**The effect of equality legislation on employment outcomes for persons with disabilities**

**EXTENDED ABSTRACT**

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# Abstract

Disabilities are largely understood from the perspective of the medical model, where physical or mental impairments differentiate disabled from non-disabled persons. However, when considered from the perspective of the social model, it has been argued that many societal attitudes, norms and structures, create barriers to the success of persons with disabilities. Whilst this may be less apparent to persons without disabilities or those otherwise not associated with this community, these barriers can impact whether and the extent to which persons with disabilities are able to obtain and retain gainful employment. This paper examines the extent to which one important mediating factor, legislative prohibitions (specifically the Equality Act, 2010) have impacted employment outcomes for persons with disabilities in the United Kingdom.

For persons of working age, having a disability may prove challenging when trying to obtain and retain employment. This is in part, because employers and managers rely on stereotypes to make employment decisions, as it relates to persons with disabilities and this may result in disparate treatment being meted out to them.

This paper will analyse disability claims adjudicated by Employment Tribunals in the United Kingdom, to explore and assess the current state of employment inclusion and/or exclusion of persons with disabilities from gainful employment, and the efficacy of the enacted legislation to protect this marginalised group against discrimination on the basis of immutable characteristics and the heterogeneous nature of persons with disabilities.

**Keywords**

Disability, equality legislation, employment outcomes, legislative efficacy

# Introduction

Extant literature purports three (3) primary models of disability, namely the social, medical and the economic models. According to the *social* model, “disability, is a social construct and problems reside in environments which fail to accommodate people with disabilities” (Olkin 2002, p.134) and “devalue differences” (Woodhams and Danieli 2000, p.403). The *economic* model of disability “focuses on the tasks associated with specific jobs and limited consideration is given to accommodating differences”, rather, it is regarded as the responsibility of persons with disabilities who are employed or seeking employment to “conform to the demands and requirements of the workplace” (Mack 2014, p.75). Finally, the *medical* model of disability considers the “physical and intellectual limitations, impairments or conditions of people” (Mack 2014, p.75). Here, disability is seen as “an individual characteristic and is described in terms of pathologies such as blindness, deafness, paralysis, mental retardation, and other such conditions” (Me and Mbogoni 2006, p.64). Though the medical model is regarded as an old categorisation of disability, it is still the most broadly used and understood, within society and consequently is the lens through which legislators draft laws prohibiting discrimination. This is to be expected given the nature of law and its goal of providing clarity and comprehensive direction, to employers and employees, to wit, Section 6 of the United Kingdom’s (UK) Equality Act, 2010, a disability is referred to as a physical or mental impairment which has a substantial and long term, adverse effect on an individual’s ability to carry out normal daily activities.

There is significant heterogeneity within categories of disabilities, “the effect of disability on people’s lives varies according to the type and severity of the disability, socio-economic status, the communities in which they live, and many other factors” (Jones and Serieux-Lubin 2018, p.7). Moreover, the range of other legally protected characteristics normally have (both anecdotally and empirically) positive attributes associated with them, for example, arguments exist in favour of retaining: *older workers* (for example: to reap the benefits of their experience and organisational knowledge), *women* (for example: to appeal to the female demographic and to get a different perspective), however, there are no generally agreed upon benefits which can be realised by organisations who hire disabled workers. In fact, though legislative requirements may successfully remove the more overt and blatant forms of discrimination, employers may be able to rely on the exceptions permitted by the legislation, to hire and employ “able bodied” persons, as to do so would obviate the need to make accommodations for persons with disabilities in the form of perceived costly changes to the work environment. This, particularly in the absence of quantitative evidence to support the potential benefits of such resource outlays (Woodhams and Danieli 2000). This paper discusses the current status of persons with disabilities in the United Kingdom and the extent to which their lack of inclusion and issues of access impact their perception of inequality, the extent to which an individual’s disability can impact their employment or employability; whether and the extent to which the law which has been enacted to prohibit discrimination on the basis of disability is effective.

# Current status on individuals with disabilities

### According to the Family Resources Survey 2016/17 conducted by the UK’s Department of Work and Pensions, the primary causes of disability in the UK are: mobility issues (51%) (caused by bone, joint and muscle conditions); stamina and breathing (39%); dexterity (28%); mental health (24%); memory (17%); hearing (15%); vision (12%); learning (14%); social/behavioural (8%) are the largest group of impairment types. Moreover, Dixon, Smith and Touchet (2018) found that 1 in 3 disabled people feel there’s a lot of disability prejudice, and 32% of persons surveyed perceived disabled people as less productive than non-disabled persons. The UK’s Department of Work and Pensions also report that the rate of disability prevalence is higher for females (23%) than males (19%) in the population, generally and among persons of working age. Moreover, as it relates to employment of persons with disabilities, 47% of women and 39% of men of working age are gainfully employed.

One factor which may impact the employment rates of persons with disabilities is the acceptance of prevailing stereotypes. Stereotypes are rife about persons with disabilities specifically as it relates to their ability to perform, rates of absenteeism, turnover and accommodation modifications which may be required (for example, to entrances, bathrooms, workstations etc.) (Heron and Murray 2003). Conversely, research has found that the performance, rates of absenteeism and turnover of persons with disabilities, are comparable to their non-disabled counterparts, and further the cost of the required job accommodations, is not normally prohibitive (Stone and Colella 1996). It has been argued that stereotypes are used when employers are unable to apply more comprehensive and analytical methods (Chiu et al. 2001; Finklestein et al. 1995; McGregor and Gray 2002). In the workplace context, willingness by employers to accept negative stereotypes can affect the ability of an applicant with a disability, to find and retain gainful employment (Reskin 2000). Thus, given the inherently covert nature of stereotypes, this may represent an aspect of inequality which is perpetuated against this group.

Employers seem slow to acknowledge that persons with disabilities are not homogeneous and as such generalised stereotypical views, ought not be applied to all persons with disabilities, nor should they be relied upon to indicate competence or ability (McGoldrick and Arrowsmith 1993; Ren, Paetzold, and Colella 2008), particularly in the absence of supporting evidence. It has been suggested that continuous use of discriminatory practices could have a multiplier effect in many areas of the economy and the wider society. The exclusion of suitably qualified persons with disabilities (from economic participation) can contribute to social isolation, increased public expenditure, increased income support required, slow economic growth and reduced tax revenues (Dudzik, Elwan, and Metts 2002; Heron and Murray 2003; McGuire and Robertson 2007; Neumark 2009; Stuart 2006; Ren Paetzold and Colella 2008).

Nonetheless, the preceding discussion should not be interpreted to mean that stereotypes are the only reason for the perpetuation of discrimination against persons with disabilities. Additional reasons why persons with disabilities may be treated less favourably in the employment context, include lack of knowledge by employers, as to how to effectively manage such workers, or where employer’s actions are based on fear of the unknown. Employers do not generally have a good understanding of the issues which are important to persons with disabilities, and as such their actions may be discriminatory, but not deliberately so. Thus, they may believe that accommodations required to their work environment may be prohibitively costly, and perhaps as a consequence, avoid employing persons with known disabilities. Such discrimination may be institutionalized within organisations or society, the outcome of which is prejudicial patterns of employment practice, which are followed without question, because of expectations within the workplace (Reskin 2000), and/or society (Banaji 1999; Palmer 2001).

An instructive multidisciplinary model outlining factors affecting the treatment of persons with disabilities, in organisational contexts, was developed by Stone and Colella (1996). They delineated the following as key variables which may be influential:- *(i)* *Legislation*; *(ii)* *Organisational characteristics*; *(iii)* *Attributes of disabled individuals*; *(iv)* *Attributes of observers/co-workers/supervisors*; *(v)* *Nature of job*; *(vi)* *Psychological consequences for observers*; *(vii) Observers’ job-related expectations;* *(viii) Observers’ treatment of disabled individuals;* and *(ix)* *Responses of disabled individuals.* In short, these factors may be categorised as those which relate to the person with the disability; their organisational colleagues and managers, structural organisational factors and external influences (i.e. legislation). Otherwise stated, a comprehensive approach must be taken, in which the important role of all relevant stakeholders must be acknowledged and measures put in place to ensure the decline and ultimate eradication of discrimination. Some of these factors have been identified as key moderators as it relates to organisational outcomes, namely the nature of the employee’s disability and the affective or behavioral responses of the individual to their disability (Heron and Murray 2003;Ren, Paetzold and Colella 2008). It has been argued that minimal accommodation may be required to create an environment in which persons with disabilities may be productive, to this end, Ren, Paetzold and Colella (2008, p.198) suggest accommodations such as “flexible scheduling (e.g. for persons with diabetes or arthritis), less stimulating work environments (e.g. for persons with epilepsy or asthma)”.

It has been argued (Dudzik, Elwan, & Metts, 2002) that in order to be effective, disability policies (and by extension the laws which result from these policies), must promote inclusion and integration into society of persons with disabilities, which includes allowing them to interact with the community and facilitating access to social and economic activities. This includes the removal of physical barriers, the promotion of inclusive practices within education, employment and society, and the provision of assistive technology. Indeed, without the legal obligation to make changes to discriminatory practices and a clear system for its implementation and enforcement, these policies lack the power to influence change. To take a crude example, road traffic regulations are legislated but in addition to this, speed cameras and police officers regularly monitor road networks to ensure compliance. Laws to prohibit discrimination are certainly of no less importance and as such should require no less resolve to ensure compliance..

This paper analyses a sample of disability discrimination cases decided by Employment Tribunals in the United Kingdom and held at the office of the Employment Tribunal Service in Bury, St. Edmunds, Suffolk and available via their online repository. The sample of tribunal cases presented here relate to various employment practices within British workplaces. The approach which was utilised to assess these cases was content analysis, (*using QDA Miner software*), which is a method used to condense data and identify themes which have emerged in the data collected. The findings give an indication of those practices which are potentially discriminatory and for which change may be required by workplaces and the extent to which the law has been effective

The analysis of this data will also offer insight into the issues which tribunal panels consider when making their decisions. These issues include for example, the evidence accepted, and the arguments regarded as valid in order for a claim to be considered well founded and successful and the precedents set by the courts and likely to be followed when the tribunal panel adjudicates a case. Conversely, this analysis will also highlight some challenges and obstacles which claimants have previously encountered and the extent to which they can be avoided or overcome. In this way, the analysis of tribunal decisions in relation to disabilities may be regarded as extending the previous research agenda vis-à-vis employment outcomes for persons with disabilities. In addition, the analysis of the tribunal cases gives insight as to the evidentiary requirements of both claimants and respondents and serves to illustrate categories of claims likely to be successful. Moreover, this analysis highlights the sectors and industries where claims appear to be most prevalent as well as whether small, medium and large workplaces are most likely to be brought before a tribunal with a complaint of discrimination as it relates to disabilities.

Where the effects of legal regulation are considered collectively, it has been suggested that large organisations appear to comply with legislation in a more systematic and comprehensive manner than do smaller organisations (Brown et al., 2000) where organisations have limited knowledge of discrimination legislation, its impact may be limited because of this lack of knowledge but also because of the supposition that the legislation is not relevant to their organisation (Edwards et al., 2004; Marlow, 2003). Furthermore, the extent of the impact of the legislation appears to be influenced by the competitive nature of the market, thus “where conditions are benign, regulations can be absorbed, but in other circumstances employment regulations can exacerbate competitive pressures” (Edwards et al., 2004:245). This suggests slow, incremental adjustments made to organisational HR practice, over time subsequent to the enactment of anti-discrimination laws. In addition to this, perhaps more fundamental changes made in relation to organisational practice, compared to a greater level of policy changes after the initial enactment of the legislation. Further challenges to the efficacy of the legislation may be said to be related to the individualistic nature of the legislation, this is because its implementation relies not on monitoring and enforcement of the law, but on the “courage and resilience of the individuals to pursue a *discrimination* (*sic*) claim” (Kirton and Greene, 2006:146). Such an approach to enforcement invariably makes it difficult, for anti-discrimination legislation to effect changes as it relates to eliminating discrimination (Dickens and Hall, 2006).

There is no single measure of effectiveness of legislation. In the absence of an instrument to measure the effectiveness of the legislation, compliance with its mandate, principles and general directives are used to determine the extent to which organisations observe or are in compliance with the responsibilities and requirements, dictated by the legislation. Assessing tribunal and court cases allows an examination of the efficacy of the legislation, as it indicates that types of actions still being taken by organisations or their failure to take action as required by the legislation. As the interpretation of legislation is largely the domain of legal justices, this analysis will also allow insight into the precedents which are set and likely to be followed in subsequent cases and as such, it would be prudent for future claimants and litigants to take into account.

Compliance with the legislation, i.e. both the letter and the spirit of the law, may also be interpreted as legislative efficacy as the legislation could be seen to be achieving its goals (thus this should not be interpreted to mean that if an organisation is in contravention with a clause or section, the law has failed). Whilst there does not currently exist, a single measure of legislative effectiveness, a decrease in the number of cases being filed could be indicative of a decrease in discriminatory organisational practices. However, this quick and dirty approach is replete with pitfalls and any changes to employment levels which are observed after such a comparison, may or may not be attributable to the anti-discrimination legislation. Thus it would be inappropriate to analyse efficacy, solely on the basis of this method because it lacks rigour and fails to consider the complexity of the environment in which organisations function, and the effect which each element could potentially have on organisational practice (Bennington and Wein, 2002; Hornstein et al., 2001; Loretto and White, 2006; Smedley and Whitten, 2006).

In order to analyse the efficacy of laws, the method chosen was to critically analyse the Tribunal decisions made on the basis of disability discrimination in the United Kingdom. In analysing the optimum approach to enforcing anti-discrimination laws, Sternlight (2004) identified factors which make discrimination cases challenging, including but not limited to the complexity of discrimination law, society’s need to deter future wrongdoers, the extent to which the compensation awarded is adequate, access to resources to have their interests suitably represented and a speedy fair process. This paper provides an assessment of whether and to what extent discrimination legislation has achieved its objectives, with respect to disabled persons. There is a paucity of articles examining this issue using this approach, which makes this paper timely. Notwithstanding this, the paper does not attempt a comprehensive review of the substantive legislation, but rather is concerned with the interpretation and implementation of the Equality Act, 2010, as it relates to discrimination in the basis of disability in the United Kingdom.

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