

EMPLOYMENT OF DISABLED PEOPLE AND THE BRITISH PROTECTIVE LEGISLATION

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I. INTRODUCTION

As a blind person, this author is so well treated by fellow citizens of this world that he has said, “If I assess the joy, I receive from my fellow human beings due to my disability, it is inestimable. I have already received in my life up to now; you better believe it, joys of immense proportion in a noble quantum which an average sighted man may receive in 300 years. I think at this rate I am destined to live for over 500 years.”²

With this kind of attitude, you may be puzzled to find me an ardent campaigner for promulgation of legislation, effectively protecting disabled people against detrimental discrimination of others. The truth is that out there is a lot of discrimination residing in not many but in some hearts.

I had every reason to believe a fellow Executive Committee Member of the Greater London Action on Disability (GLAD) when she told me an appalling episode of discrimination against a paraplegic disabled lady. My friend said, “When she heard unusual noise at 5 a.m. at the front of her home, she looked out. She was shocked to notice that the yellow area, indicating where she could park her adapted car, without incurring any charge was being painted over by the neighbor to blend it with the rest of the road. In the past the neighbor had objected to this ‘special’ treatment and had said, incorrectly, that it was impeding her freedom to park her car in her drive-way”.

According to a survey, conducted by Liberty in autumn 1995, 54% of the disabled people surveyed suffered violence and harassment, and 46% had

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² Amir A. Majid, *I Am Already 300 Years Old*, 88 *New Beacon* 17, cmt. at 19 (Feb. 2004)

experienced psychological abuse in the preceding year at the hands of so-called “normal” people.³

The mission of the Disability Law Service (DLS) is to challenge the extensive inequality and poverty experienced by disabled people, by securing them free and equal access to their legal rights and entitlements. This national charity is dedicated to the legal protection of disability rights. Rooted in its “direct contact with disabled people”, in its Strategic Plan for the next three years (2008-2011) it observes, “There are estimated to be as many as 12 million disabled people in Britain, with adults comprising two-thirds of the total. Despite some improvements in recent years following progressive implementation of the Disability Discrimination Acts (DDA), disabled people continue to face major and very extensive inequalities and disadvantage compared with non-disabled people.” The DLS describes the plight of British disabled people thus:

- Individual instances of discrimination and poor administration of benefits affecting disabled people in Britain remain high;
- awareness of their rights and how to secure them is lower among disabled people than non-disabled people;
- disabled adults are twice as likely to be in poverty; there are more disabled adults in poverty than ten years ago; and of all children living in poverty, one in three has at least one disabled parent;
- literacy and numeracy levels are significantly lower than among nondisabled people;
- The rights, independence and life chances of those requiring social care are often further restricted by the poor availability or design of those services. In the case of adults with learning disabilities in care, the Joint Parliamentary Committee on Human Rights found an often harrowing picture of neglect, abuse and denial of fundamental rights;
- suitable housing for disabled people remains in short supply, and the consequences include their retention for too long in too

³ *Access Denied: Human Rights and Disabled People*, Liberty, (1995), (Copies of the report can be obtained from Liberty, 21 Tabard Street, London SE1 4LA)

many cases in inappropriate settings such as care homes and hospital;

- some groups of disabled people die young of potentially preventable illness, and yet are more poorly served than others by healthcare services. ⁴

Significant numbers of disabled people feel the sharp end of discrimination in the form of abuse or harassment, whether in the community, institutional settings, or work. And parts of the justice system still have much to learn about disability awareness. ⁵

Until 1950, it was not unusual to come across names like the “Association for the Welfare of Cripples.” Sometimes offensive expressions of discrimination against disabled people even by so-called “quality press” are astonishingly repulsive. One article, not the only one of its kind, was described by the writer’s friends as “Harris’s kicking cripples piece.” Mr. Harris feels a perverse necessity to mention this description in the prelude to his article. With the ferocity of naked prejudice, Mr. Harris opines, “It is a dreadful thing to be crippled or blinded or deafened. It could happen to any of us; and if it happens to me I would want every benefit I could wring from the wretched state and its tight-fisted taxpayers.” ⁶

Society ought to show care by the lexicon it deploys to deal with people with disabilities. The euphemisms to describe disabled people like “mentally incompetent”, “mentally deficient”, “physically incapacitated” and “visually challenged” are considered to be condescending by disabled people. The emotional descriptions such as “unfortunate”, “pitiful”, “mad”, “stupid”, “mental”, “handicapped”, etc. (used by some people recklessly) are intensely disliked by disabled people. They wish to be treated like anybody else and do not desire any special favour. Those who have the ambition to do their best for disabled people must not mystify the high achieving disabled persons as “super humans.”

⁴ *Strategic Plan 2008-2011*, Disability Law Service, at <http://www.dls.org.uk>

⁵ *Id.*

⁶ Harris, *The Spectator*, Dec. 2, 1994

Many litigants under DDA 1995, as found in a research report on the operation of this Act in the first 19 months, “were reluctant to be labeled as disabled, and did not regard themselves as disabled.” They were commonly motivated in taking cases by concerns for “justice”, rather than by considerations of financial compensation. “They typically viewed what had happened to them in terms of unfairness rather than ‘discrimination.’”⁷

Mr. Greg Heller, a distinguished deaf American, was invited to give the inaugural speech to the 1996 graduating class by the Missouri School for the Deaf. He highlighted the point, “My purpose in life was to educate the ordinary people that deaf people can do it.” He related a personal story about being called for jury duty a few years ago. To prove the court staff wrong in their assumption that the deaf persons would not be able to serve on the jury, he went in as a juror, performed properly and educated the ordinary people of the capabilities of deaf people.⁸

The author has spotlighted the shocking prejudice against disabled people, not forgetting that it is not everyone’s conduct and many good souls bring excellent relief and happiness to those who have their lives even made harder by the nuisance of disability. In the rest of this article focus will be on pro-disabled laws in the United Kingdom and what action the United Kingdom is taking to enforce them. Particularly, attention will be given to the employment of disabled people.

Fully cognizant of some reprehensible individuals who some times indulge in harmful discrimination against disabled people with full deliberateness; legal sanctions are supported by the most right-thinking members of the society. Commenting on the desirability of the legislation aimed at quelling prejudice, the authors of an authoritative treatise (spread over thousands of pages) on this subject states that it shows “at least a serious attempt was being made to eradicate the problem. Well-disposed employers were forced to re-examine their assumptions and practices for signs of unconscious prejudice and the ill-disposed

⁷ N. Meager, B. Doyle, C. Evans, B. Kersley, M. Williams, S. O’Regan, N. D. Tackey, *Monitoring the Disability Discrimination Act (DDA) 1995*, - Research Report RR119, Department for Education and Employment, (May 1999), <http://www.employment-studies.co.uk/pubs/summary.php?id=ddamon>

⁸ Central Institute for the Deaf Alumni Association, *CIDAA Bulletin*, (1996), at http://www.cidaa.org/CIDAA%20Bulletins/Fall96/Autumn_1996_Bulletin.html

were forced to admit their prejudice and to accept that they stood condemned by right-thinking members of the society.”⁹

Good things are worth-repeating and regarding the protective laws viz the civil rights of disabled people this author has to yet come across any test of welfare more potent than that authoritatively enunciated in the United Kingdom House of Lords by Lord Slynn of Hadley (a jurist of brilliant distinction). Adopting a purposive and justice-oriented approach to this issue, Lord Slynn recommends that a nation should strive to enable a disabled person to lead a “normal life” as is possible within its means. His Lordship says that “the pursuit of ‘normality’ is better than adopting the test as to whether something is ‘essential’ or ‘desirable.’ Social life in the sense of mixing with others, taking part in activities with others, undertaking recreation and cultural activities can be part of normal life. It is not in any way unreasonable that the severely disabled person should wish to be involved in them despite his disability.”¹⁰

Until November 1995, when the Disability Discrimination Act (“An Act to make it unlawful to discriminate against disabled persons in connection with employment, the provision of goods, facilities and services or the disposal or management of premises; to make provision about the employment of disabled persons; and to establish a National Disability Council”) was enacted, British disabled people did not have specific recourse for legal protection. For instance, if you said, “this is a pub not [sic] for niggards” you had the protection of the Race Relations Act 1976 but no such shelter was available when you were subjected to the remarks, “You, dozy; you are upsetting my customers by your appearance; clear off.” This Act was passed as a political expedient in consequence of an unprecedented campaign of disabled activists. Referring to its insincere half-hearted safeguards, one of the most eminent libertarians of our time, Lord Lester

⁹ Harvey on Industrial Relations and Employment Law, Part II, Div. L (Butterworths, London)

¹⁰ Cockburn v. Chief Adjudication Officer, 1 W.L.R. 799 (1997), 3 All ER 844-870 (H.L. 1997) (also known as Halliday); see Prof. Nick Wikeley, *Cases: Benefits, Bodily Functions and Living with Disability*, 61 M.L.R. 551, 556 (1998) (referring to the Department’s attempt to confine the need for attention to “essential”, as opposed to “desirable” communication, said that it “seems at best outdated and at worst grossly insensitive to the position of those with hearing loss); see also Amir A. Majid, *Anachronistic Judicial Approaches to Disability Benefits Law*, 15 Denning L.J. 93-112 (2000)

of Herne Hill, said that the Act is “so full of holes that it is more like a colander than a binding code.”¹¹ One of the major flaws of the 1995 Act was mentioned in the just-quoted long title of the Act – National Disability Council (NDC). The Conservative government of the time had shown the political naivety not to realise that disable people were bound to regard the lexical protections (however they were limited in their scope) second rate, noticing that the enforcement bodies, Equal Opportunities Commission under the Sex Discrimination Act 1975 and Commission for Racial Equality under the Race Relation Act 1976, had more teeth than the NDC under the DDA 1995.¹²

The NDC was replaced by the DRC (Disability Rights Commission) in 2000. From September 2007, the Equality and Human Rights Commission has been established under the Equality Act 2006, which took over the responsibilities of the Commission for Racial Equality, Disability Rights Commission and Equal Opportunities Commission.

The Equality and Human Rights Commission will enforce equality legislation on age, disability, gender, race, religion or belief, sexual orientation or transgender status, and will additionally encourage compliance with the Human Rights Act. It will also give advice and guidance to businesses, the voluntary and public sectors, and to individuals. This Commission is the independent advocate for equality and human rights in Britain. It aims to reduce inequality, eliminate discrimination, strengthen good relations between people, and promote and protect human rights.

The insincerity of drafters of the DDA 1995 is apparent when one looks at the layout of this extensive Act (“one-page version” with supplementary materials occupying 87 pages). The “Part I” deals, not with safeguarding the civil rights of disabled people, but with “disability” – it’s not clear whether the definitional barrier is surmountable by a person who entertains the hope that DDA will protect him.¹³

¹¹ Amir A. Majid, *The Disability Discrimination Act and the Proposed Commission*, 81 New Beacon 4 (Oct. 1997)

¹² Amir A. Majid, *National Disability Council: Blunt Sword of the DDA?*, 147 New L.J. 1218, 1222 (Aug. 8, 1997).

¹³ Amir A. Majid, *The UK Disability Discrimination Act: Definitional Maze and Enforcement Barrier*, 36 Braille Forum 8, 33-38 (1998)

The Disability Discrimination Act says a disabled person is someone with “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.” A disabled person is not covered by this statutory definition if he/she fails to show that one or more of the faculties of mobility, manual dexterity, physical co-ordination, continence, ability to lift, carry or otherwise move everyday objects, speech, hearing or eyesight, memory or ability to concentrate, learn or understand, or perception of the risk of physical danger are affected in a substantial and adverse way.

Examples include cancer, diabetes, multiple sclerosis and heart conditions; hearing or sight impairments, or a significant mobility difficulty; and mental health conditions or learning difficulties. People in these circumstances and some others (such as people with a facial disfigurement) are likely to have rights under the Disability Discrimination Act (DDA) to protect them from discrimination. However, only the courts can say if a particular individual is defined as disabled under the legislation.

The rules about who is protected against unfair treatment under the DDA are very complicated and bereft of candid prohibition against disability discrimination generally. In response to a lot of pressure from disable people (not forgetting the formidable support of some good spirits in the able-bodied individuals) the 1995 Act is improved.

Some people with cancer, HIV and MS have had problems in the past showing that they were protected under the DDA. There have always been special rules for people with ‘progressive conditions’ such as these, but following changes to the law in 2005, they are now simpler and clearer. Anyone with cancer, MS or HIV is now protected against unfair treatment in the workplace, education, and housing or in accessing services from the point of diagnosis. It doesn’t matter whether you have any symptoms. These changes have been made in recognition of the stigma that is often associated with a diagnosis of these conditions. The rules apply to all forms of cancer, regardless of whether or not they involve substantial treatment.

If you are treated unfairly because of a past disability – for example because you had cancer in the past – you are also protected under the DDA. If you have a mental health problem, you no longer have to show you have a “clinically well recognized” condition to qualify for protection under the DDA, although you do have to meet other conditions.

If you have had a disability (as defined in the DDA) and someone, such as an employer, treats you unfairly as a result of this, then you will still be protected by the DDA, even if you have now recovered. An employer may be liable to a legal action under the DDA if, for instance, he refuses to employ a disabled person saying, “This is a job which requires a lot of concentration and dealing sometimes with difficult people and therefore it may cause the depression to recur from which the applicant had fully recovered two years ago.”

The measures injected by DDA 1995 into British law were a beginning for quelling the discrimination which many disabled people face in their everyday lives. Subsequent legislation, particularly the DDA 2005, strengthens these measures; still not outlawing the discrimination against disabled people per se. Important changes are made to the scope of the original legislation by the 2005 Act. Under the current UK legislative regime, if you are disabled, or have had a disability (falling within the ambit of the statutory definition as defined by the courts and tribunals), the Disability Discrimination Act (DDA) makes it unlawful for you to be discriminated against in:

1. Employment;
2. Trade organizations and qualifications bodies;
3. Access to goods, facilities and services;
4. The management, buying or renting of land or property; and
5. Education.

There are also DDA regulations dealing with buses, coaches and trains, which set out access standards for those vehicles to help people with mobility or sensory impairments, and learning disabilities. Together, the legislation provides disabled people with rights and it places duties on those who provide services, education and employment.

The DDA also encourages employers and employees to work together to break away from rigid employment practices, identify what adjustments and support might be needed, and find flexible ways of working that may benefit the whole workforce. The advocates of legal sanctions have not given up on the civil conduct of the society towards disabled people, knowing very well that this approach is good for the community as a whole because disability can visit anybody.

Other than the four specific types of discrimination - direct discrimination, failure to make reasonable adjustments, disability-related discrimination, and victimization - the DDA protects disabled people against unjustified discrimination (going outside the permissible statutory boundaries) and harassment. Harassment occurs where, for a reason which relates to a person's disability, another person engages in unwanted conduct that has the purpose or effect of violating the disabled person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her.

Many organizations have internal anti-harassment policies. If yours has one of these policies, this would be your first way of dealing with harassment at work. If your organization does not have a policy or its procedures do not deal with the situation very well, then you have the right to take your case further.

Historically the vulnerable employees were given help to prove their cases, often facing large institutions or corporate bodies, under the Race Relations Act

1975 and Sex Discrimination Act 1975. This ethos has been also injected in the DDA. The complainant of disability discrimination can serve statutory questionnaire asking the employer some questions and under Section 56 of the DDA 1995 (as amended) a Tribunal may draw any inference which it considers “just and equitable to draw, including an inference that the respondent has contravened a provision of the Part II.” The prescribed forms, time limits for serving questions and manner of service of questions and replies under Section 56 are determined by a Statutory Instrument issued from time to time.¹⁴

A complaint about the treatment concerned must be made to an Employment Tribunal, within three months after the treatment in question (unless the time limit for making a complaint to an Employment Tribunal has been extended under the new dispute resolution procedure - in which case, the period for serving the questionnaire will be extended by the same period). But if a complaint has already been made to a tribunal, the questionnaire must be served within 28 days of the complaint being received by the Tribunal. However, the Employment Tribunal has the discretion to give leave to serve a questionnaire after 28 days if a Complainant persuades it that there were some good reasons which prevented him/her from benefiting from the questionnaire procedure within the prescribed time limits.¹⁵ Adverse inference can be drawn by the Tribunal if it appears to it:

- (i) that the respondent deliberately, and without reasonable excuse, omitted to reply within a reasonable period, or
- (ii) that the respondent’s reply is evasive or equivocal.¹⁶

A major area, other than employment, is the provision of goods, facilities and services. Part III details statutory provisions in this respect. Section 19 of the DDA is headed “Discrimination in relation to goods, facilities and services” and it makes substantial provisions in this field.¹⁷

¹⁴ Disability Discrimination (Questions and Replies) Order 2004, Statutory Instrument 2004 No. 1168, at <http://www.opsi.gov.uk/si/si2004/20041168.htm>

¹⁵ A helpful Tribunal will be keen to let the complainant serve the questionnaire, knowing very well that the replies will help it to reach at the truth.

¹⁶ *Id.*

¹⁷ Section 19 of the DDA 1995, inter alia, says:-

(1) It is unlawful for a provider of services to discriminate against a disabled person—

Rather disappointingly, the rights in Section 19 are considerably diluted by exemptions contained in the DDA elsewhere, particularly in Section 20 et seq. The providers can avoid liability by advancing reasonable justification defence, health and safety consideration and on the ground that the adjustment is too costly. For instance Section 21(7) provides, “Nothing in this section requires a provider of services to take any steps which would cause him to incur expenditure exceeding the prescribed maximum.” (The maximum is to be prescribed by the relevant Secretary of State.)

The county or sheriff court is the normal venue for redress in respect of cases concerning the provision of goods, facilities and services, governed by Part 3 of the Disability Discrimination Act, as amended.¹⁸

II. EMPLOYMENT OF BRITISH DISABLED PEOPLE

Employment is the most significant area in which any vulnerable group needs protection. Unemployed disabled persons are burdens on an economy,

(a) in refusing to provide, or deliberately not providing, to the disabled person any service which he provides, or is prepared to provide, to members of the public;

(b) in failing to comply with any duty imposed on him by section 21 in circumstances in which the effect of that failure is to make it impossible or unreasonably difficult for the disabled person to make use of any such service;

(c) in the standard of service which he provides to the disabled person or the manner in which he provides it to him; or

(d) in the terms on which he provides a service to the disabled person.

(2) For the purposes of this section and sections 20 and 21—

(a) the provision of services includes the provision of any goods or facilities;

(b) a person is “a provider of services” if he is concerned with the provision, in the United Kingdom, of services to the public or to a section of the public; and

(c) it is irrelevant whether a service is provided on payment or without payment.

¹⁸ The author is desisting from expounding the rules viz provision of goods, facilities and services because he wants to maintain the focus of the article on “Employment of Disabled people.”

whilst employed disabled people not only reduce the national welfare budget but also boost the economy by paying income tax. It is a win-win situation because:

The importance of employment retention for a disabled person, for whom it is considerably more difficult to find new work, is such that it is a freestanding justification per se. The Social Market Foundation estimates that improving the employability of disabled people would be worth £13 billion to the economy and financial analysis from Lloyds TSB has shown that for a typical manager who becomes disabled, the financial benefit of retaining them, weighed against the costs of making them redundant and hiring a new member of staff, totals over £9,000.¹⁹

Unfortunately, the United Kingdom has an unimpressive record in the employment field. It was heartening to note that a young Austrian blind woman, Ms. Constanze Hill, who aspires to become a journalist, during her interview in an “In Touch” programme on BBC Radio 4 in 1997, said that almost any employable blind person could have a job in Austria. Many developing countries also beat the British record on employment by their schemes of providing work, established in recognition of the true depth of employment prejudice against disabled people. In the British civilized society, if truth has to be faced, 50 % of employers have no intention of employing a person with difficulty in seeing.²⁰

According to an authoritative survey of visually impaired people conducted in spring 2007, only 34% of the employable disabled people were in employment. The three top barriers people said which prevented them from finding work were their vision problems, their age, and their lack of mobility.²¹

Based on 670 questionnaires (returned out of 4200 distributed April-May 2007) an Royal National Institute for the Blind (RNIB) survey found that blind and partially-sighted persons identified the following to be the barriers and challenges in obtaining and retaining employment, and attaining promotion:

¹⁹ Robertson, John, UK House of Commons, Jan. 29, 2008

²⁰ Steve Winyard, *Blind in Britain: The Employment Challenge*. Royal National Institute for the Blind Report (Sept. 1996)

²¹ Pritti Mehta & Sue Keil, *Survey of Visually Impaired People: Key Findings of the ‘Network 1000’ Study Carried Out by the University of Birmingham on the Issues of Employment, Finance, Independent Living Skills, Travel, Computer Use, Education, and Leisure*, (2007).

1. Visual impairment
2. Attitudes or lack of awareness of employers
3. Poor health
4. Unemployed for a long period of time
5. Lack of job opportunities
6. Lack of public transport
7. Difficulty finding out about jobs
8. More money in benefits than working
9. Difficulty in getting job applications in an accessible format
10. Lack of support from official employment agencies
11. English Not being the first language
12. Confidence issues
13. Lack of appropriate skills or experience

All respondents were asked what, if any, challenges they had experienced in getting a job. The most common challenge was “visual impairment,” with 54% of all respondents and 77% of active jobseekers citing this as a barrier.

The next most significant barriers were “attitudes or lack of awareness of employers”, “poor health”, and “unemployed for a long period of time.” All three of these challenges were influenced by the propensity to work of the respondent. For example, the number of respondents that selected “poor health” as a challenge to finding work increased the number further away they saw themselves from the labour market. The opposite was true for “attitudes of employers”; with respondents who were actively job seeking highlighting this as a challenge most frequently.

Active jobseekers and potential workers highlighted practical elements of job search as a challenge. One-third of this group stated that a “lack of job opportunities” and “difficulty in finding out about jobs” were challenges. This group also highlighted a need for training and work experience opportunities, with one-third identifying “confidence issues” and a “lack of skills or experience” as a challenge.

The low employment of blind and partially-sighted people has not shown any appreciable increase. According to a report issued in August 2006, “[t]he overall employment rate was 34%, but was higher for the 30-49 age group (45%). Not surprisingly, those in the 18-29 age group had a lower employment rate (33%), which can be partly attributed to the 22% who described themselves as

being a student. The 50-64 age group had the lowest employment rate at just 21%.²²

Although the employment of visually impaired person of working age is very bad, people with learning difficulty feature even worse in this field. Most optimistic figures place the employment of this group not at more than 15%.

One has to be wary of the pretend supporters of disabled persons. They, for instance, deprive disabled persons of the benefit of employment on nebulous excuses; most frequent of these is “for your own safety you should not be employed for this job.” An individual diagnosed as being HIV positive applied for a nursing course at a university. His application was turned down as it was claimed by the employer that he would have to undertake “exposure prone procedures” and his own health could be at risk from infectious disease.²³

Part II of the Disability Discrimination Act 1995 deals with employment of disabled people. Section 5 gives the meaning of “discrimination” and says:

(1) For the purposes of this Part, an employer discriminates against a disabled person if—

(a) for a reason which relates to the disabled person’s disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and

(b) he cannot show that the treatment in question is justified.

(2) For the purposes of this Part, an employer also discriminates against a disabled person if—

(a) he fails to comply with a section 6 duty imposed on him in relation to the disabled person; and

²² Graeme Douglas, Christine Corcoran & Sue Pavey, *Network 1000 - Opinions and Circumstances of Visually Impaired People in Great Britain: Report Based on Over 1000 Interviews*, Visual Impairment Centre for Teaching and Research (VICTAR), School of Education, University of Birmingham, ISBN: 0704426048 / 9780704426047 (Aug. 2006)

²³ Chih Hoong Sin, Monica Kreel, Caroline Johnston, Alun Thomas & Janice Fong, *Background to the Disability Rights Commission’s Formal Investigation into Fitness Standards in Social Work, Nursing and Teaching Professions*, (May 2006) at http://www.maintainingstandards.org/files/MS_background_paper.doc

(b) he cannot show that his failure to comply with that duty is justified.

The Disability Discrimination Act stipulates that it is unlawful for an employer to discriminate, in the context of the conditions provided at the place of work, access to work, recruitment and selection, performance, training and development and redundancy, against a disabled person. The employer is assessed in the following specific fields:-

1. in the terms of employment offered;
2. in the opportunities for promotion, transfer, training or receiving any other benefit;
3. by refusing to offer, or deliberately not offering, any such opportunity; or
4. by dismissing, or subjecting the disabled person to any other negative treatment.

It is important to note that a disabled person does not have to show that his/her disability was the main or only cause of the employer's behavior towards him/her as long as it was a significant factor. The law must first recognize him/her as a disabled person. Not all unfair treatment is unlawful. The Disability Discrimination Act covers most disabled employees. A disabled person is also protected when he/she applies for a job and he/she leaves a job.

Some legal protections are good and can provide a good basis for progress. The DDA covers prospective, current, and former employees. The DDA covers all sizes and types of employers so no matter how small or large the company or organisation is, the DDA applies. As long as your employment takes place either wholly or mainly within Great Britain, you have DDA rights. Only combat roles in the Armed Forces are not covered by the employment provisions of the DDA.

III. EXAMPLES OF REASONABLE ADJUSTMENTS

By virtue of Section 6 of the DDA 1995, the employers are under a legal duty to make "reasonable adjustments" for enabling a disabled person to work in their establishments. These include:

1. allocating some of the disabled person's duties to another person
2. altering the disabled person's working hours or training
3. transferring the disabled person to a different place of work or training
4. giving or arranging for training or mentoring

5. allowing the person to be absent during working or training hours for rehabilitation, assessment or treatment
6. acquiring or modifying equipment (for example, providing voice-activated computer software for an employee with a visual impairment)
7. modifying or adjusting disciplinary and grievance procedures
8. adjusting redundancy selection criteria
9. altering physical features of the building/office layout²⁴

In some cases, as indicated above, the employer has the right to defend its actions by invoking the “justification” defense. If the employer can convince the Tribunal that it has a valid justification defence, the claim will fail. The disability-related discrimination can only be justified if the reason for the less favourable treatment is both material to the circumstances of the case and substantial. “Material” means that there must be a strong link between the reason given for the treatment and the circumstances of the case and “substantial” means that the reason must carry real weight. The reason must be more than minor or trivial. Also, the Tribunal will expect the employer's defence to be based on a reasonable and fair assessment of the relevant circumstances and available information.

Sometimes, after the unfair treatment has already taken place, an employer finds information which appears to support their less favorable treatment of a disabled person. Or, sometimes, during legal proceedings, the employer justifies their treatment of a disabled person with reasons which differ from the explanation they gave at the time of the alleged discrimination. The employer can raise these kind of “after the event” arguments, but it will generally be harder for them to convince an Employment Tribunal that their reasons were material and substantial when the disabled claimant was subjected to the discriminatory action.

It is up to the Employment Tribunal to decide whether the employer's defense of justification is valid. The Tribunal will consider a number of factors, including:

²⁴ *Using Your Rights at Work: What Types of Discrimination in Employment are Unlawful Under the DDA?*, Equality and Human Rights Commission, at <http://www.equalityhumanrights.com/en/foradvisers/usingyourrights/Pages/discrimination.aspx?section=4>

1. whether the employer's stated reason for its action(s) is the real reason, and not just a cover for general prejudice about people with that disability
2. whether the employer had properly considered what reasonable adjustments could be made to accommodate the person's disability
3. whether the reason given to justify the employer's behaviour is relevant. For example, the fact that an employee has a mobility impairment is unlikely to be a relevant reason for refusing him promotion to a post involving sedentary duties.
4. what information the employer looked at when it made its decision(s). (This information should be specific to the individual and the circumstances. General assumptions about a disability and its probable effects are unlikely to be accepted as valid "justification")
5. what investigation the employer carried out. For example, if health and safety was a concern did the employer carry out a proper risk assessment? If the person's ability to do the job was an issue, did the employer obtain medical or other relevant reports - for example, from Access to Work or occupational health - to find out what, if any, adjustments might be appropriate?
6. was the writer of any report properly instructed, and was he or she qualified to express an opinion? This will have a bearing on whether it was reasonable for an employer to rely on any findings to justify its actions.

For an employer to succeed in proffering the defense of justification, it must, *inter alia*, satisfy an Employment Tribunal that the following factors prevented him from taking the necessary measures:

1. The adjustment would have not overcome the disadvantage faced by the disabled person.
2. The adjustment was likely to cost too much.
3. Adequate financial and other resources were not available. (The availability of fiscal resources to the employer distinguishes this reason from the one mentioned in the preceding paragraph.)

4. The size of the employer and the nature of the business did not justify it.
5. Any external body - such as Access to Work – was not willing or able to fund the adjustment.
6. The impact of the adjustment in question would be detrimental on other employees.²⁵

IV. FINAL REMARKS

Despite laudable and not so insubstantial legislative efforts, the employment of disabled people in the United Kingdom remains embarrassingly low. It has not improved consonant with the progressive trends in the British society generally.²⁶ If looked at the disabled persons as a whole, employment has not increased (only for a specific age group, 30-49) from 45%.²⁷

Most disappointingly the recent figures disclose a terrible circumstance in respect of the blind and partially-sighted people – 34%. Even worse is the plight of people with learning difficulty. Only 15% of them are employed. A Member of the UK House of Commons (reputed to have substantial expertise in the matters of employment of disabled people), Mr. John Robertson, has said in the Parliament on January 29, 2008 that when it came to real results, the current legislation was “inadequate.”²⁸ He further said:

The Government’s approach to the high unemployment rate in disabled people, has been to increase awareness of this current law amongst employers, as we are seeing with the Employability campaign. Welcome as this is, it misses a number

²⁵ *Using Your Rights at Work: How Can the Employer Argue Back?: The ‘Justification’ Defense*, The Equality and Human Rights Commission, at <http://www.equalityhumanrights.com/en/foradvisers/usingyourrights/Pages/discrimination.aspx?section=5>

²⁶ For instance, the outlawing of prevention of disable people being barred to serve on a jury by Section 9(b) of the juries act 1984, as inserted in this act by the criminal justice and public order act 1994; *see also* Amir A. Majid, *Disability Per Se Is Not Bar to Jury Service*, 1 J.L. Tech Risk Management 8 (2007).

²⁷ Report, *supra* n.21

²⁸ Robertson, *supra* n.13

of fundamental issues about the support needed to keep someone in work. Although the Disability Discrimination Act provisions are born from the principle and the arguments for employment retention, they remain inadequate when it comes to delivering it in practice.²⁹

Severely disabled people, particularly persons with learning difficulty, can benefit from supervised and shelter employment. The unfortunate fact is that full dedication is not given to this kind of employment. A number of workers (including 26 visually impaired employees) have been made redundant by closure of a shelter employment factory in London in June 2008.³⁰

The Royal National Institute of Blind People has been leading a campaign advocating for “Disability Leave” like the Maternity Leave. If a person becomes visually impaired, or becomes disabled in any other way, he/she should be given say six months leave from work to undertake rehabilitation courses, acquire appropriate skills and, if possible, go back to the previous job. He/she should not be treated differently from a person who breaks his leg and the employer gives him leave to recover; in some cases even six months.

His chance to make difference to the most cherished objective of his parliamentary life, Mr. John Robertson MP introduced the “Employment Retention Bill.” His Bill commanded considerable support and 131 members from nine different parties put their names to the motion in support of this Bill. The aim of the Bill was to make provision for a statutory right to an employment retention assessment to determine entitlement to a period of rehabilitation leave for newly disabled people and people whose existing impairments change; and for connected purposes.

It was the third attempt of Mr. Robertson at introducing this measure. In his “First Reading Speech” of the House of Commons on January 29, 2008 he said:

The Government has acknowledged that to meet its target for an 80 per cent employment rate and the requirements of Public Service Delivery Agreement this is an issue it cannot ignore. 2008 sees the latest strand of this with the Department of

²⁹ *Id.*

³⁰ *Union to Protest at Blind Charity’s Gala*, Kent on Sunday, June 29, 2008, at <http://www.kentnews.co.uk/newsStory.aspx?id=14128>

Work and Pension's Employability campaign. ... I find myself once again making the point that we need to focus on retention, to stop people from falling into the welfare system in the first place.

The widespread support I have always received with this Bill is testament to the fact that the matter is not confined to the margins of society. Every quarter around 600,000 people become sick or develop an impairment as defined by the Disability Discrimination Act - and within one year 13%, that's 78,000 people, have left work. From these, each year around 25,000 people permanently leave employment due to illness or disability, never returning - that works out at over a quarter of a million people since the Government came to power in 1997. This more than cancels out the creditable achievement of the Department of Work and Pension of helping 200,000 disabled people into work over the last decade.

We know that as a result of this and other barriers a disabled person is nearly five times more likely to be out of work and claiming benefits than a non-disabled person and, crucially, we know that once out of work they are far less likely to move back into employment. Behind these statistics lie people's lives, often suddenly unrecognisable, as they simultaneously have to come to terms with a permanent life-changing impairment whilst facing the prospect of losing their employment, their source of income and, in some cases, even their home.³¹

Axiomatically, the accessibility of new electronic devices can open new doors of employment for disabled people. However, after a detailed survey of the UN, EU, US and UK, this author was forced to conclude as follows:

With the exception of the US, the immaculate declarations of realizing the goal of accessibility of electronic sources for disabled people, is shocking and results of real progress are not visible. This is particularly so in the EU which is expected to be a leader in this field. Whilst thousands of trees are cut to produce tons of paper (multi-lingual translations not ignored) to declare pro-disabled policies, only 3% public websites have become accessible to disabled people. The UK also has to

³¹ Robertson, *supra* n.13

focus on “action.” Even though the Disability Discrimination Act 2005 has been a progressive Act for disabled people, it is feeble in providing for binding duties for accessibility of ICT source and services provided through them. Most disappointingly, in the entire text and schedules there is no mention of “electronic”, “internet” or “website.”³²

In the domains of visual impairment and people with learning difficulty the situation remains abysmal. Action has to match the rhetoric in this area. The UK Government has to focus with full candour on training opportunities, sheltered employment for severely disabled people and “Retention” of persons who become disabled in their ordinary work. Rather than cutting benefits, and wrongly hoping that it will force the individuals to seek work, and inflicting more poverty on disabled people, it should devote more resources in measures promoting the employment of disabled people. A civilised society cannot afford the needs of large groups of its population. Rather than more deliberations, action with a fire brigade speed is warranted by the present situation.

³² Amir A. Majid, *Right of Disabled People to Accessible Internet*, 2 J. Int’l Commercial Law and Tech. 76, 82 (2007).