

# Understanding the Law

## 21 March 2024 Transcript

### **Charlotte Clewes-Boyne:**

Good evening and welcome, everyone. Thank you for joining us tonight for Understanding the Law. This is the penultimate event of our Understanding Unlocked series for Neurodiversity Celebration Week. My name's Charlotte Clewes-Boyne, and I am a co-founder of Neurodiversikey®. First of all, it's a pleasure to introduce our speakers who are both solicitors this evening. That's Elizabeth McGlone, who is a partner at Didlaw, and Lizzie Hardy, who's an associate at Eversheds Sutherland.

If you didn't already know about neurodiversikey®, we launched back in October with the aim of making the justice system and legal sector neuroinclusive - mainly through education, training and raising awareness. We're a neurodivergent-run non-profit and have recently been named Legal Sector Neurodiversity Non-profit of the Year in the SME News UK Legal Awards and finalists in the Women and Diversity in Law Awards.

As for the event, we're going to take a look at disability and neurodivergence in the context of legal education, training and practice. And so I'm going to ask my speakers now to introduce themselves a little bit more so, Liz, would you like to start us off?

### **Elizabeth McGlone:**

Thank you. And thank you for having me. I'm Liz McGlone. I'm an employment specialist Partner at Didlaw, a boutique discrimination practice acting predominantly for employees. Didlaw stands for disability injury and discrimination, so hopefully well-poised to deal with the issues this evening.

**Charlotte Clewes-Boyne:**

Thanks Liz. And Lizzie.

**Lizzie Hardy:**

Thanks Charlotte and yep, I'm Lizzie. I'm glad it didn't also go by Liz. Otherwise, that would have been very confusing for us all. I'm an employment Associate at Eversheds Sutherland and, I'm on the opposite side of the fence, so I tend to advise employers on disability, best practice and compliance, especially in respect of reasonable adjustments. So hopefully I'll be able to give a slightly different perspective from my fee-earning work. And we've just had a chat and I think we're going to have a really exciting discussion so yeah we're in for a good hour.

**Charlotte Clewes-Boyne:**

Thanks both. Now, before we begin, I'm just going to set the scene a little bit. And as I've mentioned, we're going to be talking about disability and neurodivergence. And you'll probably notice I've specified those separately, and that's because many neurodivergent people do not identify as disabled and for the purposes of this evening, our focus will be on the following neurodivergent neurotypes. That's ADHD, autism, dyscalculia, dysgraphia, dyslexia and dyspraxia.

So without further ado, let's get the conversation started. So I think I'm going to start by asking Lizzie about the Equality Act, and I wonder if you could tell us a little bit about who classes as disabled under the Equality Act and sort of what the law specifies in that respect.

**Lizzie Hardy:**

Yeah, great question. And probably the best place to start when we're talking about disability. So what does it mean to be disabled

under the law? And the Equality Act's where we go to, exactly right, where we find that definition. So there's lots of different ways of looking at disability. Lots of the time we're moving now in society towards something called the social model of disability, which essentially says it's society rather than the condition that is what makes that individual disabled.

Now, with legislation, we're not quite there yet, and that's often the first you know question that we get asked is how does that sort of legislation identify disability rights? So we really are still stuck in that real medical model of disability. And when I'm looking at disability from that legal perspective, I can really break that definition down into sort of three key parts ok.

The first part I'm thinking about is, is there physical or mental impairment? And most conditions will meet that definition. So that's the first part. The second part I'm looking at is how long has that lasted? And the law says to be a disability, that physical or mental impairment has to be long term. What we know is that's either 12 months or if it's not yet lasted 12 months, it has to be likely to last 12 months. So that longevity piece is also really important to look at about disability.

And the final part, which is the bit that probably gets litigated the most in tribunal, is the effect. So you need a physical or mental impairment lasting or likely to last more than 12 months. But then we're looking at the effect, what the definition under the law says, in the Equality Act says it needs to have a substantial and adverse effect on your normal day to day activities. I'm sure Liz can give lots of examples of where she's worked with people and that sort of thing. But just to break that down a bit because it's always a bit wordy, isn't it? Substantial means more than minor or trivial. Okay, so that's a relatively low bar. Adverse, we're talking negative. What I always think is super interesting about that definition is, particularly from a neurodiversity perspective, people say, well, do we have to look at the individual as a whole, when looking at what's adverse?

In other words, just because some of my day to day activities are affected, what if I'm really great at other things? And it's a little bit of a cliché to use the autistic savant as this example because it doesn't affect a huge proportion of people with autism. But I think it helps demonstrate this point. You could be affected with your autism by not being very good at reading social cues, but you could be great at maths or music, that's the cliché with an savant isn't it? That doesn't matter. We're not looking at the individual as a holistic piece. We're looking at are any of your normal day to day activities affected when we're thinking about that? Okay. And the normal day to day activities is the final part. And then I promise I'll stop talking and hand over to Liz.

Lots of people always say, "well, what is, when we think about normal day activities, does that mean sleeping, eating the real bare minimum stuff?" And it does, it's absolutely included in that. Right. But we have to think a bit bigger than that, and the tribunals have definitely interpreted that much more widely. So that might be playing sport, going to the cinema. Okay. So it's not just the bare minimum as "well I can get dressed and I can feed myself and I can do the grocery shopping".

Some day to day activities aren't affected. So I could talk about this for an hour. I think this could be the entire session if we want to talk about the definition, but I'll pass over to Liz now because I think I'd like to hear your views, because you're dealing with those statements on a sort of day to day basis and individuals.

**Elizabeth McGlone:**

Well, I mean, I completely agree with you in terms of the definition, which is lucky. So obviously, interpreting the law in the same way, which is a positive.

**Lizzie Hardy:**

A great start.

**Elizabeth McGlone:**

I think it's important that every Section six of the Equality Act application is case is fact specific. And it's very difficult. You know, someone comes to you and says X, Y, and Z, am I disabled for the purposes of the Equality Act?

Then you have to break it down and apply the tests. And every person is different and everybody's thresholds are different in terms of what they do in their day to day life. And I think it's, as you highlighted, obviously with the autism example in terms of neurodiversity, that it's very difficult because it's a spectrum to slot that into the disability definition.

And I think that's where a lot of people don't, especially from an employer situation, from employer perspective, don't always recognise. And because people mask very well and function at a high level that they don't then correlate that that is potentially someone who's disabled. And I think that's where you have to change the narrative from an employee perspective, especially I know with women who are late diagnosed, especially in terms of neurodivergence, you know, they've spent a lot of their time correcting their behaviours to try and fit in. And so people are then surprised when things come tumbling down or there is a mental health adverse impact. But it's definitely yeah, definitely person specific and every person is different which I guess is the same for everybody.

**Charlotte Clewes-Boyne:**

It's really interesting that you mentioned those points Liz because you touched on a little bit there, sort of what the sort of limitations and problems might be with the way we currently look at the definition of disability. Lizzie sort of touched on it and you've expanded on it a little bit. In your work on the claimant side, have you encountered any other issues specifically in relation to the way neurodivergence is viewed from a legal perspective in relation to the legislative provisions? Are there other issues you come across, maybe potentially in relation to neurotypes?

**Elizabeth McGlone:**

I think I've seen a growth in neurodivergence and categorisation as a disabled person. So I think in the last 12 months, 18 months, the increase in inquiries we've seen for people who have been diagnosed with ADHD and especially late diagnosis and I have said women as well who struggled and then have explored diagnoses and then diagnosed.

But I think also sometimes then, that causes issues with the timing factor in the sense that you obviously had to have suffered or were likely to suffer for 12 months. And so that can cause problems as well. But I think also the law is very static and the law is very kind of black and white and with neurodivergence there's a lot of grey. So I think the two don't correlate very well. And also and I think just as a dog leg from that, I've found the running litigation supporting employees with neurodivergence is problematic in itself because of managing the litigation, managing the proportionality of that litigation is also another hurdle that somebody with a different type of disability or a physical disability may not experience.

And also the court system itself and the tribunal process and Lizzie can obviously support me on this, in terms of an employment tribunal claim can take 18, 24 months and becomes all consuming for somebody who struggles to get through data or assimilate data or condense data sometimes. So I think that's where there is also problems. Just the actual system itself doesn't support court people who may see the world differently or may interpret information differently or, you know, struggles with not having clear deadlines because you can't tell someone there's a deadline because you don't know yourself, etc. So I think that's a broader issue as well.

**Charlotte Clewes-Boyne:**

I think that's a really nice sort of expansion on that point to take in to account the system as well as sort of, we've got the law but we've also got the legal system and it's important that you acknowledge the impact that has as well. I know I noticed you

threw a bit to Lizzie there so I'm actually going to let Lizzie speak a little bit on that as well, because I think it's important that we get the, sort of the other perspective on that. And because I think that'll be really interesting to have as well. So I'm going to let Lizzie sort of jump in on that before we sort of move on. If she's got anything to add.

**Lizzie Hardy:**

Well I'm happy to I'm not sure it'd be so much of an alternative perspective, because I certainly echo a lot of that. I mean, particularly, you know, sharing frustrations with you know the tribunal system. I think that's frustrating for either party, whichever side of the you know, whichever side of the fence you're litigating on, if you've got a neurodivergent party, if the system's not serving that party particularly well, it's frustrating for everybody involved.

So it's certainly not a sense of me disagreeing with Liz in any respect. And I absolutely agree. I think if you are an employment lawyer at the moment, the real hot topics that we are hearing are menopause and neurodivergence if you're operating in this field. I don't think that's going away. I think that's certainly something that we are going to be dealing with and will be a hot topic for the next sort of five years at least that, you know, neurodivergence is not going away.

And we're operating in the context of a system that I think, as you say, is not necessarily well set up for neurodiverse or neurodivergent employees. And we're having to deal with issues of hugely long waiting lists, for people who can't get diagnosed - self-diagnosis, you know, people here are having to resort to sort of private appointments and private diagnosis just just to get that sort of thing.

And I know we'll probably touch on diagnosis later and what that means, but I'm often advising employers from that side of things as well, in terms if we've just got suddenly this wave of sort of neurodivergent employees, which is you know fantastic, if people

can bring their most of authentic selves to work that that can only be a good thing.

But it's how do we deal with that and how do we manage that? And pivot, very quickly, because we might have you know an entire generation of managers who 20 years ago thought that the idea of autism and ADHD and other sort of forms of neurodivergence, were well, they're not really a real thing, are they? So we're having to manage it in the context of that, which is a really interesting time to employment lawyer, I'll say that much.

**Charlotte Clewes-Boyne:**

Thank you so much, Lizzie, that's exactly what I was hoping to hear. Was just expanding on that and your points on self-diagnosis actually kind of answered one of my questions that I was going to ask, which was going to be in relation to whether or not some people might not meet the criteria for disability depending on their specific circumstances, and I think self-diagnosis is a really valid point to make in that area in the sense that obviously we do have these long waiting lists and they are creating difficulties for people who, you know, are almost certainly neurodivergent but potentially can't access that formalised label. Well, I don't like what label for this, but that formalised document, it says you are this and you know the extent to which employers need to help with that when they don't have that piece of paper that says you are this. So I think that's a really relevant point and we probably will come onto that again.

But I'm going to just sort of segway us slightly now to talk a little bit about what disability discrimination is specifically. I think I'm going to ask Liz to jump in on this one first this time. If we talk a little bit about that and then we can just sort of see where the conversation takes us.

**Elizabeth McGlone:**

It's a really wide question, so thanks for that. It's also breaks down into lots of different subsections of the Equality Act. So we'll talk



through some of the examples. So direct discrimination is when you are treated less favourably because of a protected characteristic, in this circumstance will be disability. The difficulty with pursuing a direct discrimination claim is you require a comparator and that's where most direct discrimination claims will fall down because you will need to find either a hypothetical comparator or real comparator who is someone in the same material circumstances with you without the protected characteristic.

So as an advisor for employees, we throw in. That sounds really technical and really really legal. We throw in a direct discrimination claim but mostly on the likelihood that it's very difficult. It's a very high threshold. It's very difficult. And so where the Equality Act has expanded for disability discrimination over recent years is the Section 15 claim, which is perfect in this kind of situation because it's in relation to something arising. So discrimination that relates to something arising from a disability. And this is perfect in a neurodivergence case because it always - it's not always, there's never an always - but there are circumstances where performance suffers because somebody is struggling with issues that arise or are symptomatic of their disability and quite often with people with autism or ADHD, it might be assimilation of information. And then that leads to someone saying, well, you can't do your job properly. You're not performing, you're not meeting standards, you're not working fast enough. So therefore we're going to performance manage you. And that is a classic kind of Section 15 case and those are definitely those that are used in this kind of situation specifically. And then we move on to harassment, which people bandy the word around harassment, in employment law a lot.

Bullying and harassment come hand in hand under a policy, despite the fact that there's no standalone claim for bullying. But harassment falls under section 26 of the Equality Act, and that is, treatment of an individual related to a protected characteristic that has the purpose and effect of creating a hostile, intimidating environment. So that can be name calling, that can be you know

gaslighting. It's a whole range of things, but it's something that, it's conduct that relates to that characteristic that makes somebody feel incredibly uncomfortable in the workplace and causes harm. Okay? And victimisation. Gosh, I feel like I'm reading off a statute book and I don't mean to. Victimisation is when you complain of being discriminated against, which is a protected act, and then you are subjected to a detriment because you raised that concern.

Okay. And harassment and victimisation quite often come hand in hand. And then finally, broadly indirect discrimination, which is more of a group issue, is where a potentially neutral policy within the workplace has an impact on a substantial adverse impact on a particular group with a shared characteristic. Okay, so that's a whistle stop tour and the main claim from my perspective in relation to disability for neurodivergence specifically would be a Section 15 claim because it works really nicely and you don't need that comparator and it's easier to plead.

**Charlotte Clewes-Boyne:**

That's a really helpful whistle stop tour actually. And I think what I sort of like to ask next, and I don't actually really mind who answers this is, but in terms of when you are looking at a specific neurodivergent context, what kind of things and I don't want this to be too much of a loaded question because obviously the idea of that is very broad. But are there any examples of the kind of behaviours that you've seen either Lizzie, as someone who represents the employer or yourself Liz as someone who represents clients that would fall within what we would consider to be either direct or indirect discrimination or harassment or victimisation that sort of really illustrate that in context?

**Lizzie Hardy:**

This is a very lawyer answer. It massively depends on the individual, and the set of circumstances, and the workplace and what's all gone before. So it's really hard to say this is typical. I don't think most of what either Liz or I do produces anything sort of typical, particularly because, you know, the umbrella for neurodiversity is so

huge, we're all individuals under it and we've all got different conditions, right? I will say that I agree in the sense of, I see a lot of section 15 say discrimination arising from disability claims, and that does tend to be exactly that, that someone hasn't necessarily been treated in a specific way because they have a condition, which would be a direct discrimination claim, right? They've been treated less favourably because of their disability.

But there's something that has a co-morbidity, it's something arising out of that condition that, if the employee is not well equipped enough or the manager doesn't know about or those sort of things that can present itself as discrimination arising from disability. So, you know, the classic with disability and section 15 claims is absences. You know, it's not in and of itself the disability that someone is being disciplined or even dismissed for absence, but that absence could well be arising from their disability.

And my understanding is that is exactly the reason that this was sort of added in as a new claim into the legislation and was legislated for, because people were being discriminated against, disabled people were being discriminated against and it seemed a little bit unfair that the loophole was people could say, "well, it's not to do with your disability, is it?" it is everything to do with the disability. It's just not specifically the disability. So I think that's right. And I absolutely agree with you, Liz. I think sort of Section 15 claims, that could be absences, you know, particularly with neurodivergent individuals. Liz you've said it, communication styles, things that can be misinterpreted as behavioural issues or personality clashes is an absolute classic. Those are the trends we're seeing.

And actually so we don't just give you a lecture on the law. We're talking about how that law is applied in practice. What we need to do is move towards a much more, I in my opinion, move to a much more open culture of talking about conditions, but not just the conditions. I think we need to move that dial a bit towards: What are the symptoms of that condition? How does that affect you in the workplace? And begin to move towards you know much more

constructive conversations about how we get the best out, not just of disabled employees, but how we get the best out of everybody at work because we all operate on, you know, as individuals. I might not have autism or ADHD, but I'm useless at work until I've had three coffees. That's how my manager is going to get the best out of me. She knows not to speak to me before 9:30 when I've chugged a few espressos, right? So it's just about understanding how different people operate. And I think that's going to help us get much more towards where we'd like to be and hopefully see fewer claims and even, you know, fewer people needing to bring the claims. Not to put Liz out of a job of course.

**Elizabeth McGlone:**

No, I mean, obviously, hopefully still there'll be big, bad employers out there that'll allow me to work until I retire. But I think it's a really interesting point that you've just said about everybody being individual. And I think the COVID pandemic and the change in working practices and the way in which people work and the balance and everybody juggling has assisted that conversation about people work differently and what works best and being able to manage your family responsibilities, get fresh air, have a walk, take time for yourself. Self-care - it's been a huge buzz word, hasn't it, in terms of getting in 10,000 steps, and I'm lucky if I do two, I think, when I'm working from home. But I think it has helped to see things in a slightly wider, with a wider lens in relation to the fact that not everybody has to work 9 to 5 chained to their desk.

Some people, as you say, need three coffees. I'm exactly like that, but I like starting work at 8:00 in the morning so I know by 4:00 I'm with my kids. That's just the way I work. But I have colleagues that very much like to start at 10:00 and burn the midnight oil. It's fine as long as obviously core hours are covered. But I do think for all the ills that came from COVID, and I'm not saying that it was good, especially the COVID lockdown, weight gain and all of the ancillary things that a lot of people experienced. And the exclusion, I do think, we've become more slightly more understanding that not everybody works the same way.

**Charlotte Clewes-Boyne:**

That leads really nicely on actually to the next sort of section I wanted to talk about, which is to do with the obligations that employers have and things like reasonable adjustments, because actually when we're looking at in the lens of the pandemic as well, I think it's worthwhile thinking about how that's potentially reframed, how we see all of that as well. And this is probably one, again, for Lizzie to start on with her being usually employer side. But I think to start with, if we talk a little bit about what the baseline obligations are for employers and what they should be doing, we can sort of then move on to a bit more of a discussion about reasonable adjustments and the kind of things that are considered reasonable for then employees to ask for.

So Lizzie, do you think you could start by talking us through a little bit about what employers are supposed to do and hopefully we can then start moving through into discussing a bit more about reasonable adjustments as well?

**Lizzie Hardy:**

Yeah, absolutely. My turn to read from the statute book. So I'll try and keep it at a high level again. It's a good reminder as well. So this is not just employers. Okay, so this could be a higher education institution, something like that if you're still a student. But it's really important that Section 20 there's, of the Equality Act, there's an obligation to make reasonable adjustments.

This is the absolute cornerstone of disability discrimination law okay. When we're always talking about disability discrimination, we're thinking about reasonable adjustments as employment lawyers okay. So failure to make reasonable adjustments. Section 21 of the Equality Act essentially says if there is a provision, a criterion or a practice, what's known in the business as a PCP, or a failure to provide an auxiliary aid, or a feature of an employer's premises that puts a disabled person at a substantial disadvantage when you're in comparison with somebody without a disability, that is a failure to make reasonable adjustments.

Okay, so that's what the law says. The next question inevitably is "Lizzie well, that's all well and good, but how on earth do we know what is reasonable and what is not reasonable?" That is the conversation I mean, 95% of the time with employers when I'm talking about reason adjustments. Okay.

Now, without having to get too much of a lawyer answer again, it depends is going to be a running theme here. And again in the running theme is, this is so fact specific, and I think Liz has already touched on this. This is absolutely to do with the individual, their condition and their set of circumstances, okay. So, you need to identify what that condition is, how that condition manifests itself as that substantial disadvantage and whether that adjustment would alleviate that disadvantage. Okay.

So that's what I'm always looking at when I'm in a conversation with an employer about whether an adjustment is reasonable or not. I had a call literally this afternoon, talking about whether it was reasonable for a neurodivergent employee to have a MacBook instead of a Windows PC. So that's the kind of conversations that I'm having and I think, you know, and I won't give away any specific details. But what we were really looking at was that real nitty gritty of what is the condition? Again, how does that manifest itself? Would there be, would it be reasonable to provide a MacBook instead of a PC? What can the MacBook offer? How does that alleviate that disadvantage, that individual's suffering? Does that make sense? So that's the law in a nutshell.

While I can say it depends on, and that you know, it depends what's reasonable, and the only people who can ultimately tell us what is reasonable is the tribunal at the end of a hearing. Hopefully we won't get there. What we do have is case law, which has given us a whole load of factors that we know the tribunal are going to consider when they're looking at whether an adjustment is reasonable or not.

And particularly they will look at things like the practicability of

putting in the adjustment, the effectiveness, so you know, whether that adjustment is actually going to help to alleviate that disadvantage. But they're also going to look at things like the type of employer, whether other financial and, you know, whether other financial resources are available. So things like Access to Work, you know, is that sort of funding available? How much does the adjustment itself cost? Are we talking about a £1500 MacBook or are we talking about putting a lift in, you know, which could be thousands and thousands of pounds? So all those types of factors are things that the tribunal would look at if they were determining whether an adjustment was reasonable or not.

**Charlotte Clewes-Boyne:**

Thanks Lizzie that's a real whistle stop tour but really, really helpful. And I think it's an interesting point because obviously, if we're to take it back to the COVID pandemic and the way that that has readjusted the way we see working life. I actually think this is a really interesting question. Liz, have you seen, and obviously it's difficult to say because obviously from what we've heard already, neurodivergence and claims in relation to neurodivergence have seen an uptick as well, so I suppose it's hard to tell whether or not there is a trend post pandemic, but I'd be interested to see if there's anything specifically that you think might have come out from that change in attitude from the pandemic as well that aligns with potentially some of the needs of neurodivergent people as to the types of complaints that you're seeing coming to you as someone who acts claimant side? Does that question make sense?

**Elizabeth McGlone:**

Yeah, and I think one of the key things that kind of correlate the two for me is communication and obviously how we communicate and some people and that's not just neurodivergence specific, it's across the board in terms of how you communicate through a screen. And some people find it very difficult to pick up on social cues and nuance through communication through a screen, because the eye contact is different, angles are different and they

feel somewhat isolated.

And so I think that's one of the key things that people have found it quite difficult to adjust to dealing with people in that sense. Other people have found that really protective of themselves and they've found that they can work in a more quiet uniform sense. They can control their working environment. Because I've been dealing today with somebody who rang me, a junior lawyer, actually, who has been diagnosed with ADHD and had requested an office to work in because he's in an open plan office and needed a quiet space and was told, okay, fine, but you need to book it, which obviously adds a hurdle because you've then got to think, do I need it? And it's not automatic. And then would go to use the room and somebody else was in there who's more senior, so he's too scared then to say "can you leave, managing partner, so I can sit in there? But that's my adjustment." So I think certain things about controlling your environment, having things that are around you that you know are of comfort or mean you can focus, your own aids, and you're not dependent or disturbed, or reliant on other people's behaviours as well to kind of impact your working day. So I think that's just not just specific to the conversation we're having today, but also just different ways people work when we've talked about the fact that people have adjusted to working practices.

Charlotte Clewes-Boyne:

I think my next question, sort of building on that a little bit is, and because you've just talked there about the example that you gave and it'd be interesting to cover a little bit sort of, the kind of information that a person's required to give when they're making that kind of reasonable adjustment. Just so that we can get sort of for the people watching an idea of the kind of things that people need to be saying when they're asking for these reasonable adjustments, like from a legal perspective, what does the law want you know, neurodivergent people to say? Are there any specific things that they need to do in relation to that request? But also, is there anything specific that an employer needs to do when responding to one of those requests? But I think it would be



interesting when we've also already talked about the wider context sort of of the legal system in terms of whether potentially that process itself is a little bit like we've talked about the legal system maybe not being quite as accessible as it could be because of all the length of time and things like that that tribunals take by the same process, that process of requesting those things and the specificity of information required. How accessible is that actually, when we're looking at that from a neurodivergent perspective? Liz you go first.

Elizabeth McGlone:

So there's so many parts to that question, and I'm going to leave Lizzie to talk about constructive knowledge and what an employer has to know, because I think a lot of people assume the employer should get it and they don't. But you're right in the sense of the delay and the time lapse. And there are certain employers and I won't name and shame but they are large institutions that the process itself, the procurement process, the ticking boxes is enough to drive people insane. And then that creates anxiety. And I always find that there's a kind of correlation between making a request and then the time chasing that request, and then also deterioration in mental health, because there's that stress of having to keep checking up. And what has happened to my adjustments? And why am I having to chase so hard?

And quite often kind of the formulation of adjustments comes from an individual that knows what they might need, but also comes from some specialist input from occupational health. Quite often you'll find that somebody may have had intermittent absence or has been displaying maybe slightly more unusual personality traits or struggling in the workplace. And hopefully a decent employer will pick up on those signs and say, you know, is there a problem here? Do we need to get you some support? Shall we also make a referral to occupational health and then we can have someone slightly more independent to take a view and provide some insight and then quite often there'll be a list of recommendations and, you know, a shopping list, not so much a shopping list, but more kind of,

you know, what would assist, what might aid someone in the workplace. And but does that help, does that answer some of that question? Because I'm mindful it's kind of quite open and quite extensive.

**Charlotte Clewes-Boyne:**

Yeah. I'm mindful as well that I asked quite a long question. I think yeah that's really helpful. I think it'd be helpful to know as well if there's anything specifically legally that either the employer or an employee needs to do as well in terms of requesting a reasonable adjustment. But I think we'll throw that one to Lizzie and see whether or not she can input further on that.

**Lizzie Hardy:**

Yeah, that's a good question. So, I think the starting point is you don't need to tell an employer anything. It's a different you know, that's legally, it's a different question about whether it's worthwhile telling the employer and that sort of thing. And Liz mentioned constructive knowledge. So the duty to make reasonable adjustments, to make it fair to employers that duty only arises once they have knowledge, okay. Of the condition and the disadvantage, right? So that could be actual knowledge, i.e. I go and tell Eversheds Sutherland I've got this condition and it affects me in this way, or that could be this constructive knowledge. And what the law says is that if the employer ought reasonably to have known, okay. So that could be based on things you've alluded to or certain ways of behaving in the workplace, that's when that duty arises.

But actually, as Liz has mentioned. The issue with neurodivergent individuals is they're very good at masking. We know that, right? And you know, what could what forms that ought reasonably to have known is quite difficult. That's the legal position. What I'd be saying as I previously said is just because you don't need to doesn't mean that you shouldn't.

And I think I've touched on this and I will probably sound like a

broken record this evening, but actually it's about how do we build this relationship between employers and employees where there's a safe enough culture at work, the employees feel empowered to share, and I hate the word disclose, so I'm going to use the word share, their disability, their condition and how it affects them.

So we need you know, that's the task of employers. How do we create a culture in which employees feel like they're comfortable enough? And then what do we do with that information? And there's a degree of responsibility from the employee side as well to get what they need to help them succeed at work, because it's not enough, you know, no one wants to come to work and feel like they're just scraping by and they're not getting what they need to succeed.

So I think it's about having those, you know, if you feel comfortable to do so, really productive conversations with the employer. And as I say, listen, you know, if they're decent employees, which we'd like to think they are, you know, getting that referral to occupational health, having a conversation and I absolutely agree you know with Liz's experience, occupational health tend to produce you know lists of proposed recommendations. I will say, because people always ask, is there a list anywhere of reasonable adjustments?

And the answer is no, there's not. And that's because it's absolutely specific to the individual, okay. So I wish. It would make our lives and our job easier if we could produce the pre-approved list of reasonable adjustments. It's never that. What could be reasonable for one person could be the opposite for another. So low and high lighting. I don't know if highlighting is the term, but high levels of lighting versus low lighting is a perfect example of what two conflicting potentially but reason adjustments for different people, right?

So there's no prescribed list, but that's the purpose of occupational health, right? You've got that independent medical professional, who can look at that individual, their condition. It's not

just for occupational health to say. And I think what we always say is the people who know their condition best are you guys. You will know your individual condition, how it affects you. So that should be a real conversation with occupational health. Working together, occ health, employee, employer, to try and get this plan in place to help you perform the best way at work.

**Charlotte Clewes-Boyne:**

That leads really nicely onto my next question, which is going to be about self-diagnosis, which you've already touched on a little bit in previous sort of in previous questions. But actually, I think when we're looking at that sort of holistic response and that holistic approach, how do we think that self-diagnosis interacts with all of that and the requests for reasonable adjustments? Again, I think that could be answered by either of you. So I'm going to let you two decide who's going to answer that one.

**Elizabeth McGlone:**

I've only had vague experience with self-diagnosis. I've had people come to me and say, I'm on the waiting list and I think I'm or I'm sure I am. And it's not a very easy position to then offer to the employer to say, well, my client assumes or believes or is exhibiting symptoms of because they do want that that kind of paper exercise and also that puts the burden on them. So that's a kind of proactive tool. So it is something that is more prevalent. And I think this is where an education element comes in as well, because I also say to my clients, and some of my employer clients I have, I think two employer clients, so that's my vague experience with respondent work. That it's about education as well, and you don't always need someone to have a diagnosis to be pretty damn sure that there's something you probably should be doing to support them.

You know, okay, yes, it's good to have the diagnosis so it's on record and you can tick your box in your personnel file to say, yes, meet Section six criteria X, Y, or Z. But as Lizzie has also said, there are certain, you know, certain traits, certain characteristics that if

you have paid attention to your HR training, or you've actually been awake in the world for the last couple of years, you would hope to think that you might recognise that somebody may or may not formally have neurodivergent be neurodivergent, or ADHD or ASD or Autism or whatever, but there are certain ways that they can be supported in the workplace. And it's creating that conversation. And I think, as Lizzie once again said, you know, having the conversation between the individual and the external provider and the employer to create the working environment where people are comfortable. But yeah I think it's quite sad that we need to be so prescriptive and that that recognition can start earlier and then can avoid an escalation.

### **Lizzie Hardy:**

I think that's right. Yeah, I absolutely agree. I certainly think that there's no requirement in the Equality Act from a purely legal perspective to say somebody needs to have a formal diagnosis on paper. And it's, you know, it's a bit of a sad state that we're in this position anyway because waiting lists etc. are so long. It's certainly not uncommon to have an employee that says, "look I'm pretty sure I've got autism or ADHD, but I've been told the waiting list in my area is three years". I would not be saying to my employer clients, well, if they don't have the diagnosis, don't worry it sort of thing. That's certainly not what we're saying. And again, you can meet the Section six criteria without any need to have that formal diagnosis. But I absolutely agree with Liz. You know, it certainly puts employers in a slightly tricky position because essentially you know you are asking to take someone's word for it.

What I would generally say is I think I absolutely agree with you Liz, I think it's part of a wider conversation piece and I think it's a great temporary measure, whilst an individual is seeking diagnosis to try and get some adjustments in place. So it's just a step along that journey, I would say, to get some of those sort of adjustments. The other thing that's worth saying is that it depends on the size and the type of the employer. It's not necessarily a reasonable adjustment to get someone formal assessment through work, but

lots of workplaces are beginning to offer that.

So it's certainly something that if you think you might be, again, not suffering but have a certain condition, it's worth speaking to your employer. Can you get an assessment either through private medical or if you can't get a you know a formal assessment or a formal diagnosis through work, is there a specialist in your occupational health service? Because I'm also finding that more and more sort of occupational health advisers are developing these specialisms in neurodivergence and are going to be much better placed to at least have that initial conversation with you and advise the employer. Yeah, I've spoken to so-and-so and they're having issues with six out of these ten typical markers of ADHD, autism, dyspraxia or whatever it is. So my thinking is that's probably where that formal diagnosis is going. Does that help?

**Charlotte Clewes-Boyne:**

Yeah, that was really helpful. And I think it's important that we have that discussion about self-diagnosis, as you say, because it is such a current issue in relation to waiting times, obviously it's going to be something that does affect a lot of people. And I think with that in mind, sort of a sort of linked but not quite the same issue is to do with the fact that neurodivergent conditions and neurodivergent people can have quite fluctuating needs.

So and that's and they can be very contextual as well and, it would be helpful to sort of maybe have a bit of a discussion about how you think that impacts things like an employer's ability to anticipate, for example, in situations like recruitment where the processes may need to be, well the processes do need to be neuroinclusive, but obviously you want to ensure rigorous assessment whilst at the same time avoiding being discriminatory.

And it's sort of having a think about those kind of situations where an employer might not necessarily know because it's a recruitment process. So they kind of have to be, like I say, anticipatory and then sort of set that up beforehand to be as accessible but also as

rigorous as they can do. Do you sort of have any views on that Lizzie?

**Lizzie Hardy:**

I think that's a great question and it touches on a lot of the conversations that I'm having with my clients about recruitment and adjustments in the recruitment processes. And the absolute classic that we get all the time is do we or can we or is it appropriate to release interview questions ahead of time? I'm always having that conversation with clients. And I think the best practice point of view is that we should be building adjustments into every stage of the employment lifecycle, including recruitment, okay. And that starts to certainly the advice that we're giving. Whether you choose to share that and take advantage of that is an individual decision as a candidate, of course it is, you know, you have to base that to a degree on individual judgement.

But of course, if you think that, you know, the way in which that recruitment process operates, you are going to be affected by virtue of a condition or symptoms or whatever else, is probably best at that stage to share that. So that you know, that that's the starting point, I guess, and that that's a judgement call to make. But, you know, certainly for neurodivergent individuals who might have you know issues with processing or memory or communication, those sort of things, it may be well worth having that conversation.

This is the condition. This is the, if you know what adjustments you've had before, great time to start talking about that, then, you know, this is what I've had in the past and has worked well for me. Is that possible? Can we have a conversation about that? If you don't know, approach that in much more of an open style. So, you know that could be a conversation about recently been diagnosed with ADHD. I don't know what that means to me in terms of the recruitment process, but I'd like to speak to someone in HR about that and have a conversation about what adjustments might be available to me. I think the more we can and again, I feel like this is

a running theme of this evening, but the focus needs to be on this education piece that Liz has spoken about.

And you know that's part of my job advising employers on best practice, but also really hammering home that focus on those open conversations, about taking this collaborative approach between employee and employer to make sure that we have you know, an absolutely rigor- we only want the best people and the right people for the jobs. Right. But making sure that no one's disadvantaged by something that's actually not that relevant to the job which we're interviewing for.

And I think that's where I'm often stress testing things with my clients and scrutinising them. So to use you know the classic example is do we really interview questions before interviews? I'll say, well, what job are they interviewing for? Is it really important that that candidate needs to be capable of thinking on their feet, or are we actually not, you know, are we interviewing them for a data analyst role, in which case they're not ever going to have to, you know, necessarily respond to things in 30 seconds? We just need a great candidate. But actually if they need 5 minutes to go away and think about you know a question that's not going to have any bearing on the role we're recruiting for. That's when we need to think about adjustments. Is that you know adjustment reasonable in the circumstances? I think I've probably answered a slightly different question to the one you asked me Charlotte. Has that been helpful? Is there something else? I think there was a question in there about fluctuation, wasn't there?

**Charlotte Clewes-Boyne:**

There was. I actually think that was really helpful. I think it sort of opens the floor up to Liz a little bit as well, because I think you highlighted a point there is that looking at what's particularly problematic for neurodivergent individuals in terms of their specific needs when they're coming into a process like this. And I think it'd be helpful to get Liz's perspective from the claimant side, as the kind of things that she's seeing from claimants that are particularly



problematic for them.

So I actually think you have sort of answered the question, but also opened us into sort of a nice little last little bit of a route into that. And I'm conscious that we've sort of got about 7 minutes. So I think we'll let Liz talk about this and then there's one last thing I want to cover, which is disability as a protected characteristic, but I'd like to hear from Liz first on that question I've just asked, because I think that's really I think it's led nicely in to sort of getting the claimant perspective.

**Elizabeth McGlone:**

Yeah. I think in terms of recruitment processes, the two things that really struck me is one is AI, that really concerns me in the sense of dealing with individuals. And I know under the data GDPR you can actually request that your application, if it's automated, then be seen by a real person. So that quite often is problematic because AI will not allow for any kind of fluctuation in terms of cognitive responses. And I think, I have lots of concerns about AI in the discrimination space. But just in relation to this talk. And I think also when it comes to recruitment, I had an inquiry the other day about whether or not someone should disclose their ADHD, during recruitment and I'd said well you can't expect someone to make adjustments if you don't disclose the fact.

And then the flip side was well what happens if they then don't recruit me because I've disclosed the fact? And we, and it was a tautologist conversation because I said I completely understand why you go for a job. You're desperate for a job, you don't want to flag something that you think is going to be used against you. Obviously, if you think your disability or your neurodivergence is something that is going to be used against you, you don't want to highlight it, but it's chicken and egg. It's you can't have one without the other. But I completely understand that you want to, you know, try and show perfection, which no one has, obviously. But that's the main thing I see with employees. You know, I've been to an interview or I'm going to an interview. Do I? Where's the balance? What do I disclose? What do I not disclose? What can I expect?

And I think that's tricky because people, you know, are desperate to get a job and I don't want to show any kind of you know 'weakness'. And I don't mean that with any disrespect, but you know what I mean.

**Charlotte Clewes-Boyne:**

Yeah, I think that's I think that's a really sort of a good point to lead into again, actually. It seems we seem to have flowed really nicely through the questions actually in this sense, because I think this actually leads really nicely to talking about disability as a protected characteristic because we're talking about people here, as you've quite rightly pointed out in these situations, feel quite vulnerable sometimes.

They can feel quite concerned about disclosing, they can feel concerned about the impact that will have. And so I think and also talking about disability as a protected characteristic, but also neurodivergence's relationship with disability, because obviously many neurodivergent people don't necessarily identify as disabled either. So when we're talking about how we protect neurodivergent people and how the law protects neurodivergent people, what kind of relationship we have between neurodivergence and disability, particularly, for example, if a person maybe doesn't necessarily identify that way.

So I think if we can just talk about very quickly, sort of what makes a characteristic protectable and specifically why disability is protectable. Conscious that we only have 4 minutes and then if we have time, we can talk a little bit about the fact that neurodivergent people don't, about them identifying disabled although I think we might run out of time. So I'm going to let sort of I think Lizzie's talked quite a lot in in the past 10 minutes so I think I'll let Liz go for this one.

**Elizabeth McGlone:**

I've spoken quite a lot, I think Lizzie can have a crack.

**Lizzie Hardy:**

I feel like we've both spoken a lot haven't we?

**Charlotte Clewes-Boyne:**

I'm trying to balance it out but it's just

**Elizabeth McGlone:**

I feel balanced I don't feel deprived.

**Lizzie Hardy:**

Well Liz. You can go first. I'm more than happy to chip in.

**Elizabeth McGlone:**

I think well I've had this conversation with other people from neurodiversikey® in terms of the negative connotation of disability and the fact that it always seems like what you can't do. And I think that's the problem when you tie it in with neurodivergence because there's so many things that people who have autism or ASD, can do so much better than a neurotypical person, you know, assimilation of data or attention to detail, whatever it might be.

And I think with all of the issues of disability, it's a negative, you know, kind of an idea of an infliction or an illness. And I don't think that that kind of framework works for neurodiversity. And I wonder if maybe there is scope and I don't know, because I'm not a legislator to subcategorise or have, because you talked Charlotte about kind of social issues as a wider context. But in terms of what makes protected characteristic, there was obviously a lot of talk about creating menopause as a protected characteristic, social class as a protected characteristic, adding regional accents to, you know, race and religious discrimination. They've all been bandied around but I think there's this reticence to widen the protected characteristics because it's a policy argument, it's floodgates. It means there'll be more claims going through the tribunal and the resources are already strained. But I don't know if Lizzie sees it any differently in terms of disability and how that frames with neurodivergence.

**Lizzie Hardy:**

Not particularly you know. I think Charlotte to answer your question. What makes a protected characteristic a protected characteristic. You know, the Equality Act was codification of all the previous sort of anti-discrimination laws that we took and shoved into one and added a couple more you know. I think the problem and Liz is absolutely right you know, this what can amount to protected characteristic crops up regularly, social class yeah menopause. As I say it has been the real hot topic of the moment and that came up a couple of years ago.

I think the issue with adding you know neurodivergence as its own protected characteristic is there's so much fact and degree issues involved in neurodivergence. You know, it's all based along a spectrum. We have that problem to some extent with the protected characteristic of disability. Right. Because we've had to almost draw the line in the sand and say, well, here is where those people are going to fall within disability and those people aren't and that's bringing us full circle to that Section six, you know, definition at the beginning. And that's never great anyway. It never sits that comfortably because again, it doesn't really fit this social model of disability that we're all talking about now.

But I think that's exacerbated even more with this example of neurodivergence. If everybody sits along this scale somewhere, where on earth do you draw the line? And, you know, as Liz says, I'm not a legislator either, so goodness knows that would be a real issue for the people writing that law to try and have to pick. But I think that would pose a really difficult problem about where on earth would we say, is it all neurodivergent people?

Is it neurodivergent people with a formal diagnosis? Where along with the neurodivergent scale would we pick, you know, protected or not? There's a lot of things in there to consider you know. So I think the people who are reticent and would be saying the disability definition, while certainly imperfect, at least covers the people who need it.

**Elizabeth McGlone:**

Yeah.

**Lizzie Hardy:**

As I say, I'm not saying it's perfect. It's certainly not. It doesn't reflect the best model of understanding disability, but at least there's something there to cater for it.

**Elizabeth McGlone:**

And I think that's exactly right, because that's why menopause didn't get through because you had sex and you have disability

**Lizzie Hardy:**

And age.

**Elizabeth McGlone:**

Yeah, and age, sorry. You've got a triumvirate if you're a woman. So, but there is something already there. There are other classes of people that don't have any protection. So I think it's better than nothing. But it's the negative connotation, I think, needs to shift in terms of what you can't do. And maybe because it's the 'dis-', because that's always got a negative. So maybe, maybe the narrative needs to change in terms of it's something that maybe doesn't allow, doesn't allow you to form with social norms. But there are so many positives that can come out the other end. And I've always said to employers when I've spoken to them about this issue that they need to take that neurodivergence and take the brilliance that you can get and apply it and make sure that they get the best out of everybody.

**Charlotte Clewes-Boyne:**

Thank you so much both. That was a really comprehensive answer there at the end, and I think that's given everybody some real food for thought. One question that has come through, if you don't mind just straying over slightly, what is the difference between positive discrimination and positive action? And obviously in the context we're talking about that is actually quite relevant to what

you've just said Liz, about getting employers to see what people are capable of and you know, potentially then looking at it from some sort of a really sort of pushing people who are marginalised and in this case neurodivergent people maybe pushing them and giving them slightly more opportunity. Where is the line between positive discrimination and positive action?

**Elizabeth McGlone:**

It's not something, I don't... Lizzie what do you advise your clients in relation to making sure that they're not crossing the line between kind of, you know, disadvantaging some, advantaging others and balancing those kind of sides.

**Lizzie Hardy:**

Yeah, it's an interesting question because positive action we don't really see in the disability space. There's only a very niche time when you can use positive action when really you're comparing between two groups with competing disabilities almost. So I don't, I'm really conscious of the time, and I don't want to get too into that. But what I will say is reasonable adjustments is basically the only kind of 'positive discrimination' that is lawful under the Equality Act.

Actually, and when we're thinking about what I'm advising my clients when we're talking about this is it is actually treating people more favourably because of a disability. That is the purpose of reasonable adjustments, to level the playing field. It's a recognition that there is you know, it's not about equality, it's about equity.

**Elizabeth McGlone:**

I was just going to use that line.

**Lizzie Hardy:**

Oh were you?

**Elizabeth McGlone:**

Yeah.

**Lizzie Hardy:**

Sorry, got in there first.

**Charlotte Clewes-Boyne:**

It's the classic line isn't it.

**Elizabeth McGlone:**

But it's great because it's actually saying you know, there is a high, you can, it's a higher threshold, it's a higher level, you don't have to make sure everyone's the same.

**Lizzie Hardy:**

Absolutely.

**Elizabeth McGlone:**

And I think it's lovely in that sense. Lovely. That's a bit trite, you know.

**Lizzie Hardy:**

But that's what it's there for. So I mean, you know, conscious we're four minutes over. So I'll keep it short and sweet, but that's certainly the conversations we're having. Reasonable adjustments is there as that only real lawful type of positive discrimination that you can do. So that's good news.

**Charlotte Clewes-Boyne:**

Fantastic. Thank you both so much for an absolutely fascinating evening. It's been really enjoyable, and thanks everyone, and have a lovely evening.