

The Equality Act 2010 and the Social Model of Disability

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Abstract

Deaf and disabled people are expected to join the labour force in greater numbers than in the past. They do so whether they are fit for work or not, with only minimal support from employers and while facing discrimination and prejudice. The premise of this study is that current disability provisions in the Equality Act 2010 (EqA), hinder this process rather than facilitate disabled people's equal participation in the workplace. The contention is that the medical model of disability on which the legislation is based is in itself a significant barrier.

This study proposes that with a change of the statutory definition of disability and a move to an anticipatory duty to make reasonable adjustments, the social model of disability will replace the medical model. It will provide the impetus for the legislation to turn from a disabling tool to an enabling means for Deaf and disabled people. These changes will help employers remove barriers in the workplace that will facilitate disabled employees' full integration and retention at work. In turn this will enable the UK to uphold the United Nation's Convention on the Rights of People with Disabilities.

The proposition is explored in four different ways: a literature review examines existing research and analysis of the legislation and of the two models of disability by disability activists and academics. Case law is critically studied to identify the failings of interpreting legislative provisions based on the medical model. Interviews with leading figures of the disability movement and of disability studies follow. The study completes its research with discussions by disabled employees in a focus group. Their experiences in the workplace form seven case studies. The final chapter develops, with the aid of legislative tools, proposals to replace the medical model in the EqA with a social model approach.

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Glossary of acronyms

ADA	Americans with Disabilities Act 1990, as amended
DDA	Disability Discrimination Act 1995, as amended, repealed by the Equality Act 2010
DDPO	Deaf and Disable People Organisation where all or majority of trustees are Deaf and/or disabled people
DED	Disability Equality Duty, came into force in 2005, repealed by the Public Sector Equality Duty in the Equality Act 2010
DPO	Disabled People Organisation
DRC	Disability Rights Commission, abolished when the Equality and Human Rights Commission was set up
DRTF	Disability Rights Task Force, set up by the Labour government in 1997
EqA	Equality Act 2010, replaced the DDA, RRA and SDA as amended. Includes protection for age, sexual orientation, religion and belief
EHRC	Equality and Human Rights Commission, replaced the CRE – Commission for Racial Equality, EOC - Equal Opportunity Commission and the DRc - Disability Rights Commission
ODI	Office of Disability Issues
PSED	Public Sector Equality Duty, EqA 2010
RRA	Race Relations Act 1976 as amended. Repealed by the EqA 2010
SDA	Sex Discrimination Act 1975, as amended. Repealed by the EqA 2010

UNCRPD United Nations Convention on the Rights of People with Disabilities

UPIAS The Union of Physically Impaired Against Segregation

Can the social model replace the current medical model on which the disability provisions in the EqA 2010 are based; and will this provide more effective measures to removing the barriers disabled people face in employment?

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'Recognising that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.'

UNCRPD, Preamble (e)

CHAPTER 1

Introduction

‘Disabled people...have for a long time fought for civil rights and have learned that legislation covering these rights is only as good as the comprehensive nature of the law, the enforcement mechanism and the understanding and judgements of the judiciary’¹

The Current Reality

Seventeen years on from the Disability Discrimination Act 1995 (DDA) and three years after the Equality Act 2010 (EqA) came into force, promoted as an improvement on the DDA², the position of disabled people in employment in the UK is still bleak. In 2012, less than half of disabled people of working age were in employment (46.3%), compared to 76.4% of non-disabled people.³

Studies have shown that impairment and ill health affect work status more than gender or lone parenthood.⁴ Only 16% of people with mental health conditions and people with learning difficulties are in paid employment. 23% of disabled people have no qualifications compared to 9% of non disabled people. Disabled people in work are paid less: in both full-time and part-time work, the proportion of disabled employees who are low paid is around 10% points higher than for other employees. Disabled men working full time earn on average 25% less than non-disabled counterparts. Wages of disabled women are only two thirds of those of disabled men.⁵ 40% of adults aged 45-64 on below-average incomes have a limiting longstanding illness or disability, more than twice the rate for those on above-average incomes. Disabled adults between the ages of 25 and retirement are twice as likely to live in low-income households as non-disabled people of the

¹ Rachel Hurst, ‘Legislation and Human Rights’ in John Swain et al (eds) *Disabling Barriers – Enabling Environments* (2nd edn, Sage Publications London 2004) 302

² Bob Hepple, ‘The New Single Equality Act in Britain’ [2010] 5 Equal Rights Review, 21

³ Office of Disability Issues, Statistics <http://odi.dwp.gov.uk/disability-statistics-and-research/disability-facts-and-figures.php#imp> accessed 9 September 2013

⁴ CPAG *A Route out of Poverty? Disabled people, work and welfare reform* (2006)

⁵ Tania Burchardt, *Enduring Economic Exclusion: Disabled People, Income and Work* (Joseph Roundtree Foundation York 2000)

same age: 30% compared with 16%.⁶ Latest figures show that 21% of children living in poverty have disabled or long-term sick parents.⁷

83% of disabled people acquire their impairment during their life. Impairment is therefore a '...common human experience and common causes of impairment are socially created: accidents, violence, poverty, war and pollution. It is also an inevitable consequence of the aging process...to suggest that impairment is a minority issue is ridiculous.'⁸

In 2005, a Cabinet Office report⁹ identified the following barriers faced by disabled people in their day to day lives:

Attitudinal – prejudice and discrimination by employers, health professionals and service providers

Policy – the way policy is designed and delivered that fails to take account of disabled people

Physical – an inaccessible built environment and transport system

Empowerment – failure to consult, listen to and involve disabled people in the decisions that affect them

The outcome of these barriers individually and collectively, it reports, is marginalisation and exclusion from society and the economy. Removing these barriers is crucial, if disabled people are to have equal rights and opportunities to participate as active citizens in the same way as non-disabled people do. This analysis reflects the social model of disability, identified thirty years ago by

⁶ Disability Rights Commission *Ending poverty and widening employment opportunity*, as referenced in 'The Disability Manifesto: Tackling Disability Poverty'[2010] Disability Alliance. First published December 2009. Revised edition January 2010

⁷ H Stickland, *Disabled Parents and Employment: background Paper for the HMT/DWP Seminar* November 2003, cited in Prime Minister's Strategy Unit: *Improving the Life Chances of Disabled People*, 2005, 37 http://www.strategy.gov.uk/downloads/work_areas/disability/disability_report/pdf/disability.pdf accessed 23 June 2013

⁸ Colin Barnes, at Disabled People Against the Cuts meeting on the Social Model, 1 September 2013

⁹ Prime Minister's Strategy Unit 'Improving the Life Chances of Disabled People' [2005] 37 <http://webarchive.nationalarchives.gov.uk/+http://www.cabinetoffice.gov.uk/media/cabinetoffice/strategy/assets/disability.pdf> accessed 22 August 2013

disabled people and their organisations,¹⁰ coined by Mike Oliver in 1983¹¹. As activists, academics and commentators they have continued to campaign for putting this model into practice and much has been achieved.

However, disabled people at present are under a sustained attack as never before, by a government insistent on cutting welfare, benefits and entitlements and pushing disabled people into employment whether they are fit for work or not.¹² The 'forced' entry into a labour market follows the Work Capability Assessment (WCA) undertaken by the much maligned French IT company ATOS. This is taking place alongside an increasing public perception that disabled people are 'scroungers' and 'shirkers', a rhetoric promoted by both government and a hostile media.¹³ The negative discourse adds to an already deeply rooted prejudice against disabled people. For example, in 2009, a third of employers responding to a Department of Work and Pensions survey said that hiring a disabled person was a major risk for an employer and 47% said it would be difficult to 'retain an employee who became disabled.'¹⁴

Failings of the EqA

Against this backdrop it is necessary to critically examine the legislation purporting to protect disabled people from discrimination in employment and promote their civil rights. The Equality Act 2010 (EqA) that repealed the Disability Discrimination Act 1995 (DDA), is claimed to be an improved instrument.¹⁵ Indeed it includes several provisions which did not apply to disabled people previously: Indirect Discrimination (s. 19); Discrimination Arising from Disability (s. 15); disallowing employers to ask about job applicants' health (s. 60); protection where discrimination or harassment arises from a wrong perception that a person is

¹⁰ The Union of Physically Impaired Against Segregation (UPIAS), in discussion with Disability Alliance 'Fundamental Principles of Disability' November 1975, 4

¹¹ Mike Oliver and Bob Sapely *Social Work with Disabled People* in 1st ed 1983 (Macmillan, 3rd ed, Basingstoke 2006) 29

¹² Claudia Wood, *Destination Unknown* (Demos London, summer 2012)

¹³ Dr Simon Duffy, 'A Fair Society: how the cuts target disabled people' [January 2013] Centre for Welfare Reform

¹⁴ EHRC 'Disability Committee Priorities and work programme 2009' [March 2006] Disability Briefing, Disability Rights Commission

¹⁵ Bob Hepple, *Equality The New Legal Framework*, (HP, Oxford, 2011)

disabled, or where it is based on a person's association with a disabled person¹⁶. S. 124 provides employment tribunals with an opportunity to recommend measures to improve organisational practice, beyond those afforded to the claimant.¹⁷

However, according to social model analysis¹⁸, there are two specific failings in the EqA as in the DDA before it. This study will focus on both. First, the restrictive statutory definition of disability. Secondly, the reactive nature of the duty on employers to make reasonable adjustments. Both are based on what is often referred to as the medical model of disability. This model is driven by medical perception that the exclusion disabled people experience is due to their impairments or health conditions. Thus medical and rehabilitative interventions are required to 'put right' the condition. For example, teaching a Deaf person speech, rather than making British Sign Language part of the curriculum of all primary schools. And if medicine or rehabilitation cannot succeed, then charity will help disabled people cope with their tragedy. This approach resulted in segregated education, disability charities run by non-disabled people and sheltered work places.¹⁹ In contrast, the social model demonstrates that it is not individual impairments that are disabling, but society's structure, culture, values, economic system and environmental construct that are responsible for creating disabling barriers. It is the way society functions that excludes disabled people from full participation. Removing these barriers will bring about their integration, participation and greater independence. This is the premise on which this study is based: widen the definition and turn a reactive duty into a proactive approach. In this way, these provisions will turn the EqA from disabling to enabling legislation. It will afford greater protection to and help integrate a larger number of disabled

¹⁶ EqA 2010 Explanatory Notes Chapter 2 Section 13 (59)

¹⁷ Unfortunately the government is planning to abolish this provision: Draft Deregulation Bill Section 2, introduced to Parliament July 2013 Cm 8642 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/210035/130701_CM_8642_Draft_Deregulation_Bill.pdf accessed 24 June 2013

¹⁸ Gooding 2000, Woodhams & Corby 2003, Harwood 2005

¹⁹ For example, Remploy Factories were set up to employ mainly people with learning difficulties. Many of them have been closed down due to financial mismanagement by non-disabled people. <http://www.remploy.co.uk/about-us/whoweare.ashx> accessed 16 September 2013

people into employment.

The Statutory Definition of Disability

Critiquing the statutory definition of disability in the EqA means challenging its aim to exclude large numbers of people with impairments or ill health. This is in contrast to the inclusive nature of the definitions of other protected characteristics in the legislation.

Section 6(1) of the EqA defines disability as follows:

A person (P) has a disability if—

- (a) P has a physical or mental impairment, and
- (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.²⁰

The definition is layered with conditions that if not met, mean the person does not qualify as disabled in the legislation. The entry point for protection therefore, is not whether the person was discriminated against or not, but whether they are disabled enough to be afforded such protection. Often a condition or impairment is deemed unlikely to be long term enough, or its effects not substantial enough. Under this rationale, work activities do not count, because they are not deemed to be normal day-to-day activities for the majority of the population. In contrast, putting on make up or rollers in one's hair are. A person with mental ill health, for example, is often unlikely to meet the definition because of the unpredictable characteristics of her or his condition. This is in spite of belonging to one of the most discriminated against impairment groups, especially in employment.²¹

With this selective definition, that discriminates between one group of disabled people and another, it could be argued that the UK is failing its obligations under the United Nations Convention on the Rights of People with Disabilities

²⁰ Equality Act 2010 (c. 15) s. 6(1)

²¹ Jed Boardman et al, 'Work and employment for people with psychiatric disabilities' [2003] 182 *The British Journal of Psychiatry* 467

(UNCRPD).²² It prevents equal access for all disabled people before the law, in line with Article 5(2):

‘...all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.’

Importantly, while they do not meet the statutory definition, they may be considered disabled for state provision.

Duty to Make Reasonable Adjustments

In the EqA s. 20(2) it says: ‘The duty comprises the following three requirements.

(3) The first requirement is a requirement, where a provision, criterion or practice of A’s puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage....

(5) The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage...’

The reasonable adjustment duty is also based on a layered approach to implementation: the employer is expected to know that the employee is disabled, that he or she is at a substantial disadvantage compared to a non-disabled employee, and then the employer need only take reasonable steps to avoid the disadvantage.²³ This too reflects the individual model of disability. The adjustment focuses on the employee’s impairment rather than on the disabling work environment. Thus the employer is only required to react to an

²² ‘The Convention on the Rights of Persons with Disabilities and its Optional Protocol was adopted on 13 December 2006. It entered into force on 3 May 2008. The UK ratified the Convention in 2009.

²³ EqA 2010 s. 20, s. 21, Schedule 8

individual situation and do the minimum to avoid the barrier, not necessarily remove it.

The Social Model in Action

The central proposition in this study is to bring the current disability provisions in the EqA closer to the social model so as to better reflect the principles of the UNCRPD.

The study begins with a review of the literature analysing both models and the failings of the legislation, of the DDA first and then of the EqA. It then examines case law, mainly under the DDA²⁴, and the resulting shortcomings of rulings by the tribunals and courts. A chapter of interviews with leading disability activists and academics provides personal views about the central proposition of this study. Discussions in a Focus Group provide case studies about the reality faced by disabled people in employment.

The findings are then translated into suggestions of how the social model can transpose the medical model in the statutory definition, in extending the reasonable adjustments provision and in applying the Public Sector Equality Duty²⁵ to all employers. This will be done by using the definitions in the Civil Rights (Disabled Persons) Bill²⁶ and the Americans with Disabilities Act 1990 (ADA) as amended, to replace the narrow disability definition. A wider, more inclusive approach will include work activities as does the ADA. The (Single) Public Sector Equality Duty, strengthened once again to reflect the Disability Equality Duty will extend a similar duty to all employers. And finally, applying the anticipatory duties of service providers to make adjustments²⁷ in the employment context. The study

²⁴ As the EqA came into force only 3 years ago, most case law on disability discrimination is based on the DDA. But given that the two provisions focused on in this study have not been changed, lessons learnt from rulings under the DDA apply equally to the EqA.

²⁵ Equality Act 2010 (c. 15) Part II Chapter 1 s. 149, at present applies only to public authorities.

²⁶ This was a private member's Bill that was opposed by the government in 1995, but was shortly after replaced with the DDA 1995. While the Bill was strongly supported by disabled people, their organisations and disability charities, disability activists opposed the DDA as an ineffective tool to combat societal barriers and discrimination.

²⁷ EqA s. 29(7), Schedule 2

ends with a set of recommendations on how this proposition can be taken forward.

CHAPTER 2

Methodology

This Chapter explains the purpose of the study, the research methods and the ways in which data will be collected and analysed, so as to inform recommendations for change.

Introduction

The research question is: can the social model replace the current medical-individual model on which the disability provisions in the EqA 2010 are based and will this provide more effective measures to removing the barriers disabled people face in employment?

There is an accepted premise on which this study is based: the current provisions in the EqA, as in the DDA before it, reflect the medical, individual model of disability. The resulting restrictive and reactive provisions, further hamper disabled people's ability to compete in the labour market and sustain gainful employment .

A second assertion is that in order to study the subject matter in depth, it is necessary to examine the DDA alongside the EqA. This is due to the relatively recent enactment of the EqA (2010). As a result, most case law is still based on the DDA; and much of the academic discourse focuses on this Act, even though it was repealed when the EqA came into force. Importantly, the provisions examined in this study are similar in both Acts.

Aims and Objectives

The aim of the research has been introduced at length in Chapter 1 (Introduction). Briefly, it is to provide a viable alternative to the statutory disability definition and the duty to make reasonable adjustments, as they currently feature in the EqA.²⁸ The proposed alternatives will be based on the social model of disability. The

²⁸ EqA 2010, s. 6; s. 20; s. 21

models and their terminology are discussed and analysed throughout the study.

There are four central objectives to the study: Chapter 3 examines the flawed medical model and the legislative provisions that are based on it. Chapter 4 examines how these provisions have been applied by the tribunals and courts. The third objective, in Chapter 5, tests the hypothesis of the research question with those who have developed the social model and drafted the legislation. The fourth objective featured in Chapter 6, places the hypothesis within current organisational practice as testified by disabled employees.

Data and Method of Collection

Data is collected through desk research, semi structured interviews and case studies drawn up from the focus group. The reason for semi structured interviews with leaders of the disability movement and others, is explained in Chapter 5. These are conducted as conversations, mainly because the information gained is not intended to provide a critique of the EqA. An in-depth understanding of the social model and its development is acquired through a study of writings by disability activists turned leading disability studies academics. Case law provides an insight into the interpretation of the two provisions. Verbal commentary and live testimonies test the hypothesis and contribute to the study's conclusions and recommendations.

Methods of Analysis

The reason for combining a literature review, case law review, interviews and a focus group is to examine and test the research question from different angles. The literature review provides a theoretical and research perspective; the interviews provide background to the legislation through the eyes of disability activists. Case law provides the opportunity to examine the interpretation of the disability definition and the duty to make reasonable adjustments. The cases scrutinised are mainly under the DDA, as cases ruled under the EqA are still few given it's relatively recent enactment. Finally, the focus group brings together employees to share their stories and personal experiences of disabled people in the workplace.

In Chapter 7, the learning comes together to articulate proposals for change. The current Public Sector Equality Duty, the repealed Disability Equality Duty and the anticipatory duties imposed on service providers by the EqA provide the application tools. The US legislation ADA and the failed Civil Rights Bill provide the terminology that replaces the current definitions of disability and reasonable adjustments in the legislation. The UNCRPD principles inform the approach suggested for the social model alternatives.

CHAPTER 3

Literature Review

Introduction

The Literature Review explores writings by academics and disability activists, statutory bodies, government appointed task forces and various government reports. Case law is interspersed within the Review in order to underpin positions and statements.

Most of the resources reviewed focus on the DDA which has been repealed by the EqA. However, as the statutory definition of disability and the reasonable adjustments rules are similar in both Acts, the literature and case law are still relevant. The review focuses on a critical evaluation of these two provisions. It is centred around the failings of the medicalised model of disability on which they are based. It begins by examining the various layers of the definition and places it within the liberal equal opportunities approach. The effect of the medical model on tribunal and court rulings is briefly explored. Finally the review looks at the reactive nature of the duty to make reasonable adjustments and its resulting shortcomings. The chapter ends with an exploration of the anticipatory duty that is imposed in the EqA on service providers and suggests the benefits if this approach was extended to the employment provisions in the legislation.

Definition of Disability

Section 1(1) in the DDA defines disability as follows:

Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.²⁹

²⁹Disability Discrimination Act 1995 (c. 50) Part I s.1(1)

The same definition appears in the EqA in s. 6. Woodhams and Corby³⁰ focus on the implications of this definition. They contend that the need for a disabled individual to demonstrate medically that they are disabled, is a significant barrier to removing disability discrimination in the workplace. Gooding³¹ contrasts the need to prove a claimant is disabled with the all encompassing definition of sex in the Sex Discrimination Act 1975 (SDA) and race in the Race Relations Act 1976 (RRA)³². For example, the broad, inclusive definition was clear to see in Section 3(1) of the RRA where it states that ‘...references to a person’s racial group refer to any racial group into which he falls.’

Konur³³ surveyed cases at the appellate courts between 1996 and 2004. Of the 104 appeals specifically about Section 1(1) containing the definition, 54% failed both at tribunal and the courts, compared to just 13% success rate. In 9% of cases, a positive outcome in the ET was reversed on appeal. The findings demonstrate the prohibitive nature of the definition, particularly for people with mental ill health. Konur found they comprised the largest group of appellants at 40%. For example, in *Grant v McKechnie Plastic Components*³⁴ G resigned while suffering work related stress. Her claim of disability discrimination was dismissed by the tribunal, based on a medical expert’s opinion that her condition did not meet the statutory definition in the DDA and was unlikely to continue in the long term. At the EAT, Judge Birtles said:

‘...the Claimant has failed to establish that her mental impairment had a long term adverse effect on her ability to carry out normal day-to-day activities and in the circumstances the Claimant's claim alleging disability discrimination is hereby dismissed.’³⁵

³⁰ Carol Woodhams and Susan Corby, ‘Defining Disability in Theory and Practice [2003] 32 Journal of Social Policy 159, 161

³¹ Caroline Gooding, ‘Disability Discrimination Act: from statute to practice’ [2000] 65 Critical Social Policy 533, 534

³² Both the SDA and the RRA were repealed by the EqA 2010 with definitions maintained

³³ Ozcam Konur, ‘A judicial outcome analysis of the Disability Discrimination Act: a windfall for employers?’ [2007] 22 Disability and Society 187, 193

³⁴ *Grant v McKechnie Plastic Components* [2010] UKEAT/0390/09/RN

³⁵ *ibid* 8:11

Rather than promoting equality through inclusivity, disability discrimination legislation sets out to exclude large numbers of people with impairments and ill health. They fail to qualify as disabled under a restrictive, medicalised definition and are not, therefore, afforded protection against discrimination. This is clearly enforced by the view of the Joint Committee on Human Rights³⁶ when scrutinising the Equality Bill, later enacted as the EqA 2010:

‘The definition of disability is an important ‘control devise’: the Bill follows the approach adopted in the DDA in providing that only those who are disabled persons for the purpose of the legislation may bring a claim for disability discrimination.’

It is difficult to reconcile this statement with Hepple’s view of the EqA that:

‘There must be no hierarchy of equality. The same rule should be applied to all strands unless there is convincing justification for an exception. To a large extent, the [Equality] Act achieves this aim’³⁷

While the aim of combating sex and race discrimination has been to achieve equal treatment at work in line with the white male norm, the focus for disabled people is on what they cannot do. The non-disabled person is openly and clearly held as the norm against which the disabled person fails to compare. ‘Disability is identified by reference to unfavourable deviance from the able bodied.’³⁸ This still holds true in the EqA. The list of day-to-day functions may have been removed, but the definition is concerned with biological weakness. The outcome therefore, is always negative. For example in *Leonard v Southern Derbyshire Chamber of Commerce*³⁹ the EAT found that the ET incorrectly focused on what the appellant could do instead of what she could not do.

³⁶ Joint Committee on Human Rights, ‘Legislative Scrutiny: Equality Bill’ 26th Report of Session 2008-09 HL Paper 169 HC 736 12 November 2009, 22

³⁷ Note 15, 15

³⁸ Note 30, 174

³⁹ *Leonard v Southern Derbyshire Chamber of Commerce* [2001] IRLR 19 EAT

The possession of skin colour or physical characteristics contributes to the definition of ethnicity. Having reproductive organs determines sex. In contrast, the definition of disability is determined by an absence of capacity or ability with limitless variations. While anyone who possesses the characteristics that define sex or race is covered by the legislation, the medicalised, individual model on which the statutory definition is based, focuses on difference.

‘If the DDA was based on the social model of disability, it would offer protection to anyone who could prove less favourable treatment (discrimination) on the grounds of impairment. This is the same type of protection from discrimination provided by the Race Relations Act 1976 (RRA) and the Sex Discrimination Act 1975 (SDA).⁴⁰

Interestingly, Ferrie⁴¹ suggests that the definition of disability, based on biological characteristics, accords with the definitions for the other protected characteristics as these too are based on biology. This however, enforces the view that the definition in the case of disability is drawn from the medicalised model. Moreover, it does not explain why the aim of the definition is to exclude disabled people in contrast to the inclusive approach elsewhere.

Substantial and Long Term Adverse Effect

Because the statutory definition of disability comprises layered elements and individuals can manifest their impairment or condition differently, they must demonstrate their own compliance with the definition. But compliance is not sufficient. It is the degree of the *effect* of the impairment that determines inclusion. Thus the definition is like an obstacle course. Once the disabled individual goes through one hurdle, she/he needs to overcome the next. Guidance issued by the government confirms this approach:

⁴⁰ Note 36, 21

⁴¹ Joanna M. Ferrie, ‘Impact of the DDA Part 4 on Scottish Schools’, (PhD 2008) 25

'In many cases, there will be no dispute whether a person has an impairment. Any disagreement is more likely to be about whether the effects of the impairment are sufficient to fall within the definition. Even so, it may sometimes be necessary to decide whether a person has an impairment so as to be able to deal with the issues about its effects.'⁴²

This poses more of a barrier with hidden impairments: 'We would argue that a medically expressed definition is difficult to reconcile with the need for visual results.'⁴³ This view is enforced by the guidance: 'While some impairments, particularly visible ones, are easy to identify, there are many which are not so immediately obvious.'⁴⁴ Harwood found that the definition '...continues to exclude a large percentage of individuals with severe, life limiting, impairments; and to discriminate against those with particular illnesses and disabilities.'⁴⁵ Similarly to Konur, Harwood found that people with mental health conditions were less likely to be defined as disabled compared to people with learning difficulties or physical impairments.

The Disability Rights Task Force (DRTF) admitted in its report that the definition of disability in the DDA was 'the most difficult issue that we considered.'⁴⁶

Although it concluded that the definition in the DDA was flawed, the DRTF did not attempt to offer an alternative. Instead it recommended inclusion of certain forms of Cancer, of HIV and multiple sclerosis. It recommended clarifying the status of

⁴² 'Guidance on matters to be taken into account in determining questions relating to the definition of disability', issued by the Secretary of State under section 3 of the Disability Discrimination Act 1995 as amended, 3
http://www.equalityhumanrights.com/uploaded_files/guidance_on_matters_to_be_taken_into_account_in_determining_questions_relating_to_the_definition_of_disability.pdf accessed 10 July 2013

⁴³ Note 30, 173

⁴⁴ Note 42, 4

⁴⁵ Rupert Harwood *The End of the Beginning – an analysis of the past decade of the Disability Discrimination Act employment provisions* (Public Interest Research Unit London 2005)

⁴⁶ 'From Exclusion to Inclusion' A Report of the Disability Rights Task Force on Civil Rights for Disabled People (December 1999) 24. The Task Force was set up in December 1997 by the last Labour Government. It included representatives from disabled people organisations and employers. It was tasked with identifying the action necessary to enforce disabled people's civil rights. It also recommended the setting up of the Disability Rights Commission which was established in 2000 with Sir Bert Massie as its Chair .
<http://dera.ioe.ac.uk/15138/1/From%20exclusion%20to%20inclusion.pdf> accessed 15 July 2013

people who are blind or partially sighted; and widening the inclusion of mental health conditions. These were implemented in the DDA 2003. Importantly, the exemption for small employers was repealed. The disability definition was left for the DRC to monitor.

The DRC, in its submission to the Joint Committee on the Draft Disability Bill⁴⁷, was critical of the narrow definition in the DDA. It cited a research that found that in 16% of cases, disabled applicants lost because the tribunals found that they did not meet the statutory definition. Most frequently this was the reason that the claim failed. The report quotes the DRC as saying that the definition was 'one of the most contentious and confusing aspects of the DDA.'⁴⁸ The report went on to suggest that other evidence supported the DRC's position. It seemed that frequently employers took advantage of the terms of the DDA to challenge the disabled status of claimants.

Barnes also discusses the criticism levelled at a definition that is medically based. In his view the DDA's limited positive impact was due to various 'get out clauses and caveats'⁴⁹ that minimised the protection it afforded, a problem he suggests, common to other legislation. For example, the DDA permits an employer to discriminate against a disabled employee, if accommodating her/his needs will be, in the employer's view, detrimental to its business. This is in direct opposition to the purpose of the legislation. The EqA prohibits an employer to subject a woman to harassment, including by a third person, but the get out clause provides that this does not apply unless she was harassed at least twice previously.⁵⁰ These examples enforce Barnes view that while the broad social policy aim was to protect minority groups facing discrimination, the legislation itself imposed limits on such protection.

⁴⁷ House of Commons and House of Lords, Joint Committee on the Draft Disability Bill Volume 1 Report (The Authority of the HL and the HC HC 352 HL Paper 82-I, 2004) Section 34, 20

⁴⁸ Ibid

⁴⁹ Colin Barnes 'Independent Futures: policies, practices and the illusion of inclusion' [2006] Background note to a verbal presentation to the European Network of Independent Living, Valencia 2006) <http://disability-studies.leeds.ac.uk/files/library/Barnes-valencia-presentation-Colin.pdf> accessed 3 July 2013

⁵⁰ EqA s 40 (2) and (4)

The Liberal Equal Opportunities Approach

Woodhams and Corby explain that when the DDA first came into force the definition of disability was particularly problematic. Organisations applied to the DDA their understanding of the RRA and SDA. It was based on the 'liberal equal opportunities' approach⁵¹ and the principle of sameness. Equality was seen as a distribution of opportunities rather than the achievement of outcomes. As long as everyone was given an equal chance, barriers constructed against 'irrelevant group characteristics' would be overcome. If collective barriers were removed then the best person would win. Although there was a recognition that certain groups may require extra support to enable them to compete equally, the aim was to ignore difference.

Howard⁵² defines this model as 'formal equality'. Everyone is entitled to equal treatment in the same circumstances. Equality legislation sets out to achieve this principle. The European Employment Directive 2000, is a good example of this approach. References to the principle of equal treatment appear throughout the document. It provides the basis for extending equal treatment beyond sex and race to age, sexual orientation and disability. For example, in paragraph (2) it states: 'The principle of equal treatment between women and men is well established by an important body of Community law'.⁵³

Howard identifies a number of problems with this approach. First, in order to establish equal treatment it is necessary to identify a comparator in the same situation. This is particularly problematic with a hypothetical comparator, as in the case of disability discrimination. The choice of comparator can affect the outcome. For example, in *Clark v Novacold*,⁵⁴ C was dismissed after four months sick leave due to impairment resulting from an injury at work. The question before the tribunal was who should the appropriate comparator be in order to establish whether C was treated less favourably, in line with Section 5(1)(a) of the DDA. The tribunal

⁵¹ Note 30, 161

⁵² Erica Howard, 'The EU Race Directive: Time for a Change?' [2007] 8 Int' Journal of Discrimination Law 237, 241

⁵³ Council Directive 2000/78/EC of 27 November 2000, Official Journal L 303, 02/12/2000 P. 0016 - 0022

⁵⁴ *Clark v Novacold Ltd* [1999] IRLR 318

ruled that the hypothetical comparator was a non-disabled employee who too would have been dismissed after a similar period of time. C therefore, was not treated less favourably. The Employment Appeal Tribunal upheld the ET's decision. The Court of Appeal however, overturned the decision and upheld C's appeal. It ruled that the correct comparator was an employee who did not take time off and therefore would not have been dismissed. The principle of 'like with like' in terms of equal treatment, did not seem to have applied in this case. In *LBI v Malcolm*⁵⁵ the House of Lords ruled that the correct comparator was a non-disabled person in the same circumstances as *Malcolm* and that the decision in *Novacold* was wrong. This caused concern that disability discrimination law was being rewritten and the opportunity was seized to amend it with the EqA. This now provides for discrimination arising from disability.⁵⁶ In addition, under the duty to make reasonable adjustments there is no need to identify a comparator with similar or identical circumstances to the disabled employee.

Another difficulty with the equal treatment approach is that it ignores diversity and difference. It does not recognise the inequalities in society and the disadvantage that minority groups suffer as a result of discrimination. And finally, as Woodhams and Corby suggest too, the formal equality approach is not concerned with outcomes, only with process. This according to Howard is evident in the legislation. As long as two individuals in similar circumstances are treated the same, it makes little difference whether they are both treated in positive or negative terms. The result is that a 'levelling' process takes place that can either be levelling-down where both individuals are 'deprived of benefit', or 'levelling-up' where both individuals receive a benefit.⁵⁷

A study Woodhams and Corby carried out demonstrated the difference in perception of disability between law and practice. The focus in the legislation is on the individual and her or his specific impairment and what they cannot do. It is in

⁵⁵ *London Borough of Lewisham c Malcolm and Equality and Human Rights Commission (intervener)* [2008] IRLR 700 HL 701

⁵⁶ EqA s. 15

⁵⁷ Note 52, 242

complete contrast to the way in which employers view disabled employees. While the definition in the legislation is construed to be objective, the views of managers in the workplace are subjective. Disabled employees are seen as part of the whole workforce and are expected to integrate within it with minimal focus on their impairments, except for the duty to make reasonable adjustments to accommodate individual impairments. The wider barriers they and other disabled people face are rarely tackled, especially as there is no legal obligation to do so. Managers' perceptions of who is disabled and 'how' disabled they consider an employee to be, are often determined by unrelated factors such as how reliable the employee is, what her or his performance is like and what is their promotion potential. Harwood's study of reasonable adjustments in local authorities,⁵⁸ indicated this rationale further. The line manager decided whether reasonable adjustments would be made. This was based on how important it was for the disabled employee to be able to carry out their job fully.⁵⁹ The lesser the skill required to do a job, the less likely was the organisation to invest in adjustments.

Woodhams and Corby conclude that discrimination law is incongruent with the day-to-day circumstances faced by disabled people in the workplace.

This argument is supported by Harwood's findings. For example, one of the HR managers interviewed, insisted that neither HR staff nor line managers based their decision to make reasonable adjustments on whether the employee met the statutory definition: '...we'd be tying ourselves in knots if we're trying to determine...whether or not they met the DDA kind of definition...If something [is] reasonable then...we'd seek to kind of put it in place'⁶⁰ However, in contrast, particularly mental health conditions were not recognised as impairments and thus requests for reasonable adjustments were refused.

⁵⁸ Rupert Harwood 'Disability, Reasonable Adjustments and Austerity'[2011] British Universities Industrial Relations Association Annual Conference

⁵⁹ This was confirmed by the focus group, Chapter 6. See in particular Case Study 3

⁶⁰ Note 58, 13

Day-to-day Activities

This contrast is most evident when examining the approach to 'day-to-day' activities. The legislation ignores work-related activities, even though these are the most relevant factors to a disabled employee seeking protection under the Act. Day-to-day work activities are also those most relevant to the employer's interests. Human Resource managers naturally tend to consider impairments within the job context. Yet the focus for the tribunals and courts is on what they consider to be 'normal' activities for all people. This excludes work activities as 'exceptional' because they do not apply to the general population

The DRTF highlighted this arbitrary separation and concluded that it was wrong to treat all work activities as 'exceptional' and therefore excluded from the definition: '...many of the activities carried out in employment are not exceptional and would be quite normal outside the work place.'⁶¹ Woodhams and Corby refer to the case of *Goodwin v The Patent Office*⁶² at the EAT. There Mr Justice Morison said:

'What is a day-to-day activity is best left unspecified: easily recognised, but defined with difficulty. What can be said is that the inquiry is not focused on a particular or special set of circumstances. Thus, it is not directed to the person's own particular circumstances, either at work or home. The fact that a person cannot demonstrate a particular skill, such as playing the piano, is not an issue before the tribunal, even if it is considering a claim by a musician. Equally, the fact that a person had arranged their home to accommodate their disability would make inquiries as to how they managed at their particular home not determinative of the issue.'

The EqA has not changed this approach and although there is a reference to the work place in the EqA 2010 Guidance: 'Normal day-to-day activities can include general work-related activities,'⁶³ the emphasis is still on generic day to day actions that apply to the majority.

⁶¹ Note 46, 33

⁶² *Goodwin v The Patent Office* [1999] IRLR 4, [36]

⁶³ *The EqA 2010 Guidance* (ODI 2011) 34

Employment Tribunals

The outcome of a medical approach to the definition of disability also results in shortcomings with regard to decisions reached by the employment tribunals. The need to make an assessment of whether a person is disabled or not is often outside the expertise of most ET members. Furthermore, while the claimant must prove that he or she is disabled, based on specific impairments or ill health, the tasks the ET must test them against are generic.

If only 3% of all claims are about disability discrimination,⁶⁴ then the employment tribunals are not likely to develop extensive experience in this area. The result is that they often rely on medical opinion to conclude whether the claimant meets the definition or not. In doing so they often relinquish their responsibility to reach the decision themselves. In *McNicol v Balfour Beatty Rail Maintenance Ltd*,⁶⁵ while there was no doubt that the claimant suffered pain, the consultant spinal surgeon could not find a physiological reason for his symptoms. Therefore the tribunal rejected M's claim that he was disabled and discriminated against by his employer's failure to make reasonable adjustments to his job. The EAT and Court of Appeal upheld the ET's decision, concluding:

'The employment tribunal did not err in law in finding that the applicant did not have a disability within the meaning of the Disability Discrimination Act, in that he had not established that his back pain resulted from either a physical or a mental impairment.'⁶⁶

Harwood suggests that due to inadequate understanding of the definition, and other parts of the legislation, both parties to the process often end up with unsatisfactory rulings that in the majority of cases are not appealed.⁶⁷

⁶⁴ Employment Tribunals and EAT Statistics, 2011-12, 1 April 2011 to 31 March 2012 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/218497/employment-trib-stats-april-march-2011-12.pdf 8, accessed 3 July 2013

⁶⁵ *McNicol v Balfour Beatty Rail Maintenance Ltd* [2002] IRLR 711(CA)

⁶⁶ *Ibid*, 1801

⁶⁷ Note 58, 10

Woodhams and Corby conclude: 'The terms...by which disabled people are defined do nothing to aid either the disappearance or the removal of their perceived inequality; in fact it is further stressed.'⁶⁸

Reasonable Adjustments – the Reactive Duty

Harwood found that although staff interviewed claimed reasonable adjustments were not based on the statutory definition of disability, in practice this was not always the case. Where occupational health were involved, some reports would include reference to whether the employee was disabled according to the legal definition. HR policies also included the definition as guidance for line managers. The decision on whether a reasonable adjustment was in line with the legislation was often considered when the expense was large. In general though, the interpretation of 'reasonable' was based on the word's day-to-day use, for example '...reasonable efforts to help them where we can...'⁶⁹ rather than an understanding of the legislative term or how it would be interpreted by the employment tribunals. However, there was also a perception that if the employee required adjustments then the organisation would be 'carrying' her or him.⁷⁰

The lack of understanding of the duty to make reasonable adjustments was also apparent in a research report prepared for the Department of Work and Pensions in 2004.⁷¹ Roberts found that for organisations to employ disabled people there needed to be a diversity of roles. Where roles required interpersonal skills, some level of mobility, comprehension or communication skills, they were assumed to rule out people with certain impairments. This pointed out to a fundamental lack of understanding that the duty to make reasonable adjustments was there in order to enable disabled people to do a

⁶⁸ Note 30, 174

⁶⁹ Note 58, 13

⁷⁰ *ibid* 6

⁷¹ Simon Roberts et al 'Disability in the workplace: employers' and service providers' responses to the DDA in 2003 and preparation for 2004 changes' [2004] Research report DWP, 202 https://dspace.lboro.ac.uk/dspace-jspui/bitstream/2134/2676/4/DWP202Main_1.pdf accessed 7 August 2013

range of jobs, not to exclude them *á priori*. He also found that staff's discriminatory views, particularly towards people with mental ill-health, determined willingness to accommodate impairments. On the whole, the attitude was more lenient towards existing employees who became disabled than towards disabled recruits. Roberts supposed that this was due to a number of factors, including whether existing disabled staff were valued because of their skills or performance. This echoes the findings of Woodhams and Corby in their study. A manager was quoted saying: ...'if somebody came in for an interview and said 'I'm depressed', right, they wouldn't get the job...if someone had worked for you well and then had a bout of depression...then okay, we'd treat it like any other illness.'⁷²

Chadwick argues that the specific elements of the reasonable adjustment provisions in the DDA are constructed in such a way as to ensure that employers are not responsible for what she terms '...the manufacture of disability itself.'⁷³ This relates directly to the reactive nature of the duty to make reasonable adjustments. For example, the employer is not expected to examine its broad 'provisions, criteria, practices or features'⁷⁴, so as to identify any resulting barriers that disabled employees may face. On the contrary, the duty is passive: the employer first needs to become aware of the disadvantage experienced by the disabled employee, then the employer needs to assess whether this disadvantage is substantial, thirdly that this disadvantage is not experienced by a non-disabled person, and finally, the action required. The EqA states '...such steps as it is reasonable to take to avoid the disadvantage.'⁷⁵ It can be argued that the current duty is less onerous compared to the DDA, as it no longer includes a reference to '...in all the circumstances of the case,'⁷⁶ suggesting a less detailed examination of the circumstances.

⁷² *ibid*, 5

⁷³ Alden Chadwick 'Knowledge, Power and Disability Discrimination Bill' [1996] 11 *Disability & Society* 25, 30

⁷⁴ EqA s. 20(3), (4); in the DDA 1995 the term 'arrangements' was replaced by the DDA 2003 4A(1)(a) with 'provision, criterion or practice'

⁷⁵ EqA s. 20(3), (4), (5)

⁷⁶ DDA s. 6(1)

Lawson in her extensive study of reasonable adjustments⁷⁷ discusses the limitations of the duty that in her view is purely reactive. The employer need only react to the disabled person he or she directly interacts with either as a candidate for a job or as an employee.

In her report to the Academic Network of European Disability Experts (ANED)⁷⁸ Lawson discusses the anticipatory duty that service providers are required to comply with.⁷⁹ She quotes from Roberts' report: in contrast to 33% of surveyed employers who said that employing a disabled person would be a "major risk"⁸⁰ and 47% who said they could not keep employing a person who became disabled; 75% of service providers reported having implemented adjustments to accommodate disabled people. Roberts also found that the DDA was more influential with service providers than with employers. Lawson suggests that rulings by the courts too have had an important role in promoting the anticipatory duty. In *Royal Bank of Scotland Group plc v Allen*,⁸¹ A, a wheelchair user, could not access his branch. The bank offered him to use telephone and online banking instead. Several options were suggested to the bank to install platform lifts but the bank turned them down. A claimed disability discrimination due to failure to make reasonable adjustments. The Court of Appeal awarded A £6,500 in damages and instructed the bank to install a platform lift at the cost of £200,000. The contrast is stark. While case law in employment argues about the detail of the reactive duty to make reasonable adjustments, the judges in the anticipatory duty case declared:

'The policy of the Act is not a minimalist policy of simply ensuring that some access is available for disabled people; it is, so far as is reasonably practicable, to approximate the access enjoyed by disabled people to that enjoyed by the rest of the public...'⁸²

⁷⁷ Anna Lawson, *Disability and Equality Law in Britain, The Role of Reasonable Adjustments* (Hart Publishing Oxford 2008) 66

⁷⁸ Anna Lawson and Sarah Woodin 'ANED 2012 Task 4 – National Accessibility Report, United Kingdom'

⁷⁹ EqA s. 29(7), Schedule 2

⁸⁰ Note 71, 2

⁸¹ *Royal Bank of Scotland Group plc v Allen* [2009] EWCA Civ 1213 CA

⁸² *ibid*, 28 (Dyson LJ)

This study will demonstrate that it is possible to apply the same determination for ensuring equal success to the employment provisions in the EqA.

CHAPTER 4

Case Law Analysis

In order to demonstrate the failings of the disability definition and the duty to make reasonable adjustments in the EqA, it is necessary to examine relevant case law. As explained in Chapter 1, much of it relates to the DDA. Given that both provisions remained unchanged in the EqA, such analysis is still pertinent to this study. The chapter first examines cases dealing with the definition and then those relating to reasonable adjustments. A brief discussion summarises the learning.

Lord Justice Mummery in *Clark v Novocold*⁸³ referring to the DDA said:

‘...it is without doubt an unusually complex piece of legislation which poses novel questions of interpretation.’ He was ruling in the first appeal under the Act.

The Statutory Definition of Disability

In s. 6(1) of the EqA it states: ‘A person (P) has a disability if— (a) P has a physical or mental impairment, and (b) the impairment has a substantial and long-term adverse effect on P’s ability to carry out normal day-to-day activities.’ The identical definition appears in the DDA in s. 1(1).

The definition with several built in qualifications results in tribunals and courts spending a great deal of time trying to establish who is acceptably disabled for the purpose of the Act. It is often based on medical opinion. For example, in *College of Rippon & York St John v Hobbs*⁸⁴, a medical expert stated that while not denying the appellant was in great pain and discomfort, he could not say she was disabled. He could not identify an organic reason for her impairments. After deliberating this issue, the EAT decided nevertheless that she was disabled under the DDA

⁸³ *Clark v Novocold* [1999] IRLR 318 CA 2

⁸⁴ *College of Rippon & York St John v Hobbs* [2002] IRLR 185 EAT

definition. A similar issue arose with *McNicol v Balfour Beatty Rail Maintenance Ltd*⁸⁵. Of more concern is that the legislation affords employers the opportunity to argue that an employee is not disabled. This was the case with *Ekpe v Commissioner of Police of the Metropolis*.⁸⁶ According to Hepple,⁸⁷ a comparatively large number of cases where the employer seeks to challenge whether the employee is disabled are withdrawn or settled. In Hepple's view, this challenge has a significant psychological impact on claimants.

Substantial Effect

Many cases focus on the substantial effects element. In *Ekpe* the EAT ruled that the tribunal was wrong to delve into individual activities rather than the overall effect. In line with the medical model, the focus should have been on what E could not do. In *Aderemi v London and South Eastern Railway Ltd*⁸⁸ ruled under the EqA 2010, the EAT reached a similar conclusion. A was a station attendant at London Bridge. The prolonged daily standing caused him lower back pain. He was dismissed due to capability when he told his employer that he had difficulty carrying out his day-to-day duties. The tribunal did not agree that his back pain, although recognised as an impairment, fitted the statutory definition. Its ruling was wrongly based on what A could do. The EAT agreed with the appellant and remitted the case for another hearing. A more striking example of tribunal ruling is found in *Goodwin v The Patent Office*.⁸⁹ In spite of Dr Goodwin being a paranoid schizophrenic, the tribunal failed to conclude that the adverse effect of his personality disorder was substantial, because he could do his housework unaided. The EAT yet again pointed out that the focus was on what he could not do; in this case hold a conversation or communicate with his colleagues.

Although the EAT upheld those individuals' appeals, the tribunals' decisions demonstrate that the definition is seriously flawed. It must be noted that the impact of such wrong decisions on disabled claimants is significant. Having then to

⁸⁵ *McNicol v Balfour Beatty Rail Maintenance Ltd* [2002] EWCA Civ 1074

⁸⁶ *Ekpe v Commissioner of Policy of the Metropolis* [2001] IRLR 605 EAT

⁸⁷ Note 15, 34

⁸⁸ *Aderemi v London and South Eastern Railway Ltd* [2013] Eq.L.R. 198 EAT

⁸⁹ *Goodwin v The Patent Office* [1999] IRLR 4 EAT

pursue an appeal is doubly stressful. Harwood found that in 2004-2005, for this reason, the majority of cases brought at tribunal either failed or were dropped.⁹⁰

Long Term Adverse Effect

In *Richmond Adult Community College v McDougal*,⁹¹ the case focused on paragraph 2(2) of Schedule 1 in the DDA. M applied for a job in the college and when her pre-appointment medical examination indicated that she had a history of mental ill-health, the employer withdrew the offer.⁹² M had delusional and schizo-affective disorders but was treated for them successfully at that point. At the tribunal M was identified as having a mental impairment but failed on substantial and long term adverse effect. The EAT overturned the decision. M had a relapse while waiting for the ET hearing and required hospitalisation. This should have been taken into account. The employer appealed arguing that this recurrence was irrelevant to the case. At the time there was no evidence of mental impairment and the prediction reflected this. What actually happened was irrelevant. The Court of Appeal agreed. In its view '...the act required a prophesy...' not a reference to reality. The judges referred to similar cases: in *Greenwood v British Airways Plc*,⁹³ it was ruled appropriate to consider the disabled person's condition up to the hearing. *Barker v Westbridge International Ltd*⁹⁴ follows the same logic. However, in *Latchman v Reed Business Information Limited*⁹⁵ the EAT interpreted both the terms in Schedule 1, 2(1)(b) and paragraph B8 in the Guidance to mean 'existence' not 'likelihood'. Any assessment was a prediction, regardless of the reality that came about.

This case, more than the others examined in this Chapter, demonstrates how detached the legislation is from disabled people's day-to-day reality. Many of the health conditions that disabled people have, fluctuate; and especially in the case of mental ill health, they are often also unpredictable. The circumstances that may

⁹⁰ Note 45, 3

⁹¹ *Richmond Adult Community College v McDougal* [2008] IRLR 227 CA

⁹² Under s. 60 in the EqA, an employer can no longer request medical information during the recruitment process.

⁹³ *Greenwood v British Airways Plc* [1999] ICR 969

⁹⁴ *Barker v Westbridge International Ltd* (unreported 8 June 2000)

⁹⁵ *Latchman v Reed Business Information Limited* [2002] ICR 1453 EAT

trigger a flare-up are many and varied. This does not mean that the person stops and starts being disabled. And if the intention is to get more disabled people into employment, then the legislation must reflect this. The alternatives suggested in Chapter 7 address such challenges.

Inappropriate Tribunal Decisions

A problem that often arises is the tribunal's abdication of its responsibility to reach the decision itself. Too often it relies on the employer's medical professional. In *Abadeh v British Telecom*,⁹⁶ A had multiple impairments as a result of a work occurrence, including post traumatic stress for which he received treatment. In spite of the barriers he encountered when travelling by public transport and aeroplanes, he failed to meet the substantial element. The tribunal accepted the medical expert's conclusions rather than reaching its own. In this case, it decided that travel was not a day-to-day activity because A did not use these transport modes to get to work. The EAT upheld A's appeal. In *Vicary v British Telecoms* the EAT found the tribunal's decision to be perverse because it dismissed the statutory guidance as irrelevant. The EAT ruled:

'...It is not...for the medical expert to tell the tribunal whether the impairments which had been found were or were not substantial. Those are matters for the employment tribunal to arrive at its own assessment.'⁹⁷

In *Kirton v Tetrosyl Ltd*⁹⁸ K became incontinent following an operation for prostate cancer. The ET and EAT ruled he was not disabled as the operation, not the cancer caused his impairment. The Court of Appeal disagreed. The operation was standard treatment for the condition and could not be separated from it. In *Ekpe*, the tribunal decided that as the appellant was able to manipulate a large ring binder during the hearing, she did not meet the statutory definition.

⁹⁶ *Abadeh v British Telecommunications plc* [2001] IRLR 23 EAT

⁹⁷ *Vicary v British Telecommunications plc* [1999] IRLR 680 EAT 680

⁹⁸ *Kirton v Tetrosyl Ltd* [2002] IRLR 840 CA

The Duty to Make Reasonable Adjustment

The failing of the duty to make reasonable adjustments is in its reactive nature. It requires the employer to find solutions on a case by case basis, ignoring the wider barriers that disabled people may face in the workplace.

One of the most quoted cases in this area is *Archibald v Fife Council*⁹⁹, where the House of Lords ruled that the duty to make reasonable adjustments extended to placing a disabled employee in a different job without a competitive interview, even if the job happens to be on a higher grade. Previously the provision was interpreted only as making changes to the way the job was carried out, not replacing it with another.

In *Nottinghamshire CC v Meikle*¹⁰⁰ the interpretation of the duty extended to providing M with additional sick leave rather than reducing it to half pay in line with her contractual terms. As M was blind in one eye and visually impaired in the other, it was likely that her 100 day absence was due to the school failing, on two separate occasions, to put in place the adjustments she asked for.

In *Foster v Cardiff University*,¹⁰¹ ruled under the EqA, F who suffered from Chronic Fatigue Syndrome, claimed the ET's failed to recognise anxiety and stress as additional impairments. In addition, using a comparator to assess whether the duty to make reasonable adjustments was carried out or not was also wrong. The EAT upholding the tribunal decisions, rejected both these claims.

In *Smith v Churchills Stairlifts plc*,¹⁰² S, a disabled job applicant was refused a place on a training course and the job that followed because he couldn't carry a 25kg radiator cabinet sample. The ET decided that as the majority of the population could not carry such a weight, there was no failure with regard to S. However, the tribunal did find that withdrawing the offer of training was discriminatory. The EAT found this contradiction between the two conclusions perverse. The Court of

⁹⁹ *Archibald v Fife Council* [2004] IRLR 651 HL

¹⁰⁰ *Nottinghamshire CC v Meikle* [2004] IRLR 703 CA

¹⁰¹ *Foster v Cardiff University* [2013] UKEAT/0422/12/LA (Transcript) EAT

¹⁰² *Smith v Churchills Stairlifts plc* [2006] IRLR 41

Appeal concurred.

Discussion

The disconnect between a restrictive definition and disabled people's reality is enforced by rulings of the tribunals and courts. Their practice is based on the medical model that focuses on what the disabled individual cannot do. Moreover, the selection of day-to-day activities seems confused and arbitrary. In some cases, as was demonstrated in Chapter 3, work related activities were rejected. In others, as with *Abadeh*, the activities provided as examples were ruled out specifically because they were not considered work-related.

The reactive and limited duty to make reasonable adjustments is further compromised by comparing the adjustments needed with a non-disabled person. The role of the duty is to remove barriers that the disabled employee experiences, regardless of whether a non-disabled person would face a similar barrier or would not. Surely the logic should be that if the whole population experiences a barrier there is all the more reason to remove it.

CHAPTER 5

Interviews

Semi structured interviews were conducted with seven individuals, who have an interest and/or expertise in the field of disability. All have given their consent to be quoted and for their names to be used. Biographical information is in Appendix 1. The list of questions asked appears in Appendix 2.

‘The main intention of a qualitative interview is not to compare cases/units but to get access to actions and events that are viewed as relevant for the research/study. Access to the single respondent and the way he or she views the world is central.’¹⁰³

Setting the scene

The interest in interviewing disability activists and academics for this study was two fold. First, to find out the background to the DDA and how it came about, directly from the people involved at the time. The second was to explore with them the study’s research question.

The intention was to gain information for a qualitative analysis. Given their prominence in this field, interviews were conducted as informal conversations with a number of thematic questions, which differed from one interview to another. These were shaped around interviewees’ particular experience, roles and contribution to the development of the legislation and analysis of the social model. In some cases the questions were based on an individual’s research and writings. Not all questions were answered directly but responses were all pertinent to this study. Where interviewees said they have not been involved closely with the EqA, their views were sought in terms of commentary rather than detailed analysis.

¹⁰³ Ryen, A. (2002) *Det Kvalitative Intervjuet: fra Vitenskapsteori til Feltarbeid*, Bergen, Fagbokforl quoted in Bjarte Folkestad, ‘Analysing Interview Data Possibilities and challenges’ [2008] 13 Eurosphere Working Paper Series 12

The Disability Movement and the DDA

A question was posed regarding the influence of the disabled people's movement at the time of drafting the DDA, as proponents of the social model of disability. Mike Oliver explained that the passage of the DDA split what was until then a cohesive alliance of disabled people organisations (DPOs). Some said it was necessary to get behind it, others said the movement should have nothing to do with it. It was 'individual model solutions to the problems facing disabled people. And we were proved right'.¹⁰⁴ In his opinion, 'the DDA was a present to employers who could now justify discrimination.'¹⁰⁵ Moreover, there was no improvement in the number of disabled people in employment following the introduction of the legislation.

In Sir Bert Massie's view, the DDA and the DRC made a huge difference to the way that disabled people were perceived. The Equality Commission has failed to continue this work. In Oliver's view, what is lacking in the UK is the approach adopted in the US. There a number of high profile cases enforced compliance and embedded the legal obligations in the minds of employers.¹⁰⁶

This difference in opinion is understandable given that Sir Bert Massie was instrumental in drafting the legislation and then headed the DRC when it was first set up in 2000 and until it was abolished and replaced by the EHRC in 2007. In contrast Mike Oliver, Colin Barnes, Jenny Morris and others¹⁰⁷ were disability activists who then became leaders in the academic field of Disability Studies and the Independent Living movement.¹⁰⁸ They campaigned for the Civil Rights

¹⁰⁴ Mike Oliver, Interview 15 August 2013

¹⁰⁵ *ibid*

¹⁰⁶ For example, *Sutton v United Airlines Inc* [1999] 119 S. Ct. 2139; *Toyota Motor v Williams* [2002] 122 S. Ct. 681

¹⁰⁷ 'The adoption of Anti-Discrimination Legislation (ADL) is about to drive a wedge through the heart of the disabled community as the artificial alliance promoting ADL predictably falls apart.' Vic Finkelstein 'The Social Model of Disability and the Disability Movement' [2007] Coalition, 4; John Evans 'The U.K Civil Rights Campaign and the Disability Discrimination Act' [1996] European Network on Independent Living, Vienna

¹⁰⁸ Disabled people believe that in order to live independent lives, they should have choice and control over the support they might need in order to obtain autonomy and self determination. This should be available as a basic human right and not dependent on charity or the view of state

(Disabled Persons) Bill which preceded the DDA in 1994-5. The Bill reflected much more the Americans with Disabilities Act 1990 as amended and the social model of disability. Their prediction that the DDA would not improve employment levels of disabled people were proved right.¹⁰⁹

The premise is that disabled people should have choice and control over how any assistance they might need is provided – in order to enable autonomy and self-determination. Most importantly, since independent living is a necessary component of full citizenship for disabled people, it should be provided as a right, and not dependent on charity or professional discretion.

The Medical /Individual Model

Barnes, Oliver and Morris, wanted to make the distinction between medical intervention and the medical model. 'Medical model thinking is embedded within our culture – as deep-seated as sexism, and as damaging.'¹¹⁰ Oliver said he avoids the term 'medical model' and refers to it as the individual or medicalised model. 'Illness gets diagnosed he said, medicalised and rehabilitated and the person gets better. What is wrong with the system, is 'medical imperialism'.¹¹¹ Barnes emphasised that medical interventions are important but this does not give the medical profession the right and privilege to decide what kind of education or job, or life disabled people should have. The medical model is used to justify a whole range of issues that discriminate against disabled people and limit their ability to live the life they choose. 'Talking about impairment does not mean applying the medical model or denying the social model'¹¹² explained Morris. The failing of the medical model is that it places the 'problem' with the individual, not with the

institutions and their representatives. Jenny Morris, 'Rethinking Disability Policy' [2011] Viewpoint, Joseph Roundtree Foundation, 11

¹⁰⁹ 'The 'disability employment penalty' is a measure of the extent to which disabled people are less likely to have a job than otherwise similar non-disabled people. It increased from 17% in 1987 to 28% in 2000 – but has not reduced since then.' Richard Berthoud, 'Trends in the Employment of Disabled People in Britain' [2011] No. 2011-3 University of Essex

¹¹⁰ Jenny Morris Blog <http://jennymorrisnet.blogspot.co.uk/2013/09/welfare-reform-and-social-model-of.html> accessed 11 September 2013

¹¹¹ 'Medical imperialism...is ...the increasing and illegitimate medicalisation of the social world' P.M. Strong 'A Critical Examination of the Thesis of Medical Imperialism' [1979] 13A Social Science & Medicine 199

¹¹² Jenny Morris, Interview 28 June 2013

employer to resolve. In contrast, the social model approach means recognising that the disabled employee who cannot climb stairs is not responsible for the problem. It is the employer who needs to resolve the problem that the stairs are a barrier to the individual.

Barnes' view was that society was obsessed with the body and therefore denied access to people with impairments. The focus on medical intervention was in order to 'put people right.'¹¹³ Furthermore, disability is a socially created construct. In the past, gay people were considered impaired. In the 19th century, women and black people and anyone who did not belong to the Arian race was considered inferior.

This analysis is expanded on in the Chapter 7.

Comparing the EqA to the DDA

Barnes stated that 'Anti discrimination legislation is not the end but a stepping stone – a recognition of disability put on a par with sex, race, sexual orientation. Individual laws are all very fine. The issue is that the problems disabled people face are not about individuals.'¹¹⁴

Sir Bert Massie did not think the EqA was an improvement on the DDA. The DDA 2003 was a very strong piece of legislation in his view. EU law had a much stronger human rights approach to discrimination and this would have influenced the need to adopt a similar approach in the UK.¹¹⁵ Thus the only area in which the EqA improved the DDA was the greater emphasis on human rights. These are very important in health and social care. The legislation and the EHRC were inevitable given the need for extra strands for older people, religion, sexual preference etc.

In Ruebain's view, the EqA widened the cover of anti discrimination legislation by including similar provision with regards to age, sexual orientation, religion and

¹¹³ Video link to DPAC meeting on the Social Model 1 September 2013

¹¹⁴ Collin Barnes, Interview 9 September 2013

¹¹⁵ The Employment Equality Directive 2000, 32000L0078 Council Directive 2000/78/EC of 27 November 2000

belief. The protection for disabled people also increased. It now includes association with disabled people; it corrected the House of Lords decision in *Malcolm*¹¹⁶; added indirect discrimination; and builds on the provisions in the DDA; There is now a strong group concept with other protected characteristics that enforces the principle that people do not have just one single identity.

Harwood's view was that the Disability Equality Duty has been 'watered down' in the EqA. The Disability Equality Duty required an action plan. The current duty does not. Furthermore, case law on the equality duty has been disappointing. It has not upheld the due regard principles and there is no requirement to carry out an Equality Impact Assessment. 'The final nail in the coffin'¹¹⁷ has been the failure to issue Equality Duty Orders.

The main thrust of this study is that the EqA fails as an effective tool for tackling disability discrimination in the workplace, because it is grounded in the medical/individual model of disability. Chapter 7 proposes ways to introduce the social model into the legislation.

Comparing the EHRC to the DRC

According to Sir Bert Massie, amalgamating all the separate commissions into the EHRC was inevitable too. For example, the women's movement lobbied about the difference in budgets. The DRC was always better funded, ending with a budget of £22 million compared to the Equal Opportunities Commission (EOC) with just £11 million.

The DRC was much stronger in campaigning for disability rights than the EHRC is now, especially with the government shifting the focus away from legal interventions. Sir Bert Massie recalls the mixed views about the desirability of setting up the EHRC. The EOC was in favour and the Commission for Racial Equality (CRE) kept changing its mind. But many of the voluntary organisations in the race

¹¹⁶ *London Borough of Lewisham v Malcolm & EHRC (intervener)* [2008] IRLR 700

¹¹⁷ Rupert Harwood, Interview 2 September, 2

field opposed. Those strands that did not have a commission to serve them were in favour. The DRC and most disability groups opposed its abolition. But eventually the DRC had to offer lukewarm support because it was going ahead anyway.

There was a tremendous ambition with the EHRC said Ruebain. No one has just one experience of identity so bringing all the strands together makes sense. On paper it has great potential. However, it was set up too quickly and the implementation was wrong. There was too much political interference. The DRC was much more effective. The suggestion that the DRC's failing was that it was not answerable to disabled people¹¹⁸ does not make sense. How can a statutory body be answerable to disabled people?

Ruebain's view is supported when examining the duties of the DRC. Although it was an independent body, it was set up by government and had statutory responsibilities. These included efforts to remove disability discrimination, to promote equality of opportunity for disabled people and embed good practice. It was also charged with advising government on the legislation. It was not intended to be a representative body of disabled people, nor did its governance structure allow for such a role. Furthermore, it is doubtful that DDPOs would have accepted it given their strong reservations about the DDA. These aspects are examined in more depth in the Literature Review in Chapter 3.

The Disability Committee

Sir Bert Massie campaigned very strongly to set up the Disability Committee so as to carry over some of the roles of the DRC. There was huge opposition to it, he says. The view was 'get together and talk' – an idea from the liberation movement - Operation Black Vote¹¹⁹ - so no need for specialist activity.

However, the rationale that there was a need for specific expertise and experience

¹¹⁸ Mike Oliver, 'The Social Model in Action: if I had a hammer' in Colin Barnes and Geof Mercer (eds) *Implementing the Social Model of Disability: Theory and Research* (The Disability Press Leeds 2004)

¹¹⁹ Operation Black Vote (OBV) started in 1996, in Parliament, in partnership with Charter88 and the 1990 Trust. OBV aims to empower Black communities to integrate, influence and campaign for government and politicians to embed a cultural diversity approach

of disabled people's issues was finally accepted. This was in recognition of the additional provisions in the EqA relating to, for example reasonable adjustments. The Government agreed for the Committee to be set up for a period of time. Recently a review of the Committee has been completed.¹²⁰ It recommends significant changes to the Committee, as Ruebain and Hearn highlight below.

Ruebain agreed that the Disability Committee of the EHRC has done some excellent work, for example on hate crime and social care. But the DRC was much more effective he concluded. Kirsten Hearn, a member of the Disability Committee, agreed about the importance of a report such as *Hidden in Plain Sight*¹²¹ but commented that the work of the Committee was slowed down by bureaucratic layers within the EHRC. In addition, the decision following the recent review of the Committee's work, to replace the Statutory Disability Committee with an external 'Advisory Group' was disappointing. The current Committee's strength lies in its decisions making role and in the EHRC's obligation to consult with it over issues affecting disabled people. It's duty to enforce equality law was an added strength. Hearn was concerned that instead, the emphasis with regard to the new body is to contribute to governance, strategy and business planning, rather than grappling with the discrimination disabled people face in their day-to-day lives. Hearn was hopeful though, that the Committee's new Chair, Chris Holmes who was close to the current government is likely to have more influence inside it.

Applying the Social Model to the legislation

According to Barnes, the social model is a tool to identify barriers with a view to finding solutions. Morris explained that the social model is the underpinning principle of removing barriers both at the individual and wider environmental levels. There is a need, though, to incorporate the experience of impairment/illness into the social model.

¹²⁰ The EHRC has already written to the responsible Minister to suggest replacing the Statutory Disability Committee with a new 'high level strategic advisory group' http://www.equalityhumanrights.com/uploaded_files/independent_review_report_final_for_web.pdf

¹²¹ *Hidden in Plain Sight* Inquiry into disability-related harassment (EHRC 2011)

Sir Bert Massie was not necessarily opposed to the medical model of disability. But it is a partial model. It proved impossible to draft a legal social model definition that limited the rights to disabled people. He described the difficulties in coming up with such a definition: '...when trying to argue the social model such as the barriers that disabled people face in terms of mobility for example, then a counter argument was given of a miner who is also disabled in terms of his life circumstances. So you either have to apply the social model to everyone or you decide on a specific definition that applies only to impairment and therefore excludes others.'¹²² However, the reasonable adjustment provision, he said, does incorporate the social model as it goes beyond just financial number crunching.

Ruebain suggested that the discussion about the social model in relation to the legislation is important but 'largely totemic'¹²³ The social model is a key principle but can't necessarily answer all questions for all disabled people. For example: how would it be applied to the legislation, what is the discrimination, what is the protection that is not there, what would the legislation look like, does it mean to include people with short term disabilities – like someone who has broken their toe? Or does it mean extending the concept to everyone? Most people are likely to be disabled at some point. This could dilute the protection for significantly disabled people; and may fail to reflect their experience of the effects on them, whether due to impairment or barriers and discrimination faced in society. 'The law will never be a ceiling – it can only be a floor'¹²⁴

Oliver agreed. The legislation is there to raise awareness but fails in this role fundamentally. No real focus on the barriers. 'Give us the resources to make our own lives. We don't want protection, but equality.'¹²⁵

¹²² Sir Birt, Interview 2 July 2013, 2

¹²³ David Ruebain, Interview 10 July 2013; according to Freud, 'totemism is a system which takes the place of religion among certain primitive races in Australia, America, and Africa, and furnishes the basis of social organization.' Sigmund Freud, *Totem and Taboo* Chapter IV. The Infantile Recurrence of Totemism (Moffat Yard & Co. New York 1918)

¹²⁴ *ibid*

¹²⁵ Note 104, 1

Reasonable Adjustments

Ruebain's view was that there was a need to 'unpick' the social model. The question to ask is 'what is the social model in relation to the legislation?'¹²⁶ The barriers faced by disabled people trying to access employment is covered, as are goods and services. Transport is specifically covered. It is necessary to explore whether the concept of reasonable adjustment can be extended to *any* reasonable adjustment and whether this is feasible. Can a person take off sick for an indefinite period of time? How would that work in practice?

According to Cunningham, organisations are not very imaginative, and there is a lack of will. Employees report bullying around the theme of adjustments. Employing disabled people is seen as a short term issue and therefore reluctance of employer to invest in reasonable adjustments.¹²⁷

Harwood found that the people he interviewed,¹²⁸ did not have a clear idea of the term reasonable adjustments. Managers had enormous discretion. Both they and HR staff often confused the term 'reasonable' with the concept that applies in unfair dismissal. By contrast, the term was an objective question for the ET to determine. For example, in *Smith v Churchill Stairlifts Plc*¹²⁹, it says: 'the test required by s.6(1) [of the DDA], is an objective test. The employer must take 'such steps as it is reasonable, in all the circumstances of the case'. And this is further explained in s.6(4). Furthermore, the problem is that the duty is to consider, not to actually do anything – employers can get away with doing little or nothing.

With regard to s. 124 in the EqA, Ruebain agreed that it expands the concept of reasonable adjustment and is a way of introducing the social model. Harwood identified the government's intention to abolish s. 124 with Neo Liberalism¹³⁰. The

¹²⁶ Note 123, 2

¹²⁷ Professor Ian Cunningham, Interview 8 July 2013

¹²⁸ Rupert Harwood, 'Disability, Reasonable Adjustments and Austerity' [2011] British Universities Industrial Relations Association Annual Conference, 13

¹²⁹ *Smith v Churchill Stairlifts Plc* [2006] IRLR CIV 41, 42

¹³⁰ Although the term began its life post 1930s as a an approach to moderate the market, it has now come to represent aggressive capitalism which seeks to allow the market free rain with little government intervention or regulation, promoting free trade and privatization.

Deregulation Bill¹³¹ is based on an argument that cutting red tape will boost economic growth. But there is no evidence for that. Empirical research does not underpin this rational. Instead it has been shown that in Europe, employment protection has increased economic growth. Consumer confidence is closely linked to employment factors.

Disabled people and employment

In Sir Bert Massie's view, the idea that people who are able to work should do so is reasonable. The problem is that the assessment done by ATOS under the Work Capability Assessment (WCA), under instructions from the DWP, does not assess employability.¹³² It is a crude test of impairment and tells us little. Some disabled people simply cannot work due to the extent of their impairments. Others cannot work because of fatigue. And this issue is underplayed and ignored. How can someone hold down a job if they cannot work more than an hour in one go? To what extent are the needs of people with mental health issues assessed and measured? How can the workplace adjust to that? Another problem is lack of education and experience.

In order to incorporate disabled people into the workforce there needs to be a considerable investment in them. And in the current climate this will not happen. There needs to be a change in the way disabled people are viewed. Need to fight the current rhetoric that paints disabled people as scroungers or heroes. This is seldom the true picture.

Cunningham pointed out that with people out of work and changes to policies and benefits, the outcome in the workplace is a change to the eligibility criteria for work. The result is increased barriers for someone who is not easily employable. With an increased supply of workers, there is a shift to performance management and a move away from a welfare approach.

¹³¹ Note 17

¹³² See Chapter 1, 2

Sir Bert Massie explained that there needs to be a multi-disciplinary approach, with proper assessment of impairments; that also considers what type of work is suitable; what are the transport issues; are there suitable jobs out there? If DDPOs get involved, it must be on their own terms and not just in order to gain a contract.

'We need to place disabled people at the heart of disability policy. There will need to be a sensible assessment of what is needed to be done and what the priorities should be. Equality laws and human rights laws should be enforced. Social care will be a huge issue and will demand additional resources.'¹³³

In Barnes view, 'The problem with the world of work is that it is about maximisation of profit and efficiency. Under such a system employers cannot afford to carry employees.'¹³⁴

However, Barnes view is not necessarily supported by the experience of disabled people in employment in the private sector; especially in fundraising roles, as the Focus Group discussion in Chapter 6 demonstrates. There the need to meet daily targets, especially financial ones, seemed to provide the employer with an impetus to ensure that disabling barriers in their broadest sense were overcome, with the help of a social model approach.

¹³³ Note 122, 3

¹³⁴ Note 114, 3

CHAPTER 6

Focus Group

In order to explore the study's research question from several angles, it was decided to hold a focus group with a number of disabled people in employment. The random selection was made among the student's contacts and work colleagues. It was hoped that both positive and negative experiences would be gleaned. The ensuing case studies were developed from a discussion that took place on Friday 13th September 2013. The programme for the session appears in Appendix 3. Confidentiality is observed by allocating random initials to each participant. All agreed for their stories to be included in the study and endorsed the written versions below.

Case Study 1

FB and an ex colleague who is disabled worked for a large, prominent national charity. The disabled woman had a blue badge and walked with the aid of a stick. Her needs were largely met with an accessible building and a car park. When the organisation decided to move the team to another premises the disabled employee was not consulted about her access needs. On visiting the new office, staff immediately recognised that it will not be accessible for their disabled colleague and raised it with management who ignored it. The office was at the top of stairs. The disabled employee had a mobility impairment that made climbing stairs extremely difficult. After the moved she could only climb the stairs with the help of her colleagues. She tried to carry out her job supporting young people by avoiding the office and meeting in local cafés, but this was unsatisfactory. Her colleagues complained to the union and the organisation's 'Disability Lead'. Finally a meeting was arranged with management. The manager present suggested that the employee go up the stairs on her 'bottom'! And if the employee contacted Access to Work, the organisation may agree to put in an adjustment. The employee became increasingly distressed and ill as a result and eventually left. It seemed that union reps were not much help. The 'Disability Lead' was a manager himself and

found it difficult to devote the necessary time to the various issues that arose. Union reps seemed reluctant to challenge management because they were employees themselves.

Case study 2

FB has a fluctuating health condition that appears in the ODI guide¹³⁵ as a recognised impairment. FB wanted to reduce her hours from 30 to 21 a week because she is unwell and is off work for 4-5 weeks at the time. She feels she needs to manage her condition better and the reduction in hours will help. At first HR and her manager (at the same large, national charity) insisted that she makes an application for flexible working. FB got external advice that she did not need to go down the flexible working route because she was asking for a reasonable adjustment due to her impairment. Her line manager would not meet with her. Finally FB filled in the flexible working form. Management continued to ignore her request for several weeks. Eventually it was acknowledged but her request was refused. They suggested that she reduce her hours to 17 instead of the 21 she wanted. The refusal was due to a business reason, as it would be difficult for the organisation to cover the other two days. Furthermore the occupational health report they had did not say they had a duty to make reasonable adjustments, only that they should consider any request from her 'sympathetically'. If FB accepts the suggested reduction, she will be penalised by the adjustment they are offering. She cannot afford to work only 17 hours, so she continues to work the 30 hours over five days to the detriment of her health. FB's view is that although the organisation has a disability policy, it is left to the line manager's discretion to make the decision about whether to accommodate an adjustment or not.

Case Study 3

ZH found a contrasting attitude when working for private companies where all employees had to meet daily targets. These employers were most responsive even though they had no knowledge of the legislation or experience of employing disabled people, or making adjustments that may be necessary. As a street

¹³⁵ *Equality Act 2010 Guidance* (Office for Disability Issues London 2011) 8

fundraiser he was the first wheelchair user the organisation employed. On his first day at the job, his manager spent half a day going through with him to identify all his possible access needs: getting to work, in work, getting home, the tasks he needed to do, the role he had. At no time was the legislation or the social model mentioned. All the company wanted to do was to ensure that he will be able to carry out his role fully and immediately. When he became team leader they paid another member of staff to work an extra hour to help ZH pick up and drop off equipment and sort out paperwork. When he was to be placed at a different location the manager would go through the 60 sites they used and identify those that were accessible in terms of public transport. He did so a week in advance of the change in schedule so they could address any potential issues that may arise. ZH had a similar experience with jobs in telephone sales and telephone fundraising. The employers wanted to make sure they put in place everything he needed and then step back and let him get on with doing his job. If any additional issues arose, they would be sorted out straight away. In contrast, when ZH worked as a street fundraiser for a large homeless charity, he found their attitude inflexible and unaccommodating. Their approach was: 'we do things this way, you do it as we want or not at all.' His experience of working for the DWP in the local council was also unsatisfactory. As the building where his team was based was not wheelchair accessible, he was placed on his own in another building and felt completely isolated. It was never suggested to him to contact Access to Work, so he missed the 6-week slot when ATW pay 100% of the costs of adjustments. He was left therefore with inaccessible equipment such as a small screen (ZH is visually impaired). ZH's conclusion was that the bigger the organisation, the less was the response to his needs. In the private companies he worked for, the motivation was profit. Not the legislation. And therefore it was important to ensure he can do the job. To enable him to do it they provided him with a 'level playing field'. However, not all was rosy there. In his interview with the fundraising company, the lift did not work. His interviewer told him he got the job because he showed determination in climbing the stairs even though he is a wheelchair user.

SI also worked in street fundraising, and had a similar experience. Because the work is target orientated and everyone is affected if an employee fails to meet their daily target, managers want to ensure that everything is in place to minimise such an outcome. SI thought that positive discrimination may have also been at work there, because they wanted diverse representation in order to maximise the target groups on the street.

Case Study 4

Jl is blind. She is working on a zero hours contract doing highly confidential work for a large statutory organisation. Jl had many difficulties to overcome from the start. She had a continuing battle with the equipment that was inaccessible. It took five months for the organisation to provide her with an accessible computer. The dogma was 'this is how we do it and we will not be flexible to meet your needs.' They justified this approach on the grounds that it was crucial to maintain encrypted information and various security levels for data Jl needed to use regularly. Although the IT system and the government intranet portal were inaccessible from the start, it took months to convince their IT provider, the infamous ATOS¹³⁶, that Jl needed different equipment and access. She was appointed in November 2012 but could not start work until the end of March 2013. Others recruited with her, were working and earning fees regularly. The organisation insisted it wanted to treat her equally with her other colleagues, but failed to make the necessary adjustments. Jl was not concerned about being treated the same as the others if it meant her access needs remained unmet. All they needed was to demonstrate some flexibility. The decision that was made in March 2013, could have been made months earlier. All that was required was a slight adjustment of the rules.

Case Study 5

When Jl was head of the disability unit at a local authority, she managed ten disabled staff. All were supported by Access to Work (ATW). However, a specific budget for implementing reasonable adjustments allowed her to get the support

¹³⁶ See also reference in Chapter 1, 2

needed before ATW completed the process, often taking months. The work was outcome focused so it was important to get staff working to full capacity as soon as possible following recruitment. Her PA had a health condition that caused severe pain in the mornings. She often couldn't come in before midday. This upset and worried her. JI who is blind, was finding it stressful too because the support provided by the PA was essential for her to do her job. For example, JI needed the post opened each morning so as to plan her day. JI asked the PA what would be her ideal hours of work in the office. The PA said 11 am to 7 pm. Given that in the evening JI had to attend committees and work for that needed to be prepared earlier, this was not feasible. The PA suggested she take a laptop home and work in bed in the morning until the pain subsided. Work would get done, she would be able to take her medication in the comfort of her home, and then come into the office having already done at least 3 hours work. JI needed to tell colleagues that post would not be opened in the mornings. Anything urgent needed to be sent the previous afternoon, or told to her directly in the morning. The arrangement worked extremely well. The PA was very productive working from home and although JI needed to learn to adjust to a different work method and schedule, she got the support she needed on a daily basis.

Case Study 6

DD had positive experiences with employers who agreed to provide her with a lot of flexibility. This is needed because of the unpredictability of her mental health condition. But staff found it difficult to accept the flexibility she was provided with. More of a problem was encountered with mental health professionals. For example, her psychiatrist told her he would not have employed her because of her personality disorder and her symptoms. Most of the medical staff she interacts with tell her she should not be working. DD is excellent at her job, a very experienced campaigner and has set up and run organisations successfully. However, if her condition is 'triggered', then she has no idea what will happen. The worry is having to sit down with a new employer to tell her or him about her condition, because of the stigma attached to mental ill health. Furthermore, unlike people with bipolar conditions who have clear periods when they are well or

unwell, DD's condition is a constant balancing act. She finds consultancy work is easier, because it is target driven and she can work around her condition. DD had to wait 18 months for ATW to provide her with support. They said they don't provide support to people with mental health conditions and suggested she gets counselling instead. It has also been a battle with the Health Authority. Instead of giving DD a personal budget so she can access the support she knows she needs, they sent her on a 2 days a week treatment for two years. Clinicians are the ones who dictate the approach and for them the only option is the recovery model. This is what they insist on. They don't want to help people with mental health conditions manage their condition, they want to cure them. All appointments are during the day so it is difficult to hold down a job. This is a clear example of how the medical model poses a barrier and hinders access to employment.

The focus group agreed that public services expect disabled people to be available during the day and do not consider that they may be employed. So employment falls apart. SI said, 'and of course, if you cannot get the social services and health services you need then you cannot get the support that will enable you to work. It is a vicious circle.' The conclusion of the focus group was that the medical model was not a good basis for making reasonable adjustments.

Case Study 7

SI works in a large charity in their supported housing project. They have never mentioned reasonable adjustments to her. Her manager declared at the very start that she is 'not PC' and 'knows nothing about disabilities'. They expect SI to know what she needs but she hasn't done this job before so she doesn't know. They have made some small changes to the immediate physical features and think this is enough, they have done their bit. SI applied for the job and got put forward for a role above. She was told she could choose which area she worked in. She also wanted to work just 3 days a week. They agreed to this too. She got offered the job but could not be placed anywhere because the available places were not wheelchair accessible. Two months later she was still not working. ACAS advised her on her entitlements and she phoned the head of HR. He was very rude. Said he

didn't understand why she was phoning him; he didn't know what she was complaining about; or what she expected him to do; that she shouldn't have phoned him. He told her she was the first wheelchair user they have ever employed. The organisation has over 150 members of staff. It is a prominent homeless charity, with a Chief Executive who is also a Peer. Eventually she was offered a full time job on the other side of London. SI wanted to work 3 days, but the only part time job they had on offer was 14 hours so this would have affected her benefits. SI has 3 P/As on a weekly rota. She has high support needs and requires it around the clock. The P/As support her to get to work. But the organisation first refused to allow her P/A to come into the office with her and insisted that she sits all day out at reception. SI had to fight for her P/As to accompany her into the office. They also needed a CRB check because this is obligatory for everyone in the building. Her manager could not tell her if this would be agreed. SI feels there is pressure on her to be 'normal', so that they don't need to consider her needs. SI does not get time off for attending hospital appointments. She needs to take annual leave. And every time she returns from medical treatments they insist on a return from sickness interview. SI is very unhappy about having to explain the nature and complexity of her impairments and health conditions. No one has advised her about ATW. And ATW has been a barrier to the kind of support she needs.

Concern was shared by the group, that it was unfair to expect the disabled person to know what they need in a new job and a new workplace. Employers tended to put the responsibility on the employee to identify their needs and then, if they did not mention a need straight away, the employer became resentful at having to put something else in place later. This is a clear example of why the reactive duty to make adjustments is detrimental to the employee. Furthermore, they encountered HR staff who advised line managers against providing flexibility because they thought it would need to be extended to everyone. A clear lack of understanding of the legislation. Cunningham and James discuss this aspect in their study.¹³⁷ They

¹³⁷ Ian Cunningham et al, 'Bridging the Gap between Rhetoric and Reality' [2004] 15 British Journal of Management 273, 283

found that line managers felt they didn't have the skills or knowledge to deal with such situations because they did not receive appropriate training or did not feel supported. The reaction of the head of HR to SI is a stark portrayal of the problem. If HR are not able to provide the knowledge and support, what chance is there that an inexperienced line manager will be able to act appropriately? This too was raised by Roberts who found that support for disabled people depended very much on the relationship between the individual and their line manager.¹³⁸

The group also discussed the return to work interview that caused disabled people worry and discomfort, especially because of their reluctance to tell the employer in detail about their impairment or health condition. Taylor et al discuss this issue in their study.¹³⁹ They found that the purpose of the return to work interview was tilted more towards the discipline spectrum than the welfare end. The aim was to get people back to work rather than find out what caused the absence and how they could facilitate return.

SI also encountered serious disability discrimination towards service users. She recruited a Deaf person to the project and was first told off for recruiting a disabled person. She was then expected to make all his access arrangements herself. And she felt her colleagues thought she recruited him because he too is disabled.¹⁴⁰

Discussion

The attitudes encountered by the focus group support the findings in Cunningham's and Harwood's research. Their interviewees reported negative attitudes towards disabled staff;¹⁴¹ the duty to make reasonable adjustments was often interpreted as a consideration rather than a requirement, with practice different from policy. Occupational health had an influential role, as FB experienced. They often decided whether the employee met the statutory

¹³⁸ Note 47, 203

¹³⁹ Phil Taylor et al, 'Too Scared to Go Sick' [2010] 41 Industrial Relations Journal 270, 275

¹⁴⁰ Many Deaf people do not consider themselves disabled, but a minority language group with its own culture. The social model acknowledges that Deaf culture is distinct and separate. Therefore the inclusive but separate reference is always to Deaf and disabled people .

¹⁴¹ Note 58, 6

definition and accordingly, whether adjustment should or should not be made. This in stark contrast to the EHRC Code of Practice suggesting employers should avoid reaching such conclusions.¹⁴² Cunningham et al found that ‘...the process of [making reasonable adjustments] was often slow and tortuous.’¹⁴³

As focus group members found in practice, responsibility for making reasonable adjustments was delegated to line managers.¹⁴⁴ It demonstrates that if the line manager is empathetic or understanding, where the employee-manager relationship is a good one, or where the motivation is ensuring tight targets are met, then the disabled employee is more likely to see reasonable adjustments put in place. The roles of HR and occupational health have also been shown to be prominent barriers to whether reasonable adjustments were implemented or not.¹⁴⁵ In many cases, where the disabled employee’s health or impairment results in lengthy periods of sickness absence, the approach is applying the capability procedure aimed at dismissal rather than making adjustments that will facilitate employees’ return to work and retention in their jobs.¹⁴⁶

Focus Group participants all agreed that it was hard to keep fighting for adjustments. SI, for example, said she knows they are “taking the mick’ but she doesn’t want to cause trouble because ‘if you want to stay at the workplace, it will become an awkward situation with your manager.’ Not only does the organisation fail to put the necessary adjustments in place, it then victimises the disabled employee for demanding the adjustments and challenging the lack of action.

¹⁴² 6.9: ‘In order to avoid discrimination, it would be sensible for employers not to attempt to make a fine judgment as to whether a particular individual falls within the statutory definition of disability, but to focus instead on meeting the needs of each worker...’

¹⁴³ Cunningham et al, ‘Bridging the Gap between Rhetoric and Reality: Line Managers and the Protection of Job Security for Ill Workers in the Modern Workplace’ [2004] 15 *British Journal of Management* 273, 287

¹⁴⁴ Note 58, 10; *ibid* 274

¹⁴⁵ *ibid*

¹⁴⁶ Note 58, 10

CHAPTER 7

The Social Model in Action

Introduction

The opportunity to replace the narrow, restrictive medical model with the social model was discussed by the DRTF and the Joint Committee on Human Rights, but not implemented:

*'We consider that it is important to have a clear and workable definition of disability in the Bill, which protects those who are genuinely disabled without extending the definition of disability too far. We concur with the view previously expressed..... that there are strong arguments for adopting a definition of disability in the Bill which is more in tune with the 'social model' of disability set out in the [UNCRPD]... It would also reflect the real life experiences of many disabled people, who may face discrimination from employers and service providers on account of their impairments even when they are insufficiently 'disabled' to satisfy the medical-centred tests set out in existing UK legislation.'*¹⁴⁷

With an increased number of disabled people expected to find employment, this can no longer remain an aspiration. People who may be severely impaired, or suffer from hidden impairments and fluctuating health conditions, will require substantial accommodation, beyond narrow job-related adjustments. It also does not make economic sense to only treat each disabled person's needs separately. For disabled people to remain at work, it will be essential to identify and remove barriers in a comprehensive way. This Chapter addresses these issues and suggests ways forward. It will draw on a number of important sources including the DDA, EqA and UNCRPD.¹⁴⁸

¹⁴⁷ Joint Committee on Human Rights 'Legislative Scrutiny: Equality Bill' 26th report of session 2008-09 HL Paper 169 HC 736 [2009]

¹⁴⁸ The Civil Rights (Disabled Persons) (No.2) Bill [H.L.]; the Americans with Disabilities Act 1990, as amended (ADA); EqA 2010 Chapter 1 Public Sector Equality Duty s. 149; EqA Part 3 Services and Public Functions s.29(7), Schedule 2; Disability Equality Duty in the DDA (Public Authorities)

The proposals will focus on making the statutory disability definition more inclusive and changing the duty to make reasonable adjustments from a reactive to an anticipatory approach. In this way social model principles will be introduced into the EqA and embedded in employment practice.

An Inclusive Definition of Disability

The definition in the UNCRPD, ratified by the UK in 2009 and entered into force for the EU collectively on 22 January 2011, reflects the social model:

‘Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’¹⁴⁹

To accord with the UNCRPD, a more appropriate definition can be found in the Civil Rights (Disabled Persons) Bill. This Bill was campaigned for by the disability movement and disabled people organisations with the support of disability charities. Its definition was shaped with the help of disabled activists and therefore reflected the social model. The Bill was a private members bill, debated in parliament during the parliamentary session of 1994-1995. However, the government of John Major opposed it. Anecdotal evidence suggests that it was deliberately filibustered by Tory back benchers and ran out of legislative time.¹⁵⁰ A few months later the DDA was introduced.

The Bill had two definitions that can replace the current definition in the EqA. The first is a general definition:

In Part 1 s. 1(10), disability is defined as follows:

(Statutory Duties) Regulation 2005; UN Convention on the Rights of People with Disabilities 2008; EqA s. 124

¹⁴⁹ UNCRPD Article 1

¹⁵⁰ Jo Roll, Research Paper 95/18 6 Education & Social Services Section House of Commons Library February 1995, referring to HC Deb 10.5.94 c.155

“disability’ means, with respect to a person –

- (a) a physical or mental impairment that substantially limits one or more of the major life activities of that person; or
- (b) a history of having had such an impairment; or
- (c) a reputation as a person who has or had such an impairment;’

This definition is clear and concise and at the same time comprehensive. It avoids the ‘layered’ approach in the EqA¹⁵¹ by using broad and inclusive terminology. It retains the ‘substantial’ element but applies it to all major life activities, thus incorporating the world of work. Such a definition will not require a separate schedule and a 60 page guide to explain in detail who is included and who is excluded from each layer. It will also allay the fear that too wide a definition would cover those who are temporarily disabled resulting in a reduced protection for severely disabled people.¹⁵²

The definition in the Americans with Disabilities Act is very similar to the one in the Civil Rights (Disabled Persons) Bill: ‘a physical or mental impairment that substantially limits one or more major life activities...’; ‘a record of such an impairment’ or ‘being regarded as having such an impairment.’¹⁵³

In Part 1 s.1(25) of the Bill, there is a second definition for the purpose of employment:

‘qualified disabled person’ means...a disabled person who, with or without any reasonable accommodation, can perform the essential functions of employment position that he holds or desires...’

¹⁵¹ ‘This means that, in general: ‘the person must have an impairment that is either physical or mental...;the impairment must have adverse effects which are substantial...; the substantial adverse effects must be long-term...; and the long-term substantial adverse effects must be effects on normal day-to-day activities...’ EQA 2010 ODI Guidance, 7

¹⁵² Note 123, 2

¹⁵³ ADA Sec 12102(1)

The term 'qualified disabled person' is then used in relation to all the provisions applying to discrimination in employment. This too is a reflection of a similar clause in the ADA.¹⁵⁴ Importantly there is no reference to impairment. Instead the definition focuses on the disabled person's ability to do their job, with or without accommodation. This puts disabled employees on a par with non-disabled employees. It concurs with Woodhams and Corby's conclusion that line managers view disabled employees in terms of their job performance rather than their impairments.¹⁵⁵

Following implementation of the definition and the use of the term qualified disabled person, the current statutory definition could be abolished. Instead, disability would be self-defined. The focus would shift to the disabled employee having to demonstrate how the employer's refusal to make reasonable adjustments is a detriment to their employment. Alternatively, where adjustments have been made but are insufficient or inadequate, the employee would need to demonstrate how these continue to be a barrier to full and equal participation. Under such measures, the comparator would no longer be needed and therefore contentious issues about who is the proper comparator could be avoided.¹⁵⁶

An Anticipatory Duty to Make Reasonable Accommodation

The study has attempted to show that the duty on employers to make reasonable adjustments is reactive and narrow. The focus is on the immediate needs of one individual at a time and often these needs, as the Focus Group case studies demonstrate, are not met appropriately. An example of such failure was evident in *Taiwo v Department of Education*¹⁵⁷ where the employer failed to accommodate Mr Taiwo's needs, in particular with regard to his Asperger's Syndrome which made his interaction with colleagues difficult. He also had Sickle Cell Anaemia and Arrhythmia. His manager failed to take the necessary action in a timely manner because she was not clear what she needed to do. The EAT judge concurred with

¹⁵⁴ ADA Sec 12103(2)(8)

¹⁵⁵ Note 30, 161

¹⁵⁶ *Foster v Cardiff University* [2013] UKEAT/0422/12/LA, (Transcript); *Smith v Churchills Stairlifts plc* [2006] IRLR 41

¹⁵⁷ *Taiwo v Department of Education* [2013] UKEATPA/1802/11/RN, (Transcript) EAT

the ET that indeed it was not clear what she could do and dismissed Mr Taiwo's appeal. The case demonstrates how a reactive approach of responding to individual needs does not work. If the Department of Education, the respondent in this case, with a large and well sourced HR department, could not deal with putting proper adjustments in place for one employee, there is little hope that a small local business will have the capacity to do so.

Instead of this failing approach, a proactive duty to make reasonable accommodations¹⁵⁸ is likely to be more effective. Extending the duty in the EqA¹⁵⁹ that is currently applied to service providers, public function and associations will facilitate a more structured and systematic approach to removing barriers in the workplace. The Code of Practice¹⁶⁰ provides clear guidance on this:

'The duty to make reasonable adjustments requires service providers to take positive steps to ensure that disabled people can access services. This goes beyond simply avoiding discrimination. It requires service providers to anticipate the needs of potential disabled customers for reasonable adjustments.'

And in the next paragraph (7.4) it goes on to say:

'The policy...is not a minimalist policy of simply ensuring that some access is available to disabled people; it is, so far as is reasonably practicable, to approximate the access enjoyed by disabled people to that enjoyed by the rest of the public.'

The anticipatory approach is made clear with:

'...the duty to make reasonable adjustments is owed to disabled people

¹⁵⁸ The term 'accommodation' that is used in the Civil Rights Bill, the ADA and the UNCRPD denotes an approach to removing barriers that is wider ranging than the 'adjustment' term used in the EqA and the previous DDA.

¹⁵⁹ EqA 2. 29(7), Schedule 2

¹⁶⁰ EqA 2010 Code of Practice Services, public function and Associations, Chapter 7 7.3 EHRC 2011 90

generally. It is not simply a duty that is weighed in relation to each individual disabled person...'

Halsbury's Laws of England¹⁶¹ explains the anticipatory duty in terms of '...consideration of, and action in relation to, barriers that impede people with one or more kinds of disability prior to an individual disabled person seeking to use the service...' Service providers are expected to identify the barrier and act on the adjustment they need to put in place, *before* encountering the disabled service user.

At present service providers have to use an anticipatory approach towards their disabled customers but a reactive approach with their disabled employees. The proposal made in this study would eliminate this contradiction. All employers will be able to apply a unified, proactive approach towards disabled people, whether they are employees or customers or both.

The Disability Equality Duty

To help employers get to grips with the anticipatory duty, the principles in the Disability Equality Duty (DED) will help. The DED came into force when the DDA was amended in 2005 but was replaced with the Single Equality Duty (PSED) in the EqA. The DED's principles were clear and can be easily tailored to the employment situation. For example, promoting equality of opportunity between disabled employees and other staff; promoting positive attitudes to disabled people in the workplace; encouraging active participation of disabled employees in identifying barriers and together finding solutions to removing them; sharing the development of a policy and action plan; collectively monitoring its implementation and progress. Where employers do not have disabled people employed already, they can work with local disabled people organisations to develop and embed this process.

¹⁶¹ 'Measures under the [Equality Act 2010](#) to ensure disabled persons have access to services and premises, Discrimination' 33 [2013] 5th Edition Halsbury's Laws of England 206 Lexis Library

This approach will meet the expectation in Article 4(e) of the UNCRPD:

‘To take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise;’

Employment Tribunals Recommendation (Section 124)

Section 124 (2)(c) of the EqA is an example of how the social model is currently applied in the legislation. The provision gives the ET additional power and discretion to order an employer to take such measures as it considers appropriate. These are in addition to any compensation it awards the claimant. The recommendation is time and action specific, relates to the adverse effect experienced by the claimant and applies to the workplace more widely. The code of practice provides some examples including delivering disability equality training to all staff or changing a policy or a practice.

In two recent cases the ET has done just that. In *Crisp v Iceland Foods Ltd*¹⁶² the tribunal was appalled by the behaviour of the managers and said that ‘senior managers including those in human resources demonstrated lack of understanding of disability issues.’ It found for the claimant, compensated her for injury to feeling and recommended that by a certain date all Iceland Food HR staff and senior managers undergo disability discrimination training with a particular focus on mental health issues. In *Stone v Ramsay Health Care UK Operations Ltd*¹⁶³, a case of maternity rights rather than disability, the ET pointed out that even during the hearing the employer failed to grasp its discriminatory and unlawful treatment of the claimant. It recommended that within six months the employer had to engage consultants to develop and deliver a training programme to all managers and HR staff on their legal obligations relating to maternity; that this must be done over a period of twelve months; and that their EOP must be rewritten to include maternity as a protected characteristic.

¹⁶² *Crisp v Iceland Foods Ltd* ET/1604478/11 & ET/1600000/12, paragraph 36

¹⁶³ *Stone v Ramsay Health Care UK Operations Ltd* ET/1400762/11

These cases demonstrate that although the ET cannot enforce such measures, it can instigate a comprehensive approach to tackling employers' discriminatory failings. It is worrying that the Government plans to abolish s. 124 in its determination to 'reduce red tape' imposed on business.¹⁶⁴ As the EHRC argues, while it is still in force, the provision should be made use of by claimants' representatives to ensure that 'systemic [institutional] discrimination'¹⁶⁵ is tackled in the workplace. This is especially important in disability discrimination cases as the majority of discriminated employees have left employment. It is submitted that instead of repealing this provision, the powers of the ET should be strengthened, to be allowed to enforce its recommendations under s.124.

Discussion

The study suggests a number of practical ways to apply the proposals made in this chapter. These appear in Appendix 4. However, the process suggested is just the start. The application of the social model in anti-discrimination legislation and in particular with regard to the employment regulations will be an ongoing process and the subject of further studies.

The goal should be a full implementation of the social model in all aspects of daily life and society's workings. Article 2 of the UNCRPD provides such a vision:

“Universal design’ means the design of products, environments, programmes and services to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design. ‘Universal design’ shall not exclude assistive devices for particular groups of persons with disabilities where this is needed.’

¹⁶⁴ Note 17

¹⁶⁵ Sarah Gilzean *Recent use of power to make wider recommendations by Employment Tribunal*, ELB July 2012, EHRC <http://www.equalityhumanrights.com/scotland/legal-news-in-scotland/articles/recent-use-of-power-to-make-wider-recommendations-by-employment-tribunal/> accessed 1 April 2013

CHAPTER 8

Conclusion

This study has been carried out at a time when the rights that disabled people have fought for and achieved over the last forty years are under significant threat. It is, therefore, an opportune moment to challenge the legal framework that further undermines their position and ability to gain and retain employment.

When formulating the research question, it was uncertain whether the task of introducing the social model into the EqA was a realistic proposition. However, a wealth of research analysing the social model and criticising the medical model of disability was available. The views of prominent disability activists and academics coupled with the experiences of a focus group of disabled employees, provided guidance and certainty that the task could be achieved. A number of legislative tools aided this process, as explored in detail in Chapter 7. Throughout, the guiding principles were those of the UNCRDP, firmly grounded in the social model of disability.

The study critically examined the medical model of disability as defined in the DDA and EqA, as interpreted by the tribunals and courts and practiced in organisations. It has shown that disabled people saw the DDA as an inadequate and ineffectual compromise, made by a government that would not allow the Civil Rights Bill, based on the social model, to succeed.¹⁶⁶ A unanimous view among the interviewees in Chapter 5 was that the EqA did not address the failings of the DDA, and that the EHRC is less effective than the DRC.

The Hepple Report suggested ways of improving the legislation, hinting at the introduction of the social model.¹⁶⁷ Woodhams and Corby¹⁶⁸ described a similar provision to the PSED, before it came about in the amendment to the DDA in

¹⁶⁶ Note 150

¹⁶⁷ Bob Hepple et al, *Equality: A New Framework* (Harp Publishing Oxford 2000) 56

¹⁶⁸ Note 30, 176

2006.¹⁶⁹ They drew on the Hepple Report and on the Fair Employment (Northern Ireland) Act 1989, amended in 1998 by the Fair Employment and Treatment Order. Various joint parliamentary committees scrutinising disability and equality bills¹⁷⁰ considered the possibility of expanding the statutory definition. However, they rejected these propositions as was demonstrated in the Literature Review, mainly so as to restrict access of all disabled people to the legislation.¹⁷¹

The Statutory Definition of Disability

The study has demonstrated that the medical definition of disability in the EqA, as in the previous DDA, is intentionally restrictive. This contrasts with the inclusive definitions that other protected characteristics in the legislation benefit from. The result is that many disabled people who suffer discrimination in the workplace are unable to access legal protection. The study has also demonstrated how the tribunals struggle to interpret and apply this definition, allowing employers to question employees' impairments and health conditions, while providing scant redress for disabled employees who are discriminated against. The outcome, demonstrated by Hepple and Harwood¹⁷², is a large proportion of cases being dropped by disabled people who are no longer in their jobs.

A further obstacle is the restriction on including work in normal day-to-day activities. While the legislation is aimed at addressing discrimination in employment, work activities are largely excluded. This results in tribunals and courts providing inconsistent and contradictory rulings, as demonstrated in Chapter 4.

The proposition put forward in Chapter 7 could help avoid these difficulties. It would replace the current definition with one that disabled employees self-define. As in the Civil Rights Bill and the ADA, it would refer to major life activities that naturally include the workplace. The focus would shift from who is or is not

¹⁶⁹ The DDA was amended in April 2005 by the Disability Discrimination Bill. It introduced a new statutory public sector duty from 5th December 2006 in the form of the Disability Equality Duty.

¹⁷⁰ Note 147

¹⁷¹ Note 35

¹⁷² Note 15, 34; Note 45, 3

disabled in the eyes of the law, to how accommodating the workplace is for *all* disabled people who can work. The law could enshrine the right to work as a civil right for disabled people and the role of the courts would be to enforce this right.

The Duty to make Reasonable Adjustments

The study also demonstrates how the reactive duty to make reasonable adjustments is a fundamental weakness of the current legislation. It focuses attention and resources on each disabled employee and their immediate job duties, without addressing the wider barriers they encounter in the workplace. By turning this duty to an anticipatory one, as required of service providers; and using the previous Disability Equality Duty to strengthen the current Public Sector Equality Duty; all employers would be expected to identify barriers in the workplace and remove them over time.

This would require employers to carry out disabling barriers risk assessments and to develop action plans for their removal over time.¹⁷³ Involving disabled and other employees in these activities will save resources and facilitate an inclusive and integrated workforce. It will also serve to meet another of the UNCRPD's aims in Article 8 2(a)(iii):

‘To promote recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market’

Closing Note

The research evidence in this study has demonstrated that the medical model on which the disability provisions in the EqA are based, results in excluding disabled peoples from protection against discrimination in the workplace. The motive, it seems, is to limit the regulatory obligations on employers. However, with a political climate in the UK that expects greater numbers of disabled people to enter and participate in the labour market (by whichever political party comes into power in

¹⁷³ Detailed suggestions and a case study of how this will take place in practice appear in Appendix III

2015 and beyond), there must be a rigorous examination of how the legislation can support this move, rather than hinder it and fail disabled people as it clearly does at present.

One approach could be to enshrine the right to work for disabled people as a civil right and the role of the courts could be to enforce this right. This principle could hold true for other minority groups where, for example language, culture or religion can be barriers to equal participation in the workplace.

Appendix 1

Interviewees' Biographies

Sir Bert Massie CBE, 'The unrepentant Pragmatist'¹⁷⁴ was the Chair of the Disability Rights Commission from 2000 when it was first set up to 2007. During 2008-2011 he was the Commissioner for the Compact¹⁷⁵. In 2007 he was knighted for his services to disabled people. He is a Governor of Motability, a national mobility charity, Governor of Liverpool John Moores University, and a member of the Baring Foundation Panel on the Independence of the Voluntary Sector. Sir Bert was the deputy chair of the National Disability Council, a member of the Disability Rights Task Force, and a trustee of the Institute for Employment Studies. He was also chief executive of the Royal Association for Disability and Rehabilitation (RADAR).¹⁷⁶

David Ruebain is the Chief Executive of the Equality Challenge Unit¹⁷⁷. Before he took up this post he was a solicitor for twenty two years; latterly as Director of Legal Policy at the Equality and Human Rights Commission. He founded the Department for Education, Equality and Disability Law at Levenes Solicitors. Among many other activities he was an equality law advisor to the FA Premier League and the Chair of the Law Society of England and Wales Mental Health and Disability committee. He is on the editorial board of *Disability and Society Journal*, and a member of the advisory editorial board of the Equal Rights Review. David Ruebain has published widely, has drafted Private Members Bills and has made oral representations to Committees of Parliament.¹⁷⁸

Colin Barnes is Professor of Disability Studies at Leeds University. In his own words: 'As a disabled person and special school survivor I have been involved with the disabled people's movement throughout my academic career. I am a member of

¹⁷⁴ Ian Macrae, Disability Now <http://www.disabilitynow.org.uk/article/sir-bert-massie-unrepentant-pragmatist> accessed 7 September 2013

¹⁷⁵ The Compact, first signed in 1998 was a new approach to partnership working between government and the voluntary and community sector

¹⁷⁶ <http://iars.org.uk/iarsusers/sir-bert-massie-cbe> accessed 24 June 2013

¹⁷⁷ The ECU support equality and diversity for staff and students in higher education.

¹⁷⁸ <http://www.ecu.ac.uk/news/equality-challenge-unit-appoints-new-chief-executive> accessed 26 June 2013

several local, national and international organisations controlled and run by disabled people. I established the Centre for Disability Studies (CDS) as the *British Council of Organisations of Disabled People's* (BCODP's) Disability Research Unit (DRU) here in the School of Sociology and Social Policy in 1990 and was its Director until 2008. I also founded the independent publisher: *The Disability Press* in 1996 and an electronic archive of writings on disability issues: *The Disability Archive UK* in 1999.' Colin Barnes' writing has been seminal for the disabled people movement and forms an important part of the literature on which this study is based.¹⁷⁹

Mike Oliver was the first professor of disability studies in the UK and is now Emeritus Professor of Disability Studies at the University of Greenwich. Mike coined the term the Social Model in 1983 and has been one of the most significant figures in the disabled people movement for the past 40 years. He served on the governing council of the British Council of Disabled People and the Spinal Injuries Association.¹⁸⁰ Like Colin Barnes, his writing on the social model of disability continues to provide inspiration including to the new generation of disability activists campaigning against current cuts and changes dramatically affecting disabled people. His writing has guided much of the learning and understanding in this study.

Jenny Morris is a disabled feminist. She worked as a researcher and consultant on disability policy for 30 years, including with the previous Labour government on *Improving Life Chances of Disabled People* (2005) and the *Independent Living Strategy* (2008). Most of her work, including *Pride against Prejudice: transforming attitudes to disability*, has been posted on the Leeds Disability Archive.¹⁸¹ She also writes a blog jennymorrisnet.blogspot.co.uk

Professor **Ian Cunningham** is Director of Postgraduate Taught Programmes and Director of Knowledge Exchange at University of Strathclyde Business School. He is Assistant Editor for *Employee Relations Journal* and his research interests are

¹⁷⁹ <http://www.sociology.leeds.ac.uk/people/staff/barnes> accessed 24 June 2013

¹⁸⁰ <http://www.disabilitynow.org.uk/regulars/Mike%20Oliver> accessed 24 June 2013

¹⁸¹ <http://disability-studies.leeds.ac.uk/library>

absence and disability management; employee relations in the voluntary sector; and violence at work.¹⁸²

Rupert Harwood is the Chair of the Public Interest Research Unit¹⁸³ and has written a number of reports critiquing the shortcomings of disability discrimination legislation, with an in-depth analysis of case law. Rupert used to work in environmental research and campaigning and switched to equality issues. He is currently completing a PhD, looking at why employment adjustments are made or not. His writing has been particularly valuable for this study.¹⁸⁴

Kirsten Hearn is Vice-Chair of the Disability Committee of the Equality and Human Rights Commission. She was an external member of the Office for Disability Issues Disability Delivery Board from 2009-2012¹⁸⁵. Kirsten was an Independent member of the Metropolitan Police Authority during 2002-2012 where she chaired the equality and diversity sub-committee and co chaired the Domestic and Sexual Violence Board. Kirsten helped set up Equality 2025 (the UK Advisory Network on Disability Equality,) and served as a member for three years (2006/2009), providing disability equality advice at the heart of government. She is a blind lesbian and campaigner for peace, human rights and justice and is a supporter of non-violent direct action.¹⁸⁶

¹⁸² <http://www.strath.ac.uk/hrm/staff/profiancunningham/> accessed 24 June 2013

¹⁸³ PIRU is an organisational and social research organisation. It is run by volunteers.

¹⁸⁴ <http://www.piru.org.uk/comment/> accessed 10 September 2013

¹⁸⁵ A cross-government body that monitors progress to disability equality

¹⁸⁶ <http://www.inclusionlondon.co.uk/Our%20Team> accessed 10 September 2013

APPENDIX 2

Interview Questions

Jenny Morris

1. Do you think that the social model is still relevant?
2. How can we enshrine the social model in the workplace given that the legislation is based on the medical model?

Sir Bert Massie

3. Bob Hepple describes pre EqA discrimination legislation as 'outdated, fragmented, inconsistent and inadequate'¹⁸⁷ Do you recognise this description as applying to the DDA?
4. What is the effect of European legislation?
5. All equality groups were very much against the setting up of the EHRC and saw it as a watering down of the DRC. Do you agree?
6. How effective is the Disability Committee of the EHRC?
7. The problem with this, as with previous legislation, is that it is based on the medical model. So any improvements to the legislation that the EqA brought about, such as indirect discrimination, make little difference. Do you agree?
8. What do you think are the problems with the current approach of pushing disabled people into work?

David Ruebain

9. Do you consider the EqA as an improvement on the DDA and if so, how?
10. Do you think that the legislation fails because it has not sought to implement the social model of disability, given that it had a unique opportunity to do so?

¹⁸⁷ *The Equal Rights Review Vol 5 (2010)*

11. Do you think, given your extensive experience, that the legislation facilitated the employment and retention of disabled people in work given it is based on the medical model – HR who write policy do not write in terms of the social model; all focuses on reasonable adjustments for the individual
12. How does the DRC compare to the EHRC in promoting the rights of disabled people?
13. Mike Oliver says that the DRC was a political tool because it was not answerable to disabled people. What do you think about this statement?
14. How can we use the law to embed the social model?
15. Do you think that S.124 was a step towards recognising the need to enforce the social model and how should we fight its proposed abolition?

Kirsten Hearn

16. Do you view the EqA as an improvement on the DDA?
17. How do you see the performance of the EHRC's Disability Committee of which you are a member?
18. What do you think of the review report and its conclusions?

Colin Barnes and Mike Oliver

19. How influential was the disability movement in determining the basis of the DDA?
20. (Mike Oliver) In 'If I had a Hammer' you say that too much time has been spent discussing the social model. Time to use it in practice. How do you think this should be reflected in employment legislation?
21. Why do you think the EqA did not seize the opportunity to move away from the medical/individual model?
22. Do you think that shifting the focus from the employee to the employer and replacing the reactive nature of the duty to make reasonable adjustments with

an anticipatory approach would be a way of introducing the principles of the social model to the EqA?

23. How could the definition of disability move away from the medical model? The argument is that the legislation needs to be able to distinguish between disabled and non disabled people?
24. Should the justification provision be removed?

Professor Ian Cunningham

25. Do you think that legislation that is framed in terms of the individual's impairment contributes to the operational problems you encountered in your research?
26. Given the tightening of managerial approach to sickness absence that you discuss in 'Too scared to go sick' – how do you think this will impact on disabled people who are forced to work following WCA and who may have been out of work for years?
27. What impact do you think the Public Sector Equality Duty has on sickness absence? And the government's intention to abolish it?
28. What do you think are the implications for disabled employees given the weaknesses you identify in 'Bridging the Gap' in 2004 and 'Too Scared to go Sick' in 2010 and now? lack of training, lack of support, budgetary pressures – what impact does economic austerity have?

Rupert Harwood

29. You talk in your article 'Reasonable Adjustments and Austerity' about the misunderstanding of the term 'reasonable'. What did you mean?
30. In 'The End of the Beginning' you suggest extending the public duty to some in the private sector. How would this work?
31. What do you think needs to be put in place in your view to ensure enforcement is effective?

Turning the 'reactive' duty to a 'proactive' duty – what needs to be done to make it effective?

APPENDIX 3

Focus Group

Disabled Employees Case Studies

Friday 13 September 2013

Programme

6:00 – 6:30

Arrival

6:45 – 7:30

Meal & Overview

The social model versus the medical model in the legislation.

Some Key points raised in the study

7:30 – Sharing individual stories – worst and best experiences of adjustments, access, inclusive practice. What made it worst, what made it best. If you cannot come up with either, no problem. But can you think why?

8:45 – Key learning points for me to take away

9:00 - End

APPENDIX 4

The Social Model in Practice

'Too much time has been spent theorising about the social model, and it is now time to focus on its implementation in practice'¹⁸⁸

This appendix demonstrates how the proposals outlined in Chapter 7 of the study can be put into practice. It has not been included in the body of the study as it relates to organisational practice rather than legislative change.

The Anticipatory Duty to make Reasonable Adjustments

The anticipatory duty featured in the EqA¹⁸⁹ would be enforced by the Disability Equality Duty to provide guidance and support to employers in how to implement this approach in practice.

An anticipatory duty would require all employers to complete a Disabling Barriers Risk Assessment in their workplace. The Assessment would cover all aspects of the organisation including governance and management, business planning, HR policies and procedures, workforce development, job roles, work practices and the physical environment. This comprehensive tool will enable organisations to identify the barriers to full participation. National benchmarks would be identified jointly with disabled people and their organisations, against which the disabling features will be assessed, so as to avoid unrealistic expectations and standards that will penalise smaller businesses.

All employers would then need to develop an action plan that outlines how these barriers will be removed and the required time scale for implementation. For small employers with less than 25 staff the period would be 5 years. Increased funding to Access to Work and government loans on favourable terms would enable employers to put the plan into action.

¹⁸⁸ Mike Oliver 'The Social Model in Action: if I had a hammer' in Collin Barnes and Geof Mercer (eds), *Implementing the Social Model of Disability: Theory and Research*(The Disability Press Leeds 2004) 18

¹⁸⁹ EqA s.29, 30, Schedule 2

The EHRC – as with the DRC before it – will be responsible for providing support with developing and implementing the action plans. This can be sub contracted to local DPOs and other user led organisations working in partnership to pool expertise across all impairment groups and health conditions. The EHRC will be responsible for monitoring implementation, with duty orders issued for lack of compliance – based on the hierarchy of sanctions featured in the ‘Hepple Report’.¹⁹⁰

However, it is expected that many barriers will not require expending resources. Instead imagination and a willingness to work differently will suffice. The case study below provides such an example.

Case Study – the Social Model in Practice

A local business sells stationery and small office machines. It has twenty three members of staff, including two disabled employees and one Deaf staff member. All three are supported by ATW, including the Deaf person who has a BSL (British Sign Language) interpreter. One of the other disabled employees has a hearing impairment and requires an induction loop. A small grant, together with support from ATW, has enabled the company to install an induction loop throughout the offices. Statutory disability awareness training has been delivered to all staff and will be repeated once a year, tailored to developed awareness and the changing needs of the business. There is an action plan in place that has identified a number of disabling barriers, scheduled for removal over the next five years. A Disability Awareness Officer (one of the three disabled employees) works with management and staff to embed inclusive practices. However, the two hearing impaired employees are at a significant disadvantage at staff meetings. Even though the induction loop is operational and a BSL interpreter is present. This is because meetings are noisy and undisciplined with everyone speaking at the same time. The hearing impaired employee cannot decipher what is being said and the BSL interpreter cannot translate multiple conversations and interruptions. Thus these two employees require an additional meeting with the Operational Manager who

¹⁹⁰ Note 167, 59

must convey to them separately any plans and decisions made at the staff meeting. This is a duplication of work and time.

Instead of this disabling experience, staff can practice and learn to conduct their meetings in an accessible manner: listen to each other, wait their turn, speak in a measured and clear way, and enable the interpreter to sign. Removing such a simple, and cost free barrier, will improve the productivity of all concerned, will enhance integration and boost business performance. A barrier free environment benefits everyone.

Summary

Mike Oliver, in his conversation with this student, recalled delivering a talk at the Institute of Architecture. He was discussing barriers to the built environment with a group of architects from an international company designing cinemas all over the world. They admitted that they considered themselves experts and did not consult disabled people during the design stage. A particular incident took place when they invited local disabled people to examine the access to a newly completed cinema. One of the disabled people said – ‘what if I wanted to be a projectionist?’ – and of course the projection room was up a staircase and inaccessible.

This anecdote demonstrates well the rationale for turning the reactive duty to make reasonable adjustments into an anticipatory duty that addresses barriers in the workplace in a wider and more holistic way. Moreover, having one anticipatory duty that applies to both disabled employees and disabled customers will save time and resources. It will introduce the social model into legislation as well as into practice to the benefit of society at large.

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