. Not only to be excluded by the service provider but also to be socially self excluded by the curbs they put on their own behaviour as they seek to avoid sanction.

At the heart of the issue of discrimination by service providers against autistic people is the question of to what extent is it right to include autistic people in mainstream society if they won't or can't meet others expectations of their behaviour.

Service providers should be aware that when they create codes of conduct or enforce some expectations of behaviour that they have engaged with this issue and that the equality act places legal duty on them to address and resolve the issue in line with its statute and case law.

It's not possible to summarize all the ways in which service providers may need to consider adjusting their practices to meet their obligations but in the table below we presented a hypothetical set of potentially discriminatory PCPs along with steps that might be considered and an explanation of the likely incurred disadvantages.

	A: PCP	B: Steps	C: Disadvantage
1	Rules or Codes of conduct that are worded ambiguously or may have multiple interpretations in any given situation.	Rules should not rely on the 'common sense' of the reader. Terms like 'harassment' and 'offence' should be given technical definitions in the rules.	Creates uncertainty about what is or isn't against the rules leading to a risk of being sanctioned for unintentional infractions. May also lead to the need to take extreme measures to avoid sanction that may be limiting the autistic person's social inclusion and freedom of expression.
2	Rules or codes of conduct that determine the breaking of rules with a subjective test that hinges on how someone perceived or felt about the autistic person's actions.	All code of conduct rules should incorporate an objective test not dependant on an one person's subjective opinion so that autistic people will be less at risk due to their difficulties in identifying hypersensitive individuals	Autistic people struggle to identify hypersensitive individuals and non verbal signals indicating discomfort or offence. Uncertainty about the subjective response of others leads to uncertainty about the rules and associated disadvantages (see cell 1C)
3	The practice of setting a rule or	Organisations should adopt rules that are as specific as	Autistic people may struggle to understand and anticipate the

	code of conduct that prohibits a wide range of behaviour but enforcing it selectively.	possible and ensure that their wording can not be interpreted as prohibiting behaviour that they can not or will not prevent with enforcement.	<p>rationale for enforcing rules in some situations and not others.</p> <p>The frustration and confusion they experience watching their peers break rules with impunity may lead to them ignoring rules.</p> <p>Also results in cell 1C-like disadvantages.</p>
--	--	--	---

4	Making rules designed to ban or limit the eccentric, controversial or peculiar behaviour of autistic people. Where such behaviour is not harmful or otherwise falls within legitimate freedom of expression.	The organisation should refrain from making targeted rules banning certain sorts of conversations or activity (that is not intrinsically harmful) merely because it's associated with complaints about the autistic person and their peculiar behaviour. Especially if they are unwilling or unable to enforce these restrictions upon non autistic people (see row 3)	Autistic people often have peculiar interests or points of view that some people may find uncomfortable. However banning these conversations and activities on the grounds that they may occasionally cause an unreasonable degree of discomfort for others is to greatly restrict the autistic persons freedom to express their interests and opinions as other service users do and can leave them feeling as though they are being targeted with greater restrictions than others because of their poor social skills that hinder their ability to recognise the circumstances in which their special interests may not be appropriate.
5	A rule or code of conduct that does not take into account the autistic person's state of mind and intentions	Disciplinary procedures should make it clear that the thought process and intentions of autistic people must be taken into account when determining whether a rule has been breached and what the outcome should be.	Autistic people are more likely to break rules or codes of conduct unintentionally rather than through malice or negligence. By refusing to take their thinking, which is influenced by autism, into account some autistic people will be punished for acts essentially caused by their autism. Also see rows 1-3
6	The practice of not enquiring about or giving sufficient opportunity for an autistic person to explain their state of mind.	Disciplinary procedures should invite autistic people to give an account of the thinking that led to their behaviour and give them enough information to do so meaningfully	Autistic people often have unusual perspectives on and responses to situations that can make the thinking behind their actions difficult to interpret. Failing to consult an autistic person about the thinking behind their actions significantly increases the risk their intentions and motivations being miss interpreted. See also cell 5c

7	A rule or practice of concealing the identity of the accuser or details of the accusation from an autistic person subject to investigation or disciplinary process.	There should be a written policy to always provide an autistic person with precise details of what they've been accused of doing, the specific incident referred to and the identity of any offended party.	<p>The inability to identify what they are accused of doing wrong puts autistic people at a disadvantage when it comes to explaining their actions (see cell 6&5C)</p> <p>It also limits their ability to point out when their accusers may have ulterior motives (see cell 10c)</p>
8	The practice of not providing feedback to autistic people when the organisation or service users object to their behaviour regardless of what if any other action is taken.	Even if a disciplinary matter leads to no objected to action the organisation should make the autistic person aware that the disciplinary matter arose and provide them with helpful details	<p>Autistic people are less likely to be aware that their actions might generate complaints so failing to inform an autistic person that a complaint has been made is denying them the opportunity to reassess the impact of their own actions.</p> <p>Also if such complaints are held on file for later use, not informing the autistic person at the time is to deny them the opportunity to put on the record what may appear to them to be an innocent explanation for their actions.</p> <p>See also cell 5c</p>
9	The practice of not encouraging and facilitating dialog between an autistic person and a complainant.	Prior to a disciplinary outcome the organisation should encourage the offended parties to enter a facilitated dialog with the aim of helping them understand each other's actions, thoughts and objections.	<p>Because the complained of behaviour of autistic people is often a consequence of miscommunication or miss understanding failing to give them an opportunity to resolve these miss understandings deprives autistic people both the opportunity to resolve a complaint by reaching an understanding with the complainant and it also deprives them of the opportunity to avoid similar situations in the future.</p> <p>See also cell 6c</p>

10	The practice of not investigating or considering whether a complaint was made as a consequence of hostility engendered by autism.	A written policy should require that autistic people are given enough information to raise the possibility that a complainant has an ulterior motive. It should also require that the motives of complaints be an appropriate topic for investigation and consideration when called into question.	Autistic people are more likely to antagonise individuals, often unknowingly, and so are more at risk of being accused because they are disliked generally. They are at risk of having complaints used against them as a form of bullying. Potentially with an actual incident used as a pretext.
11	The practice of refusing to repeat stages of a disciplinary procedure taking autism into account after it becomes evident that the subject is autistic.	There should be a written policy that whenever it becomes evident that the subject is probably autistic the disciplinary process should be repeated so as to confer the same benefits as if they had been assumed to be autistic from the beginning.	Autism is a hidden disability, often not obvious to the layperson. Many autistic people struggle to be formally diagnosed. Many autistic people will miss out on the benefits of reasonable adjustments if they are only applied after their autism is declared and even more so if it is only after a formal diagnosis.
12	The practice of requiring an autistic person to respond to an accusation 'on the spot' rather than by writing	There should be a written policy requiring that an autistic person is informed in writing of the relevant details in advance of any meeting and offering them the chance to respond in writing instead. Where this is not practical the chance to offer a written clarification should be offered prior to any final decision.	autistic people struggle to communicate generally and especially in stressful situations. Put 'on the spot' there is a risk an autistic person may be misunderstood or might misunderstand what they are being told, compromising their ability to give a fair account of their actions, thinking and motivation. See also cell 5c
13	A zero tolerance policy that prevents a person's autism being considered as a defence, mitigation or that mandates a severe response.	There should be a clear written policy that any zero tolerance rule may be set aside in cases related to disability and written guidance on when to do so based on the equality act.	zero tolerance policies by definition mandate inflexibility and disadvantage autistic people subject to disciplinary processes who often require the flexibility of being treated more favourably on account of their disability.

Auxiliary aids

References to auxiliary aids include auxiliary services (equality act section 20(11)) and for autistic people the relevant aids will typically be services.

In this strand the disadvantage to the autistic person need not be caused by a PCP (even one of omission). It is enough that a substantial disadvantage exists and the service provider can provide an extra service (or aid) to help redress that disadvantage and that it is reasonable for them to do so.

Occasionally the steps necessary to redress a PCP may be so elaborate that they seem to blur the line between addressing PCPs and adding an entirely new service. Historically courts have tended to take the view that if a reasonable adjustment relates to something the service provider already does then it will be considered a PCP even if the adjustment involves the service provider spending more money, dedicating more resources and significantly changing the way things are done. PCPs would typically include matters relating to drafting and enforcing a code of conduct, conducting disciplinary proceedings, handling complaints and performing investigations.

However if there is any doubt regarding whether a substantial disadvantage and the steps to alleviate it are attached to a valid PCP it will often also be possible to reframe the steps as an auxiliary service.

Adjustments are more likely to be auxiliary services when they don't pertain to a particular complaint or disciplinary action. Particularly supportive measures designed to help the autistic person prevent issues before they occur.

One auxiliary service that might help autistic people is the provision of a helpful and sympathetic point of contact they can speak to in confidence when they are concerned about rules, their interpretation and any interpersonal conflicts.

Another potentially useful service might be a confidential register the autistic person could add their name to so that, in the event of disciplinary proceedings or any complaint their autism will be flagged at the start of the process.

What is reasonable?

The first point to stress is that in deciding what is and isn't reasonable the test in law is an objective one. It will not matter if the decision not to provide an adjustment was understandable

or other organisations would or might have taken the same decision. The question is one of is the adjustment objectively reasonable on its own merits.

As one court put it. "Thus, so far as reasonable adjustment is concerned, the focus of the Tribunal is, and both advocates before us agree, an objective one. The focus is upon the practical result of the measures which can be taken. It is not - and it is an error - for the focus to be upon the process of reasoning by which a possible adjustment was considered"
[24 p8-9 & p15]

Ultimately the court determines reasonableness on a case by case basis and so far hasn't developed a formulaic approach to doing so. so it is difficult to lay down any firm rules on what is and isn't reasonable.

However the court will generally take into account

- The extent to which an adjustment is likely to overcome the disadvantage.
- Whether the adjustments would be a significant drain on a service provider's resources.
- What obstacles and disruption the service provider is likely to experience implementing the adjustment.

Indirect discrimination

Equality Act 2010 (section 19)

19 Indirect discrimination

- (1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
 - (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
 - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - (c) it puts, or would put, B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.
- (3) The relevant protected characteristics are—
 - age;
 - disability;
 - gender reassignment;
 - marriage and civil partnership;
 - race;
 - religion or belief;

sex;
sexual orientation.

Equality Act 2010 (section 23)

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

Unlike the law on reasonable adjustments and discrimination arising from disability the law on indirect discrimination applies to all protected characteristics including disability. When an issue gives rise to action under discrimination arising from disability or the duty to make reasonable adjustments it is often also possible to pursue it under indirect discrimination.

It is therefore productive to proceed by discussing how indirect disability discrimination differs and what the implications might be.

Differences between indirect discrimination and discrimination arising from disability

Unlike discrimination arising from disability it is necessary to identify a pcg, some set of rules or practices, that is applied to everyone but that places autistic people at greater disadvantage.

The test is applied to the group, not the individual. A common approach is to look at the group of people subject to the PCP and split it into 2 subgroups. Non disabled people and autistic people. If the autistic group is more frequently and/or severely affected than the non disabled group then the group test is probably satisfied. [26 p24-29] [19 s5.21] There is no need to argue a particular mechanism of causation, demonstrating correlation is enough although an argument for causation may be helpful in establishing that. [26]

Unlike discrimination arising from disability justification applies to autistic people in general not a specific autistic person. [27 p41] The 4 tests of legitimacy, effectiveness (rationality), minimality and impact must be applied with reference to the subgroup of affected autistic people.

Unlike discrimination arising from disability having prior knowledge of the disability is irrelevant.

Because it's not necessary to prove causation it may sometimes be easier to challenge a rule that targets an autistic person through behaviour that might be less obviously caused by autism.

Autistic people are often eccentric and have odd interests. If a organisation seeks to ban or limit eccentric behaviour or behaviour associated with weird interests it may be easier to prove the connection to autism under indirect discrimination where it would be possible to show autistic people are statistically more likely to have this peculiar interest or eccentricity.

It's also worth noting that these odd behaviours sometimes extend to age and gender atypical behaviors and interests (eg cross dressing, juvenile or precocious interests etc) which may give rise to combined actions of indirect (or possibly direct) discrimination with other characteristics.

Differences between reasonable adjustments (services) and indirect discrimination.

Unlike reasonable adjustments indirect discrimination is only relevant when a PCP (or the omission of one) causes a disadvantage. The rule does not require the service provider to create a totally new service unconnected to previous activity or an aid or to modify physical features.

The scope of appropriate alternatives to the PCP is also narrower. In the case of reasonable adjustments 'steps' to address the effects of a PCP is a very broad concept. In indirect discrimination the court will principally consider how the service provider could have changed the PCP (or created a new one) rather than whether they should have employed creative ad hoc solutions [27 p41-42]

Indirect discrimination as a form of harassment protection

As we will see later, other provisions of the equality act 2010 do not admit the possibility of one service user taking legal action over another service user's actions. However in some limited sense indirect discrimination can be used in this way. Lower courts have previously found failing to have a robust and properly enforced policy for preventing discrimination may in itself be indirect discrimination. [28 p159-162] However the need to make allowances for disabled service users may well be an objective justification (under section 19(2)(d)) for such a policy applying differently to autistic people. Indeed in *Risby v London Borough of Waltham Forest* [8] there was an alleged racial dimension to Mr Risby's verbal abuse.

Also such a requirement to take steps to prevent discrimination between service users could apply equally to preventing the bullying of autistic people. Especially by critically assessing whether complaints against autistic people were motivated by hostility towards their autistic traits.

Distinction between services and associations

The distinction between a service and association is largely whether or not there is a selection process. A venue open to the general public, a club or group you can join just by filling out a form, an event you can enter just by paying on the door. These are generally services. If you have to make an application which is critically assessed, in short if there is a selection process,

then it would generally be an association. The rules applying to both are nearly identical and services are by far the more common.

Enforcement

The equality act provides for its enforcement against service providers and associations through the county court. [29 s114] Disabled persons must bring cases in respect of the breach of the act. Often this will be as a litigant in person.

The equality act grants the county court all the powers of the high court (in cases of tort or judicial review) to grant remedies which means in theory even the county court operating on the small claims track (for cases worth less than 10000£) could impose an injunction on an organisation that would change the way it operates day to day. [29 s119(2)] [30 s27.3]

In many cases the core of the issue will not be damages. The services being denied in discrimination cases are often unique and irreplaceable. In monetary terms the cost of the service may be less than 1000£ but in personal terms to the autistic person it may be invaluable. An injunction may open the door to restore access to the service. Failing that the act does make provisions for injury to feelings [29 s119(4)] and an award towards the top of the small claims band (up to 10000£) may well prove a hefty deterrent to organisations. However in terms of improving the situation for the autistic individual an injunction is often the most effective remedy. It's worth considering asking the county court for an injunction (not to be confused with an interim injunction), even on the small claims track.

Another thing autistic people acting as litigants in person should be aware of is the risk of their case being assigned to the fast or multi track. On the fast or multi track the costs of the lawyers are typically paid by the losing side. Organisations accused of disability discrimination, even in low value cases, often have a considerable incentive to avoid reputational damage and injunctions and will understandably commit to spending a great deal of money on their legal defence.

Autism is a complex disability and the risk is the county court may feel the time required for hearing such a case is more than can be reasonably allotted to a small claims case (usually half a days' hearing). However the court is able to consider a whole range of factors including the autistic person's financial means. Organisations may and do use the threat of costs as a deterrent to compel a claimant to settle.

If a case is particularly complex the court could be invited to consider whether it is in the interests of justice (and in keeping with the civil procedure rules [31 s26.8(1)]) to assign a complex case involving autism (with a value of up to 10000£) to the small claims track (as part 26.6(3) of the civil procedure rules [31] suggests) but make additional directions under part 27.7 of the civil procedure rules [30] that both sides prepare written legal arguments so the hearing can primarily focus on disputed questions of fact which are likely to be more straightforward and less time consuming.

It's quite possible written legal arguments produced by autistic litigants in person may be clearer and more productive for the courts in any case and the use of such 'skeleton' arguments is not unusual in legal practice.

Harassment under the equality act

Equality Act 2010 (section 26)
<p>26 Harassment</p> <p>(1) A person (A) harasses another (B) if—</p> <ul style="list-style-type: none"> (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of— <ul style="list-style-type: none"> (i) violating B's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B. <p>(2) A also harasses B if—</p> <ul style="list-style-type: none"> (a) A engages in unwanted conduct of a sexual nature, and (b) the conduct has the purpose or effect referred to in subsection (1)(b). <p>(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—</p> <ul style="list-style-type: none"> (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect. <p>(5) The relevant protected characteristics are—</p> <ul style="list-style-type: none"> age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.

section 26 provides protection from harassment. It applies to harassment related to a protected characteristic (including disability's like autism) and sexual harassment. It applies to harassment of service users by service providers and to employees by employers.

Originally the equality act also had a provision making employers liable for the harassment of their employees by service users if they failed to take reasonable steps to prevent it. However this provision has now been repealed. [33] The act has never established any provision for a service provider (or anyone else) to be liable for harassment (as defined in section 26) of one service user by another.

A service provider may be liable under section 26 for failing to take action over a service user's conduct only if the service provider's inaction (as opposed to the service user's action) is related to the complainants protected characteristic. [34 p98] [35 p52]

Service providers should be wary of relying upon section 26 for justification of disciplinary policies and codes of conduct. One thing to consider is section 26 is typically applied in a professional environment and most services are not provided in a professional environment. Venues such as bars, clubs and activity groups are social spaces in which people can expect a degree of unprofessional behavior, behavior out of place in a workplace, to be normal and acceptable.

A good example of how the law interprets harassment in an unprofessional context can be seen in the case of *Evans v Xactly Corporation*. [36] Mr Evens claimed harassment when a colleague referred to him as a 'fat ginger pikey.' Mr Evens, having strong links to the traveler community, objected to this.

The court's position was that the context (as referenced in subsection (4)(b)) was extremely important in determining harassment. The work culture of this office was one where casual trading of insults was normal and Evens had participated in and encouraged this practice of friendly insult trading.

The decision of the tribunal as approved by the court was that "(4) in any event it would not have been reasonable for him to have considered his dignity was violated or the environment was hostile etc given the particular circumstances and all the context and material facts relevant to the claim."

So that in this case where an environment was extremely unprofessional and the claimant had participated in and encouraged that unprofessionalism a professional standard for harassment could no longer apply to the same degree.

However if one were to attempt to apply section 26 to the actions of autistic service users towards other service users one would have to consider the impact of subsection (4)(b) which requires the circumstances of the service users autism be taken into account. When considering the objective test in subsection (4)(c) the question must be asked: is it objectively reasonable to consider that behaviour that was driven by a disability, and was likely unintentional, violated someone's dignity etc?

A helpful comparison would be that of a blind man who, finding himself disoriented and unbalanced, reaches out for a handrail but instead touches someone's body in a way they consider sexual and unwanted. With regards to subsection (4)(a) above the victim may well feel harassed. And excluding the circumstances of the man's blindness it may well seem reasonable in (4)(c) to define it as harassment. But (4)(b) mandates that the circumstances of the man's blindness must be taken into account and in that context the test in (4)(c) is clearly not satisfied.

Autism can be considered a kind of social blindness. It is arguably no more reasonable to consider the unintentional discomfort caused by a person's autism as harassment than the unintentionally touching of a blind man.

The protection from harassment act

Protection from Harassment Act 1997 (section 1 (abridged))

1 Prohibition of harassment.

- (1) A person must not pursue a course of conduct—
 - (a) which amounts to harassment of another, and
 - (b) which he knows or ought to know amounts to harassment of the other.
- (2) For the purposes of this section or section 2A(2)(c), the person whose course of conduct is in question ought to know that it amounts to or involves harassment of another if a reasonable person in possession of the same information would think the course of conduct amounted to harassment of the other.
- (3) Subsection (1) or (1A) does not apply to a course of conduct if the person who pursued it shows—
 - (a) that it was pursued for the purpose of preventing or detecting crime,
 - (b) that it was pursued under any enactment or rule of law or to comply with any condition or requirement imposed by any person under any enactment, or
 - (c) that in the particular circumstances the pursuit of the course of conduct was reasonable.

Unlike harassment under the equality act, harassment under the protection of harassment act applies to the acts of service users towards other service users. It may be tempting for service providers to think that harassment as defined under this act, which establishes it as a criminal offence, provides a firm basis for a zero tolerance approach. However there are a number of things they should consider first.

Autism's effect on interpretation

The protection from harassment acts definition of harassment is very nearly a circular one. One might say harassment is harassment if one ought to know it is harassment. So the question will often be what ought an autistic person to know is harassment. The law offers some clarification. A person generally ought to know something is harassment if a reasonable person with the same information would consider it harassment.

The argument has been made and rejected in court that when the subject is disabled, in the particular case disabled with schizophrenia, the test should be would a reasonable schizophrenic with the same information consider it harassment. [37] The 2 principle reasons for this rejection being that

- The court was not convinced you could reliably construct a notion of a reasonable schizophrenic and
- It would defeat the purpose of the act by removing the protection it offers from stalking given that a great many stalkers have mental illnesses like schizophrenia.

Arguably neither of these considerations apply to autism. Autistic people do not have an intrinsically impaired reasoning process. They have a lack of information about social context. An autistic person may lack:

- Information about a person's non verbal communication that may indicate their discomfort
- Information about what is socially appropriate. Much like a foreigner entering an unfamiliar country autistic people may lack an instinctive understanding of what may offend or alarm.

The list is not exhaustive. The subconscious mind presents a considerable amount of information to the conscious mind, for it to reason with, without the conscious mind having to think about it.

It can be argued that in the case of an autistic person the proper test for harassment is whether a reasonable person who may or may not be autistic but who has only the information the autistic person has, including the information provided by the autistic person's subconscious mind, considers something to be harassment.

This test does not require construction of a hypothetical unreasonable reasonable person nor does it strip protection from victims of stalking because once an autistic person had had the impact of their actions on another properly explained to them they would no longer be able to use autism as a defence.

The service provider as a harasser

The court has maintained that under very limited circumstances an organisation may be guilty of harassment for their inaction over the alleged harassment of a 3rd party. [38] However the legal test requires that their inaction be “oppressive and unacceptable.” [39 p11] Inaction due to concerns raised about the 3rd party's disability is unlikely to be oppressive and unacceptable within the meaning of the protection from harassment act.

The significance of criminality

It has already been established in case law that the disabled persons criminality does not automatically make action taken against them on account of that criminality non discriminatory.

In *Burdett v Aviva* [40] a schizophrenic man who discontinued medication sexually assaulted 2 co-workers. The court found the convictions for sexual assault did not on their own automatically satisfy the objective justification test (a proportionate means of achieving a legitimate aim). The court held tribunals must consider if dismissal is a proportionate means of protecting their

employees. It also observed that in this case the discontinuation of medication appeared to be a genuine mistake which was unlikely to reoccur.

If a court is persuaded a criminal act was caused by disability it may treat this as very strong mitigation. With regards to the convictions for sexual assault the court showed great leniency due to Mr Burdett's condition essential placing him under a court order requiring him to take medication under regular supervision or face resentencing.

A similar principle applies to harassment. Even if an autistic person is found guilty of harassment the court may have so much regard to the impact of their condition that they see no grounds to take punitive measures. The court may not even be inclined to issue an injunction if it feels there would be little benefit and it would cause considerable trouble to the autistic person.

It would be strange if the equality act offered less protection from the punitive measures of service providers than disability as a mitigation does in criminal court.

A second example would be the case of *Hensman v Ministry Of Defence* [41] where an autistic man was dismissed for covertly recording people in the shower. The court found the tribunal had been within its rights to find this behaviour was caused by autism and that dismissal was a disproportionate means of addressing the legitimate aim of maintaining standards of conduct in the workplace.

It did however send the matter back to a fresh tribunal because the legitimate aim of maintaining secrecy on an MoD base had not been properly addressed by the tribunal.

It is surprising that both the *Hensman* and *Burdett* case reached the appeal stage. There is a provision (4(1)) under the statutory instrument "the Equality Act 2010 (Disability) Regulations 2010" [42] which excludes certain disabilities from being treated as disabilities for certain purposes under the equality act. This includes excluding autism being treated as a disability in so far as it may predispose an autistic person to physical or sexual abuse and voyeurism etc.

However this is secondary legislation that the courts may overrule if it conflicts with the human rights act. The courts have already overruled this provision once with regards to under 18s in an educational context. [43 p93-100] In any event the sort of conduct we are concerned with is predominantly behavior that could not be described as criminal except maybe under the protection from harassment act and so the "Equality Act 2010 (Disability) Regulations 2010" [42] is unlikely to apply.

Data protection act

A key aspect of addressing discrimination in complaints against autistic people is the need to share information about the complaint with the autistic person. The gathering of information about a complaint qualifies as the collection and retention of personal data under the data

protection act. It is sometimes claimed this is a bar to sharing information with autistic people subject to complaints.

However the DPA provides a legitimate interest justification for sharing data with a 3rd party [44] and is clearly in the interest of resolving the complaint fairly and in providing reasonable adjustments to disclose such information.

Even when a legitimate interest argument does not apply, data sharing can also be justified with consent. [44] If an individual refuses consent for the details of their complaint to be shared (including their identity) the service provider has a choice as to whether to proceed with the complaint or not. However should the matter reach a legal context such as court there may and probably will be a legal obligation to disclose which is of course an exemption within the data protection act.

On that basis many employers refuse to consider complaints with an anonymity condition made against their own employees on the grounds that an employment tribunal will almost certainly require disclosure irrespective of any promise of anonymity made.

In this circumstance if they proceed the employer would be being unfair both to the accuser who is at risk of having their confidentiality unexpectedly breached, the employee who might avoid dismissal if properly informed, and potentially themselves as the practice may harm their case in the tribunal.

In the same way we argue it is good practice and as previously mentioned a reasonable adjustment to refuse complaints with an anonymity condition that are made against service users where the issue of disability arises. All such complaints should be viewed as potentially leading to legal action where disclosure is likely to be compelled.

References

1. Elliott v Dorset County Council (DISABILITY DISCRIMINATION) [2021] UKEAT 0197_20_0904. https://www.bailii.org/uk/cases/UKEAT/2021/0197_20_0904.html
2. Paterson v. Commissioner of Police of The Metropolis [2007] UKEAT 0635_06_2307. https://www.bailii.org/uk/cases/UKEAT/2007/0635_06_2307.html
3. London Borough of Lewisham v Malcolm [2008] UKHL 43. <https://www.bailii.org/uk/cases/UKHL/2008/43.html>
4. Williams v The Trustees of Swansea University Pension & Assurance Scheme & Anor [2018] UKSC 65. <https://www.bailii.org/uk/cases/UKSC/2018/65.html>
5. Sheikholeslami v The University of Edinburgh (Reasonable adjustments : Sex Discrimination : Victimisation Discrimination) [2018] UKEAT 0014_17_0510. https://www.bailii.org/uk/cases/UKEAT/2018/0014_17_0510.html
6. Equality Act 2010, section 212. <https://www.legislation.gov.uk/ukpga/2010/15/section/212>
7. City of York Council v Grosset [2018] EWCA Civ 1105. <https://www.bailii.org/ew/cases/EWCA/Civ/2018/1105.html>

8. Risby v London Borough of Waltham Forest (Unfair Dismissal: Reasonableness of dismissal) [2016] UKEAT 0318_15_1803.
https://www.bailii.org/uk/cases/UKEAT/2016/0318_15_1803.html
9. Baldeh v Churches Housing Association of Dudley & District Ltd [2019] UKEAT 0290_18_1103. https://www.bailii.org/uk/cases/UKEAT/2019/0290_18_1103.html
10. Akerman- Livingstone v Aster Communities Ltd [2015] UKSC 15.
<https://www.bailii.org/uk/cases/UKSC/2015/15.html>
11. Merlin Entertainments LPC & Ors v Cave [2014] EWHC 3036 (QB).
<https://www.bailii.org/ew/cases/EWHC/QB/2014/3036.html>
12. Equality Act 2010, Schedule 1 Section 3.
<https://www.legislation.gov.uk/ukpga/2010/15/schedule/1/paragraph/3>
13. Griffiths v The Secretary of State for Work And Pensions [2015] EWCA Civ 1265.
<https://www.bailii.org/ew/cases/EWCA/Civ/2015/1265.html>
14. Autism spectrum disorder in adults: diagnosis and management, Clinical guideline [CG142]. <https://www.nice.org.uk/guidance/cg142>
15. Equality act 2010, section 31. <https://www.legislation.gov.uk/ukpga/2010/15/section/31>
16. Roads v Central Trains Ltd. [2004] EWCA Civ 1541.
<https://www.bailii.org/ew/cases/EWCA/Civ/2004/1541.html>
17. Archibald v. Fife Council [2004] UKHL 32.
<https://www.bailii.org/uk/cases/UKHL/2004/32.html>
18. MM & DM, R (on the application of) v Secretary of State for Work and Pensions [2013] EWCA Civ 1565. <https://www.bailii.org/ew/cases/EWCA/Civ/2013/1565.html>
19. Services, public functions and associations Statutory Code of Practice.
https://www.equalityhumanrights.com/sites/default/files/servicescode_0.pdf
20. Edwards v Flamingo Land Ltd [2013] EWCA Civ 801.
<https://www.bailii.org/ew/cases/EWCA/Civ/2013/801.html>
21. Finnigan v Chief Constable of Northumbria Police [2013] EWCA Civ 1191.
<https://www.bailii.org/ew/cases/EWCA/Civ/2013/1191.html>
22. Ishola v Transport for London [2020] EWCA Civ 112.
<https://www.bailii.org/ew/cases/EWCA/Civ/2020/112.html>
23. The Royal Bank of Scotland v. Ashton [2010] UKEAT 0542_09_1612.
https://www.bailii.org/uk/cases/UKEAT/2010/0542_09_1612.html
24. Newham Sixth Form College v Sanders [2014] EWCA Civ 734.
<https://www.bailii.org/ew/cases/EWCA/Civ/2014/734.html>
25. Bowerman v B & Q PLC, employment tribunal, Bristol, 4th May 2005. Westlaw database: 2005 WL 7863629
26. Essop & Ors v Home Office (UK Border Agency) [2017] UKSC 27.
<https://www.bailii.org/uk/cases/UKSC/2017/27.html>
27. The City of Oxford Bus Services Ltd (t/a Oxford Bus Company) v Harvey [2018] UKEAT 0171_18_2112. https://www.bailii.org/uk/cases/UKEAT/2018/0171_18_2112.html
28. Mr C Bessong v Pennine Care NHS Foundation Trust: 2403971/2017. Employment Tribunal.
<https://www.gov.uk/employment-tribunal-decisions/mr-c-bessong-v-pennine-care-nhs-foundation-trust-2403971-2017>

29. Equality Act 2010 part 9 (enforcement) chapter 2 (civil courts).
<https://www.legislation.gov.uk/ukpga/2010/15/part/9/chapter/2>
30. Civil Procedure Rules part 27.
<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part27>
31. Civil Procedure Rules part 26.
<https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part26>
32. Equal Treatment Bench Book.
<https://www.judiciary.uk/wp-content/uploads/2021/02/Equal-Treatment-Bench-Book-February-2021-1.pdf>
33. Enterprise and Regulatory Reform Act 2013, section 65.
<https://www.legislation.gov.uk/ukpga/2013/24/section/65>
34. Unite the Union v Nailard [2018] EWCA Civ 1203.
<https://www.bailii.org/ew/cases/EWCA/Civ/2018/1203.html>
35. Bessong v Pennine Care NHS Foundation Trust (RACE DISCRIMINATION – Harassment) [2019] UKEAT 0247_18_1810.
https://www.bailii.org/uk/cases/UKEAT/2019/0247_18_1810.html
36. Evans v Xactly Corporation Ltd (HARASSMENT - Disability related discrimination) [2018] UKEAT 0128_18_1508. https://www.bailii.org/uk/cases/UKEAT/2018/0128_18_1508.html
37. SPC, R v [2001] EWCA Crim 1251.
<https://www.bailii.org/ew/cases/EWCA/Crim/2001/1251.html>
38. Majrowski v. Guy's and St. Thomas' NHS Trust [2006] UKHL 34.
<https://www.bailii.org/uk/cases/UKHL/2006/34.html>
39. Veakins v Kier Islington Ltd [2009] EWCA Civ 1288.
<https://www.bailii.org/ew/cases/EWCA/Civ/2009/1288.html>
40. Burdett v Aviva Employment Services Ltd (Unfair Dismissal) [2014] UKEAT 0439_13_1411. https://www.bailii.org/uk/cases/UKEAT/2014/0439_13_1411.html
41. Hensman v Ministry Of Defence (Unfair Dismissal : Reasonableness of dismissal) [2014] UKEAT 0067_14_1006. https://www.bailii.org/uk/cases/UKEAT/2014/0067_14_1006.html
42. The Equality Act 2010 (Disability) Regulations 2010, section 4.
<https://www.legislation.gov.uk/uksi/2010/2128/regulation/4/made>
43. C & C v The Governing Body of a School, The Secretary of State for Education (First Interested Party) and The National Autistic Society (Second Interested Party) (SEN) (Disability discrimination in schools) [2018] UKUT 269 (AAC).
<https://www.bailii.org/uk/cases/UKUT/AAC/2018/269.html>
44. Data sharing code of practice.
<https://ico.org.uk/media/2615361/data-sharing-code-for-public-consultation.pdf>