

How should the law protect the right of persons with disabilities to just and favourable conditions of work, on an equal basis with others, including equal remuneration for work of equal value?

Rights described in Article 27(1b) of the UN Convention on the Rights of Persons with Disabilities are fundamentally important. Persons with disabilities have, on average, higher living costs¹, hence, lower earnings can significantly impact their quality of life. Moreover, since certain disabilities (especially mental health conditions) are exacerbated by stresses of being on the lower income brackets², the wage gap creates a self-perpetuating cycle of poverty. Hence, addressing these rights is of importance for both advancement of human dignity of persons with disabilities and resolving income inequality as such. It will be argued that, because of many economic and social variables involved, a range of comprehensive legislative measures should be promoted in order to tackle the following diverse causes of the described wage gap: direct discrimination, indirect discrimination, and underlying social causes. The current law (represented, first and foremost, by the Equality Act 2010) attempts to tackle the first and partly the second, but further legislative measures can be required in order to advance rights of persons with disabilities. Moreover, it will be argued that the legislature might be facing trade-offs between promoting equality and complying with free market values.

The first, and most apparent problem persons with disabilities face in the workplace is direct discrimination. According to the Equality Act (s 13(1)), it occurs when a person treats someone less favourably because of their protected characteristic. In the context of this essay, it applies to that individual having a disability. Moreover, the Act extends direct discrimination to discrimination on the basis of someone being perceived as having a disability, or because they associate with someone who has a disability. In any case, the situations surrounding direct discrimination are rather straightforward and hence easy to avoid by the employer, and hence favourable from the rule of law standpoint. Moreover, they represent negative rather than positive duties, and hence do not impinge the employer's freedom and provide a wider scope for conducting their business activity in a way they desire. Despite these advantages of prohibiting direct discrimination as a sole method of advancing rights of persons with disabilities, absence of direct discrimination should not be the highest standard imposed on the employer, since it is rather limited in the scope of its application. While, according to a 2000 study, a wage gap between individuals with and without disabilities can be attributed to differences in productivity only to a limited extent³ (and hence there is a substantial evidence of discrimination), there are more subtle causes that need to be addressed in order to tackle this discrepancy in a more comprehensive and thorough way.

One of them is indirect discrimination – *i.e.*, when differences in pay and working conditions occur not because of one's disability directly, but due to other related reasons, such as taking a long-term medical leave or working shorter hours because of disability (a more general provision can be found in s 19(1) of the Equality Act). In some cases, indirect discrimination can be justified when it appears to be 'a proportionate means of achieving a legitimate aim'. Some authors. *e.g.*, Butlin argues that the 'justification' option is contrary to the UN Convention of the Rights of Persons with Disabilities, since this is not mirrored in the

¹ Leonard Cheshire, 2014, Disability facts and figures, <www.leonardcheshire.org/who-we-are/disability-facts-and-figures>.

² Office for Disability Issues, 2012, Measuring National Well-being – Education and Skills, <www.ons.gov.uk/ons/dcp171766_268091.pdf>.

³ Michael Kidd, Peter J Sloane, Ivan Ferko, 'Disability and the Labour Market: an analysis of British males' [2010] *Journal of Health Economics* 961.

Convention at all⁴– it refers to 'adjustments that are disproportionately or unduly burdensome'. However, Lawson argues that this notion is implied in the Convention and related discussions in the UN Committees⁵. Should the law prohibit only 'unjustified discrimination' in this context? In a way, it appears to be the question of weighting up the individual interests of persons with disabilities and business interests or other legitimate aims such as health and safety requirements. While it is important to give due credit to the former, the latter also appear to be crucial. In my view, the current standard for 'justified discrimination' contains a sufficient degree of precision to avoid imposing arbitrary restrictions on employees with disabilities, and hence represents an adequate balance. One of the (conceptually speaking) species of indirect discrimination is addressed in a separate provision of the Equality Act specifically related to disability – it is a duty of the employer to make adjustments related to such disability (s 20). While this can substantially address the wage gap, since the lack of productivity often stems from inadequate working conditions, which probably explains why these two dimensions of employees' with disabilities rights are grouped together in the Convention, there can still be some controversy. Adjustments can, in some scenarios, place a financial burden on employers, which can disincentivise them from hiring employees with disabilities – this is, however, partly mitigated by provisions against direct discrimination. That said, this is hardly an adequate justification for not making the workplace more accessible – it can, however, be argued that stringent legal requirements with no other policy incentives (grants or positive publicity available to businesses) might provoke a negative reaction and will not improve the situation.

Finally, what is not addressed in the employment-related legislation (and should be improved via other means) is that the wage gap and lower levels of career advancement begin earlier and stem from, for example, inequalities in secondary and higher education. Because of many educational institutions being ill-suited to the needs of pupils with disabilities, the latter might lack necessary qualifications and skills while joining the workforce⁶. Although separate measures (including some provisions of the Equality Act) are designed to tackle discrimination in this respect, in my view, it should be a part of the single strategy, and policymakers should place more emphasis on deeper social causes of different levels of attainment. Positive discrimination, *e.g.*, special employment schemes for people with disabilities, is a potential measure that can address this discrepancy on the later stage, however, the policymakers should be careful to strike an optimal balance between selection on merit and equality of opportunity. Moreover, while these measures are allowed under the Equality Act, they should be promoted via extra-legal means in order to incentivise their implementation.

All in all, it can be argued that the current legislation tackling the rights of persons with disabilities to just and favourable conditions of work is satisfactory, but not sufficient to address inequality on a deeper level. In some way, there is not much the policymaker can do using solely legal measures – more incentives are required, including change in public attitudes. Hence, advancement of persons with disabilities' employment rights is a task for governments and advocacy groups alike, and state and the civil society should cooperate in order to achieve a truly meritocratic society.

⁴ Sarah Butlin 'The UN Convention on the Rights of Persons with Disabilities: Does the Equality Act 2010 Measure up to UK International Commitments?'

⁵ Anna Lawson 'Disability and Employment in the Equality Act 2010: Opportunities Seized, Lost and Generated' [2011] *Ind Law J* 359.

⁶ Papworth Trust, 2014, *Disability in the United Kingdom: 2014 Facts and Figures*, 13, <www.papworthtrust.org.uk/sites/default/files/UK%20Disability%20facts%20and%20figures%20report%202014.pdf>.