

Mental Health in the Workplace (2) – Mental Health and Discrimination in Employment¹

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Introduction

People with mental health problems are stigmatised and in particular there is concern about stigmatisation in employment³. The *Disability Discrimination Act 1995* (“the Act”) was introduced to address the problems of disabled people, both in employment and in the provision of education, goods and services⁴ and the legislation is concerned with mental as well as physical health. However, its basic premise is that disability has to be long-term and must be defined in terms of the individual disabled person. Many people with mental health problems are not disabled within the meaning of the Act, and because of the individualised approach what has been described as institutionalised discrimination has not been addressed⁵. This article examines the current employment protection for those with mental health problems offered by the Act and elsewhere. It will be argued that there are particular problems associated with mental health that are not addressed by the current law and that recent attempts to address these have resulted in a missed opportunity, and that a more radical approach is necessary because of the nature of mental health and the perceptions and prejudices surrounding this area.

PART I – DISABILITY DISCRIMINATION

History of disability discrimination in the UK

Although it would probably not have been thought of as a piece of anti-discrimination legislation, the *Disabled Persons (Employment) Act 1944* was, for 50 years, the only legal vehicle, not for the prevention

1 This is the second article by the author published in the *Journal of Mental Health Law* about mental health in the workplace. The first was published in the May 2006 issue, pp 53–65.

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3 See J Read and S Baker *Not Just Sticks and Stones: A Survey of the Stigma, Taboos and Discrimination experienced by People with Mental Health Problems* (1996, London: Mind), and G Thomicroft *Shunned –*

discrimination against people with mental illness (2006, Oxford: Oxford University Press).

4 This protection came into force in a staggered timetable in 1996, 1999 and 2004. For a comprehensive account of disability discrimination see B Doyle, *Disability Discrimination: Law and Practice*, (2005, Bristol: Jordans).

5 See the Disability Rights Commission website at http://www.drc-gb.org/library/policy/employment/drc_short_briefing_on_eq_ualit.aspx

of discrimination, but for a rather crude acknowledgement that there should be some concession made towards disabled people and work. The legislation provided for a form of positive discrimination in the form of a quota for disabled workers in any employment undertaking and a number of reserved occupations⁶. The Act repealed this and set up a new structure of protection for disabled people in an attempt to address the growing concern⁷ that disabled people were suffering from difficulties in obtaining employment and from prejudice once they managed to find their way into the workplace.

Following the passing of the Act in 1995, the Government published *Towards Inclusion*⁸ and set up the Disability Rights Taskforce. The Disability Rights Commission published its review following the recommendations of the Taskforce⁹. Legislation was also passed to provide for a Disability Rights Commission (“the DRC”)¹⁰. Subsequent to the 1995 Act the EC Framework Directive 2000/78/EC was issued.¹¹ A number of amendments have been made to comply with the Directive, principally made by the *Disability Discrimination (Amendment) Regulations 2003* and the *Disability Discrimination Act 2005*. The most significant of these are the abolition of the following: the requirement that any mental impairment must result from a clinically well-recognised illness;¹² the exemption for employers with fewer 15 employees,¹³ and the justification defence available to employers if there was a failure to make reasonable adjustments¹⁴. Most notably, the Act has also been amended to provide that people with HIV, cancer or multiple sclerosis are deemed to be disabled at the point of diagnosis¹⁵. However, arguably there are still areas of non-compliance with the Directive, perhaps most significantly in the context of the statutory obligation to make reasonable adjustments to accommodate disabled workers¹⁶. This is explored further below.

The current structure of disability discrimination in the UK

There are some basic concepts in discrimination law in the UK that are common to the various forms of anti-discrimination provisions. There are two forms of discrimination: direct and indirect. Direct discrimination is where there is less favourable treatment because of the person’s sex or other protected characteristic. Indirect discrimination occurs when a provision, criterion or practice (such as a mobility clause or a certain standard of English) is applied to everyone but which has a disparate impact upon

6 One significant impetus for this legislation was the effect of the Second World War (see, e.g. A Borsay, *Disability and Social Policy in Britain since 1750* (2005, Basingstoke: Palgrave Macmillan) pp 133–138).

7 In addition at the end of 1993 the United Nations Standard Rules on the Equalisation of Opportunities for Persons with Disabilities were adopted by the United Nations (General Assembly Resolution 48/96). However, the concern had been present for a long time. In 1976 the Union of the Physically Impaired Against Segregation published a strongly worded account of the link between poverty and disability: *Fundamental Principles of Disability* (1976, London: UPIAS) p 14.

8 Department of Education and Employment, *Towards Inclusion – civil rights for disabled people* (2001, Department of Education and Employment).

9 Disability Rights Commission, *Disability Equality: Making it happen* (2003, Disability Rights Commission).

10 *Disability Rights Commission Act 1999*.

11 This was complemented by Council Directive

2000/43/EC which established the principle of equal treatment between persons regardless of racial or ethnic origin (gender discrimination had already been dealt with by the Equal Pay Directive (EC/75/117) and the Equal Treatment Directive (EC/76/2070).

12 Removed by section 18 *Disability Discrimination Act 2005*.

13 *Disability Discrimination (Amendment) Regulations 2003* SI 2003/1673, Reg 7.

14 *Ibid* Reg 4. In any event the defence was otiose as since the law only requires reasonable adjustments to be made, any justification defence would necessarily entail a finding that the employer was being unreasonable.

15 Section 18 *Disability Discrimination Act 2005*.

16 See K Wells, “The Impact of the Framework Employment Directive on UK Disability Discrimination Law” (2003) 32 No 4 *ILJ* 253, and L Waddington, “Implementing the Framework Employment Directive: Room for Exercising National Discretion” in A Lawson and C Gooding (eds) *Disability Rights in Europe* (2005, Oxford: Hart) p 107.

those who come within the protected group. However, this form of discrimination can be justified by the employer in circumstances where it can be shown that the provision, criterion or practice of the employer is proportionate to the legitimate needs of the undertaking¹⁷.

Direct discrimination

The *Disability Discrimination Act 1995* protects against direct discrimination only¹⁸. Direct discrimination is unlawful inasmuch as an employer cannot use the fact of disability as a ground for treating someone less favourably, but less favourable treatment can be meted out for a reason which relates to the disability¹⁹. This is a distinction of excessive subtlety, and a distinction that would not be tolerated in the context of sex and race discrimination²⁰.

Direct discrimination is defined as less favourable treatment when the relevant circumstances of the disabled person and another person (real or hypothetical²¹) without that particular disability are not materially different. The discrimination can be justified if there is a reason that is both material to the circumstances of the particular case and substantial,²² and the justification will only stand if no reasonable adjustment can be made²³.

Reasonable adjustments

UK disability discrimination law is unique in the canon of legislation that offers protection against discrimination in that there is no provision to protect against indirect discrimination. The reason for this was that it was thought that there would be no need for indirect discrimination provisions because of the duty to make reasonable adjustments would render them unnecessary²⁴. However, Bell is arguably correct in saying that if employers are mindful of a prohibition on direct discrimination, the more likely they are to move away from this and towards indirect forms of discrimination²⁵. Furthermore, some employers at least, may well review their needs if they know that they are vulnerable to an indirect discrimination challenge.

The fact that indirect discrimination is not prohibited is only somewhat ameliorated by the obligation upon the employer to make reasonable adjustments to accommodate disabled workers. In some respects the language of the Act mirrors some of the language of the other discrimination legislation in relation to indirect discrimination²⁶. However, as Wells has argued, the obligation to make reasonable adjustments

17 *Sex Discrimination Act 1975* ss 1 & 3, *Race Relations Act 1976* s 3, *Disability Discrimination Act 1995* section 1 and Schedule 1, *Employment Equality (Sexual Orientation) Regulations 2003* Reg 2, *Employment Equality (Religion or Belief) Regulations 2003* Reg 2, and *Employment Equality (Age) Regulations 2006* Reg 3.

18 *Disability Discrimination Act 1995* section 3A. The Act also makes it unlawful to subject a disabled person to harassment for a reason relating to their disability (ss 3B and 4).

19 Section 3A(1), (4) and (5).

20 See e.g. the sex discrimination case of *Webb & Emo Air Cargo Ltd* [1996] 2 CMLR 990, ECJ.

21 The comparator must be someone who has no disability or a different kind of disability or a hypothetical person based upon evidence of others who have been treated differently in broadly similar circumstances (see *Disability Discrimination Act 1995 Code of Practice: Employment and Occupation*, 2004, paras 4.12–4.18).

22 Section 3A (3).

23 The Court of Appeal held that the correct approach in deciding whether direct discrimination is justified is whether the employer has carried out a proper risk assessment, and as long as they have, then its decision will be unassailable unless it is actually perverse, which looks very much like the inappropriate introduction of public law principles *Jones v Post Office* [2001] IRLR384.

24 HC Deb Standing Committee E co 142.

25 M Bell, "Sexual Orientation Discrimination in Employment: An Evolving Role for the European Union" in R Wintemute and M Andeaes (eds) *Legal Recognition of Same-Sex Partnerships*, (2001, Oxford: Hart) p 659.

26 Section 4a of the Act states: (1) Where – (a) a provision, criterion or practice applied by or on behalf of an employer, or (b) any physical feature of premises occupied by the employer, places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect.

does not oblige an employer to take preventative measures and “leaves no scope for a claim relating to an anticipated disadvantage”²⁷. By way of contrast Article 2(2)(b) of the Directive²⁸ does specifically refer to measures that “would” place a disabled person at a disadvantage. Justification of such measures is permitted under the Directive, but the measure must be objectively justified by a legitimate aim and the means of achieving that aim are proportionate and necessary²⁹. Another shortcoming of the Act is the specific provision that if the employer cannot be reasonably expected to know of the need for an adjustment this is a defence to an action under section 4A³⁰.

The interaction between direct discrimination and reasonable adjustments has been summed up as meaning that the justification defence to an allegation of direct discrimination will not be made out if there has been a failure to comply with a section 4A reasonable adjustments duty³¹. Section 18B of the Act sets out the matters to which regard shall be had in deciding whether an employer has complied with the duty, and there is a very clear emphasis upon cost³².

However, Wells argues that in European law ‘reasonableness’ means effectiveness³³. This is clearly at odds with the cost effective approach of the Act. Fredman has argued that if the employer does not pick up the cost of adjustments then that cost does not disappear; it will either fall on some other third party or the disabled individuals themselves³⁴. Although many employment protection measures give rise to issues of cost, there is a compelling argument that this is a necessary price to pay for the cost of inclusion of people with disabilities³⁵.

27 K Wells, “The Impact of the Framework Employment Directive on UK Disability Discrimination Law” (2003) 32 No 4 ILJ 253, at 271.

28 EC Framework Directive 2000/78/EC.

29 Article 2(2)(b)(i).

30 Section 4A (3).

31 See *Baynton v Saurus Ltd* [2000] ICR 375, and *Chaudhery v London Borough of Newham* [2003] WL 1935409. Arguably the section 4A duty introduces an element of positive discrimination although it is suggested that this is really a form of positive action., as it does not treat disabled people more favourably but seeks to level the playing field.

32 Section 18B states:

(1) In determining whether it is reasonable for a person to have to take a particular step in order to comply with a duty to make reasonable adjustments, regard shall be had, in particular, to-

(a) the extent to which taking the step would prevent the effect in relation to which the duty is imposed;

(b) the extent to which it is practicable for him to take the step;

(c) the financial and other costs which would be incurred by him in taking the step and the extent to which taking it would disrupt any of his activities;

(d) the extent of his financial and other resources;

(e) the availability to him of financial or other assistance with respect to taking the step;

(f) the nature of his activities and the size of his undertaking;

(g) where the step would be taken in relation to a private household, the extent to which taking it would-

(i) disrupt that household, or

(ii) disturb any person residing there.

(2) The following are examples of steps which a person may need to take in relation to a disabled person in order to comply with a duty to make reasonable adjustments-

(a) making adjustments to premises;

(b) allocating some of the disabled person's duties to another person;

(c) transferring him to fill an existing vacancy;

(d) altering his hours of working or training;

(e) assigning him to a different place of work or training;

(f) allowing him to be absent during working or training hours for rehabilitation, assessment or treatment;

(g) giving, or arranging for, training or mentoring (whether for the disabled person or any other person);

(h) acquiring or modifying equipment;

(i) modifying instructions or reference manuals;

(j) modifying procedures for testing or assessment;

(k) providing a reader or interpreter;

(l) providing supervision or other support.

33 K Wells “The Impact of the Framework Employment Directive on UK Disability Discrimination Law” (2003) 32 No 4 ILJ 253 at 264.

34 S Fredman, *Disability Equality and the Existing Paradigm*, p 210, in A Lawson and C Gooding (eds) *Disability Rights in Europe*, (2005, Oxford: Hart).

35 Legislation that protects e.g. pregnant women, may result in extra cost and inconvenience for employers but as the House of Lords stated in *Brown v Stockton-on-Tees Borough Council* [1988] 2 WLR 935, it is the price to be paid for the equal status of women in the workplace; the same must be true of the equal status of disabled people.

The employer's duty to make reasonable adjustments only arises if, otherwise, the worker is at a 'substantial' disadvantage. The word 'substantial' has a wide range of meaning and "takes colour and meaning from its surroundings", but it was held that it does not have to be more than "worthy of consideration for the purposes of the Act" and that it is not equivalent to "considerable, solid or big"³⁶.

Definition of disability

The issue as to what it means to be 'disabled' is central to this article. Disability is defined under section 1 of the Act as 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. This has to be read in conjunction with Schedule 1 of the Act that deals with specific conditions that will qualify the person as being disabled and, in other cases, with what is meant by 'long-term effects' and 'normal day-to-day activities'. Long term means that it has lasted for 12 months, or is likely to last for 12 months or for the rest of the life of the person concerned. Normal day-to-day activities are affected for the purposes of the Act only if the impairment affects one of the following: 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, and perception of the risk of physical danger³⁷. The meaning of normal day-to-day activities was given a commendably wide interpretation in *Paterson v The Commissioner of Police of the Metropolis*³⁸ where it was held that carrying out an examination or assessment (in this case, the internal assessments carried out by the police for the purposes of promotion through the ranks) is a normal day-to-day activity. The European Court of Justice has considered the concept of disability thus: "Directive 2000/78 aims to combat certain types of discrimination as regards employment ... the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life"³⁹. Arguably this definition is more satisfactory because it removes the need to decide upon whether a day-to-day activity is impaired and replaces it with an emphasis upon the applicant's ability to undertake work, which should be the key issue under consideration in an employment disability discrimination claim.

A recommendation made by the Disability Rights Commission in 2003⁴⁰ that the ability to communicate should be one of the criteria and that self-harming behaviour should be included has not been adopted. Certain conditions will qualify as imparting a disability without more, and they are: severe disfigurement,⁴¹ cancer (with the proviso that regulations can be made to disapply the 'automatic' designation of disability in certain cases of cancer), HIV and multiple sclerosis⁴². The inclusion of severe disfigurements is interesting because they are rarely disabling in the common sense of the term and are not life-threatening, and yet there is an automatic assumption that they will have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities. It is unfortunate

36 See *Disability Discrimination Act Code of Practice: Employment and Occupation*, 2004 para 4.6 and *A v London Borough of Hounslow* [2001] Emp LR 1255 EAT at para 54.

37 Para 4 of Schedule 1 of the Act.

38 [2007] UKEAT 0635_06_2307.

39 *Chacon Navas v Euresst Colectividades* [2006] IRLR 706, para 43.

40 *Disability Rights Commission, Disability Equality: Making it happen* (2003, Disability Rights Commission) p 60.

41 Para 4 of Schedule 1. 'Severe' is interpreted in relation to its degree and the visibility of the disfigurement (see *Guidance, Part II, para A17*). Disfigurement caused by tattoos is excluded, but Doyle suggests that disfigurement caused by an attempt to remove a tattoo would not be excluded, nor would disfigurement caused by self-harm *B Doyle, Disability Discrimination: Law and Practice*, (2005, Bristol: Jordans), p 28.

42 Para 6A of Schedule 1.

that the statutory framework requires the effect on the ability to carry out day-to-day activities (i.e. what might be called the 'functional' formula) to be mentioned at all because it is fictitious in the case of most severe disfigurements, particularly because, as Doyle says: "This is a rare example of the legislation acknowledging a social model of disability rather than a purely medical one"⁴³.

The issue of recurring impairments is dealt with in section 2(2) of the Act. If the disability in the past has had a substantial adverse effect on carrying out normal day-to-day activities, then if it ceases and recurs then it is treated as continuing to have that effect.

Those who have been disabled in the past are also protected by the Act (there is no time constraint so it does not matter that the earlier disability pre-dates the Act) on the basis that it would be inconsistent to give protection to those who are currently impaired, but not to protect from discrimination on the very same basis, those who have now recovered, particularly as part of the recovery process might be getting them back into employment⁴⁴. However, the definition of disability still applies to past disabilities; the person still has to show that in the past they had a physical or mental impairment that had a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities.

Knowledge of the disability

As we have seen, disability discrimination protection has two arms. First there is a prohibition on direct discrimination which in itself has two elements. It is absolutely prohibited to mete out less favourable treatment on the ground of the disability; if the less favourable treatment is for a reason related to the disability then this is prohibited unless the employer can justify it. Secondly, there is a duty to make reasonable adjustments to accommodate the worker's disability. In this case the Act specifically provides that there is only a duty on the employer who knows or can be reasonably expected to know of the disability. There is no specific requirement of 'knowledge' in the case of direct discrimination. In *O'Neill v Symm & Co Ltd*⁴⁵ the Employment Appeal Tribunal ("EAT") held that it is not possible for an employer to treat a person less favourably for a reason related to the disability without having actual or constructive knowledge of the disability or its 'material' features. A differently constituted EAT in *HJ Heinz & Co Ltd v Kenrick*⁴⁶ stated that the test is one of objective causation: did the employer, in fact, act on the basis of disability even if the disability or its material features were absent from the employer's thinking? A disability might not be apparent to the employer, but its manifestation might be. The decision of the Court of Appeal in *Clark v TDG Ltd t/a Novacold* suggests, on the basis of statutory interpretation, that the latter view is to be preferred, and that it is more probable that Parliament meant "the reason" for the treatment to refer only to the facts constituting the reason for the treatment, and not to make the additional requirement of a causal link with disability⁴⁷.

43 B Doyle, *Disability Discrimination: Law and Practice*, (2005, Bristol: Jordans), p 27.

44 HL Deb vol 564, col 1655.

45 [1998] IRLR 233.

46 [2000] IRLR 144.

47 [1999] ICR 951, at 963.

Models of disability and discrimination

Disability – medical and social models

The definition of disability has raised both practical problems⁴⁸ and the accusation that the UK is following a ‘medical’ model of disability and not a ‘social’ model⁴⁹. The debate on the two models goes back to the 1980s when disabled people questioned the premise upon which disability rights were based⁵⁰. It assumed that disabled people suffered from some form of medical abnormality which meant that they did not fit into the regular world upon whom they were then dependent for largesse of one kind or another⁵¹. The ‘social’ model’s basic premise is that disabled people are disadvantaged because of society placing unnecessary constraints upon their inclusion⁵². It is part of the view that successful, and powerful people are largely white, male and able-bodied and that this profile dictates the terms upon which (inter alia) disabled people can succeed in the employment field⁵³.

The ‘individualised’ medical model is the predominant model, at least as far as the UK legislation is concerned. The emphasis is on impairment of the individual; the test is whether the impairment has a substantial effect upon that person’s ability to carry out day-to-day activities which are defined by reference to the word ‘normal’. In *Goodwin v The Patent Office* it was stated that there should be no attempt to define a day-to-day activity but that “it is not directed to the person’s own particular circumstances, either at work or home”,⁵⁴ and this implies that there are objective ‘normal’ activities. Furthermore, it has been argued⁵⁵ that the medical model is endemic in international conceptions of disability, such as the World Health Organisation’s International Classification of Impairments, Disabilities and Handicaps, which defines disability as: “any restriction or prevention of the performance of an activity, resulting from an impairment, in the manner or within the range considered *normal* for a human being” (emphasis added)⁵⁶. As Barnes says, the medical model means that people with impairments “become objects to be treated, changed, improved and made normal”⁵⁷. This is reinforced by the need for the individual disabled person to find another ‘individual’ with whom to compare him/herself. On the other hand, a social model means that the focus is on the adaptation of attitudes, social structures and the physical environment to accommodate people who do not fall into the mould⁵⁸.

48 In 2002, the most common reason for the failure of claims was the inability to satisfy the definition of ‘disability’ (Disability Rights Commission, *Disability Equality: Making it happen* (2003, Disability Rights Commission) p64).

49 K Wells, “The Impact of the Framework Employment Directive on UK Disability Discrimination Law” (2003) 32 No 4 ILJ 253 at 261.

50 E.g. *The Chronically Sick and Disabled Persons Act 1970 and the publicity surrounding the United Nations designation of 1981 as the International Year of Disabled Persons*.

51 This is exemplified by the fact that it was the World Health Organisation that produced the International Classification of Impairments, Disabilities and Handicaps in 1980.

52 M Oliver *Understanding Disability: From Theory to Practice* (1995, Basingstoke: Palgrave Macmillan).

53 *Ibid.*

54 [1999] IRLR 7, at 7.

55 K Wells, “The Impact of the Framework Employment Directive on UK Disability Discrimination Law” (2003) 32 No 4 ILJ 253

56 WHO 1980. (Sometimes language can be misleading: at the same time as writers such as Oliver have been striving to get away from society’s strictures on what is normal, there has also been a drive towards a process of ‘normalisation’, particularly towards those with learning disabilities, which has, in effect, been trying to achieve the same, see e.g. J O’Brien and A Tyne, *The Principle of Normalisation*, (1981, London: Campaign for Mentally Handicapped People).

57 C Barnes, *Disabled People in Britain and Discrimination*, (1991, London: Hurst & Co) p24.

58 C Barnes “A Working Social Model? Disability, Work and Disability Politics in the Twenty-First Century” (2000) 20 *Critical Social Policy* 221.

Tackling discrimination – individuals, groups, everyone

In the context of sex and race discrimination, Lacey distinguishes between individuals and groups, pointing out that the individual norm is white and male (and in our case, not disabled), and further distinguishes between group rights that claim the right to be different, and those that see the aim to achieve remedial rights, where socio-economic disadvantage is the key⁵⁹. Traditionally, disability rights have fallen into the latter group, although it is arguable that the right to be different is the better route as it has a more positive and empowering effect⁶⁰. In the context of mental impairment this distinction is interesting. The right to be different can be particularly compelling, particularly amongst, say, people in creative jobs⁶¹.

Fredman's analysis of discrimination in the context of disability traces a progressive line from individual to universal rights⁶². Stressing the rights of the individual, she argues is part of the liberal ethic of rational self-interest that ignores more communitarian instincts and ignores the fact that individual merit is itself a social construct, implying that the individual should fit the job and not the other way round. Moving on to looking at minority group rights, she finds this inadequate, implying as it does discrete and insular groups united by a defining characteristic: a model that is unsuited to impairment in all its disparate forms. Fredman argues that universalism, where the range of the normal is widened and where differences are respected will promote universal access to all activities. Clearly we are a long way from this at present as both the Act itself and its interpretation⁶³ emphasise the normal and the abnormal dichotomy.

Arguably, therefore, a social model of disability together with a universalist approach via the principle of toleration, should be tempered by an approach that treats disabled people as non-disabled people should be treated: as unique individuals.

Ill-health outside the Disability Discrimination Act 1995

The two main categories of people who are unprotected by the Act are those who have an existing health problem but cannot satisfy the definition of disability, and those who have no health problems now but who have had problems in the past (as we shall see, an issue of specific concern in relation to mental health)⁶⁴. Such people are unprotected unless they have at least one year's qualifying employment to enable them to bring claims for unfair dismissal. Unfair dismissal claims can be brought if employees are dismissed on the basis that they are incapable of doing the job and in such circumstances the dismissal may be fair⁶⁵ as long as a fair procedure has been followed and as long as there is no other available job within the organisation that the employee could reasonably have been offered⁶⁶. There is also a possibility

59 N Lacey "From Individual to Group?" in B Hepple and E Szyssczak (eds) *Discrimination: The Limits of the Law* (1992, London: Mansell Publishing Ltd).

60 Note the potentially empowering effect of Marc Quinn's statue of a pregnant Alison Lapper in London's Trafalgar Square. Alison Lapper was born with no arms and shortened legs due to a chromosomal condition called Phocomelia. She was brought up in a care home and is now a recognized artist who was awarded an MBE in 2003.

61 See, e.g. a discussion of 'the creative voice' v 'the psychotic voice' by Maxwell Steer at <http://msteer.co.uk/analytical/creativotext.html>

62 S Fredman *Disability Equality and the Existing Paradigm*, pp 203–208, in A Lawson and C Gooding (eds) *Disability Rights in Europe*, (2005, Oxford: Hart).

63 See e.g. *A v London Borough of Hounslow* [2001] *Emp LR* 1255.

64 *O'Brien v Prudential Assurance Co Ltd* [1979] *IRLR* 140 *EAT*.

65 Section 98 (2)(a) *Employment Rights Act* 1996.

66 See e.g. *Links, A & Co Ltd v Rose* [1991] *IRLR* 353 *Ct of Session*.

of claiming unfair constructive dismissal if the employer breaches a term of the contract⁶⁷. This could be a breach of an express term such as changing the job content or reducing pay, or it could be a case of breaching an implied term such as that of the obligation to maintain trust and confidence⁶⁸. Nevertheless, until the 1995 Act, disabled workers had no protection qua disabled workers. The provisions of the *Disability Discrimination Act 1995* mean that disabled workers are afforded some job security in circumstances hitherto not available.

Ironically, the emphasis on a medical perspective in the Act, where protection is available from the time of applying for a job, is absent when looking at ill-health in the workplace that does not amount to a disability. Dismissal can take place on the basis that the employee is absent through ill-health and the more the medical evidence suggests that the person is incapable of doing the job concerned, the easier it is for an employer to dismiss. Only when the 'ill-health' is such as to amount to a disability does protection kick in.

PART II – MENTAL HEALTH

Mental health and employment

It is important to acknowledge that not only do people currently having mental health problems face difficulties in employment, but that previous mental ill-health can continue to give rise to prejudice and discrimination. There may, in the past, have been some form of mental condition which was disordered or thought to be disordered and, therefore, in need of treatment. In this case it will form part of the medical history of the person concerned about which s/he may be asked questions, either prior to being engaged or, as an enquiry prior to being offered a formal contract⁶⁹. The case of *O'Brien v Prudential Assurance Co*⁷⁰ illustrates the difficulties that can arise. Mr O'Brien had a history of mental illness which included some hospitalisation, but at the time of making his job application he had not had any treatment or symptoms for over four years. The company's policy of not employing anyone with a history of mental illness if (as in this case) they would be visiting people in their own homes was reflected by a question on the application form and a question asked in person during the course of a pre-employment medical examination. The question asked whether he had ever consulted a psychiatrist or suffered from nervous or mental disorder. He answered in the negative, was offered and took the job and became respected for his work. The following year he applied for life assurance with the company and consented to the disclosure by his GP of his medical records. As a result of this disclosure he was dismissed on the advice of the company's senior medical adviser. Mr O'Brien's previous problems were a matter of fact and the suggestion that the tribunal should have taken into account the evidence of up to date medical evidence to the effect that he was no longer ill was rejected, and the tribunal found that it was a fair dismissal as the company policy was fair.

67 Section 95(1)(c) of the *Employment Rights Act 1996* defines constructive dismissal as where: "the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

68 See *Gogay v Hertfordshire County Council* [2000] IRLR 703, where an unjustified suspension from duty caused

clinical depression and the claimant successfully claimed damages for personal injury flowing from the breach of the implied term.

69 See, for example, *Farnsworth v London Borough of Newham* [2000] IRLR 691.

70 [1979] IRLR 140.

Of course, O'Brien lost his job because of the dishonest response to a pre-employment enquiry. However, it was admitted by the company that had Mr O'Brien revealed his history of mental illness, he would not have been employed. The EAT said that if the employment had been of a different nature then it may not have been justifiable, either in terms of the enquiry itself or in terms of enforcement to the point of dismissal. O'Brien's case is over 25 years old and although the approach may be different now, it is likely that the same decision would be made. There is nothing to protect someone with a history of treatment for a mental health condition if they choose not to reveal it. Paradoxically, under the Act, if they have an existing rather than a past mental health condition they have a chance of bringing themselves within the ambit of protection.

Mental health – special considerations

Terminology in this area is fraught with difficulty. It is important to move away from the notion that all mental 'conditions' that are not typical or conventional, are necessarily disabling, whilst at the same time acknowledging the prejudice, fear and misunderstanding that exists in relation to people who might have had treatment for a non-physical 'disorder'⁷¹. The expression 'disorder' is problematic in itself, with its implication some sort of order needs to be imposed or restored. Mental 'illness' often suggests psychosis⁷². Further, none of these expressions is appropriate in cases of learning disabilities. I try, therefore, to use the expression 'mental health', which has the disadvantage of medicalisation, but the advantage of referring to the positive of health rather than the negative of a medical condition.

Mental health issues particularly point up the division between the medical and social models. Firstly, mental health is harder to define than forms of physical health. It rarely has any physical manifestations and it is inevitably bound up with the personality of the person concerned. A mental health atypicality can be nothing more than a minor behavioural eccentricity,⁷³ yet it can have a significant effect on the person's interaction with others (in our case, in the workplace) in a way in which a minor physical atypicality would not even be noticed. Secondly, there might be concern that diagnosis of mental disorder is more woolly and uncertain than in the case of physical conditions. However, there is no real evidence for this save for the inevitable difficulty already mentioned that one's mental state is also about one's personality. Thirdly, there is a fear that people can more readily fake or embellish mental disorder than physical disorder and this has long been part of the debate in the context of civil liability for psychiatric damage. However, the Law Commission has reported on this area and concluded that fraudulent or exaggerated claims can be made in respect of physical conditions too and that this should not be a reason for treating them differently⁷⁴. Finally, mental conditions are often linked to dangerousness in the eyes of the general public⁷⁵. In this regard, note the O'Brien case and the policy of the insurance company in

71 "I had a cleaning job for three years, but when I mentioned I had an appointment with a psychiatrist I received a letter the next week to say my services were no longer required." This is quoted in J Read and S Baker *Not Just Sticks and Stones: A Survey of the Stigma, Taboos and Discrimination experienced by People with Mental Health Problems* (1996, London: Mind) p 9.

72 *The Mental Health Act 1983 does not define mental illness, but many of the characteristics of psychosis were included in a consultative document prior to the 1983 Act (Department of Health and Social Security, Consultative Document on the Mental Health Act 1959, (1976, London: HMSO)).*

73 *A mild form of autism, say.*

74 *Law Commission Liability for Psychiatric Illness* (1998, London: The Stationery Office) para 6.7.

75 See National Centre for Social Research, *British Social Attitudes Survey 2006/07* (2007: Sage Publications: London). It should also be noted that arguably the adverse publicity surrounding the Michael Stone case (http://news.bbc.co.uk/1/hi/in_depth/uk/2001/michael_stone_verdict/default.stm) was at least part of the impetus behind the Government's attempts to do something radical about patients with personality disorder (see Home Office and Department of Health *Managing People with Severe Personality Disorder* (1999 Department of Health: London)).

excluding people who had received treatment for mental disorder from any jobs that entailed them visiting customers at home.

Stigma and mental health

Stigma surrounding mental health issues arguably brings more socio-disadvantage than the problems that arise for the physically impaired. Some who have physical impairments, such as mobility problems are more acceptable in a social framework; the split between some of physically impaired people⁷⁶ and mentally impaired people is not unlike the split between the deserving and the undeserving poor that originated in the Victorian workhouses⁷⁷. Indeed statistics bear out the emphasis on disability being associated with physical conditions⁷⁸ and the fact that those with mental health problems are categorised as being socially unworthy⁷⁹. Yet despite this, it is acknowledged that even a period of short-term depression can have a seriously adverse effect on people's working life⁸⁰.

Where the 'social' model of disability comes into its own is when examining issues of stigma, and, in particular, past episodes of mental health problems that are likely to attract as much discrimination as a current mental health problem, and, arguably, more so than a current physical health problem. These stigmatising conditions are much more akin to other aspects of people that attract prejudice e.g. skin colour, gender reassignment and so are deserving of exactly the sort of anti-discrimination protection that these have⁸¹.

Mental health and the Disability Discrimination Act 1995

The definition of disability

As we have seen, a person is disabled for the purposes of the 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" and this impairment must have lasted for at least 12 months or be reasonably expected to last for at least that period or the rest of the person's life. The earlier provision that mental impairment had to arise from an illness which was 'clinically well-recognised' has now been removed to bring it into line with physical impairments where there has never been any such requirement⁸². This had been inserted on the basis that it would screen out "obscure conditions unrecognised by reputable clinicians"

76 It must nevertheless be acknowledged that some 'shocking' physical impairments can attract just as much stigma.

77 See D Lipsey "The National Wealth Service at http://www.publicfinance.co.uk/opinion_details.cfm?News_id=26224

78 52% of those surveyed did not think of someone with schizophrenia as being disabled, yet 31% regarded a person with a broken leg as being disabled. National Centre for Social Research, *British Social Attitudes Survey 2006/07* (2007, London: Sage Publications).

79 *Ibid.* More than 70% of people surveyed said that they would not feel comfortable living next door to someone with schizophrenia, and half would not want someone with depression as a neighbour.

80 Disability Rights Commission, *Disability Equality: Making it happen* (2003, Disability Rights Commission), p23. See also Office of the Deputy Prime Minister, *Social Exclusion Unit Mental Health and Social Exclusion* (2004,

Wetherby: ODPM Publications), and G Thomicroft *Shunned – discrimination against people with mental illness* (2006, Oxford: Oxford University Press), Chapter 3.

81 'Stigma' is well-recognised outside the context of discrimination. Defamation law depends upon its existence (a defamatory statement can be one that causes a claimant to be shunned and avoided; see *Villers v Monsley* (1769) 95 ER 886) and it has crept into the common law of employment, whereby a disadvantage on the job market due to a stigmatising association, has been held to be compensatable (*Malik v Bank of Credit and Commerce International SA* (In Compulsory Liquidation) [1997] 3 WLR 95).

82 Section 18 Disability Discrimination Act 2005. In *Dunham v Ashford Windows* [2005] IRLR 608 the EAT held that this requirement did not apply to learning disabilities.

or “moods and minor eccentricities”⁸³. It will be suggested below that when this was re-examined by Parliament there was a missed opportunity to reform radically the particular issues surrounding mental health, and that the screening out of such things as minor eccentricities might not necessarily be wrong.

The DRC Review made two recommendations that are relevant for our purposes. Firstly, that the list of normal day to day activities should be revised to include “the ability to communicate with others” and to ensure that self-harming behaviour is covered⁸⁴. These have not been acted upon. Secondly, the Review recommended that for those whose day-to-day activities are substantially affected as a result of depression the requirement that the effects last twelve months should be reduced to six months. They cited a number of cases where claims had failed because of an inability to satisfy the twelve month rule, for example, a case of a man who had attempted suicide and had his job offer withdrawn but whose claim failed as he could not establish that the substantial effects of his depression were likely to last twelve months or more⁸⁵. This recommendation was not taken up when reforms were made. Direct discrimination raises issues of stereotyping⁸⁶. For people affected by mental health problems this is particularly pertinent. As we have seen from the *O’Brien* case, protection is needed by people who have a history of mental health problems. Unfortunately, the protection offered by the Act on recurring and past disabilities still incorporates the definition of disability i.e. long term substantial adverse effect on carrying out normal day-to-day activities, so many people with mental health problems e.g. clinical depression, will not qualify as having a current, past or recurring disability.

Discussion

As was stated in the Report of the Social Exclusion Unit, paid employment improves self-esteem and that can only have a beneficial effect upon mental illness⁸⁷. The centrality of work to the lives of most of us is well-recognised among labour lawyers. For example Blanpain states:

*For the majority of citizens, work represents the best path to a meaningful way of life, affording them access to the market of goods and services, offering the possibility of making a positive contribution to their own family and to society at large, and providing enriched human contacts. It contributes to self-development, to the development of the human personality and objective and subjective human culture. In this view of things, unemployment comes to represent marginalization and exclusion. Indeed, work is a question of human dignity.*⁸⁸

Given this, and the well-recognised disadvantages experienced by those who have had some spell of mental ill-health, and the even greater disadvantages of those workers or potential workers who have existing mental health problems that might not come within the ambit of the Act, there is a strong argument that, either the Act should be amended to take account of the special issues that have been under discussion, or mental health should be treated as a separate category of discrimination protection.

83 As per William Hague, HC Deb Standing Committee E, col 71.

84 Disability Rights Commission, *Disability Equality: Making it happen* (2003, Disability Rights Commission), p 66.

85 *Compton v Bolton MBC*, Manchester Case No 2400819/00.

86 E.g. assumptions about typical male and female behaviour (see *Alexander v Home Office* [1988] 2 All ER 118 CA.

87 See also Office of the Deputy Prime Minister, *Social Exclusion Unit Mental Health and Social Exclusion* (2004 Wetherby: ODPM Publications) p 51.

88 R Blanpain, *The Changing World of Work*, in R Blanpain and C Engels *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (1998, The Hague: Kluwer Law International) p 23.

Amending the Act

There might be considerable political resistance to extending the ambit of disability discrimination law. However, such objections would have to contend with the fact that there are two defences available to a claim: justification, and refusal to make adjustments that are not reasonable. There is a parallel situation in the context of indirect discrimination in other areas. For example, many employers can and do require employees to work shifts or unsocial hours. This can immediately give rise to claims that these work patterns have a disparate impact upon women who find it difficult to combine them with their traditional role of carers. However, as long as the work patterns are a proportionate response to a legitimate need, an employer has a defence. It is unfortunate, as has already been noted,⁸⁹ that, from the perspective of applicants this form of wording was not incorporated into the Act, but the fact remains that there are defences available to employers.

The most obvious reform is to make a past or present diagnosis of a mental health problem or a recognition of a learning disability, the same as a diagnosis of HIV or cancer. An objection could be raised that it would not necessarily be linked to a present or even a recurring medical condition. However, given that HIV is, in many cases, a 'bare' and symptom-free diagnosis, this objection is flawed. Furthermore, as mentioned above, the inclusion of severe disfigurement in the Act does not sit with the functional approach to disability, as there is no necessary connection between a person's ability to carry out activities of any sort and a disfigurement. There is, therefore, a precedent for such an inclusion.

It might be argued that to introduce this new category of protection would be to include an unacceptably large number of people. However, currently a diagnosis of cancer is sufficient for someone to be disabled under the Act⁹⁰. This is despite the fact that many cancers are curable and many more are treatable over a very long period of time without significant impingement on the working lives of the persons concerned. Furthermore, one in three people will develop some form of cancer at some point in their lives⁹¹. The incidence of mental health problems is considerably smaller, whereby one in ten will be diagnosed as having a mental health problem and only a quarter of these will require specialist mental health services⁹². There could be no principled opposition to including this new category unless we wish to return to the deserving and the undeserving disabled dichotomy: people with cancer attract sympathy,⁹³ but as we have seen many people with mental health problems are stigmatised.

Furthermore, given that the proposal is to introduce a new special category of protection within the Act, the requirement that the diagnosis be of a 'well-recognised condition' could be re-established, but without the qualification that it must be 'clinically' recognised. Although the requirement was offensive in the original Act because the requirement was not applied to physical conditions, in practice, the undesirable results could be as a consequence of evidential problems in the conduct of specific litigation rather than of an underlying failure of principle⁹⁴. Nevertheless, some might argue that it reinforces the medical model and that it harks back to the old accusations that malingering is easy and/or more prevalent in the context of mental health. On the first point, it might well do this, but we have already established that

89 See the argument above under 'Reasonable adjustments'.

90 Schedule I section 6A(2) gives the Secretary of State power to make regulations to exclude minor cancers.

91 See Cancer Research website:
<http://info.cancerresearchuk.org/cancerstats/incidence/risk/>

92 See the Mind website:
<http://www.mind.org.uk/Information/Factsheets/Statistics/Statistics+>.

93 Although are not necessarily regarded as 'disabled'. National Centre for Social Research, *British Social Attitudes Survey 2006/07* (2007, London: Sage Publications).

94 As in *Morgan v Staffordshire University* [2002] IRLR 190, where the claim failed because there was no medical report available, despite the disclosure of GP records diagnosing depression and anxiety.

the medical model is reflected by the Act and to reject a reform that might help those who suffer from a prejudice⁹⁵ is cutting off one's medical nose to spite one's social face. Furthermore, this disparity of treatment could be dealt with by making the 'well-recognised' requirement apply to both physical and mental impairment⁹⁶.

Moreover, it is arguable that by treating mental health in terms of social disadvantage only, rather than having had or currently experiencing a treatable condition on a par with a physical condition, one is being patronising and refusing to treat the persons concerned as being able to control and develop their own lives⁹⁷. In any event, those with physical conditions can fall foul of difficulties in diagnosis⁹⁸.

The strongest argument, however, is one that disposes of the above argument and the suggestion that malingering is easy where mental health is concerned. This is that well-recognised diagnostic criteria are already implicit in the inclusion of HIV, cancer and multiple sclerosis at the point of diagnosis i.e. when the recognised diagnostic criteria of these conditions have been satisfied.

Arguably, it could be said that this is further pandering to the medical model. However, the expression 'well-recognised' is not restricted, either in physical or mental impairment, to ill-health models. It could be clinically recognised or recognised by other means. Even under the old structure it was not necessary for learning disabilities to be clinically well-recognised⁹⁹ and some conditions require no medical involvement at all, let alone a formal clinical diagnosis. No medical training is necessary to recognise the fact that someone has no legs; nor would it be appropriate to regard such a person as being unhealthy. The same can be said of disfigurement. The criticism inherent in the medical versus social models is that there is a suggestion that the impaired person is abnormal and therefore only to be accommodated if relatively easy to do so. On the other hand, Wells has argued that there has to be some form of impairment, otherwise the protected group will extend to anyone who is socially disadvantaged¹⁰⁰. Note, however, that there is scope for a very wide interpretation of impairment, e.g. Mabbett has argued that someone who has a skill deficiency caused by lack of educational facilities should be seen as having an impairment¹⁰¹. Certainly, just as severe disfigurements can be regarded as impairments, so can stigmatisation.

A new discrimination category?

A more radical proposal would remove mental health issues from the Act's framework all together and treat them as a separate category of discrimination. There is precedent for this in both the protection from discrimination on the ground of gender reassignment and sexual orientation. Although the European Court of Justice had specifically included gender reassignment as an aspect of sexuality that was protected by European sex discrimination provisions¹⁰² the government made it clear beyond doubt by introducing

95 *Of course the proposed reform is not just about protecting against this prejudice; it is about protecting against those who draw unjustifiable conclusions about a person's mental health such as the assumption of dangerousness.*

96 *Tribunals in any event emphasise the need for medical evidence. See, for example, the Court of Appeal judgment in McNicol v Balfour Beatty Rail Maintenance Ltd [2002] EWCA at paragraph 26.*

97 *See N Cobb "Patronising the mentally disordered? Social landlords and the control of 'anti-social behaviour' under the Disability Discrimination Act 1995" (2006) Legal Studies Vol 26 Issue 2 238, in which he argues that the*

Act patronises the mentally disordered by overly protecting them.

98 *In Millar v Commissioners for HM Revenue and Customs [2006] SC 155 the appellant's claim failed when he could not establish a physical cause of his physical symptoms.*

99 *Dunham v Ashford Windows [2005] IRLR 608.*

100 *K Wells, "The Impact of the Framework Employment Directive on UK Disability Discrimination Law" (2003) 32 No 4 ILJ 253 at 261.*

101 *D Mabbett "Why have disability categories in social security?" (2003) Benefits 11 (38) 163.*

102 *P v S [1996] All ER (EC) 397.*

specific legislative protection¹⁰³. This is a good example of a social inclusion of persons who may be significantly stigmatised. Similarly, although the European Court would not interpret 'sex' to include sexual orientation (inconsistently, but no doubt with policy in mind¹⁰⁴) the subsequent Framework Directive recognises that (inter alia) sexual orientation is a valid category for protection¹⁰⁵. Gay people suffer from prejudice and as a result can be disadvantaged in the workplace. To introduce a new mental health protected interest has a particular resonance because of both the old medical¹⁰⁶ and general social attitudes towards homosexuality; it would be a further step away from flawed, prejudiced thinking.

The Government is concerned about social inclusion and has stated the aim of ensuring that health and social services should promote mental health for all and should combat discrimination and social exclusion associated with mental health problems¹⁰⁷. There is no doubt that mental health problems can exclude people from the mainstream of society and from rewarding and empowering work. This article has suggested ways in which this might be avoided.

103 *The Sex Discrimination (Gender Reassignment) Regulations 1999* SI 1999/1102 inserted new s 2A and 7B into the *Sex Discrimination Act 1975*.

104 *Grant v South-West Trains* [1998] All ER (EC) 193. By 'policy' I mean that the court may well have had an eye on the prevalence of homosexuality compared with that of transsexualism.

105 *EC Framework Directive 2000/78/EC, and the Employment Equality (Sexual Orientation) Regulations 2003* SI 2003/1661.

106 Until 1973, the American Psychiatric Association actually classified homosexuality as a form of mental illness. See http://www.psych.org/psych_pract/copptherapyaddendum83100.cfm

107 Standard 1, *National Service Framework for Mental Health: Modern Standards and Service Models* (1999, Department of Health).