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What Has Limited the Impact of UK Disability Equality Law on Social Justice?

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Abstract: The literature indicates that disabled workers in the UK experience more social injustice than UK workers as a whole, including in relation to employment rates and wage levels. Drawing on the author's 2015 qualitative study of 265 disabled workers, this paper considers how successful the Equality Act 2010 Reasonable Adjustments Duty has been in tackling this social injustice. It finds that in the context of the "flexible" labour force (consisting of insecure jobs), and the "reformed" welfare state, the Reasonable Adjustments Duty is ill-equipped to achieve its original purpose of reducing the substantial disadvantage that disabled workers face. As regards the "flexible" labour force, there appeared, for example, to be a strong reluctance to make reasonable adjustments for workers on zero hours contracts; while, as regards the impact of welfare reform, fear of being dismissed and facing benefit sanctions discouraged zero hours workers from pushing for adjustments which had been refused. The paper goes on to suggest a possible wording for a strengthened Reasonable Adjustments Duty. It concludes, however, that, without changes to unfair dismissal, and other labour laws, to address the wider inequities of the flexible labour market, a strengthened duty will not be able to prevent a long term increase in social injustice for disabled workers.

Keywords: social justice; disability; employment; Equality Act 2010; reasonable adjustments

1. Introduction

1.1. Social Justice and Disabled Individuals

This paper uses qualitative data, from the author's 2015 study, to provide insights into the impact of United Kingdom disability employment law on social justice for disabled workers. In doing so, the paper draws on Nancy Fraser's [1] distinction between redistributive justice and recognition. While redistributive justice is concerned with the distribution of resources, recognition, according to Danermark and Gellerstedt ([2], p. 344), "is rooted in social patterns of representation, interpretation and communication, and includes for instance cultural domination, non-recognition and disrespect". There is considerable evidence that disabled individuals experience disproportionate, what Fraser ([1] in [3], p. 539) refers to as, "maldistribution" and "misrecognition". For example, as regards employment maldistribution, disabled individuals experience higher rates of unemployment (e.g., [4], p. viii); and, as regards employment misrecognition, disabled individuals are more likely to experience ill-treatment in the work place (e.g., [5]). In addition, there are indications that both maldistribution and misrecognition could have increased for disabled people in recent years. Heslop and Gordon ([6], p. 209), for example, found that "The experience of deprivation and disadvantage for households with disabled people has considerably worsened over the past 13 years..." This could in part have been the result of welfare reform, with, for instance, Reed and Portes ([7], p. 5) finding that the impacts of tax and welfare reforms have been "more negative for families containing at least one disabled person". Further, the nature of welfare reform (e.g., [8]) appears to have entailed

misrecognition towards disabled people, with, for example, the disrespect at the heart of government and media benefit cheat narratives (e.g., [9]). In addition, misrecognition and maldistribution can feed into each other. For example, Harwood found [10] “indications that benefit-cheat narratives could be spilling-over into the work place and encouraging some managers to question the honesty of adjustment requests”, with other research indicating that failure to make adjustments can lead to dismissal or resignation (e.g., [11], p. 78). In other words, the misrecognition entailed in benefit-cheat narratives can lead to the maldistribution entailed in increased unemployment for disabled workers. There are, of course, alternative and overlapping conceptualisations of social justice (e.g., [12,13]); and of concepts central to social justice, including equality (e.g., [14,15]). For reasons of space, however, these are not addressed in this paper.

As returned to below, disability discrimination law could be argued to have improved both redistributive and recognition justice in the case of particular individuals. However, the aggregate impact of these laws on disabled people as a group is far from certain.

1.2. The Strengthening, Harmonisation and Weakening of Disability Discrimination Law

James ([16], p. 517), referring to the United Kingdom, notes that “[t]he first piece of legislation to tackle the problem of disability discrimination in the labour market was the Disabled Persons (Employment) Act 1944...”; which required employers with more than 20 employees to ensure that at least three percent of their workforce were registered disabled people. She adds ([16], p. 517), however, that the Act “was an unmitigated failure...” It was not until just over 50 years later that an arguably more effective piece of legislation, the Disability Discrimination Act 1995 (DDA), was enacted. Of particular relevance to this paper, the DDA introduced the employer’s Reasonable Adjustments Duty. The Duty (now in the Equality Act 2010) provides that where an employer’s provision, criterion or practice, or physical feature of his/her premises, puts a “disabled person” at a substantial disadvantage, compared with persons who are not disabled, the employer has a duty to take such steps as it is reasonable for him/her to have to take to prevent that disadvantage. Adjustments might entail, for example, altered hours or duties; adaptations to the workplace; or specialised equipment (e.g., [17], pp. 335–36).

There then followed a succession of regulations and Acts that significantly strengthened the DDA. For example, the Disability Discrimination Act 1995 (Amendment) Regulations 2003 *inter alia* removed the justification defence for a failure to make reasonable adjustments ([18], p. 8); and, of particular relevance to this paper, the Disability Discrimination (Amendment) Act 2005 introduced the Public Sector Disability Equality Duty (DED). The DED provided that “public authorities” (such as, for instance, local councils) in exercising their functions, and non-public authorities in exercising functions of a public nature, must have “due regard” to a number of specified matters, including, for example, “the need to...eliminate discrimination that is unlawful under” the DDA. The last statutory strengthening of disability employment law came with the Equality Act (EqA) 2010. This placed the different “protected characteristics”, such as “race” and “disability”, under one legal roof. It also aimed “to establish a single approach to discrimination, with some exceptions” ([19], p. 13), with the Reasonable Adjustments Duty being conspicuous among these exceptions in that it necessarily entails an element of more favourable treatment. The EqA did introduce some additional protections in the disability field, including, for example, “discrimination arising from disability”. The EqA also replaced the public sector Disability Equality Duty (DED) and the other equality duties (such as the Gender Equality Duty) with a single Public Sector Equality Duty (PSED). It has been argued (e.g. [20], p. 405) that the PSED is stronger in some respects than the DED and other predecessor duties. However, the comparison is, to some extent, academic, as the effectiveness of the DED depended to a considerable degree upon the specific duties made under it, and the PSED specific duties (as returned to below) are a pale reflection of the predecessor DDA specific duties (e.g., [21], p. 315).

This weakness of the PSED specific duties appears to have principally been the result of them having been drafted after the Conservative Liberal Democrat Coalition came to power in May 2010 and

the Coalition being in general less committed (e.g., [22]) to equality and employment law protections than the New Labour government it replaced (e.g., [23], pp. 127–29). Indeed, the Coalition decided to abolish, or not bring into effect, a number of provisions of the Equality Act 2010 (e.g., [24], p. 207). These included, for example, the provision on combined discrimination, which would, in essence, have provided protection against discrimination on the grounds of, for instance, being an older disabled person. In addition, non-equality employment laws, of potential relevance to disability equality (such as unfair dismissal law, discussed below), were weakened. According to Harwood [25], there were at least 22 major cuts to equality and employment law protections during the Coalition years. There could also be more cuts to come under the current Conservative government (which came to power in May 2015). A number of important employment law protections (including the Reasonable Adjustments Duty) remained out of reach of the Coalition and successor Conservative governments on account of being required under European Union directives. This may, of course, change now that the UK has voted to leave the EU. There have also been indications that current government ministers (including during their Coalition years) might be hostile to some equality law protections. Of particular note, there has been an articulated intention to move “away from treating people as...‘equality strands’” ([26], p. 8). Whilst the House of Lords Inquiry recently recommended some minor strengthening of the Equality Act 2010 ([27], pp. 114–15), the Government has not accepted any of the suggested changes to the Act ([28], pp. 27–28). It is also notable that the Department for Work and Pensions [29], in its written evidence to the ongoing Disability Employment Gap inquiry, does not refer to a role for equality law in reducing the gap.

1.3. The Impact of Disability Discrimination Law

The Coalition’s principal stated justification for cutting employment law protections—or what it would often refer to as “red tape” (e.g., [22])—was the need to stimulate economic growth (e.g., [30]). This is despite, as Harwood argues ([31], p. 1515), research evidence appearing to indicate that reasonable levels of employment law protection are more conducive to economic growth than low levels (e.g., [32,33]). There is, however, the more specific question of the impact of disability law on the employment of disabled people. According to Baumberg et al. ([34], p. 72), “Confusingly for the UK, studies undertaken between 1998 and 2012 have simultaneously reported both a widening and a narrowing of the” disability-related employment gap, with this gap being “the percentage point difference between the employment rate for disabled and non-disabled individuals” ([34], p. 72). Nonetheless, it might be argued that there is more evidence—from the studies taken together—for a narrowing than a widening in the gap between 1998 and 2010 [35]. There is also, of course, the important, and as yet unanswered, question of causation, i.e., whether legislation has been responsible for much or any of the changes in the disability employment gap? In these circumstances, of contradictory and limited evidence, it is hard to determine whether or not disability employment law protections have reduced maldistribution in terms of employment rates for disabled people as a whole.

What there is considerable evidence for is that disability employment law has improved the circumstances—including in terms of distribution and recognition—of particular individuals included in studies and improved practice in studied organisations, and there is far less published evidence of it having worsened circumstances or practice. Provisions which appear to have made a particular difference include the Disability Equality Duty (DED) (e.g., [36], p. 249) and the Reasonable Adjustments Duty. As regards the Reasonable Adjustments Duty, which is the principal focus of this paper, there is a good deal of evidence (e.g., [37], pp. 81–83) that adjustments “have enabled organisations to recruit and retain valuable staff and helped disabled individuals to work and progress in their careers” ([31], p. 1511). There are also indications that the Reasonable Adjustments Duty has encouraged adjustments (e.g., [38], p. 56). However, adjustments appear to be quite often not made when there could well have been a legal duty to make them or when there might not have been a duty but making them would have benefited the individual and the organisation (e.g., [39,40]). For example,

Chaplin and Davidson ([41], p. 1) state “The results showed that people who develop a dementia while still in employment do not always receive the ‘reasonable adjustments’ in the workplace to which they are entitled under the Equality Act (2010)”.

Against this background, this paper draws on the author’s 2015 qualitative study (hereafter referred to as the Reasonable Adjustments Study (RAS)), to address the following questions:

- What difference have adjustments and the Reasonable Adjustments Duty made to the circumstances of disabled people, in relation to maldistribution and misrecognition?
- What factors have limited the effectiveness of the Duty in improving the circumstances of disabled people?
- How could the effectiveness of the Duty be increased?

2. Method

2.1. Generalisation

The author’s qualitative Reasonable Adjustments Study (RAS) was undertaken between April and November 2015; and ran alongside his study of the enforcement of equality law, which is reported elsewhere in this journal [42]. The sources of data are shown below. A qualitative approach was adopted in large part on the grounds that qualitative approaches are better suited, than quantitative ones, to identifying causal processes (e.g., [43]), including, in this case, those involved in adjustment related decisions. However, as an important objective was to influence policy debates around equality law, it was also necessary to arrive at some generalizable conclusions. It is accepted here that limited and provisional generalisations can be drawn from qualitative research, including what Williams [44] calls *moderatum generalisations*. According to Williams ([44], p. 215), “moderatum generalizations in their simplest form are the basis for inductive reasoning in what Schutz called ‘the life world’ [45]”. Williams ([44], p. 220) goes onto to argue “The basis for everyday generalisations and I submit, *moderatum* generalisations in interpretivist research, is cultural consistency in the social world...” Drawing on this idea, the RAS aimed to identify relevant cultural consistencies and how these influenced adjustment related decisions across the organisations included in the study. It might then be reasonable to suggest that there is some likelihood of finding these consistencies in comparable situations/organisations outside those in the sample. Identified consistencies included, for example, individuals with mental health problems being in general more reluctant to declare a disability to their employer than individuals with other impairments. That this finding reflects findings in the existing literature (e.g., [37], p. 80) might be argued to add to the confidence with which a *moderatum* generalisation can be drawn. The study does not, however, go beyond *moderatum* generalisations, as it is assumed that doing so would require the use of quantitative methods (e.g., [46]).

2.2. Data Collection and Analysis

Drawing on grounded theory [47], concepts developed from collected data suggested additional data that needed to be collected to further develop and test these concepts. For example, answers to the qualitative surveys suggested that work colleagues can resent adjustments being made; and, therefore, some of the follow-up interviews aimed to better understand under what circumstances there was a greater likelihood of such resentment. As with the enforcement study, the Framework Method [48] was used to assist with the organisation and analysis of the data. The principal sources of study data were the following:

- *Two online qualitative surveys.* These asked self-selecting “disabled workers” principally open-ended questions about their work-related experiences. The surveys were conducted between June and September 2015 and were publicised on the websites of disability related organisations and widely tweeted. A total of around 265 individuals responded to the first and/or the second

- survey; with it not being possible to be certain, on account of some respondents not providing identifying emails, what the total number of respondents was.
- *Follow-up emailed questions.* The surveys asked respondents to indicate if it would be OK to email them follow-up questions and around a third indicated that it would be. Individualised emailed follow-up questions included, for example, “Why do you think that HR didn’t support the request you made for time off for an appointment?”
 - *In-depth interviews.* All those who emailed the author, with additional information, were asked whether they would be prepared to be interviewed on the phone. Fifteen in-depth semi-structured telephone interviews, addressing adjustments, were conducted. Consistent with Sturges and Hanrahan [49], there was no sense that (compared to face-to-face interviews) the use of phone interviews had significantly undermined rapport. Each interview guide sets out issues that it had been decided to include in all the interviews; issues that analysis of earlier interviews had suggested were salient; and questions tailored to the particular interviewee.
 - *Documents.* Twenty-five HR policies and other documents (such as committee reports) were collected from 16 of the organisations for which interviewed participants had worked.

To help in identifying relevant cultural consistencies, needed for moderatum generalisations [44], the data analysis applied the grounded theory “constant comparative method” (e.g., [47]). This included, in particular, comparing cases where adjustments were made with cases where adjustments were not made. The study also drew on concepts from discourse analysis, including, for example, Fairclough’s ([50], p. 933) idea of “recontextualisation”, which provided insights when looking at whether dominant welfare narratives about disabled people being cheats were spilling over into the workplace. With a self-selecting sample of on-line respondents, there were numerous threats to validity. In addition, the places where the surveys were publicised (including being tweeted by disability rights activists) might be assumed to have increased the likelihood of attracting respondents who felt that existing legal protections should be strengthened. Addressing threats to validity included, in particular, as in the enforcements study [42], “member checking” (e.g., [51], p. 322); searching for “discrepant data” (e.g., [43], p. 258); and individual triangulation (e.g., [52]). As regards member checking, this involved sending draft interpretations of their responses to 55 participants and adjusting the interpretations in the case of the 17 who suggested misunderstandings. As regards searching for discrepant data, this led to some concepts being dropped and others being amended. For example, the initial conclusion that spending cuts were making it harder for local councils to fund adjustments was amended to take account of having found that some participants felt that spending cuts had been used as a pretext to not make adjustments. As regards individual triangulation, this involved, for example, using interviews to explore some of the assertions that individuals had made in their survey responses. During data collection and analysis, ethical principles followed included: informed consent (e.g., [53]), trying (successfully as far as is known) to protect the anonymity of participants, and complying with the UK Data Protection Act 1998.

Bringing together the study findings and the existing literature, this paper next considers some of the limitations on the impact of the Reasonable Adjustments Duty; proposes possible revisions to the existing Duty and discusses how a revised duty might better meet the needs of disabled and other workers in the flexible labour force; and then provides conclusions.

3. Limitations on the Impact of the Reasonable Adjustments Duty

3.1. The Impact of Adjustments and the Reasonable Adjustments Duty

Consistent with the literature discussed above (e.g., [37]), adjustments appear, from the author’s Reasonable Adjustments Study (RAS), to have benefited disabled individuals, other workers, and the organisations that made them. All the study participants who referred to adjustments having been made for them indicated that adjustments had assisted them in relation to their jobs. This included enabling them to obtain a job. For example, referring to adjustments, a charity worker

wrote “These...are the only reason I am now in employment after 10 years on sickness benefits.” Adjustments also helped individuals to keep their jobs, including on account of enabling them to “continue working without exacerbating” their “condition” (public sector worker); and to succeed in their jobs, including through helping them to improve their performance, reduce sick leave, and gain promotion. Encompassing some of these issues, a local authority housing officer wrote, referring to her adjustments, “Less pain, less time off, less need for extended hours to ensure rest breaks. I am now the top performer in my department, but the only one with a disability”. While it is self-evident that the organisation will often benefit from these positive outcomes, it also appears that there can be spin-offs for workers for whom a particular adjustment is not made. For example, a campaigns worker, who was “deaf-blind”, wrote “Some of the adjustments made to minimise the number of meetings I have to attend meant new working practises for the whole team, which everyone in the team prefers, for example doing updates to the team by email rather than the old system of oral updates at team meetings”. However, also consistent with the literature discussed above (e.g., [39]), adjustments were quite often not made when there might have been a legal duty to make them. In other cases, adjustments were made but did not appear to have been adequate to their intended purpose. For example, an office worker, with a visual impairment, wrote “Equipment would have worked but the employer would not provide extra training...I don’t think I would ever disclose my disabilities again”. Adjustments not being made had adverse impacts on health and work performance; and, in addition, some individuals appear to have been punished (including through dismissal) for what might have been the consequences of reasonable adjustments not being made. Indeed, there was an impression that organisations might in general have become more willing than in the past to discipline disabled individuals for impairment related shortcomings.

Forty-four of the one hundred and twenty seven participants, who referred to reasons why adjustments were made, indicated that the Reasonable Adjustments Duty had contributed to the decision to make adjustments. In some of these cases, however, this entailed the disabled worker first having to explain the duty to their employer and/or convince them that it applied. For example, a software engineer argued that “knowledge (of the Equality Act) in HR was non-existent and I had to explain the law around adjustments and this was at a very well-known multinational with £Bns turnover” (writing in brackets added). In others cases, the worker had to threaten or take legal action. In addition, seven of the 54 participants, who addressed the question of whether the legal duty had contributed to them getting an adjustment, indicated that it had made limited difference to practice (e.g., retail worker) or “offered no protection at all” (central government employee), while three of the 54 indicated that the Duty had discouraged adjustments. For example, a private sector office worker wrote “The obligation just got managers backs up. Made them even more determined not to do it”. However, during the follow-up interview, he indicated that, if the worker subsequently appealed the refusal of an adjustment, the existence of the Duty could sway the decision in favour of the adjustment being made. There were also a number of other factors, additional to the existence of a Duty, which appeared to have had an important influence on adjustment decisions. These included individual factors, such as the nature of the individual’s impairment; job/role factors, including seniority in the organisation; relationship factors; and organisational factors, including, of particular note, whether the personnel function had been devolved to line managers. Touching on at least some of these factors, a National Health Service worker, with a genetic disorder, wrote “the relationship you have with managers...and their perception of your disability are the biggest factor in how adjustments have been made for me”. Identified relevant external (to the organisation) factors included the economic environment and social norms; and, the focus of the rest of this paper, the wording and interpretation of the Reasonable Adjustments Duty and other employment and equality laws, and government flexible labour force policies, which are taken to include employment and equality law deregulation and welfare reform. As enforcement of employment and equality law is the subject of a separate paper [42], it is not dealt with further below.

3.2. Wording and Interpretation of the Statute

As various commentators have pointed out (e.g., [54], p. 194), the wording and interpretation of disability discrimination statute law can frustrate the fulfilment of its promise. Arguably, the wording and interpretation reflects the limited ambitions behind it, and, in particular, the priority that successive governments have given to ensuring that employment law protections do not reduce business competitiveness (e.g., [55,56]). Instead of implementing strong regulation, the focus has been on achieving change through good practice schemes (e.g., [57,58]), notwithstanding that these have shown limited success (e.g., [59]). Issues, with the wording and interpretation of the statute, of particular relevance to this paper, include the definition of disabled; what the Reasonable Adjustments Duty requires of employers; and the non-anticipatory nature of the Duty. In addition, while the Duty remained out of reach of the government's "Red Tape Challenge" [22] (on account of being required under European Union law), it was not strengthened under the Coalition or the successor Conservative government, and other laws which encourage compliance with the Duty have been weakened (e.g., [24]).

3.2.1. The Definition of Disabled

The Reasonable Adjustments Duty reflects the social model of disability (e.g., [60]) in that it addresses disabling barriers external to the individual in question (such as inaccessible office environments). However, reflecting the individual-medical-functional model (e.g., [61], p. 736), there is no entitlement to reasonable adjustments, however substantial the disadvantage experienced, unless the individual meets a quite restrictive definition of disabled. In the Equality Act 2010 (EqA), cancer, HIV, and MS are expressly stated to be disabilities for the purposes of the Act, and a person with a progressive condition has a disability if she/he has an impairment which has some effect and the effect is likely to have a substantial adverse effect in the future ([19], p. 20). These principal exceptions aside, a person who has a disability is defined (at EqA Section 6) as someone who has a physical or mental impairment which has a substantial and long-term adverse effect on his/her ability to carry out normal day-to-day activities. Three principal problems seem to have arisen from there being a definition and/or from the nature of the definition. The first is that elements of the definition can exclude workers who have impairments and would benefit from adjustments in the work place; such as the long-term requirement excluding short-term severe impairments which are not expected to recur. There have also been problems with how tribunals have interpreted elements of the definition of disabled (e.g., [54], pp. 202–4), with, for example, the first instance tribunal in *Banaszczyk* appearing to have given too much weight to things that the claimant could do outside work—such as being able to "clean windows at ground floor level" (recorded in the Employment Appeal Tribunal judgment, *Banaszczyk v Booker Ltd* [2016] UK Employment Appeal Tribunal, EAT 0132_15_0102, para 14) [62]—in determining whether there was the required impact of the impairment on his ability to carry out normal day-to-day activities. From the limited information available, it appears probable that most of the individuals, in the author's Reasonable Adjustments Study (RAS), had serious long-term impairments (such as, for instance, Parkinson's) which would have met the definition of disabled, and therefore the study did not cast much light on the first problem with the definition (i.e., individuals not getting adjustments because of not meeting the definition). The second problem with the definition arises from workers being covered but not being aware of this (e.g., [63], p. 448). Again, the RAS did not cast much light on this, as it was publicised as a survey for "disabled workers" to fill-in, and therefore those filling it in might be expected to have regarded themselves as disabled. The third problem with the definition arises from workers being covered but being unable to convince their employer or later an employment tribunal of the same or their employer claiming not to be convinced (e.g., [54], p. 202). The employer denying that an employee was disabled did appear to be a possible major reason for adjustments not having been made among the RAS participants; with 24 of the 127 who gave reasons for adjustments, or particular adjustments, not being made, including this among the reasons. For example, a civilian worker in the police force, with osteoarthritis, wrote "My previous line manager

disputed I was disabled and this put up a lot of barriers..." In another 17 cases, it was indicated that adjustments were delayed while the individual had to prove that he/she was disabled; with the delays, in some cases, being substantial. For example, a private sector technician wrote "Do they ever get any mental health illness training...didn't accept it was a disability for 9 years till I entered grievance..." Possible contributions towards organisations wrongly concluding that someone was not disabled were sought amongst the HR policies that 16 study respondents provided from the organisations that they worked for. It was notable, for example, that none of the policies indicated that certain conditions, such as cancer, are, as Karim and Maynard ([19], p. 20) put it, treated as disabilities "in their own right, without the need to demonstrate a substantial adverse effect on normal day-to-day activities". The fourth problem with the definition arises from workers being reluctant to declare a disability for fear of discrimination (e.g., [64], cited in [65], p. 233), with this appearing, in the RAS, to have been a particular problem for those with mental health conditions. Indeed, 16 of the 21 participants, who indicated that they had decided not to declare their disability, recorded themselves as having a mental health condition.

Some of these problems with the definition might suggest either the need for a less restrictive definition of disability or no definition at all. Indeed, it might be that a less restrictive, more social model, definition is already required in relation to the Equality Act (EqA) 2010 and reasonable adjustments, as the result of the findings of the Court of Justice of the European Union in *Jette Ring and Skouboe Werge* (e.g., [42], p. 14; [66], p. 6), and the 2014 Advocate General's opinion in *Karsten Kaltoft v the Municipality of Billund*, Case C-354/13 ([66], p. 7). In particular, such a definition might require a focus on the adverse impact of an impairment in interaction with external barriers, including, for example, working arrangements. Also giving more weight (than the EqA definition) to external factors, the UN Convention on the Rights of Persons with Disabilities, which the UK has ratified (e.g., [67]), provides (at Article 1) that "Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others". However, despite the existing EqA definition of disabled appearing to have had an influence in a significant number of cases in the Reasonable Adjustments Study, meeting it (and being taken to meet it) did not in general appear sufficient to guarantee that reasonable adjustments were made, suggesting that other factors (including those discussed below) also need to be addressed. For example, a university lecturer with a physical disability wrote "The organisation accepted I was disabled but did not make the adjustments. I do not know why they did not do this, because after I made a complaint to an employment tribunal they put it all in place within a week."

3.2.2. What the Duty Requires

As well as the definition of disabled arguably acting as an over-restrictive gateway to adjustments, there have also been problems with what the Reasonable Adjustments Duty requires, including in relation to whether there is a duty to assess and/or consult on the employee's needs; with how the reasonableness of an adjustment is determined; and problems with the non-anticipatory nature of the employment duty.

As Harwood reports [31], "In *Mid Staffordshire General Hospitals NHS Trust v Cambridge* ([2003] IRLR 566), the Employment Appeals Tribunal (EAT) determined that a 'proper assessment of what is required to eliminate a disabled person's disadvantage is...a necessary part of the Reasonable Adjustments Duty' ([68], para. 17). Other judgments disagreed". Of particular note, in *The Royal Bank of Scotland v Ashton* [2011] ICR 632, the EAT argued that "it is irrelevant to consider the employer's thought processes or other processes leading to the making or failure to make a reasonable adjustment" ([69], para. 24). This, it has been argued ([31], p. 1514), "would appear to reduce the statutory encouragement to take the arguably common-sense step of considering what adjustments would be effective". Related to these decisions on assessments, there has been found to be no separate duty to consult on adjustments (*Tarbuck v Sainsbury's Supermarkets Ltd* [2006], IRLR 664 EAT [70]). Further, the legal diminution of the

role of assessment and consultation (as part of the adjustments duty) appears to have been extended to trials and exploratory investigations. In *Salford NHS Primary Care Trust v Smith* [2011] EqLR 1119 (EAT) ([71], para. 49), the EAT stated “Adjustments that do not have the effect of alleviating the disabled person’s substantial disadvantage...are not reasonable adjustments within the meaning of the Act. Matters such as consultations and trials, exploratory investigations and the like do not qualify”. There appear to be a number of problems with these judgements. Of particular note, the apparent argument, in *Salford NHS Primary Care Trust* [71], that, to be an adjustment, a step must in itself have the effect of alleviating the disadvantage, fails to recognise that all adjustments will involve steps that do not in themselves reduce disadvantage; and, indeed, in many cases, none of the steps will on their own reduce the disadvantage. This was apparent among some of the author’s Reasonable Adjustments Study (RAS) interviewees. For example, one of the interviewees had been measured for an adapted chair and then an adapted chair was provided. Of course, measuring him for the chair would not on its own have alleviated his disadvantage, but providing an adapted chair without measuring him for it first could well have increased his disadvantage. It was also notable (from the RAS) that, in the current absence of a duty to assess and consult, employers did not appear in general to have assessed the worker’s need for adjustments; and, instead, it was often a case of the worker requesting adjustments and these being granted or not granted. Some organisations did conduct occupational health assessments. However, these tended to be one off events, even though changes in the work situation or impairment might mean that additional adjustments were needed. For example, one woman stated “After providing the initial basics, all subsequent needs were ignored...” Of course, the organisation might fall foul of the law as a result of the failure to make reasonable adjustments that an assessment might have identified, bearing in mind, for example, that the duty to make adjustments is on the employer (*Cosgrove v Caesar Howie* [2001] IRLR 653) [72] and is ongoing. However, this might be of little use to workers who in general will be reluctant ([42], p. 6) to take a case to tribunal.

As regards particular problems with determining the reasonableness of a possible adjustment, despite the judgement in *Archibald v Fife Council* [2004] UKHL 32, para. 47 [73], some lower tier tribunals have continued to incorrectly assume that there is no duty to make an adjustment which would constitute more favourable treatment. For instance, in *Griffiths v The Secretary of State for Work and Pensions* [2015] EWCA Civ 1265, the Court of Appeal found that “both the majority in the ET and the EAT were wrong to hold that the section 20 (reasonable adjustments) duty was not engaged simply because the Policy applied equally to everyone” (writing in brackets added) [74]. With tribunals struggling to understand, it is perhaps not surprising that substantial numbers of employers appeared, from the Reasonable Adjustments Study, to also not get it. One participant, for example, wrote “a particular manager...wanted to block every change arguing that all employees should be treated the same in the interests of fairness but that didn’t stop ‘friends’ getting privileges”. It also seems that colleagues could come to resent adjustments, as in the case of the participant who recalled “pretty awful I was frequently referred to as ‘special’ because I needed work adjustments and particular type of chair and this made other employees angry at me”. Further, fear of colleagues’ reactions could inhibit requests for adjustments. For instance, a call centre worker, with renal failure, wrote “I decided not to press for all the adjustments identified by occupational health..., as I did not wish to provoke my line managers and colleagues who would not have wanted me to have preferential treatment...”

As regards the employment Reasonable Adjustments Duty not being anticipatory, this in essence means that the duty is owed to particular disabled individuals who are placed at a substantial disadvantage. In contrast, the services Reasonable Adjustments Duty is anticipatory (e.g., [18], p. 162), in the sense that it is owed to disabled people at large, and requires that a reasonable adjustment (such as providing wheelchair access to a shop) is made before a particular disabled individual is known to have been placed at a substantial disadvantage. Not being anticipatory, the employment Reasonable Adjustments Duty is not well designed to bring about changes in organisational practices (as opposed to an often time limited minimal change for a particular disabled individual) nor for bringing about substantial changes to physical features of the employer’s premises. For example, one Reasonable

Adjustments Study participant explained that his need for wheelchair access (following an accident) was met through moving him to a different office, and so away from the team that he was part of, rather than making his current location more accessible. Reasonable adjustments did lead to changes in practice which benefited employees more generally, such as where providing home working as an adjustment for a disabled worker led the organisation to trial home working for all employees in the department. However, benefits to other workers from adjustments seemed, in general, to be minimised (as a result of attempts to find the option that least expensively met the Reasonable Adjustments Duty) and to be incidental and unplanned.

3.2.3. The Wording and Interpretation of Other Laws

There are laws other than the Reasonable Adjustment Duty that appear to have had the potential to impact on the effectiveness of the Duty in addressing substantial disadvantage. Of particular note, the Disability Discrimination Act (DDA) Disability Equality Duty (DED), and the specific duties “made” under it (discussed above: para. 1.2), appear to have encouraged improvements in disability equality employment practice (e.g., [75]), including in relation to adjustments. For example, Harwood ([31], p. 1517) found that the equality schemes which public authorities were required to produce under the DDA specific duties had “included adjustment-related planned actions; such as ‘appointing reasonable adjustment co-ordinators’”. However, there were major limitations to the effectiveness of the DED (e.g., [20]); and the potential effectiveness of the successor Public Sector Equality Duty (PSED) appears to be even more limited. Of particular note, the DED and PSED are duties to have “due regard” to specified “needs”; they are not duties to take steps to fulfil these needs (e.g., Dyson LJ in *R (Baker and others) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141 [76]). In addition, the Reasonable Adjustments Study (RAS) indicated that the Coalition government’s watering down of the specific duties under the PSED (as compared to those under the DED) has reduced the pressure on public sector organisations to encourage good practice. For example, one study participant wrote “The PSED has been weakened dramatically. Consultation has decreased greatly, DET (disability equality training) is now all but non-existent and recruitment of disabled people is now even lower than it was before 2010”. In addition, some of the EqA provisions that (as referred to above: para. 1.2) the Coalition did not bring into effect appear from the RAS to have had the potential to have encouraged adjustments. The “combined discrimination” provision, for example, may have encouraged employers not to refuse adjustments to disabled employees on the grounds of being disabled and having some other characteristic; as with the study participant who indicated that he might have been provided with the requested adjustment if he had not been gay as well as disabled. The wording, interpretation, and recent weakening, of non-equality laws also appears to have reduced the encouragement to make adjustments in some situations. For instance, as Harwood reports [31], “unfair dismissal case law has provided encouragement for employers, when using absence as a redundancy selection criteria, to take into account that someone’s absence may be the result of a disability..., which might, in turn, encourage the reasonable adjustment of not counting some or any disability related absence”. However, the situations to which unfair dismissal law applies have been reduced as a result of the Coalition’s doubling of the normal qualification period for protection from unfair dismissal from one to two years ([24], pp. 215–16) and as a result of the increase in short-term contracts (e.g., [77]). This might have been of particular relevance to the significant numbers of RAS participants who had been unable to enforce any right to reasonable adjustments, including in some cases on account of their employer denying that they were disabled; had been dismissed for disability related reasons (which might not have arisen if adjustments had been made); and had not been in post long enough to have acquired protection under unfair dismissal law.

3.3. Flexible Labour Market Policies

The need to increase employer benefit flexibility (EBF)—in the sense of a labour force that is responsive to organisational needs—has long been an article of faith for UK governments (e.g., [78,79]).

Government policies aimed at increasing EBF have included the cuts to employment law protections discussed above (e.g., [79]), as well as, it might be argued, welfare reform policies. For example, Wigan states ([80], p. 269), referring to welfare reforms and citing Peck ([81], p. 349), the “Conservative-Liberal Coalition government’s active labour market policy...” is part of a state strategy “to erode the autonomy of labour power and facilitate a reconfiguration of labour *and* work to impose (competition for) undesirable jobs on the terms and conditions offered by capital” (words in brackets in the original). EBF policies at the organisational level, which governments policies appear designed to facilitate, can usefully be divided into adaptable worker policies and disposable worker policies. The “adaptable” and “disposable” worker are given a range of related meanings in the literature (e.g., [82]). The adaptable worker is taken here to mean a worker who is expected to meet demands to undertake a wide range of duties, work in a wide range of locations, work at variable and sometimes unpredictable times, and/or work harder and longer (i.e., work intensification). The disposable worker is taken to mean a worker who can be readily dismissed, whether through the use of a short-term contract; or, for instance, through streamlined procedures for dismissing those on permanent contracts.

There are indications that there have been increasing demands on UK workers to be adaptable, with, for example, evidence of public sector workers having to take on additional duties (e.g., [83], pp. 8–9); and indications that workers have become more disposable, and, in particular, with the increase in the use of zero hours contracts [77]. In addition, the findings from the author’s Reasonable Adjustments Study (RAS), consistent in places with the published literature ([39], p. 714), suggest that organisational EBF policies could reduce willingness to make adjustments. As regards adaptable worker policies, for example, demands on workers in general to take on more duties appeared to contribute—often along with the belief, referred to above, that all employees should be treated equally—to disabled workers being denied requests to reduce those duties that their impairment made it hard to fulfil. As regards disposable worker policies, there appeared to be a strong reluctance to make adjustments for non-permanent workers and a reluctance on the part of some non-permanent workers to request adjustments. For example, one study participant wrote, “Neither of my zero hours contract employers have ever asked about my disability, let alone offered to make reasonable adjustments—and I am too nervous to raise it as I assume I will lose work as a result”.

It also appeared, from the RAS, that welfare “reform” policies exacerbated the adverse impact of organisational EBF policies on the willingness to make adjustments. First, the welfare discourse is an individualising one (e.g., [84]), in which the role of individual “deficiencies” (such as an impairment) are focussed on as the principal cause of individuals being unemployed, rather than either structural problems (such as insufficient demand in the economy) or employer deficiencies (including not being prepared to make adjustments). In addition, this individualising discourse has increasingly entailed negative government and media narratives about “disability benefit cheats” (e.g., [9]), with Harwood [10] finding that these “narratives could be spilling-over into the work place and encouraging some managers to question the honesty of adjustment requests”. There was considerable evidence, from the RAS, that this individualising discourse and “benefit cheats” narrative was reducing organisational focus on the need to make adjustments and providing a pretext in some cases for not making them. For example, to get adjustments, a Department for Work and Pensions administrative officer reported having to “go for four audiograms till they believed me followed by two consultant letters and two GP letters”. Second, the increasingly harsh welfare regime—including the readiness to impose sanctions for being deemed not to have done enough to find work (e.g., [85])—appears, from the RAS, to have forced many disabled individuals to take up jobs (and in particular zero hours contracts) which they could not do without adjustments and in which adjustments were not expected to be made. For example, one study participant wrote “When I came to the end of the Work Programme, I was so scared by what Job Centre Plus said they were going to do, I rushed into an agency 12 week office job...and it turned out very badly...” It also seems that concerns about the impact of sanctions are justified. For example, a respondent in his 50s, stated “No money for 6 months almost drove me to take my life”. Third, the fear of being dismissed and facing the harsh welfare benefits

regime seems to have discouraged some disabled workers from requesting or pushing for adjustments; and, fourth, some interviewees suspected that employers—knowing the fear of the harsh benefits regime—felt less pressure to accede to requests for adjustments. Fifth, there were indications that work experience/workfare employers in general felt little need to provide adjustments for disabled participants. There appear to be a number of possible reasons for this, including indications that Job Centre Plus did little or nothing to ensure that employers put adjustments in place. In addition, it is not clear that there is a legal duty on the work experience provider to make adjustments for work experience/workfare participants ([86], p. 47). Indicating the lack of proper systems being in place to help ensure reasonable adjustments are made, a mobility disabled study participant suggested “I also think that JCP (Job Centre Plus)...should be asking all claimants about the suitability of their WRA (work related activity), in respect to their disability limitations, and if claimants are not getting Reasonable Adjustments from their WRA employers, then the JCP advisor should have a mechanism in place that allows them to take the issue up directly with the employer” (words in brackets added). Sixth, the impact of the sanctions regime appears, in some respects at least, to have been greater on disabled than non-disabled benefit claimants, so increasing the impact on adjustments of the threat of sanctions (discussed above). This was, in part, because disabled individuals appear to have quite often been sanctioned for not doing work related activities which their impairments made it hard or impossible for them to do (at least in the absence of adjustments). For example, one study participant wrote about friends “being unfairly sanctioned and plunged into poverty when they were unable to take up training or employment experience that they could never have physically undertaken”.

4. Can the Statute Be Revised to Better Meet the Needs of a “Flexible” Workforce?

In the context of the flexible labour market (e.g., [79]), and the reformed “neoliberal” welfare state (e.g., [80]), the Reasonable Adjustment Duty seems, as discussed above, ill-equipped to achieve its original purpose of removing the substantial disadvantage that disabled individuals face in the work place. In addition, it excludes workers with impairments who do not meet the statutory definition of disabled but who might experience substantial impairment-related disadvantage. The Duty also appears, from the author’s Reasonable Adjustments Study (RAS), to have created resentment, against “special” treatment, among some non-disabled colleagues; and to have been used by some employers to facilitate, through allowing a limited exception (with legal justification) for particular disabled workers, a reduction in working conditions for the workforce as a whole. A revised definition of disabled might address some of the problems with the current duty. One possibility would be the statement in the UN Convention on the Rights of Persons with Disabilities, quoted above, of who “Persons with disabilities include...” However, a possible weakness of the statement is that it indicates that there might in general be taken to be a need for the impairment to be long-term, whereas, as referred to below, short-term impairments can have substantial long-term adverse impacts. While the long-term requirement could be removed from the definition, it is not clear that the residual definition would be desirable in the case of some other EqA disability provisions. For instance, if direct discrimination simply required less favourable treatment because of an impairment, this might undermine the provisions’ value in addressing the ongoing prejudice that disabled people face.

Instead, it is argued here that consideration be given to the amendment proposed to the reasonable adjustments duty. Drawing, to some extent, on the Advocate General’s opinion in *Karsten Kaltoft* discussed earlier (para. 3.2), the following is a possible wording for a revised duty (to replace the current wording at Section 20 of the Equality Act (EqA) 2010, shown above at para. 3.2 (a)): “Where a provision, criterion, or practice (PCP) applied by or on behalf of an employer, or any physical feature of the premises occupied by an employer, in interaction with a person’s impairment, puts or would put that person at a substantial disadvantage in relation to a relevant matter in comparison with persons without that impairment, there is a requirement on the employer to take such steps as it reasonable to have to take to avoid that disadvantage”. However, as with the current definition of disabled, some impairments, such as pyromania, would need to be excluded from protection. As touched on above

(para. 3.2), and returned to below, there are what might be thought to be problems with the scope, as well as the wording, of the existing Reasonable Adjustments Duty. To address these, the EqA might usefully be extended beyond those in “employment” (who are covered under the existing Duty) to those on work experience and workfare type schemes (albeit the author is opposed in principle to these schemes) and to volunteers. In addition, the EqA might usefully be strengthened to ensure adequate protection for those in certain types of self-employment, in which, for example, the organisation worked for has strong control over working conditions (and so might be able to decide whether or not adjustments are made) but the relationship of subordination required in *Jivraj v Hashwani* [2011] IRLR 827 [87], for the individual to be protected under equality law, might not be taken to exist; and for those in “false” [88] self-employment. Further, in the light of so many study participants having referred to being granted adjustments inadequate to their needs, there might usefully be an ongoing requirement to assess the need for adjustments. This might make explicit the requirement for “a proper assessment” indicated in Cambridge (quoted above at para. 3.2 (b)). This paper next discusses how well if at all this proposed revised Reasonable Adjustments Duty might meet five objectives, derived in part from the apparent weaknesses in the existing duty (discussed above at paras. 3.2(a)–(b)).

Objective 1. Not to exclude individuals with impairments who experience substantial disadvantage but do not meet the relevant definition of disabled or cannot prove the same to their employer. The suggested revised duty should meet this objective in that a person, to come under the protection of the duty, only need have a (non-excluded) impairment which, in interaction with the employer’s provision, criterion, or practice (PCP), puts them at a substantial disadvantage. This should be particularly suited to addressing some of the problems arising from the ease with which employment is terminated in the flexible labour force. For example, under the current arrangements, if a non-disabled individual on a short-term contract breaks a leg, some employers might be tempted to immediately fill their position, rather than wait for the employee to return. Being on a short-term contract, the employee will not have been employed long enough for protection from unfair dismissal and there will be no duty to make reasonable adjustments. However, as the broken leg (the impairment), in interaction with the employer’s sickness absence policies and practices (the PCP), would put them at the substantial disadvantage of being dismissed, then the individual would come under the protection of the proposed revised reasonable adjustments duty. It might be a reasonable adjustment, for example, to alter the office environment so that he/she can return sufficiently quickly so as not to need to be replaced.

Objective 2. Minimise resentment against adjustments among the workforce as a whole and benefit the workforce as a whole. Whereas most individuals might not regard themselves as either disabled or likely to become disabled, most will recognise the possibility that they could become ill or injured and that this could have an impact on their employment status. This is particularly the case in the current flexible workforce, with one Reasonable Adjustments Study participant writing that “employers work their employees till they drop and then replace them”. Therefore, a wider duty—encompassing injuries and short-term ill health—might gain greater support than the current one. In addition, the anticipatory reasonable adjustments, that the revised duty could encourage, might tend to benefit workers as a whole, including in terms of improved working conditions and practices. One reason why the duty might encourage anticipatory adjustments is that, once there is potentially a duty to make reasonable adjustments for any worker who becomes ill or injured (subject to the substantial disadvantage requirement), there will be a stronger incentive to take steps to reduce the likelihood of work-related illness and injury, including stress related conditions.

Objective 3. Provide protection for workers on contracts personally to do work and those on workfare schemes. The EqA provides that an employer has a duty to make reasonable adjustments in relation to employment, and employment is defined broadly and includes inter alia “employment under a contract of employment, a contract of apprenticeship or a contract personally to work”. This clearly includes short-term contracts; and, in addition, those on short-term contracts (and all included contracts) are protected under the Duty from day one. However, following the Supreme Court’s judgement in *Jivraj v Hashwani* [2011] IRLR 827 [87], referred to above, it seems that, for equality legislation to apply, services

under a contract personally to do work must be performed “for and under the direction of another person” (*Jivraj*, para. 34), i.e., there must be a relationship of “subordination” (para. 34) (e.g., [89]). This appears to have the potential to reduce the scope of equality legislation ([90], p. 176), including the Reasonable Adjustments Duty. A particular problem identified in the Reasonable Adjustments Study was participants being hired as “self-employed”, and so being taken to not be entitled to reasonable adjustments, but in effect working as short-term contract workers. It is, therefore, suggested that the EqA be strengthened to ensure adequate protection for the increasing number of self-employed [91], as well as for those in what Behling and Harvey, [88] call “false” self-employment.

It was noted above that Paz-Fuchs and Eleveld ([86], pp. 47–48) suggest that workfare participants might currently be excluded from non-discrimination protection. As the Reasonable Adjustments Study indicated, those on workfare type schemes experience substantial disadvantage as a result of not being granted adjustments. In addition, volunteers are not expressly covered by the Equality Act ([92], p. 58), and the circumstances in which they could be entitled to protection under the Act seem quite limited (*South East Sheffield Citizens' Advice Bureau v Grayson* [2004] IRLR 353 , para. 12 [93]). Therefore, the proposed revised duty has been worded so as to cover those on work experience and workfare type schemes, and volunteers.

Objective 4. Benefit employers in terms of a more productive and stable workforce. The Reasonable Adjustments Study, consistent with the literature (e.g., [94], p. 76), indicated that adjustments can often bring net benefits over costs to an organisation, and indicated that many of these benefits will arise in relation to adjustments made for non-disabled workers, as well as in relation to those made for disabled workers. Therefore, if, as seems possible, the revised duty would lead to an overall increase in adjustments, it could lead to an overall increase in net benefits for organisations. However, in so far as the revised duty is designed to tackle some of the worst excesses of Employer Benefit Flexibility policies (including in terms of making it harder to dismiss workers who become injured for short periods of time), it might be argued to go against the grain of current employment practices and that this would be disruptive for organisations. There again, it is not clear that these current practices are conducive to productivity. For example, as Harwood argues [31], “the threat of being sacked at the drop of a hat seems unlikely to increase the employee characteristics, such as ‘trust’ [95] and ‘engagement’ [96], which these and other authors have associated with improved performance.” Numbers in square brackets added).

Objective 5. Promote social justice for those with impairments. The Reasonable Adjustments Study indicated weaknesses with the existing Duty in terms of how well it promoted social justice, and indicated that the proposed revised duty could go some way towards addressing some of these weaknesses. The existing Duty did appear to have promoted social justice for particular disabled individuals. For example, as regards distributive justice (e.g., [1]), work place adjustments (which the Duty might have encouraged) enabled some study participants to get off out-of-work benefits and so increase their income; while, as regards recognition justice (e.g., [1]), getting off benefits meant that disabled individuals were no longer subject to the disrespectful treatment (e.g., [97], pp. 20–22), including sanctions, associated with the welfare benefits regime. However, the Duty did not in general promote social justice for those who did not meet the medical model definition of disabled in the Equality Act, or could not prove the same, but were experiencing substantial impairment related disadvantage; nor did it promote social justice for disabled individuals still on workfare schemes. The proposed revised duty should go some way towards addressing these problems in that there is no requirement to meet a definition of disabled and it is suggested that the duty should apply to those on workfare schemes.

However, a more fundamental problem with the existing Duty, from a social justice perspective, is that it is not clear whether or not it has led to a redistribution of income towards disabled workers as a whole. In particular, it is not clear whether the disability employment gap has narrowed since the duty came into force under the Disability Discrimination Act 1995 [34]; and it's not clear what contribution, if any, the Duty has made to any narrowing of the gap. The reason why it is not self-evident that the

Duty has made a net contribution towards any closing in the gap is because, as some have argued (e.g., [98], p. 465), the existence of the duty, and the extra responsibilities it entails, could have discouraged some employers from employing disabled workers. Arguably, the proposed revised duty should help address this possible problem. In particular, in that the duty would not only apply to disabled workers, the disincentive to employing disabled workers should be reduced; and, at the same time, the duty to make reasonable adjustments for disabled and other workers with impairments should help ensure that disabled workers who are hired are promoted and not dismissed (for issues that adjustments could have resolved). Therefore, the redistributive impact, in terms of employment rate and wage rates, between disabled workers and non-disabled workers, or at least between workers with impairments and workers without impairments, might be expected to be greater than with the existing duty. Another problem with the existing duty is that it does not seem, from the Reasonable Adjustments Study, to have benefited workers in general, except, for example, when an adjustment made for a particular disabled worker had incidental knock-on on benefits for his/her colleagues. In contrast, the proposed revised duty is designed in part to encourage improvements in working conditions across an organisation (as referred to under objective 2 above). If such improvements were taken to occur across organisations in general, it might be argued to represent an improvement in social justice for workers as a whole. In addition, some more disadvantaged groups appear to have the most to gain from the proposed revised duty, including, for example, non-disabled zero hours and short-term contract workers, who will not be covered under the current reasonable adjustments duty (on account of not being disabled) and are not in post long enough to gain some protection under unfair dismissal law.

Despite advantages, however, the proposed revised duty would still have substantial limitations in terms of reducing the social inequality (e.g., [4], p. viii) that disabled workers face. These limitations relate, in particular, to the nature of the flexible labour force. It seems inevitable that courts will take account of accepted practice when determining what is a reasonable adjustment; with, *ceteris paribus*, an adjustment being taken to be less reasonable the further it is from accepted practice. Therefore, as more is demanded of the “adaptable” and “disposable” worker (e.g., [99]), and so the further this accepted practice is from the adjustments that disabled workers require, the less reasonable these adjustments will be taken to be. In addition, while the duty is a day one duty, how long an employee is expected to be in post will be a relevant factor in determining what is a reasonable adjustment. In these circumstances, the growing numbers on short-term contracts, and especially zero hours contracts [77], could increasingly find themselves unable get adjustments and perhaps increasingly unable to get work. Without changes to unfair dismissal and other labour laws to address the wider injustices of the flexible labour force, and proper enforcement of these laws (e.g., [100]), it is not clear that even a revised Reasonable Adjustments Duty will be able to prevent a long term increase in social injustice for disabled workers.

5. Conclusions

Fraser (e.g., [1], cited in [3], p. 540), when discussing social justice, distinguishes between distributive justice and recognition, with the lack of recognition justice entailing, for instance, cultural domination and disrespect ([2], p. 344). The author’s Reasonable Adjustments Study (RAS) (reported in this paper) found, consistent with the literature (e.g., [4], p. viii; [5]), that disabled study participants experienced disproportionate employment-related distribution injustice and recognition injustice or what Fraser ([1], cited in [3], p. 539) refers to as “maldistribution” and “misrecognition”. Also consistent with the literature, the Reasonable Adjustments Study found that adjustments—to working arrangements and the working environment—could reduce maldistribution and misrecognition (e.g., [37]); and that the Reasonable Adjustments Duty (now under the Equality Act 2010) could encourage adjustments ([38], p. 56). For example, as regards maldistribution, RAS participants reported adjustments enabling them to obtain work, and the associated increased income, after a considerable time on benefits; while, as regards misrecognition, obtaining work removed

some from the sanctions (e.g., [85]) and other elements of disrespect that have become common place on benefits [101]. However, a small number of study participants reported that the Reasonable Adjustments Duty had discouraged adjustments, with, for example, one disabled worker suggesting that the “obligation just got managers’ backs up”. In addition, reflecting findings in the literature (e.g., [17], pp. 335–36), it appeared that reasonable adjustments or adequate reasonable adjustments were quite often not made when there could have been a legal duty to make them. The RAS identified a range of factors which appeared to have contributed to this, including individual factors, such as the disabled individual’s limited knowledge of their rights; organisational factors, such as the structure of HR; and external factors, including, the focus of this paper, the nature of the Reasonable Adjustments Duty and other relevant laws, and government “flexible” workforce policies.

5.1. The Nature of the Reasonable Adjustments Duty and Other Relevant Laws

Consistent with the literature (e.g., [54], p. 194), the author’s Reasonable Adjustments Study indicated that the wording and interpretation of disability discrimination statute can frustrate the fulfilment of its promise. There were indicated to be particular problems with the definition of disabled (which individuals need to meet if they are to be entitled to adjustments under the Reasonable Adjustments Duty) and with what the Duty requires of employers. The problem with the definition which appears to have had the greatest impact among the study participants was workers being covered by the definition but not being able to convince their employer of the same or their employer claiming not to be convinced. Indicated problems with what the Duty requires included there being no duty to assess what adjustments are needed and no anticipatory Reasonable Adjustments Duty in the employment field. Along with problems with what the Duty does not require, there were problems with what it was taken not to require. These included the failure of employers to recognise or accept that the Reasonable Adjustments Duty, in Baroness Hale’s words in *Archibald v Fife Council* [2004] UKHL 32, para. 47, “necessarily entails an element of more favourable treatment” ([73], para. 47). For instance, a study participant wrote “One particular manager...wanted to block every change arguing that all employees should be treated the same in the interests of fairness...” Indeed, an idea of “fairness”, taken to mean treating all the same, appeared to in general over-ride any belief in equality, taken to mean addressing disadvantage. It also seemed that colleagues could resent what was seen as “special” treatment of disabled workers, that employers could encourage this perception and use it as a pretext to deny adjustments, and that fear of negative reactions from colleagues could discourage some disabled workers from requesting adjustments. In addition, there were indications that some employers had made reasonable adjustments for particular disabled workers in part so as not to have to improve working conditions for workers as a whole.

5.2. Flexible Labour Force Policies

The need to increase employer benefit flexibility (EBF)—in the sense of a labour force that is responsive to organisational needs—has long been an article of faith for UK governments (e.g., [78,79]). Consistent with the literature (e.g., [83], pp. 8–9), the Reasonable Adjustments Study found that EBF policies might have increased across the organisations in the Study in the last few years; and, again consistent with the literature (e.g., [39], p. 714), the Study found that EBF policies could discourage adjustments. Of particular note, as demands on workers in general to be more adaptable increased—including, for example, to work more varied and unpredictable hours—the distance between adjustments (such as allowing time off for a medical appointment) and normal practice increased, which in turn could lead to adjustments appearing less reasonable to employers. That some employers regarded reasonableness as a subjective judgment on their part, rather than an objective one which it would ultimately be for a tribunal to make (*Smith v Churchills Stairlifts PLC*, [2005] EWCA Civ 1220 ([102], para. 44), seemed to contribute in some cases to employers rejecting adjustments (regarded as out of line with its EBF policies). Along with employment law deregulation [24], government welfare policies also appear to have been aimed in part at facilitating organisational EBF policies

(e.g., [103]); and the author's Reasonable Adjustments Study suggested that welfare policies could have exacerbated the negative impact of EBF policies on the willingness to make adjustments in a number of ways. Of particular note, the individualising discourse (e.g., [84]), in which individual "deficiencies", including impairments, and being a "benefits scrounger" (e.g., [9]), are focussed on as the principle cause of individuals being out of work, have taken government and employer focus off the need to tackle employer deficiencies, including failures to make reasonable adjustments. In addition, fear of being dismissed, and the awaiting harsh benefits regime, appears to have discouraged some workers from pushing for adjustments. There was also considerable evidence that employers in general felt little need to provide adjustments for disabled welfare participants, and that Job Centre Plus did little to address this.

5.3. *Revising the Reasonable Adjustments Duty to Meet the Needs of the Flexible Workforce*

A fundamental problem facing the UK workforce is the increase in EBF policies ([83], pp. 8–9, and work intensification [99], and the related decline in working conditions (e.g., [104]). It also appears, from the Reasonable Adjustments Study, that EBF policies could have had a disproportionate adverse impact on disabled workers, and that welfare reform has contributed to this impact. In the context of the flexible labour market, and the reformed "neoliberal" welfare state (e.g., [80]), the Reasonable Adjustment Duty seems, for the reasons discussed above, ill-equipped to achieve its original purpose of removing the substantial disadvantage that disabled individuals face in the work place, and arguably needs to be revised and strengthened. The possible wording for a revised duty are set out in this paper (para. 4). In brief, it is being suggested that there be a duty towards any worker whose (non-excluded) impairment (whether or not long term), in interaction with the employer's working arrangements or physical features of their premises, place that individual at a substantial disadvantage. It might arise, for example, where, without adjustments, a short-term injury could lead to an individual being dismissed. It is also suggested that the scope of the duty be extended to those on welfare type schemes and to volunteers, and to some forms of self-employment and all forms of "false" [88] self-employment; and that the duty includes a duty to assess what adjustments are needed.

It is argued here that, along with other advantages (discussed in this paper at para. 4), a revised duty could be more effective than the existing one in promoting social justice. The existing duty did appear, from the Reasonable Adjustments Study, to have promoted social justice for particular disabled individuals. However, it did not promote social justice for those who did not meet the medical model definition of disabled in the Equality Act or could not prove the same; nor did it in general promote social justice for disabled individuals on welfare schemes. As discussed above, the proposed revised duty should go some way to addressing these problems, including on account of not including a definition of disabled, and being extended to cover those on welfare, along with some other currently excluded groups. A more fundamental problem with the existing duty, from a social justice redistributive perspective, is that it is not clear what if any contribution it has made to any narrowing of the disability employment gap (between employment rates for disabled and non-disabled individuals). The reason why it is not self-evident that the duty has helped narrow the gap is because the existence of the Duty, and the responsibilities it entails, could have discouraged some employers from employing disabled workers (e.g., [98]). In that the suggested revised duty does not only apply to disabled workers, this possible disincentive effect should be reduced. Another problem with the existing duty is that it does not seem, from the Reasonable Adjustments Study, to have benefited workers in general, except, for example, when an adjustment made for a particular disabled worker had incidental knock-on on benefits for his/her colleagues. In contrast, the proposed revised duty is intended to encourage improvements in working conditions across an organisation. If such improvements were taken to occur across organisations in general, it might be argued to represent an improvement in social justice for workers as a whole. Despite advantages, however, the proposed revised duty would still have substantial limitations in terms of reducing the social injustice (e.g., [4], p. viii) that disabled workers face. These limitations relate, in particular, to the nature of

the flexible labour force. It seems inevitable that courts will take account of accepted practice when determining what is a reasonable adjustment; with, *ceteris paribus*, an adjustment being taken to be less reasonable the further it is from accepted practice. Therefore, as more is demanded of the “adaptable” and “disposable” worker (e.g., [99]), and so the further this accepted practice is from the adjustments that disabled workers require, the less reasonable these adjustments will be taken to be. In addition, while the proposed duty is (as is the existing one) a day one duty, how long an employee is expected to be in post will be a relevant factor in determining what is a reasonable adjustment. In these circumstances, the increasing numbers on short-term contracts, and especially zero hours contracts [77], will increasingly find themselves unable to get adjustments and perhaps increasingly unable to get work. Without changes to unfair dismissal and other labour laws to address the wider inequities of the flexible labour market, and better enforcement of these and other labour laws [100], it is not clear that even a revised reasonable adjustments duty will be able to prevent a long-term increase in social injustice for disabled workers.

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Abbreviations

The following abbreviations are used in this manuscript:

DDA	Disability Discrimination Act 1995
DED	Disability Equality Duty
EqA	Equality Act 2010
PSED	Public Sector Equality Duty
RAS	The author’s reasonable adjustments study

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