

Written evidence from the Employment Lawyers Association (DEG0157)

INTRODUCTION

1. The Employment Lawyers Association (“ELA”) is an unaffiliated and non-political group of specialists in the field of employment law. We are made up of about 6,000 lawyers who practice in the field of employment law. We include those who represent Claimants and Respondents/Defendants in the Courts and Employment Tribunals and who advise both employees and employers. ELA’s role is not to comment on the political merits or otherwise of proposed legislation or calls for evidence. We make observations from a legal standpoint. ELA’s Legislative and Policy Committee is made up of both Barristers and Solicitors who meet regularly for a number of purposes, including to consider and respond to proposed new legislation and regulation or calls for evidence.
2. A Working Party, co-chaired by Robert Davies and Emma Burrows was set up by the Legislative and Policy Committee of ELA to respond to the Call for Evidence for Disability employment gap inquiry. Members of the Working Party are listed at the end of this paper.
3. References in this paper to the views of ELA are intended to be inclusive of the views of the minority as well as the majority of ELA members. Whilst not exhaustive of every possible viewpoint of every ELA member on the matters dealt with in this paper, the members of the Working Party have striven to reflect in a proportionate manner the diverse views of the ELA membership.

EXECUTIVE SUMMARY

4. We support the Government’s aim of narrowing the disability employment gap and doing so as quickly as possible without placing undue burdens on business at this difficult time. We also acknowledge the necessity for and challenges that stem from cross-Departmental experience/responsibilities. The thrust of the questions indicate the potential benefit of greater coordination to achieve a Disability Focus perhaps explicitly based in one Government Department.
5. Awareness has improved since the introduction of the Disability Discrimination Act 1995 but the nature of the questions in the Call for Evidence also emphasises the need for the publication of better information about the business advantages of a workforce which features a proportionate number of disabled workers, and the

improvement of support to employers about the existing legal opportunities for positive action and good practice.

QUESTION 1

What progress has been made, especially since 2015, on closing the disability employment gap? How has this progress been made?

6. We understand that nearly 20,000 employers have signed up to the Government's initiative **Disability Confident**, and that 325 employers are at level 3. We suggest that this indicates that while employers are happy to sign up to the initiative, they need further support and incentives to make progress which will actually lead to change in this area.

QUESTION 2

What is the economic impact of low employment and high economic inactivity rates for disabled people? Are some disabled people (for example, young disabled people or people with different health conditions) more at risk of unemployment or economic activity than others?

7. There has been significant focus on the impact of low employment and high economic inactivity on the mental health and wellbeing of workers across all sectors of the economy. There are additional factors which are likely to exacerbate these challenges for disabled workers. The recent [ELA response](#) to the DWP Call for Evidence and Good Practice on in-work progression referred to the TUC Report on Disability and Employment which suggests that discrimination, negative attitudes and structural barriers are holding back disabled people in both educational achievement and progress in work
8. The ELA response reported that disabled workers were more likely to work part-time and not necessarily through their own choice. It also reported that there are likely to be fewer opportunities and limited career progression in low paid jobs, which factors increase the risk of disabled people becoming trapped in low pay work. This disproportionately impacts disabled workers as they are more likely to be in low-paid work/work in lower paid sectors.
9. Further, we noted in the ELA response that some disabled workers need to spend time out of work for health reasons. This can negatively impact their prospects for progression. This can still be the case even if proportionately, the duration and

frequency of absences are not materially longer than periods of absence (for health related reasons) taken by non-disabled workers.

QUESTION 3

What has been the impact of the coronavirus pandemic on disabled peoples' employment rates?

10. It has been observed anecdotally that many disabled people are early adopters when it comes to new technology. Covid-19, perhaps inevitably, is placing greater emphasis on technology to facilitate remote working but that alone is insufficient to provide opportunity and security for disabled workers across many sectors.
11. It is hard to overstate the impact and 'cost' of social and enforced professional isolation on mental health and this is amplified and exacerbated in relation to disabled workers.
12. Those disabled employees in work that have continued or returned to working (for example in the caring professions) have been further isolated if they have been unable to work as normal. Employers may have made decisions regarding disabled employees' working arrangements due to the requirement for some disabled people to shield, and/or because their employers are unhappy with the element of risk that is presented by allowing those disabled employees to work and put themselves at greater risk of catching Covid-19.
13. Anecdotal evidence suggests that Covid-19 has been 'catastrophic' in its impact on disabled freelance arts practitioners in the creative industries. Disabled employees in other professions and industries that are already badly impacted (eg retail and leisure) are also very likely to have seen a significant impact on their ability to work. Consequently it may be anticipated that Covid-19 will place very considerable strain on the disability employment gap.

QUESTION 4

Where should lead responsibility for improving disabled peoples' employment rates sit (for example, DWP; Business, Energy and Industrial Strategy; Health and Social Care)?

14. The Government's work on equalities can appear to be fragmented. We understand that the Cabinet Office's Disability team has taken the lead on improving disabled people's employment rates, and has adopted a cross- Departmental approach, which is both welcome and necessary. We also understand that the DWP's experience and expertise, especially on benefits, is vital.
15. The Government Equalities Office (GEO) is not mentioned in this call for evidence. It is responsible for policy relating to women, sexual orientation and transgender equality. Some of the GEO's work relating to closing the gender pay gap, could be extended to disabled workers to try and bring about change in disability employment rates. The GEO's expertise should not be overlooked by whichever department has lead responsibility for improving disabled peoples' employment rates.
16. Our view is that improvement to the Government's response to the challenges faced by disabled people may be achieved if one Government department had the lead for improving the employment rate for disabled people, drawing upon cross- Departmental experience and expertise.

Question 5

What international evidence is there on 'what works' in supporting disabled people into, and in work, and how applicable is this to the UK?

17. We are not aware of a unified report on international approaches to supporting disabled people into, and in work, including the assessment of the possible benefits/efficacy of national sector-specific or workforce-wide intervention such as quotas. We are acutely aware that such an approach is an inherently political question and beyond the scope of our response. We have noted the [EU's Progress Report](#) from February 2017 and the [2015 European Parliament](#) report from 2015.
18. We are not aware of an update to Table 6, Page 41 of the [2015 European Parliament](#) report but this indicates that some public funding and some coordination/sources of information to help employers approach both the initial recruitment and then the initial and subsequent reasonable adjustment phase is a necessary feature if effective change is to be brought about.

Question 6

What is the right balance between in and out of work support, and is DWP getting the balance right? What more should the Department look to provide?

19. We are aware that anecdotal concerns have been expressed as to the efficacy of the Access to Work scheme. We agree with the implication of the question that it is crucial to assess both the workplace and the wider needs of disabled workers but we are unable to comment further.

Question 7

How can DWP better support employers to take on and retain disabled employees, and to help them progress in work? How effective is the Disability Confident scheme?

20. In our view there is insufficient information available to employers on how to recruit and retain disabled employees. We support the provision of further resources and guidance.

21. It is our experience that when some employers think of “disability” they have people with physical disabilities in mind. Many disabilities are not visible. Employers need to be more aware that disability also refers to mental, neurological and learning disabilities.

22. At the same time some people with disabilities do not wish to declare (on an application form or otherwise) that they have a disability, fearing they will be discriminated against. This makes it challenging for employers to 1) know who in their organisation is working with a disability and 2) take steps to improve representation of disabled people in the workforce. It implies that a different approach to disability and a cultural shift of the perception of disability (and the range and nature of disabilities) by employers is needed to improve the disability employment rate.

23. The twin challenges both for some candidates and employees not wishing to declare their own disability where it is not visible, and some employers (perhaps particularly SMEs) not appreciating (by virtue of more limited access to Human Resource expertise and support) as much as they might about some disabilities, make closing the disability employment gap a greater challenge. For example, there are options by which to take positive action under the current legislation and the DWP could make employers more aware of these. Currently employers can take positive action in two forms:

23.1. proportionate action to overcome disadvantages suffered by, or the underrepresentation of, individuals who share a particular protected characteristic; and

- 23.2. in a recruitment or promotion scenario, if an employer has two candidates who are equally qualified for the role / promotion, it can favour a candidate with a particular protected characteristic provided this is a proportionate means to overcome a disadvantage suffered by, or the underrepresentation of, individuals who share that particular protected characteristic.
24. Any action must fall short of positive discrimination. Affirmative action also cannot occur in the UK (unlike in the USA, for example).
25. There are a number of options employers can take consistent with paragraph 23.1 above to improve the representation of disabled people in the workforce and to encourage them to stay in it.
26. In our experience, some employers more readily consider taking these steps in respect of the protected characteristics of sex and ethnicity rather than disability. We consider that this may be due to a lack of awareness as to potential approaches and concerns regarding the volume of potential impairments that may need to be managed, which of itself creates a fear of “floodgates” and overwhelmed resources, leading in turn to an unintended inertia
27. As well as continuing to seek to ‘bust myths’ about some disabilities in new guidance, examples of actions that the Government could encourage employers to take to attract and retain people with disabilities are set out below. We think it is important that these options are not presented in isolation – rather that they are linked to the business advantages that can derive from a diverse workforce (**as emphasised in the recent ELA response referenced at paragraph 7**) The range of conditions that need to be managed and accommodated suggests that a facilitative and coordinating role on the part of Government both in terms of demonstrating best practice and as a source of information and appropriate financial support for employers and candidates, is a particular aspect when considering a cost effective and proportionate methods to seek to address the disability employment gap. Specific suggestions include:
- 27.1. setting targets for increasing representation (either across the workforce as a whole or for particular positions) – provided that (under current legislation) the targets are not fulfilled through positive discrimination;

- 27.2. focusing advertising at disabled people (provided they are an underrepresented group);
 - 27.3. providing financial support to people with disabilities to obtain qualifications in order to address underrepresentation and give them access to the initial opportunity;
 - 27.4. instructing recruiters to consider disabled candidates (even targeting some disabilities in certain sectors/roles) as well as to have disabled candidates on short and long lists;
 - 27.5. targeting training at unrepresented groups to remove barriers to progression;
 - 27.6. carrying out disability monitoring and establishing an action plan to address underrepresentation of those with disabilities;
 - 27.7. carrying out audits of promotion and compensation processes, and succession plans not just for disability pay gaps;
 - 27.8. creating and promoting networks / support groups/mentoring targeted at individuals with disabilities; and
 - 27.9. providing standard questions for interviews which have been vetted for unconscious bias against those with disabilities of whatever form.
28. It is our experience that employers, while interested in taking positive action to move the dial on representation in the workplace, are fearful of using the steps set out above given the uncertainties around the “equally qualified” test. To our knowledge, there is only one reported case, at Employment Tribunal level on this provision. It concerned a Police Force recruitment process which determined that 127 candidates were equally qualified. Unsurprisingly the Respondent could not successfully defend a claim from a white, male, heterosexual applicant that the process had discriminated against him when trying to boost recruitment from underrepresented groups. [*M Furlong v The Chief Constable of Cheshire Police*]
29. In terms of encouraging employers to take action further examples of what it means to be **equally qualified** could be given by the DWP in any new guidance.

30. We understand that while 20,000 employers have signed up to the Disability Confident scheme the entry level tiers do not require much from employers and a small number of employers are at level 3. Other schemes appear to have more success in raising the numbers of disabled employees in the workplace, such as Work With Me, <https://www.workwithme.support/> and through the Business Disability Forum <https://businessdisabilityforum.org.uk/>.
31. Anecdotal evidence suggests the Disability Confident scheme is viewed as a tick box exercise but we do not have great visibility into this initiative. We suggest that success stories under the Disability Confident scheme should be more effectively publicised.
32. The positive impact for employers that derives from the greater degree of loyalty and retention rates that can be experienced by employers with regard to disabled workers should be emphasised.

Question 8

What improvements should DWP make to the support it offers to unemployed disabled people via Jobcentre Plus?

33. We are aware of suggestions that grant payments could be made to disabled candidates and tax relief provided in response to applications. The support should be immediate and tangible.

Question 9

The coronavirus pandemic continues to make it difficult to offer in-person support. What evidence is there of 'best practice' in supporting disabled people remotely – either in or out of work? How can DWP put this into practice in services such as Access to Work and the Work and Health Programme?

34. Regular contact through telephone and internet facilities is to be encouraged.

Question 10

Are 'reasonable adjustments' for disabled people consistently applied? How might enforcement be improved?

35. The assessment of what is or is not a reasonable adjustment differs depending on the individual's disability, whether any adjustment an employer can make will overcome

the disadvantage suffered by the individual as a result of their disability, and the size and resources of an organisation. There is no 'one size fits all' approach. It is difficult to speculate whether all employers are aware of an obligation to make reasonable adjustments and if so how they may be able to secure advice on their practical provision.

36. An emphasis on "enforcement" being related to an employer's perspective of individual applicants/workers may itself reinforce some of the barriers from the perspective of some employers. It may be helpful to emphasise the importance that relatively modest changes in approach in recruitment practices could make in the achievement of sectoral targets. The availability of rights to enable individual enforcement is clearly essential but focusing on an adversarial or litigious route for individual employers and employees runs the risk of unintended consequences. "Enforcement" may be better linked to Government-level action (see further below in paragraphs 37 - 40).
37. Disabled people are often clear as to what adjustments they need and what has worked for them at school or in other settings/roles. Working in conjunction with the disabled person should give the employer a good idea of what adjustments will work to overcome the disadvantage, and therefore those that the employer might reasonably be expected to make. An obligation could be placed upon employers specifically to ask this question of a disabled candidate or employee when considering reasonable adjustments in order to help inform and illuminate practical cost-effective approaches.
38. In practice, enforcement currently relies on a disabled applicant or employee bringing a claim of disability discrimination in an employment tribunal. Just like some non-disabled former employees some disabled people may not have the energy or resources to bring a claim. They may wish to focus on finding another role rather than suing their former employer. Enforcement which moves away from requiring the sole responsibility of the individual (alone) should be considered.
39. If disability pay gap reporting is adopted by the Government for employers with 250 or more employees this could start to bring about a change by employers wishing to nudge closer to those they regard as peers, and be best in class when it comes to mining the disabled talent pool. The prospect of an EHRC investigation would also be a move away from the need for individuals to bring claims to change behaviour. We also suggest that for bigger employers some sort of board level scrutiny on the number of employees with declared disabilities and whether any adjustments have

been recorded as being made or considered, might be a proportionate nudge to encourage retention of disabled employees.

40. We appreciate that employers have finite resource and that additional reporting obligations should not be imposed lightly at a time of immense economic pressure arising from the on-going impact of Covid-19. However, if the existing reporting system were extended to disability we are aware that the vast majority of SMEs would not be directly affected by such an obligation. The value and utility of pay reporting may be felt more through a medium-term shift in perception of the advantages that stem from a workforce that more consistently reflects the composition of society. The opportunity for distilling, sharing and cascading good practice which may be derived from pay reporting narratives may have particular advantages in relation to disability pay reporting given the range of conditions that are considered to be disabilities.
41. Ideas for enforcement already used to ensure rights for young people; such as the HMRC's naming and shaming of those who do not pay the national minimum wage, could be utilised for those who lose a disability discrimination claim, though this still depends on the disabled person bringing a claim.

Question 11

What would you hope to see in the Government's National Strategy for Disabled People?

42. Clearly access to employment and a fair opportunity for progression within employment is an important strand of the broader strategy. This inevitably and properly requires consideration of the needs of employers and candidates alike. We consider that a more focused strategy about the disability employment gap is needed. This would include publicising the steps that employers can take to employ disabled people, sources of information to help emphasise the positive benefits of engaging disabled workers and support to encourage disabled people in the workplace. Careful consideration should be given to how such information may be provided to employers in a succinct and ready-to-use manner.
43. There may be an advantage if Government was to centralize all Government publications and possibly consider new guidance from one Government department to increase the information available and raise awareness about disabilities in the workplace.

44. Incentivising employers by “rebooting” Disability Confident (or similar) and making it more challenging should be considered. The more advanced tiers could include a commitment to consideration of positive action already allowed in the Equality Act 2010 or adoption of the Rooney rule (where a commitment is given to have at least one disabled candidate on shortlists).
45. Guidance could strongly encourage a change to recruitment/interview practices, especially for those candidates who are currently disadvantaged by standard recruitment processes, including by way of example, neuro-diverse applicants. For example, all questions should be sent to them in advance so that as many uncertainties in the process can be assessed from the perspective of the candidate and the chronic anxiety that stems from trying to anticipate what the questions may be can be removed.

Question 12

How should DWP look to engage disabled people and the organisations that represent them in formulating the Strategy?

46. We suggest that DWP should consult on the Strategy with those involved in successful disability employment schemes, and employers in tier 3 of Disability Confident.

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