

Neurodiversity in the Workplace: Legal Obligations, Practical Support, and Unlocking Potential

[Nick Coffey]

Hello and welcome to this latest episode of TW Law Talk. I'm Nick Coffey, and I know it's my job at the start of these episodes to say "this episode is of particular interest to me because..." well, the link today is far from tenuous. As a late-in-life assessed 'ADHD-er' and what we now call ASD1, I have at different points in my life, struggled in workplaces. And looking back, I have some, shall we say, annoyance as to how my own neurodiversity was handled. And not to fall into stereotypes, but I'm currently struggling to sit on my hands while a thousand questions race around my head, while at the same time making constant mental assessments about the atmosphere in the room. But I'm not trying to fall into stereotypes at all, but that is how my own brain works, and that does really pose challenges, great traits for a broadcaster, perhaps less easy to manage in a place of work. And I know I'm not alone in this experience, and we come to the crux of today's episode. With understanding and knowledge of neurodiversity increasing, are employers getting better at providing appropriate support for employees? Or is being neurodivergent in the workplace still, for some people, a painful exercise in trying to fit into neurotypical work practices? What do employers need to do to protect themselves, their neurodiverse colleagues, and their neurotypical colleagues as well? I'm delighted to welcome back Alec Colson, partner and head of employment at Taylor Walton, and Nichola Smyrl, who's also a partner in the employment department. Lovely to have you both back and for the second series now, not first ones up as you were last time, so this must feel a little bit more relaxing than first time round.

[Alec Colson]

We'll let you know that, Nick, in about half an hour's time.

[Nick Coffey]

Yeah, we'll see how we go in 25 minutes. Joining us also is employment law specialist and barrister at 1EC Barristers, Lisa Hatch, who has over 20 years of experience at the bar. Lisa, welcome to the podcast.

[Lisa Hatch]

Thank you very much. It's a great pleasure to be here.

[Nick Coffey]

So much to talk about today, and I guess the easiest place to start is to look at how neurodiversity is viewed legally. Is it a protected characteristic under, and I remember we spoke about this last time, the Equality Act, am I right in saying 2010 rings a bell? Is it a protected characteristic?

[Alec Colson]

It can be, Nick, in terms of whether it qualifies as a disability under section 6 of the Equality Act, which talks about a physical or mental impairment which has a substantial effect on someone's ability to undertake normal day-to-day activities, that's the test, which is set out in Section 6 of the Equality Act. So, an employee with a neurodiverse condition may well qualify under that section as someone who is disabled. And by being disabled, that triggers a number of different issues in relation to protection under the law and probably most pertinent to employers, is the duty to make reasonable adjustments in relation to the person with a neurodiverse condition, but clearly, it can be an issue for employers, and often, issues arise not just between the neurodiverse individual, but their work colleagues as well, and it becomes more of a difficult issue for the employer to manage and how to do that, and that can cause difficulties in the workplace.

[Nick Coffer]

So, in simple terms, Nicola, remembering what we spoke about last time, it was around duty of care, we were talking about sexual harassment at work, and it struck me that a lot of the law actually just fell under that category of the duty of care of employers towards their employees. Can we simplify this by saying this is under exactly the same umbrella?

[Nicola Smyrl]

Yes. I guess that would be right. There are specific parts of the Equality Act which are specific to people who have disabilities or fall within the definition of a disabled person under the Equality Act. So Alec's already mentioned the duty to make reasonable adjustments, so if you have somebody in your organisation and they, you know they're neurodiverse, then you should be thinking about how you can support them in the workplace to kind of alleviate any disadvantages that they face as a result of the way that they're affected by their condition.

[Nick Coffer]

And as a result of the way their condition, as you said Alec, affects the environment within which they work. And Lisa, I know you barristers, you love complicated things, this is a minefield, is it? This is a new thing or a relatively new thing, and it is a minefield.

[Lisa Hatch]

We are seeing a lot more cases involving neurodiversity in recent years. When I started practice, you saw very few, but there's a lot more public awareness, there's a lot more

information available to employers and employees, and they are using that to try and get the suitable working conditions for themselves.

[Nick Coffer]

But here's the interesting thing, because although you saw fewer cases revolving around neurodiversity, I can guarantee you that that neurodiversity was still there. So, when you look back, let's say 10, 12, 15 years, to some cases you worked on, you know, a decade ago, do you now look at them with a fresh eye? And you think, actually, what was at play there wasn't misdemeanour, wasn't misbehaviour, wasn't whatever was on the charge sheet, it's probably a bit dramatic, but actually was around neurodiversity. And in some ways, we were letting those people down, historically speaking.

[Lisa Hatch]

Yes, looking back, I can remember cases where there were potentially neurodiversity issues that weren't explored by tribunals and courts. I think the public awareness is so much greater now that it's at the forefront of people's minds.

[Nick Coffer]

And I'm guessing that one of the challenges, and Alec, you alluded to it a few moments ago, but for you, Lisa, one of the challenges is you've got on the one hand, people who are neurodiverse and they are able to accept they're neurodiverse, but equally, I speak as someone who is neurodiverse, we don't always want to be treated differently, and we don't want to be treated as disabled, I'm using the tone you use there, Alec. This is a a real juggling act, isn't it?

[Lisa Hatch]

It is, and everybody's needs are different. So, in each and every case, you'll find, a range of symptoms, and people's needs will vary on a case-by-case basis.

[Nick Coffer]

So, let's look at the challenges, because there are challenges, and I suspect there were challenges in employing me, I mean, I was obviously a model employee, but I suspect that there were challenges. And I look back, actually, at certain moments where perhaps I dug my heels in, where I had a sense of injustice, for example, and where I might have been viewed as a difficult employee, and I think back, and actually, I think that was also neurodiversity at play. I wonder what you all view as the main challenges that employers face, and, perhaps equally importantly, what are their legal obligations? Because you're all lawyers, so everything starts with legal obligations, so what is that framework?

[Alec Colson]

Well, Nick, as I mentioned earlier about the issue of reasonable adjustment, so that duty starts right from the very beginning, from the advert for the role, and employers now really have to look at how they recruit people. What's the criteria? What's the testing? Is it an interview? Are there tests that individuals have to go through? And if you're someone with dyslexia, for example, what would be a suitable, fair recruitment process? And this means employers do really need to think, if I can use that awful term, 'outside the box', in terms of, well, what are we trying to achieve here? What does the role require? And someone with perhaps a neurodiverse condition, how would that affect them if we apply this particular test or et cetera. So, it's looking at that whole process, and once they've been recruited, it may be many months before even the employer knows that the person has a neurodiverse condition.

[Nick Coffer]

And I'm going to jump on that because that was literally where my own brain was going at that point, where does the responsibility with the employer lie. So, for example, Nicola, you're employing, you're advertising for a job, and someone comes to you, and you suspect that they may be neurodiverse, and lots of people are neurodiverse without realising it or accepting it, or there's a whole another conversation around that, where is the employer's responsibility? Should the employer be looking at someone saying actually, I think there may be a question of neurodiversity, and I should be raising that? Or in raising it, could that, in itself be discriminatory?

[Nicola Smyrl]

Yeah, I think it is difficult because the employer can't just say, well, you didn't tell me you are neurodiverse, and therefore I have no awareness. In an employment context, if an employer ought reasonably to be aware that somebody has a disability, then they're potentially on notice that they have that. So you can't just take everybody based on what they tell you expressly, and if you suspect somebody has a neurodiverse condition and it's starting to cause issues, either as part of a recruitment process or in the employment relationship itself, then you probably should take steps to explore that and see what support can be offered. So, you don't necessarily need to go and speak to that employee and say, we suspect you're neurodiverse, what can we do to help you? But you can indicate that there might be support available with certain aspects of the role. In terms of recruitment, generally, as an employer, it might be sensible to have a range of ways that people can participate in a recruitment process. So, rather than having written answers, maybe somebody could record them and send them in, or perhaps you could consider a trial session instead of an interview or something like that, depending how people are affected by their neurodiversity. So, like Alec said, it's about thinking about ways that you can perhaps accommodate people who can't necessarily do as well as they could if they were just following a normal standard process.

[Nick Coffey]

And on an HR level, should it be part of their process when establishing a recruitment process, is this neurodiverse friendly? Should that be the question that they're asking themselves?

[Nicola Smyth]

Yeah, I mean, ACAS has recently released some new guidance around neurodiversity, and one of the suggestions in that is that as an employer, you should think about how you can make your organisation more neuro-inclusive, so that people don't necessarily have to disclose that they're neurodiverse in order to be able to participate as fully as other people. So having a range of ways that people can do things, rather than one set way that might be more appropriate for neurotypical people, thinking about ways that you can accommodate a range of people and their kind of individual circumstances, I suppose.

[Nick Coffey]

I was about to say, there's an elephant in the room, and then I realised I've got three lawyers in the room and they're all going to tell me that I can't say it's an elephant in the room because I'm going to say Greg Wallace, so I'm not saying I'm not, I'm not linking the two, but we can talk about this because it is in the public domain. And I think Greg Wallace himself has well, and I think I know he's come out, he's done a video, and he said, You know, "I'm neurodiverse, I'm autistic, I've been let down by the BBC." Now we can't talk about that part of it because that's obviously an ongoing issue, but it does lead to a really important, wider question, which is how people who are autistic can, in some instances, use that as a means to cover potential alleged bad behaviour. And Lisa, you must see this a lot, and I wouldn't want to be dancing the line that you're dancing, because on the one hand, you could have, you know, very well-founded, substantiated accusations, on the other hand, you've got someone saying, well, as Greg Wallace says, well, that was my autism. And at what point does neurodiversity become an excuse for just really bad behaviour?

[Lisa Hatch]

Well, there are other forms of discrimination. And one form of discrimination is for something arising from your disability. Now, I don't know the ins and outs of that particular case, I don't know what's been, and what the findings of the investigation are.

[Nick Coffey]

Or what he disclosed at the BBC, we know none of that.

[Lisa Hatch]

Or what he disclosed. But taking a hypothetical situation, if a behaviour that someone exhibits is a cause for disciplinary proceedings, and the employee argues that it's because of something arising from a condition that they have, then that's something that the employer

has to factor into the disciplinary procedure. So, it's not clear-cut. I think it's not as simple as saying that it may be used as an excuse for bad behaviour. It could be quite a complex factual situation.

[Nick Coffer]

And I never thought I'd say this sentence, but I spent an hour this morning reading case law around neurodiversity and employment, because you said, David, it was very interesting, and I think it's fair to say, and Lisa, stop me if I've got this wrong, but using autism or neurodiversity as, in inverted commas, an 'excuse' is not a slam dunk legally. I read some of those cases, and when you get to employment tribunal level, which of course is when you guys get involved, it is not automatic that a judge is going to say, "yeah, no, I can see you're neurodiverse it's fine, that was okay." In fact, I would say, if anything, there is a relatively strong bar of, I'm not going to say scepticism, that's the wrong word, but there's a relatively high bar of proof to evidence that what actually happened was due to neurodiversity, as opposed to other factors.

[Lisa Hatch]

Yes, absolutely. I mean, the tribunals job is to look for causal connections. And, of course, in tribunal, we always have the benefit of hindsight. So, my job, part of my job, and Nicola and Alec's job is to weigh up the body of evidence to see which way it's shifting, or landing. So, for the tribunal, the tribunal's job is to try and work out what the most likely cause of any particular situation is.

[Nick Coffer]

So, when someone comes to you both as lawyers, and obviously then you're the next person in the process as a barrister, is part of your job assessing the chances of this claim against an employer of succeeding? And if the answer is yes, and you're both nodding, so I can help our listeners say the answer is yes, but when the answer is yes, where do you even start to work out where that sits?

[Nicola Smyrl]

I think often we get approached by employers who perhaps have a neurodiverse employee and they might be experiencing, say, a performance issue, and it's about thinking about how best to manage that in a way that's not going to lead to a claim, or if ultimately, you do have to take some kind of action against that employee and that causes a claim, putting the employer in a position to defend that. So often that's about considering before you take any formal kind of start any formal processes against an employee is thinking about how you can support them, to try and remove the barriers which might be causing the poor performance or the disciplinary concern. And giving some time to enable that to kind of bed in and work before you then go on and assess them in a more formal way.

[Nick Coffey]

So, you're not trigger happy when it comes to going to tribunal?

[Alec Colson]

No. Well, they're time consuming, can be expensive, stressful. So, it's clearly important for the employer, in those circumstances, to think carefully about what they're doing. As Nicola says, one of the things which employers do need to do, I think in these cases, and as Lisa mentioned, they all rest on their own merits, these cases. So, the employer does need to find out from the employee, who perhaps says they have ADHD, how can we help you in that? And get a diagram where maybe you approach occupational health, obviously with the person's consent, and find a bit more about that, because what the employer is then doing is treating it seriously, giving it the respect it deserves, and then finding out with some form of medical report, it may be, what things, what steps can the employer take? Because in order to exercise that duty of reasonable adjustments, you need to know what those adjustments should be and can they be, are they reasonable? Is it possible for this particular person who may have a condition, you know what reasonable adjustments would help? Does it mean having a break, you know, perhaps every hour just to formulate the thoughts? Or often, particularly with ADHD, is having some form of order put in into the daily work, that the employee can follow. And there's also often an educational issue here as well for the other employees, because they won't necessarily understand that someone's behaviour is due to their condition, and therefore there is that sort of wider educational sort of duty on the employer. And the employers might be sitting here thinking, well, we just employ people, we don't know, but the law is pretty clear on this now, there is an expectation on employers to look at things like reasonable adjustments, how they treat the staff, are there changes which can be made to the workplace to assist that person? Because what was the Disability Discrimination Act, which then became morphed into the Equality Act, was a means of facilitating people with disabilities into the workplace. And that's what the law is designed to do.

[Nick Coffey]

I wonder also whether one of the challenges that you all face here is, we've spoken about constructive dismissal before as well, and there must be an element whereby employers, in effect, use that neurodiversity to bully someone out of the workplace. And they create environments that are going to tap into, negatively, an employee's neurodiversity, and that employee is going to really struggle, which is kind of like the old-fashioned picking on someone in a playground. But where an employer, whether deliberately or perhaps just subconsciously, knows what they need to do to push the buttons of the person who is struggling to be neurotypical, do you see a case like that, Lisa?

[Lisa Hatch]

We do come across cases where people essentially complain of being managed out of a business, and you see cases where capability procedures are raised against individuals and perhaps an unrealistic target is set for them. And they're put under a lot of pressure. And for certain individuals, that can be a pressure that's too much to bear. So unfortunately, we do see cases like that, yes.

[Nick Coffey]

And do you see any link between the kind of organisation and the kind of cases? So, I know you work a lot with public bodies and authorities and large charities. Is it harder for someone who employs two people than someone who employs 20,000 people, or is it the other way around?

[Lisa Hatch]

I think you perhaps see more formal capability procedures in larger organisations. I should caveat that by saying that some, I would say a lot of capability procedures are entirely authentic and they have positive results.

[Nick Coffey]

And they're needed to help an organisation function.

[Lisa Hatch]

Absolutely. But from time to time, procedures appear to be used to rid an organisation of individuals, or at least that's how those affected employees feel.

[Nick Coffey]

See, this is interesting for me because we're second episode in on employment, and I just find it the most both perplexing and fascinating topic, and I don't know how the three of you navigate it, because you are right on that cusp of humanity and legal complexity. You know, Nicola, last time we were talking about, you know, getting it wrong at the work Christmas do, for example. And what an employer has to do with that. And your job is around working out what is human fallibility, vulnerability and, actually, misdemeanour.

[Nicola Smyth]

Yes, absolutely. That's right. I mean, employers do come to us all the time and ask us to take a view on the best way to approach something. And you have to think carefully about what's reasonable. Some employers are more willing to be supportive than others, and therefore, they will go through a more thorough and a longer process than others. And some people just say we have got business to run, we can't afford this, we can't do this, we'll have to take the risk. So different employers have different approaches, for different reasons. And, yes, our job is to tell them this is what you ought to do, and it's ultimately up to a business to decide whether they do that or not.

[Nick Coffey]

And that leads to the key question, in some ways the most important question of the whole discussion, the three of you, with your vast experience, what do employers need to do? So, anyone listening to this now, can we create almost like a checklist of five things? What should they be doing if they're not doing it? And Alec, you'll recognise this question from last time around, what is the worst-case scenario if they don't? Because ultimately, especially if you're a business owner, you're thinking about cost, cost, both financially and reputationally. So, let's start with what you can do in all of your experiences around neurodiversity in the workplace and cases that arise from it. What could and should employers be doing from the moment they hear this episode?

[Alec Colson]

I think what's important is right at the very beginning is to think through, what is the strategy here? Because it's for the employer to think through, well, if we go down this particular route, what are the advantages and disadvantages of that? What could be the worst-case scenario? And when you're dealing with something like disability, whether it's neurodiversity or any other form of disability, the law, in some sense, is quite clear on what the duties are in terms of reasonable adjustment, et cetera. But my first thing is, well, and I always say to the employer, look, we're now on notice, the individual, for example, has said they have ADHD, so we're now on notice immediately that they may have a disability. We don't know necessarily that it fits the requirements of the Act, but more likely than not, it may well do.

[Nick Coffey]

And at this moment in time, it is not our job to ascertain how true or not this may be. They have put us on notice because they've said it.

[Alec Colson]

They've said it, yes, they may not even have said it, they may just have a certificate saying the person may have maybe been feeling depressed and has taken time out. So, there are all sorts of warning signals, so the employer doesn't necessarily, it can be on what they know as constructive knowledge, what lawyers call constructive knowledge, that put various factors together, there's an issue here. So, my advice at that stage would be, well, we probably do need a medical report.

[Nick Coffey]

Right.

[Alec Colson]

And in order to have something to educate the employer about this individual concern, again, we need to look at it in terms of the individual. Because if there is going to be a claim, it will be on that person's individual basis, so it's getting that information together about what are the conditions? What adjustments do we need to make, or what will be sensible to do? So, we then got a picture that the employer is informed then. And then, from that moment on, can then make informed choices about how it wishes to manage the situation.

[Nick Coffer]

Lisa, would you go as far as to say that if you're creating a business today, this should be at the top or very close to the top of the list of the things that you're putting in place to make sure you've got the right procedures in place?

[Lisa Hatch]

Yes, I think so. I think it's so much in the public awareness that it justifies putting it front and foremost and high on the list of priorities.

[Nick Coffer]

And as you said earlier on, this is a relatively new field as well. So, do employers have a duty to keep abreast of the evolution in how neurodiversity is viewed under employment law? And if so, how do they even do that, apart from asking Chat GPT?

[Lisa Hatch]

I wouldn't advise using AI, but there's a wealth of information available from various charities. And quite often, in practice, we look at charity websites to glean information about any particular condition. It can be really helpful. So, places like the National Autistic Society or the British Dyslexia Association, or the Dyspraxia Foundation, all of these organisations, and there's a wealth more, have really interesting, helpful information.

[Nick Coffer]

And it's been quite interesting to come back to the Greg Wallace story again, the part of it that's in the public domain, many of the organisations you've just quoted have come out and said, we don't ascribe to the view that we can blame inappropriate behaviour on autism. And I think this is actually a really important point because we do have longstanding stereotypes around people who are neurodiverse. I know that I am extremely empathic, very easy to talk to, I know that I have a lot of qualities that you may associate with someone who's neurotypical, but I know I'm neurodiverse, and I think that what those charities are suggesting is some of those stereotypes may be accentuated by that kind of story where someone's saying, well I, and this has been proven in the report, 'I behaved inappropriately because of my autism.' I think that's basically what he said in his video. I don't think we're saying anything libellous here, he said it himself. And that's quite

dangerous, isn't it, for people like me, who are quite happy to say, well, I am neurodiverse myself, because then will that mean that people are concerned about me?

[Lisa Hatch]

I think it's important for employers to have conversations with their individual employees to see what the effects of their neurodiversity are because when we're talking about discrimination, we're quite often focusing on the effects, and the effects may be different for each and every person. So, oftentimes, the reasonable adjustments that people are looking for may be free or cheap. They might be quite straightforward. So, it's important to have that conversation, to see what can be done.

[Nick Coffey]

And I'm going to put you on the spot now, Nicola, with the key question of those reasonable adjustments, what can they look like? What is reasonable?

[Nicola Smyth]

Yeah, I mean, I suppose that depends on the nature of the job and what the employee does, and also the kind of resources of the employer. But, like Lisa says, often they're quite straightforward, lots of the websites and organisations that Lisa mentioned have suggested adjustments on their websites. The new ACAS guidance lists out various conditions and how they might typically affect somebody and give some suggestions for adjustments. So, I had a client recently and they had an employee who had ADHD, and really, all he wanted was like a wall planner so that he could see his day, and some time between meetings to kind of write down some notes and process his thoughts. So that didn't really cost the employer more than about £50 on a board to put on the wall. So, there are obviously other things that employees might like, so things like coaching, software to do certain things like transcribe meetings, those types of things. But really, it is about understanding from the employee as far as possible how they feel that they're affected by the condition and how they might be supported with that.

[Nick Coffey]

I've tried the wall planner idea, but I need a list to remind me to look at the wall plan. And then I've tried keeping lists, but then I have lists reminding me to look at those lists. Can I ask a Maverick question? A room of lawyers looks very worried, and I'm just flipping this around in my head, because so, I've got some experience with children who are having adjustments at school. For example, with exams, they're being allowed to take longer with their exams, or they're given a laptop. And I know that some of their peers are a bit annoyed about that, and that there is an element of jealousy, and they're thinking, well, you're getting 20 minutes to work out the answer to that maths question when you may not need it. So, my Maverick question is actually just looking at this from the standpoint of you're running an organisation, it could be a large public sector organisation, it could be a small

business with five people in it. Surely some employers are going to say, is there not some kind of reverse discrimination? You'll have a better term than me on this. Whereby, focusing on someone's need for adjustments, other people are potentially losing out. Now, I've probably asked that question in the most illegal and unclear way, but does it make sense?

[Alec Colson]

It does make sense, but I suppose the answer to that is that if someone has a disability within the meaning of the act, then there are duties on the employer to make those adjustments. So, in a sense, it's sort of a positive action point, in terms of helping someone, the law recognises someone with a disability may need assistance.

[Nick Coffer]

And that's full stop.

[Alec Colson]

That is full stop. If you walk into a railway station, clearly a person who perhaps has a physical impairment, we would expect these days there to be facilities in order so they can gain access to the platform. Likewise, within the workplace, the same conditions apply. There are expectations now that adjustments are made for people who have a particular disability, whether that's physical or mental.

[Nick Coffer]

Sorry, I'm just going to relay very quickly, which goes back to my time at the BBC, but I think it is relevant to this. I was contacted by a remarkable woman who has Coprolalic Tourette's, which is the 'swear' version. And I spoke to her on the phone and boy does she have Coprolalic Tourette's. I mean, I don't know how best to phrase this, but she uses all the words all the time. And she said, I'd like to come in and do an interview about living with Tourette's, and I said, OK, yeah, great, so we'll probably need to pre-record, and before I'd even said pre-recorded, and by the way, you can't pre-record it because if I came in, with a problem with my leg or as another disability, you wouldn't pre-record me. So, pre-recording me, with my Tourette's, would be discriminatory, and it really got me thinking, and I then took this all the way. We have a thing called or had a thing, I know I'm no longer there, but a thing called editorial policy at the BBC, and it went all the way to the very top, and I really advocated for her doing a live interview. And to the BBC's credit, by the time it came back down, it took us a little while, but by the time it came back down, the result was she will have a live interview, because to not have a live interview would be discriminatory. And that's kind of the full stop that got me thinking of hearing you, Alec. Her view was that the fact that she would say, and in fact, the interview is still available, you'll probably find it online, but she would say, I'm not swearing, that is my Tourette's, so I'm using the words, but that is Tourette's. And her view was I therefore deserve and have a right to an interview like anyone else. And I've always remembered that example, because actually she was right,

and we did it live, and she used all the words all the time and got an incredible reaction from it because people were fascinated by her description of, you know, it's like sneezing, I just can't stop it, don't try and stop me. So, is that the context under which you all operate as well, that fundamentally everyone has a right to a fair life?

[Alec Colson]

Yeah, I think in that context, it was an interesting example, and it's probably pushing up the limits. But in a sense, it's right, because it's the Tourette's, in a sense, was speaking there, isn't it? And I think generally people in those circumstances actually understand that the audience probably understood that, whereas someone who came on just to be offensive, people would be turned off by it. Whereas that, generally people are understanding, actually, I find in life, if someone has a genuine disability, then my experience is that employers will wish to try and facilitate, and indeed it does often enhance a reputation. Many years ago, I dealt with a case where the employer employed an employee who had a guide dog. And they were very proud of the fact that they were recruiting someone with a guide dog. Unfortunately, one of the other employees said that they were allergic to dogs. So, we had a bit of an issue then about where the dog would sit in the office. It was resolved in the end, but there's this clash of issues, but with a bit of imagination, these things can be resolved.

[Nick Coffer]

And, of course, Alec, this speaks of, in a way, normalising being around disability. I remember, just going back briefly to the Tourette story, I was honest on air, and I said, I'm finding it quite hard not to laugh, and she said, that's the best thing you could have said because of course, you want to laugh because I'm on radio using the bad words and therefore it is funny and also really uncomfortable for you, and I want people to be able to say it's uncomfortable. And maybe part of this, for employers, is around actually just being open in the workplace and acknowledging that actually there may be elements that are uncomfortable for their staff, and actually naming that is that helpful?

[Lisa Hatch]

Yeah, it's very helpful. To promote a tolerant and inclusive workplace, it has to be the right thing to do for every employer.

[Nick Coffer]

Can only be a good thing. There's just another thought coming to my mind and do stop me if I'm if I'm wide of the market. But I know a number of parents who are dealing with, for example, children who are neurodiverse. When I say dealing with, I'm talking about perhaps at the more difficult end of the spectrum, and it is a spectrum, we say it's a spectrum for a reason. And I know parents with non-verbal children, children who require extra care, hospital appointments, doctor appointments, and actually that really does impact on their

working life. One in particular I'm thinking of is a very dear friend of mine, has an amazing employer who from the outset knew the situation and factors it into her work and her working life, and her timetable. She would say she couldn't work anywhere else because this employer is so understanding and she can get a call with a second's notice, 'you have to come now', and she would, she would do that. My question to all three of you, and perhaps I'll look to the barrister here, I'll put you on the spot, Lisa. Is associated neurodiversity by that, I mean, like for mums, dads, carers, does that fall under the law? Does an employer have to look after people who look after people who are neurodiverse?

[Lisa Hatch]

Yes, they do. A parent or carer would fall within the remit of the Equality Act, and so they would be protected from discrimination for caring for their child or whoever they care for.

[Nick Coffer]

So, an employer that says, well, your child's not my problem, you're my problem, actually is headed down a dangerous road.

[Lisa Hatch]

A very dangerous road. There is a legal duty to consider the needs of parents and carers.

[Nick Coffer]

And Alec, just quickly, and this is a mirror of what we did last time around, worst case scenario. So, I know that, for example, with an employment tribunal, if it's around constructive dismissal, I happen to know, the worst-case scenario, I think, is a year's salary, I think that's my memory from the last episode and personal experience with friends and colleagues where I've worked. Is it different with a discrimination tribunal? So, if you're saying that you have been discriminated against, is it capped in the same way?

[Alec Colson]

No, it's not. For disability discrimination, the remedy is to still have the heading, what is known as loss of earnings, but there's no cap placed on that. So, it could be longer than, say, the 12 months gross pay for unfair dismissal. But there still would be a duty to mitigate their loss. So, the employee who's lost their job because of, say, for example, disability discrimination, the employer's been found to have directly discriminated against them or some form of discrimination, therefore, the employee will be able to claim loss of earnings without the cap. In addition to that, the employees also will be entitled to what is known as an injury to feeling, and that's what is known as Vento bands.

[Nick Coffer]

Oh, that came up last time, I remember.

[Alec Colson]

It's the same point. There are three levels of Vento bands, there's lower, middle and upper, depending upon the severity of the discrimination. So, if it's a very, say, for example, there's been harassment involved and the person's been very badly treated, then you could be looking at the higher level of the Vento bands. So, you know that that could be sort of in the region of over thirty thousand, forty thousand pounds. Most series is sort of looking at the sixty thousand pounds. Whereas for more trivial ones with sort of in what is known as a lower band, say, seven or eight thousand pounds. And to be honest with you, it's very difficult to know, Lisa may make contradict me here, but it's very difficult to know what a tribunal would award by way of injury to feeling. Because it does very much depend on what the tribunal thinks and what they hear.

[Nick Coffer]

And Lisa? Any barrister that says 'I know what's going to happen' is probably not fully giving the full picture. Is it that case? You just can't know?

[Lisa Hatch]

It's very, very difficult to predict exactly where a tribunal will assess injury to feelings. It depends upon how an individual comes across more often than not. So yeah, it's a hard one.

[Nick Coffer]

No promises. TLDR, too long, didn't read. Get it wrong and it could cost you a lot of money. Can I finish in a soft place? Because what I'm hearing from all of you, and you're clearly very, very empathic people, I don't sense any huge litigation trickiness with any of you. You all want to resolve these things, I would say, well before they reach tribunal. Is the summary of all of this, and I know it sounds really, really soft, but is the summary, be kind. So, in your workplace, be alert. Be aware of people's challenges and be kind and foster that that kind environment, and if you do that, you may be 85 to 90 percent of the way there to ensuring that you won't have issues.

[Alec Colson]

Yes, I think that's true to a certain extent, but I want to take away the fact that issues of disability can be challenging to employers, and therefore, it's important that employers do think carefully about how they manage that process and how they treat individuals. But that's not to say it's easy, and as Nicola has indicated in relation to associated discrimination, you know, that we've seen, well, how is that our issue, well, it is your issue in the sense of the employer now, but these things are not always easy to manage, so kindness doesn't always get you over the line.

[Nick Coffer]

And it's not an excuse.

[Alec Colson]

No, it's not an excuse. So, it is important to think carefully about how you're dealing with a particular issue, as I said earlier, finding out, discussing with the employee what the issues are. So, if you are unfortunate enough to end up in an employment tribunal facing Lisa cross-examining you...

[Nick Coffey]

Don't do it, everybody, don't do it, that's my advice.

[Alec Colson]

Lisa should be able to show that these were not ad hoc decisions, not given without any thought, but were given with thought, and do take advice.

[Nick Coffey]

I have no doubt, Lisa, that you would be a fierce advocate for anyone finding themselves in that kind of difficult situation. A couple of things come to mind just to wrap up. First, I think that anyone listening to this should come to you before any of this flares up. It is much better to approach, for example, yourselves, Alec and Nicola, with a question and get an honest answer before it escalates into something more serious. It also reminds me, I think we touched on this last time as well, the importance of having proper HR within your businesses and your organisations because I know a lot of people in HR, that they've kind of been eased out in a lot of places, and that HR is the first thing that gets cut. And when I speak to you both, it reminds me of how important it is to have proper HR that actually ensures that those problems don't escalate. And perhaps my final thought, and I say this without a hint of self-interest, is just a reminder that, actually, outside of all of this, and we've looked at the problems, but outside of all of this, often neurodiverse people have superpowers. And, you know, we talk about it as I say, without a hint of self-interest, but we talk about it as a disability, and rightly so. But savvy businesses know that in certain contexts, and by the way, I'm sure that about 80% of broadcasters are neurodiverse, I would happily do a survey on that, that actually, and you must see this Lisa all the time, it is a superpower and perhaps one that if you can embrace it within your businesses, not only will you avoid a lot of problems, but actually, you could really fly as well.

[Lisa Hatch]

That's very true. There are a number of organisations now who are positively looking for people with neurodiverse conditions. So, yeah, it's definitely something to look for.

[Nick Coffey]

Yeah. And with good cause, that they're looking for them again, without a hint of self-interest. Lisa, where can we find you in your day job? Should anyone feel the need to come and approach you for your expertise, what's the best way to do that?

[Lisa Hatch]

I'm a barrister at 1EC Barristers. You can look at our website, which is 'www.1ec.co.uk'.

[Nick Coffey]

And they'll find your contact details there as well. Although normally they'd come to you first, wouldn't they, Alec and Nicola? So where do we find you?

[Alec Colson]

Yes, I can be approached on email, 'Alec.Colson@taylorwalton.co.uk'. Also on our website, Taylor Walton.

[Nick Coffey]

And those links will be in the notes of Nicola, same for you Nicola Smyrl on the Taylor Walton website. And I can confirm you are both very good at replying to emails, especially when I'm confused about employment law. If you want to discover any of the first series and indeed the second series that we're now well into, you can find all of the episodes wherever you happen to listen to your podcasts, whether that's Apple, Spotify, or indeed on the Taylor Walton website TaylorWalton.co.uk. And while you're there, while you're on Apple or Spotify, perhaps click on Follow. Because what that will mean is that you'll get a little notification of future episodes, so you'll be the first to hear them. And we've got some really, really great episodes lined up that will be coming your way over the next weeks and months, and certainly as we head into September. Some very key parts of law that we try and look at in a way that makes them understandable for those of you who are, like myself, not legal, but also fascinating for those of you who are. So do subscribe to the series and you'll be notified of all future episodes. But for now, from myself, Lisa, thank you so much for coming. It's been lovely to have you in the studio, and Alec and Nicola, it's goodbye.

[Alec Colson]

Thank you.

[Lisa Hatch]

Thank you.

[Nicola Smyrl]

Thank you. Bye.