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Can International Human Rights Law Help Restore Access to Justice for Disabled Workers?

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Abstract: The research literature indicates that legislative changes in recent years, including the introduction of tribunal fees, have made it harder for workers in general to enforce their rights under UK employment laws. Drawing on the author’s qualitative study, conducted in 2015 and with information from 265 participants, this paper finds that these legislative changes could be having disproportionate adverse impacts on disabled workers. Of particular note, fees had deterred substantial numbers from submitting discrimination claims; and it appeared that this reluctance to take legal action had in turn emboldened some employers to commit what might have been found to constitute unlawful acts if taken to tribunal. The paper goes on to consider whether these adverse impacts on disabled workers could render fees unlawful under UK and European equality and human rights law and/or could entail violations of rights under the United Nations Convention on the Rights of Persons with Disabilities. The paper concludes that the intent behind UK laws might (in relation to the lawfulness of fees) have been frustrated in the domestic courts and that the impact of any future successes in the domestic courts, or under international law, might be dependent upon public opinion and political expediency. The paper also briefly compares developments in Britain with developments in neighbouring and other comparable jurisdictions.

Keywords: UN Convention on the Rights of Persons with Disabilities; Equality Act; discrimination; disability; tribunal fees; justice; employment

1. Introduction

Disabled individuals in the UK have long experienced work-related disadvantage [1], including higher levels of unemployment and lower wages ([2], p. viii) and being more likely to be subject to ill-treatment in the work-place [3]. Disability employment protections in the Equality Act (EqA) 2010, and in the predecessor Disability Discrimination Act (DDA) 1995, have played an important role in reducing this disadvantage for many disabled workers. In particular, adjustments (to working arrangements and the working environment) have facilitated recruitment, progression, and retention (e.g., [4], pp. 81–83); and the DDA/EqA Reasonable Adjustments Duty has encouraged adjustments (e.g., [5], Figure 4.2). There are, however, indications that disability employment laws are quite often breached, with, for example, adjustments not being made when there could have been a legal duty to make them (e.g., [6]). A wide range of factors have contributed to failures to comply with disability employment law requirements. These might usefully be divided into individual factors, such as the attitude of particular line managers (e.g., [7], p. 412); organisational factors, including the size of an organisation ([8], p. 66); and external factors, including problems with enforcement, which are the focus of this paper.

As Elias LJ put it in *Unison v The Lord Chancellor* ([9], para. 26), “A right is rendered illusory if there is no practical mechanism for enforcing it.” The research literature indicates that legislative and policy changes in recent years have made it harder for workers in general to enforce their rights at the

employment tribunals [10], with relevant changes having included a narrowing in the scope of legal aid ([11], para. 3.1), as well as cuts in grants to voluntary sector advice providers ([12], p. 7); changes to tribunal procedures ([13], pp. 416–17); and the introduction of fees to take a case to tribunal [12]. Of particular note, with fees introduced in July 2013, total claims to employment tribunals went down by 81% between the first quarter of the 2013/14 financial year and the first quarter of the 2014/15 financial year ([14], Table 1.2), as shown in Table 1 below. There are also grounds to suspect that fees could have had disproportionate adverse impacts on disabled workers. Except for a small number of passing references (e.g., [11], p. 79; [15], p. 8), however, the research literature does not address this matter. If it turns out that there have been disproportionate adverse impacts, these might render the fees scheme unlawful under UK, EU, and/or international law.

Table 1. Changes in tribunal claims following the introduction of fees.

Adapted from data from the Office for National Statistics, Table 1.2 [14], licensed under the Open Government License v.3.0.	Change Q1 of 2013/14 to Q1 of 2014/15
Change in total employment tribunal claims accepted	−81%
Change in disability discrimination claims accepted	−63%

Whilst challenges to the lawfulness of the fees scheme have so far failed in the High Court (*Unison v The Lord Chancellor* [2014] EWHC 218 (Admin) (henceforth referred to as *Unison 1*) [16], and *Unison v The Lord Chancellor* [2014] EWHC 4198 (Admin) (*Unison 2*) [9], and in the Court of Appeal (*Unison v Lord Chancellor* [2015] EWCA Civ 935 (*Unison 3*) [17], the door has in effect been left open for parties to return to court with additional evidence and argument. First, in relation to whether the EU “principle of effectiveness” had been breached, the High Court in *Unison 2* indicated that more evidence was needed to show that the fees scheme makes it virtually impossible or excessively difficult for individuals to take a case to an employment tribunal ([9], para. 60), with the Court of Appeal in general concurring ([17], para. 68). Second, as regards the indirect discrimination claim, the claimants—and, in their stead, the courts—focussed on the disproportionate impact of the fees scheme on women as a group and did not other than nominally address the impact on disabled people as a group ([9], para. 65). In the light of this, there *might* be thought to be some value in presenting the High Court with evidence of indirect disability discrimination. However, the court’s findings in relation to justification ([9], paras. 82–91) might be argued to have closed off the possibility of a successful disability claim. Third, the Public Sector Equality Duty (PSED), which the High Court in *Unison 1* [16] found had been complied with in relation to the introduction of the fees scheme, may subsequently have been breached in relation to requirements to monitor the impact of the scheme. There also appear to be possibilities under the United Nations Convention on the Rights of Persons with Disabilities and the European Convention on Human Rights. There are, however, problems with all of the above legal routes. Not least of these is that (even with legal decisions hostile to the fees scheme) any decision to remove tribunal fees in England and Wales appears likely to depend in large part upon changes in public opinion convincing the government that it would be politically expedient to do so.

Against this background, this paper draws upon the author’s qualitative study (hereafter referred to as the *Disabled Workers Study*), and an analysis of the literature and some of the principal relevant case law, to address the following questions:

- What has been the impact of tribunal fees, and other potential barriers to justice, on whether and how disabled workers have enforced their rights under equality and employment laws?
- How if at all have restrictions on access to employment justice influenced employer behaviour towards disabled workers?
- Have restrictions on access to justice for disabled workers entailed breaches of UK, EU, and/or international law?
- How can legal and campaign action together help improve access to justice?

The author's Disabled Workers Study was conducted between April and September 2015; and involved collecting information from 265 disabled workers, using two qualitative online surveys, follow-up questions emailed to the third of respondents who agreed to be sent these, and 11 semi-structured in-depth telephone interviews. The paper approaches the above questions from the social sciences side of socio-legal studies.

The study methodology is outlined in the next section; then the findings are presented—in the context of the existing literature and in the context of the legal environment; and the paper finishes with conclusions and discussion.

2. Methods

2.1. A Pragmatic, and Exploratory, Qualitative Study

The study was pragmatic in that it aimed to produce, within a reasonable space of time, robust evidence to feed into ongoing policy and legal debates, and, in particular, in relation to the House of Commons Justice Committee's *Court and Tribunals Fees and Charges Inquiry* [18] and expected future legal challenges to the fees regime. In addition, the study aimed to help fill gaps in the research literature referred to above. The reason for taking a qualitative approach was that qualitative approaches appear better suited, than quantitative ones, to the study's purpose of identifying causal processes [19], concerning, for example, why and how disabled workers achieve or do not achieve access to employment justice. It is accepted here that limited and provisional generalisations, including what Williams calls *moderatum* generalisations [20], can be drawn from qualitative research ([20], p. 216). Ideally, however, qualitative research based generalisations require more detailed data (such as from a greater number of in-depth interviews), as well as a wider range of perspectives (including from managers and HR officers), than was available in this study. In addition, to go beyond *moderatum* generalisations, it might be argued to be necessary to use quantitative methods [21]. Therefore, while the study indicated the presence of relevant processes in particular cases and indicated where some of these processes were common across cases, the study is best regarded as exploratory and the findings cannot be assumed to be generalizable to wider populations. The findings do, however, suggest questions which could be used in a quantitative survey of a representative sample of disabled workers.

2.2. Data Collection and Analysis

Data collection and analysis ran in parallel. In particular, drawing on Strauss and Corbin [22], 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 survey suggested that fees might have a particularly strong deterrent effect on casual workers, and, therefore, some of the follow-up semi-structured telephone interviews discussed what it was about being a casual worker which militated against taking legal action. The Framework Method [23] was used as a tool to help organise and analyse the data. The principal sources of study data were the following:

- *The literature review.* This included government documents and the research literature. The findings from the review are reported alongside the study findings in Sections 3 and 4 below.
- *Two online qualitative surveys.* These surveys asked disabled individuals principally open-ended questions about their work-related experiences, including, for example, "What has been your experience of taking...legal action?" The first survey was conducted between April and June 2015; and the second between June and September 2015, with the findings from the first survey having suggested topics to explore in the second. The surveys were publicised with help from the UK campaign Disabled People against Cuts and links to the surveys were posted on organisational websites and extensively tweeted (see Appendix 1). 154 individuals responded to the first survey and 158 to the second. Where respondents gave email addresses, it was clear that some had responded to both surveys; and it was estimated that a total of around 265 individuals responded

to the first and/or the second survey. A short extract from the second survey is shown at Appendix 2.

- *Follow-up email information and in-depth telephone interviews.* 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. This provided an opportunity to seek clarification of answers and further details about experiences referred to. All those who emailed the author additional information, and referred to tribunals, were asked whether they would be prepared to be interviewed on the phone. Twenty five agreed to be interviewed and 11 in-depth semi-structured telephone interviews had been conducted at the time of writing.

The data analysis drew upon the grounded theory “constant comparative method” [22], including, for example, when comparing cases where legal action was taken with cases where it was not taken. With a self-selecting on-line sample of respondents, threats to validity were manifold. In addition, it seems likely that the places where the surveys were publicised (see Appendix 1)—including, for example, in tweets from trade unions—would have significantly increased the likelihood of attracting respondents opposed to tribunal fees and whose answers would include comments critical of fees and their impact. That the surveys indicated the involvement of Disabled People against Cuts could well have increased the possibility of such bias. It is also worth noting that the composition of the sample did not appear to reflect the composition of the workforce along a number of important dimensions. There was, for example, a disproportionate number of public sector workers. Along with making clear the study limitations (including in relation to bias and generalisability), attempts to address threats to validity included, in particular, “member checking” (e.g., [24], p. 322) searching for “discrepant data” (e.g., [19], p. 258); and individual triangulation. As regards member checking, the 15 survey respondents, sent the draft interpretations of their responses, in general agreed with the thrust of the interpretations; while, in a significant number of cases, suggesting some changes in detail. HR officers and managers sent some of the study conclusions in general expressed the opinion that the recorded problematic organisational practices might happen but far less frequently than appeared to be indicated in the draft study conclusions. The findings and conclusions were amended in the light of this feedback. As regards discrepant data, this led, in some cases, to a concept being abandoned; and, in others, to it being amended. For example, the initial conclusion that serious health problems and no representation would in most cases prevent legal action was amended as a result of finding that a number of individuals with serious health problems took action without representation (albeit without success) where a family member was able to provide considerable support. Individual triangulation included exploring, during the in-depth interviews, some of the assertions (such as about fees deterring action) that the interviewee had made in his/her survey responses. This was particularly aimed at addressing the possible biases arising from how the study sample was recruited.

In the findings sections below, the author’s study presented in this paper is referred to as the “Disabled Workers Study”.

3. Findings in the Context of the Existing Literature

3.1. *The Impact of Law on Practice*

Consistent with the literature (e.g., [5], Figure 4.2) discussed in the “Introduction”, legal requirements appear to have encouraged improvements in disability employment practice in many of the organisations in the author’s Disabled Workers Study. This was most apparent in the case of the Equality Act 2010 Reasonable Adjustments Duty. There were indications that adjustments (to working arrangements and the working environment) had facilitated the recruitment and retention of disabled workers; reduced sickness absence; and improved performance. An NHS worker, for instance, wrote—“I have a very low sickness rate because of my adjustments. It’s lower than the able bodied in my building.” It also appeared that the Reasonable Adjustments Duty could have encouraged the adjustments in a substantial number of cases. This was clearest in the nine cases where

study respondents reported that an employer had initially refused an adjustment and then later agreed to it when the respondent was able to show that he/she was disabled under the Equality Act. It was hard or impossible from the limited information provided (and that from one source in each case) to assess the likelihood of the legal requirements having been breached in particular instances, except where the study respondent reported that he/she had won his/her case at tribunal. Nonetheless, again consistent with the existing literature (e.g., [6]), it appeared that practice may well have quite often fallen short of what was required in law. In some cases, it was said that no adjustments were made; and, in others, that adjustments were inadequate. For example, a central government worker, referring to additional adjustments that he had needed but did not get, wrote—“MS is progressive and what might have been an adequate adjustment 5 years ago would now not be adequate.” This might have been inconsistent with the Reasonable Adjustment Duty being in law a continuing one.

There appear to have been a wide range of factors contributing to what could have been failures to comply with legal requirements. These included individual factors, such as the perceived importance of the disabled worker to the organisation, with casual workers being least well served; organisational factors, including organisational policies; and external factors, which might be taken to include, among others, social norms and (the focus of this paper) the enforcement of legal requirements. Arguably, the effectiveness of anti-discrimination law depends, in large part, upon a realistic prospect of workers being able (if poor practice continues) to enforce their rights at an employment tribunal. The findings of the Disabled Workers Study reported here suggest the possibility that the limited availability of free legal advice and representation, combined with the introduction of fees, and fear of victimisation, could have left the majority of study respondents with no realistic prospect of enforcing their employment rights. For example, referring to fees and lack of legal advice, a local council officer wrote —“The whole lot has a chilling effect on even contemplating a case, no matter how bad or personally hurtful the level of discrimination.”

This section next looks at some of the impediments to enforcement encountered at different stages between what might be a discriminatory workplace incident and possibly fighting a case at tribunal.

3.2. Pre/No Legal Claim Actions

The coalition government justified the introduction of tribunal fees in part on the grounds that informal dispute resolution within the workplace is preferable to enforcement action and that fees will encourage the former ([25], para. 1). However, in addition to it appearing, from the existing literature, that tribunal fees could in fact have discouraged informal dispute resolution ([12], pp. 6–7), the mechanisms for such resolution appear in general to be ineffective. For example, Kirk *et al.* ([10], p. 3) found that “[p]articipants who attempted to resolve disputes within workplace procedures frequently found their grievances were ignored, hearings were pointless or managers simply covered one another.” Being in a trade union can assist workers in obtaining their rights through informal means [26], with, for example, unions helping disabled workers to negotiate adjustments [27]). However, the general weakening of unions—with laws curtailing union activities ([28], p. 221), and the decline in membership ([29], p. 5) and in collective industrial relations (e.g., ([30], p. 359)—has reduced the power of unions to influence decisions in favour of individual workers (e.g., [31], p. 1521). Informal dispute resolution action does not, of course, take place in isolation from the legal environment. In some cases, for example, employees referring to legal requirements (without explicitly or at all threatening legal action) led to previously denied adjustments being made (e.g., [31], p. 1517).

The author’s Disabled Workers Study, in general, reflected these findings about informal resolution in the existing literature. Of particular note, the study provides little or no evidence to support the government’s claim that fees would encourage internal resolution of disputes. Indeed, consistent with Rose *et al.* [12], there were indications that tribunal fees have reduced the incentive for employers to resolve disputes through internal procedures, as employers, according to some respondents, know that non-resolution of disputes is now unlikely to lead to an employment tribunal case (on account of their employees not being able to afford tribunal fees). In addition, 35 of the 43 respondents who

referred to grievance procedures either indicated that they had little faith in them, and so had not used them; or that they had used them and were disappointed with the results. A central government worker, for example, wrote—“took out a grievance, which is managed by the two managers against whom the grievance was.” Union representatives did appear to have helped some study respondents to use internal procedures to secure their rights, with union support being referred to in 5 of the 8 cases in which the respondent appeared satisfied with the outcome of the grievance procedure. In one case, for example, a union rep assisted in making a successful complaint about reasonable adjustments not having been made, with the study respondent, a government agency control room operator, reporting—“Assessments, new chairs, less screens. When I and my union complained.” A number of respondents, however, indicated that their union had provided insufficient help. Even where legal action was not initiated, threats of initiating it appear to have brought about improvements in practice. However, fear of an adverse reaction left some disabled workers reluctant to threaten legal action. This seemed to be particularly the case with casual workers, on account of regarding their positions as vulnerable. A retail worker, for example, referring to being bullied after requesting adjustments, wrote—“I didn’t do anything about it because I was on a temporary zero hours contract, and they could have reduced my hours to zero at any time. After they found out I was disabled, they halved my hours.”

3.3. Submitting a Claim

The Coalition government Business Secretary, Vince Cable, justified plans to “radically reform the tribunals system” in part on the grounds that “there is a widespread feeling it is too easy to make unmerited claims” [32]. Government representations of the tribunal system did not, however, strongly reflect the statistics or the realities that potential claimants appear (from the existing literature) to face. First, that the majority of claims are permitted to go onto a full hearing (*i.e.*, are not dismissed at a preliminary hearing) (e.g., [33], Table E.2) supports a conclusion that a majority of claims have merit. Second, the discrepancy between indications that potentially unlawful treatment could be relatively common place (e.g., [2]) among the millions ([34], p. 10) of UK disabled workers, and there only having been 7492 disability discrimination claims in the year before fees came in ([14], Table 1.2), suggests that it might in fact be too difficult to make merited claims, rather than too easy to make unmerited ones. Third, claims which are made appear in general to be made reluctantly and sometimes after years of ill-treatment ([10], p. 2). Reasons why most disabled workers do not attempt to enforce their rights at an employment tribunal include workers not knowing that their legal rights could have been breached. Edwards and Boxall ([35], p. 448), for example, report that the Disability Discrimination Act “featured little in the experiences of the participants with CF (cystic fibrosis). Few were aware of the [A]ct and others questioned whether they would be covered by it”. For those who feel that their employment rights might have been breached, there are a number of principal deterrents to taking legal action.

These deterrents might include a not unrealistic perception that the odds will be stacked against them. Ewing and Hendy ([36], p. 120), for instance, referring to claims that have been submitted to the employment tribunal, report that “only 8% of unfair dismissal claims ultimately succeed at full hearing...” Difficulties getting initial legal advice can further discourage claims, with Holgate *et al.* ([37], p. 772), for example, finding “a paucity of individual employment advice...”. It also seems that lack of advice at this stage has the potential to impact upon the likelihood of winning at tribunal later on, and, in particular, as a result of how well the case is made out in the ET1 tribunal claim form. Busby and McDermont ([38], p. 175), for example, found, in their interviews with Citizens Advice Bureau clients, that “[t]hose who completed the ET1 themselves found this a daunting experience”. As with representation throughout the process, employees will in general be at a disadvantage compared to employers at the submission stage. For example, Harding *et al.* ([39], p. 6) found that “Three in ten claimants (31 percent) nominated a representative on the ET1 tribunal claim form, compared to five in ten (49 percent) of employers on the ET3 tribunal response form”. Problems arise in part from the restriction of employment legal aid to discrimination cases; and legal

aid in discrimination cases having become more limited in application and scope, and more difficult to access ([40], para. 27). There can also be fears that initiating a claim will lead to victimisation. Suggesting possible substance to these fears, O'Sullivan *et al.*, in their study of union officials' views in Ireland, found ([41], p. 236) that "half of survey respondents" indicated "that claimants are victimised by their employer".

Again reflecting the existing literature (e.g., [10], p. 2), as well as contradicting the Business Secretary's claim quoted above, the author's Disabled Workers Study suggested that workers do not easily or readily submit tribunal claims. In 17 of the 55 cases in which a reason for not submitting a claim was given, it was indicated that the employer's behaviour, or the dispute that this led to, had contributed to the disabled worker being too ill to go onto submit and see through a legal claim. This appears to have been the case with a speech therapist who wrote,—“If I had not felt so ill and upset by the time I left I would have explored my legal options for constructive dismissal”. However, a more commonly cited reason for not submitting a claim was fear of victimisation and/or aggravating an already difficult situation (this being cited in 26 of the 55 cases in which a reason was given). One voluntary sector worker, for example, stated—“I've not taken legal action...because I fear my employer making me redundant as a result”. There were also fears that taking action could make it harder to find work in future; and, for one local authority officer, it was not only being without a job that he feared, it was the changed and punitive conditions for those not working. He stated—“I know, and my family know, there is no longer any financial safety net if I lose the job I have now”.

3.4. The New Requirement to Pay Tribunal Fees

The most powerful obstacle to submitting a disability discrimination claim could now be the requirement, introduced in July 2013, to pay a fee of £1200 to have a discrimination or other class B claim heard at an employment tribunal. This is the first time that fees have been charged to take a claim to tribunal since the UK tribunals were established in 1964 ([42], p. 136). There is, however, a remission scheme, with individuals qualifying to pay a reduced fee or no fee if their disposable capital and monthly income are below the specified thresholds. The government's fees consultation document suggested the possibility ([43], p. 19) that “Tribunal users required to pay a fee would not be especially price sensitive...”. What, in fact, happened was a striking fall of 81% in claims accepted by the employment tribunals between the first quarter of the financial year 2013/14 and the first quarter of the financial year 2014/15 ([14], Table 1.2), as shown in Table 1 above. In addition, the government took a sanguine view of potential equality impacts. Its equality impact assessment of its proposed fee structure concluded that the structure would have few if any adverse impacts on equality [44]; and that “the measures” they “have put in place would mitigate any equality impacts” ([44], p. 9). Subsequent evidence, however, indicates that fees could be having disproportionate adverse impacts on disabled workers.

A principal impact has been reduced access to legal redress for disability discrimination. Following the introduction of tribunal fees, there was a fall in accepted disability discrimination tribunal claims of 63% between the first quarter of the financial year 2013/14 and the first quarter of 2014/15 ([14], Table 1.2), as also shown in Table 1 above. As well as the sequence and timing of this fall being suggestive of fees having contributed to it, research indicates that fees have deterred large numbers from submitting employment claims ([12], pp. 4–5). In addition, the evidence does not support the government's assertion that fees would be about “filtering out weaker and non-meritorious” employment claims ([45], p. 18). Of particular note, Anthony and Crilly ([11], p. 78) report that “success rates for employment tribunals remained broadly the same in the year before and after the introduction of fees.” The reduced access to legal redress for disability discrimination would appear to entail a number of disproportionate adverse impacts on disabled workers. It is self-evident that disabled workers are more likely than non-disabled workers to experience unlawful disability discrimination, as only those who meet the Equality Act 2010 definition of disabled can be the subject of such discrimination. Therefore, a measure (in this case tribunal fees) which makes it harder for all

groups to take a disability discrimination case to an employment tribunal will have a disproportionate adverse impact on those groups with the greatest likelihood of needing to take such a case, *i.e.*, disabled workers. The government's principal defence (in its equality impact assessment) to the argument that fees could have disproportionate adverse impacts on disabled people was that "disabled people are more likely to fall into the lower income brackets", than non-disabled people, and so "would be more likely to qualify for partial or full fee remissions" ([44], p. 7). This, however, gives insufficient weight to the fact that individuals can be on low incomes and ineligible for a substantial or any fees remission. The impact question in relation to low income groups should arguably have been whether the greater likelihood of those in such groups being eligible for a fee remission compensates (in terms of numbers affected and individual impacts) for the greater likelihood that individuals on low incomes will find it harder to pay whatever fee is not remitted. In addition, as disabled workers may be prevented by fees from bringing claims involving breaches of employment provisions other than those dealing with disability discrimination, the potential impact of fees on disabled workers is greater than the drop in disability discrimination claims reveals. Reduced access to redress for disability discrimination, and for other employment law breaches, could in turn embolden some employers to discriminate against disabled employees or to subject them to other detriment. Rose *et al.* ([12], pp. 6–7) lend indirect support to this possibility, in so far as their study indicates that fees have left workers in general in a weaker position *vis-à-vis* employers in relation to workplace disputes.

As the existing literature does not address the impact of fees on disabled workers, other than in passing (e.g., [15]) or to record the drop in disability claims [14], there is a limited basis for making comparisons with the author's Disabled Workers Study. The author's study findings do, however, add substance to concerns that the Equality and Human Rights Commission ([46], para. 19) and others have expressed about the possible negative impact of fees on disabled workers. Only a minority (73 out of 265) of respondents, in the Disabled Workers Study, addressed the issue of whether fees deterred claims. One of these respondents stated that "the fee would not prevent" him if he "needed to go to tribunal"; and five indicated uncertainty as to the impact of fees. All the others indicated a deterrent effect. First, this included respondents indicating that the fee would have deterred them if it had been in place when they took their case. Second, some respondents suggested that fees would deter them from taking another case in future. For instance, a third sector worker, with a visual impairment, referring to fees, wrote—"I wouldn't do it again. The financial implications are too high...and the service for those on legal aid is not fit for purpose". Third, there were those who had not taken a case before and stated that fees would stop them from doing so in future. In some cases, the additional costs of being disabled were indicated to have helped push the fee out of reach. For example, the just quoted third sector worker wrote—"It's a lot of money to lose—money that many of us simply don't have access to. Being disabled is incredibly expensive". In another case, the suggestion was that the money was there but that it was needed for difficult times ahead as the respondent's condition deteriorated. A data analyst wrote—"With a fee of £1200 to pay, and not being eligible for any relief (my wife received a relatively small sum...we have kept it against when times get even worse than they already are). I don't think that I could possibly file a claim against a large, well-funded organisation that already employs its own legal staff". Fee remissions could, of course, allow some not to pay all or part of the fee. However, just one respondent indicated being found eligible for a remission (though many more might well have so indicated if there had been a specific question about remissions). She wrote—"I was very wary of making a claim. Luckily I had the fee waived due to my disability (or paid by legal aid, I'm not sure...it's all so very confusing)".

Not feeling able to make a claim seems to have contributed to some individuals feeling compelled to put up with what they considered to be discrimination. For example, one respondent wrote—"I'm unlikely to make a claim. Things have on occasion been disgustingly discriminatory (getting trapped during a fire evacuation, anyone?) but I'm not likely to risk justice now. I will simply lump it until the stress of it simply drives me from my job". In addition, a significant number of respondents (19 of the 73 who discussed tribunal fees) seemed to suggest that employers realised that employees could

not afford tribunal fees, and that this realisation had or would embolden some employers to behave in ways which before fees were introduced might have landed them at an employment tribunal. For instance, a voluntary sector worker wrote, with reference to fees,—“I think employers care much less about following rules because they know there is little or no comeback for their behavior”. Another respondent suggested an impact on dismissal, writing that employers were now “willing to let people go due to lack of action. Tribunal fees stop people taking their case further”.

3.5. *Fighting the Case*

For claimants who get as far as the employment tribunal, the chances of losing are higher than those of winning (e.g., [33], Table E.2 on unfair dismissal). A case might be lost in large part as a result of the statute and how the courts have interpreted it. Of particular note, despite having experienced substantial disadvantage, there would have been no unlawful disability discrimination if the affected individual did not meet the quite restrictive definition of disabled in the Equality Act 2010. Even if the definition is met, it can be difficult or impossible to prove this to the satisfaction of the tribunal. For instance, Bell ([47], p. 202) notes that “there are examples in the law reports of first instance tribunals and courts doubting, for example, whether even a condition as well-recognised as schizophrenia satisfies the test”. A case might also be lost as result of a lack of representation. Employers are more likely than claimants to be represented at the tribunal hearing ([39], p. 6); and the tribunal process is heavily weighted against the unrepresented party ([48], p. iv). In addition to legal aid reforms ([11], para. 3.1), a number of other recent government policies further tilted the balance against the unrepresented claimant. For example, changes to tribunal procedures made it easier to reject claims without a full hearing ([13], p. 417); and the discrimination questionnaire procedure was abolished ([49], p. 207). This procedure had provided a statutory incentive for the employer to give non-evasive answers to questions about its actions, with the answers providing a potentially useful resource at any subsequent tribunal hearing.

Among respondents in the author’s Disabled Workers Study, the biggest problem in fighting a case seemed, consistent with the literature (e.g., [48], p. iv), to be lack of representation. While it was far from clear, it appeared that all those who indicated that they had won at tribunal had some kind of representation. That one successful claimant had representation was implied, for example, in her comment that the case was “awarded to” her “without” her “having to appear”. Without formal representation or access to professional advice, steering a case through the tribunal process would tend to prove difficult or impossible. For instance, a carer’s support worker wrote—“Fighting that case was the hardest thing I have ever done and probably the most stressful. There is virtually no advice if you don’t have legal representation and no legal aid. You have to work out how the system operates for yourself at every stage”. In some cases, inadequate advice or representation, rather than none at all, appears to have been the problem. For instance, referring to advice provided through legal aid, a voluntary sector worker wrote—“the service I got was outsourced to another part of the country and I had no representation and minimal support”. Once at tribunal, it appeared that there could be problems with accessibility. Of particular note, the carer’s support worker, quoted above, wrote—“trying to get the Tribunal to make the same reasonable adjustments I was at the Tribunal about was a complete nightmare at every hearing.” However, only two other respondents referred to problems getting reasonable adjustments to the tribunal process, with this suggesting the possibility that tribunal adjustments related practice could have improved since earlier studies (e.g., [50], para. 5.6.3). Whilst none of the respondents in the author’s Disabled Workers Study referred to the recent government policies (additional to fees), which seem (as referred to in the previous paragraph) to tilt the balance further against the unrepresented claimant, there were indications that these policies could have been having an impact. For example, as regards the tightening up of tribunal procedures, all three of the telephone interviewees who referred to their cases being dismissed at a preliminary hearing appear to have been unrepresented, and their cases appear to have been dismissed for procedural reasons.

4. Findings in the Context of the Legal Environment

The existing literature (e.g., [15]), and the Disabled Workers Study reported here, suggest that the fees scheme, and some of the other barriers to justice discussed above (at Sections 3.1–3.5), could be at odds with domestic, European, and/or international law. However, there appear to be major obstacles to establishing this in relevant courts. In addition, it is far from certain that any judgements finding the fees scheme unlawful would lead to its abandonment or even to its substantial modification.

4.1. The Equality Act 2010 Public Sector Equality Duty (PSED)

The PSED requires that a “public authority” must, in the exercise of its functions, have due regard to a number of specified needs, including, for instance, “the need to” “eliminate discrimination...”. The High Court in *Unison 1* dismissed Unison’s argument that fees had been introduced in breach of the PSED ([16], para. 69), and the Court of Appeal in *Unison 3* dismissed Unison’s appeal ([17], para. 125). The High Court’s grounds for dismissing Unison’s PSED challenge included, it seems, that (1) whilst the duty requires the public authority to collect and consider all relevant information, “it is for the public authority to decide what is relevant..., subject only to challenge on conventional public law grounds” ([16], para. 59), *i.e.*, on the grounds that the decision is outwith the range of reasonable decisions; and (2) in any event, the Lord Chancellor did collect and adequately consider an impressive amount of information ([16], para. 60). However, as Fredman argues ([51], p. 357), Moses LJ, in *Unison 1*, adopted “a very light touch standard of review of the duty to have due regard under the PSED”; and, as Fredman seems to imply, Moses LJ did not take adequate account of the extent to which requirements under the PSED go beyond what would be required in public law without the PSED ([51], p. 358). Amongst specific requirements under the PSED, the judgment in *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) (para. 92) seems of particular relevance, stating that the due regard “duty must be exercised...with rigour and with an open mind”. Moses LJ does ([16], para. 58) cite the reference to “rigour” in *Brown* but not the reference to “an open mind”; and it is the absence of an open mind, and a consequent lack of rigour, which might be argued to have entailed a breach of the PSED. Both the consultations and the equality impact assessments (EIAs) appear to have been directed at supporting an already reached policy decision to introduce fees. The second EIA, for instance, seems to dismiss the consultation evidence wherever it goes against this policy decision (e.g., [44], pp. 23–24).

The pre-fees introduction EIAs, despite their apparent inadequacies, are now effectively clear of possible domestic legal trouble. The PSED, however, is a continuing duty. That the author’s research reported here (at Section 3.4), and other research (e.g., [15], p. 6), indicate that the now implemented fees regime could be having disproportionate adverse impacts on “equality groups” seems to provide a compelling reason as to why the government needs (if it is to remain compliant with the PSED) to conduct a fresh impact assessment (albeit not necessarily a formal EIA). However, despite evidence [52] that PSED judicial reviews can hinder unwelcome policies, it is not clear that a great deal would be gained in this case. Even if the High Court were to instruct the Ministry of Justice to conduct a new assessment, and this assessment was to prove damning, there would seem to be no consequent requirement under the PSED to abandon or even adjust the fees scheme. As Dyson LJ said in comments about the Race Equality Duty which also apply to the PSED, it “is not a duty to achieve a result...” (*R (Baker and others) v Secretary of State for Communities and Local Government* [2008] EWCA Civ 141, para. 31).

4.2. The European Union Principle of Effectiveness

In Unison’s second case (*Unison 2*) [9], there were two principal challenges to fees carried over from *Unison 1*. The first was that the fees scheme breaches the “principle of effectiveness”. As Elias LJ explains ([9], para. 23)—“That principle has been defined by the CJEU (Court of Justice of the European Union) in the following terms: ‘The procedural requirements for domestic actions must

not make it virtually impossible or excessively difficult to exercise rights conferred by [EU] law’.” This principle is of relevance to fees in that their payment is a procedural requirement which has the potential to prevent individuals from enforcing employment rights conferred under EU directives. Whilst Elias LJ could “see the force of” Unison’s “submission” on effectiveness ([9], para. 60), he rejected it, arguing that “the court has no evidence at all that any individual has even asserted that he or she has been unable to bring a claim because of costs” ([9], para. 60). The Court of Appeal agreed that additional evidence was needed, but was more amenable than the High Court to the idea that the individuals, whose circumstances constituted this evidence, could be “notional” ([17], para. 69) *i.e.*, hypothetical case studies could be relied upon. The principle of effectiveness ground would, therefore, appear to remain open, with Unison needing examples of individuals for whom fees made it “virtually impossible or excessively difficult” to take their case to tribunal. There again, the High Court had raised the possibility ([9], para. 63), which the Court of Appeal ran with ([17], para. 72), that the Lord Chancellor’s existing discretion to waive fees in “exceptional circumstances” meant that such additional evidence might not be sufficient to show a breach of the effectiveness principle. In essence, the suggestion appears to be that this discretion could be used to accommodate the rights of those whose access to justice is rendered illusory by the fees scheme as currently administered, so long as the number of individuals involved is “very small” ([9], para. 63). Whilst the focus in this section is on the lawfulness of the tribunal fees scheme, other policies which restricted access to justice (such as changes to legal aid) also need to be born in mind, in the sense that (combined with fees) these other policies might have reduced access to such a degree as to render fees unlawful. The following comment from Elias LJ in *Unison 2* ([9], para. 51) suggests some authority for this approach—“As the CJEU observed in the *Duarte Heros (sic)* case (*Soledad Duarte Hueros v Autociba SA* [2014] 1 CMLR 53, para. 34), the effect of any restrictions must be considered in the context of the procedures as a whole...”.

The author’s Disabled Workers Study produced findings of potential relevance to the effectiveness claim. The study—consistent with the literature (e.g., [39], p. 5)—indicated that fees could be having a substantial deterrent effect on tribunal claims (as discussed at Section 3.4). Further, it appeared that, in some cases, fees might have made it “virtually impossible or excessively difficult” to take a claim to tribunal (suggesting the possibility that the principle of effectiveness had been breached). For instance, five of the study respondents, whose survey responses had indicated that fees had a strong deterrent effect, agreed to take part in telephone interviews, and four of these credibly maintained during the interviews that they simply could not afford the fee. In general, survey responses cited the fee as a barrier which deterred a claim when combined with other barriers. Of particular note, there was indicated to have been concern that paying a fee would (in the absence of legal aid) have necessitated forgoing legal representation and that without representation it would have been difficult or impossible to successfully pursue a case. In addition, it did appear, also consistent with the literature [38], that legal representation could make a substantial difference to outcomes. The author’s Disabled Worker Study findings might be thought to lend support to the argument that, in determining the lawfulness of fees, the courts should give more weight, than the High Court did [9], to the deterrent effect arising from the interaction between tribunal fees and the cost of legal representation, as well as from the interaction between these factors and other impediments to action indicated in this study. These other impediments included, for example, the impact of health problems on the ability of some disabled workers to take a case without legal assistance. However, as referred to above, the Lord Chancellor’s discretion to waive the fee could prove a stumbling block to any attempt to show that the effectiveness principle has been breached. The Disabled Workers Study casts some possible light on this issue. While the sample was not representative, the significant numbers who, it appears, might have been prevented from making a disability claim (as a result of the fee) suggests the possibility that the total numbers across Britain prevented from making any kind of employment tribunal claim could well be greater than the “very small” numbers that the High Court ([9], para. 63) appears to imply could be accommodated through the Lord Chancellor’s existing discretion to waive the fee in “exceptional circumstances”. It is also possible that there are individuals among the study respondents who would

be willing to provide evidence to the Court of having been prevented by fees from pursuing legitimate employment claims. However, this would present potential ethical difficulties; and, instead, a separate study (with this legal purpose flagged up from the start) might need to be conducted. In addition, as Busby writes ([53], p. 257), referring to individuals who were refused a fees remission,—“to require such individuals to participate in litigation which is not directly concerned with resolving their personal dispute is a lot to ask.”

4.3. Indirect Discrimination

The second principal challenge to fees carried over from *Unison 1* to *Unison 2* was that the fees scheme constitutes indirect discrimination under EU law and under the UK Equality Act (EqA) 2010. Under EqA section 19 (indirect discrimination), which Elias LJ focussed on in *Unison 2* ([9], para. 67), a provision, criterion or practice (PCP) is discriminatory where (to take the case of disability) it is applied or would be applied to non-disabled persons; it puts or would put disabled persons at a particular disadvantage compared to non-disabled persons; it puts or would put the disabled person in question at that disadvantage; and the person who applies or would apply the PCP cannot show it to be a proportionate means of achieving a legitimate aim. Elias LJ ([9], para. 65) states that Unison’s case “focussed almost exclusively on discrimination against women”, and that “The court does not have the material to determine whether there has been any other form of discrimination”, such as against disabled people. The first two arguments that Unison put forward, as to why there was indirect discrimination, were rejected on the grounds that the comparisons (which Unison argued established disproportionate impact) were not legitimate (e.g., [9], para. 71) and the third argument was rejected on the grounds that (with the most recent statistics) the comparison did not support its claim that women were discriminated against ([9], paras. 77–78), as well as on the grounds of justification ([9], para. 90). The Court of Appeal upheld the High Court’s rejection of Unison’s indirect discrimination challenge [17]. However, in addition to it not being clear that the High Court had good reasons in law to reject the first two arguments, the third argument, which failed on the statistical facts in relation to women as a group, might (if a court were to consider the matter) be thought to have some hope of succeeding on the statistical facts in relation to disabled people as a group. For this reason, Elias LJ might not have been correct in asserting—“if the sex discrimination claim does not succeed, it is unlikely that any claim based on any other protected characteristic would do so” ([9], para. 65). The third argument alleged that the fees scheme “as applied to all class B cases discriminates against women” ([9], para. 76), with class B fees being higher than class A fees. While the latest statistics may or not support this argument ([9], paras. 77–81), they appear fairly likely to support the argument that the fees scheme as applied to all class B claims discriminates against disabled persons. In essence, this is because it is likely that the ratio of disabled to non-disabled persons caught by the class B fees (which apply to discrimination and, for instance, unfair dismissal claims) is greater than the ratio of disabled to non-disabled persons in the labour force as a whole. It is notable, for instance, that 52% of all discrimination claimants (not just those making disability claims) in 2013 had a long-term disability ([54], p. 84 cited in [11], p. 79). However, even if the courts were to accept that the higher class B fees put disabled persons at a particular disadvantage, the tenor of the High Court and Court of Appeal judgments (in *Unison 2* and 3), including comments on how “legitimate” policies justified disproportionate adverse impacts on women (e.g., [9], para. 69), suggest that the courts may well be minded to regard any discriminatory impact on disabled persons as justified in law. Indeed, as the Court of Appeal notes ([17], para. 88), the High Court judgment includes a section “which appears to be intended to address the question of justification rather more generally in respect of any disparate impact which the Fees Order might have been shown to have on members of protected classes”; and this section in the High Court judgement ([9], p. 90) concludes that “the scheme taken overall...is justified and proportionate to any discriminatory effect”. In short, the indirect disability discrimination claim could well be a legal *cul de sac*. There again, additional evidence (including that from the author’s Disabled Workers Study discussed next) may contribute to showing that the discriminatory

effect of the fees scheme on disabled workers is greater than the “very small” “extent of any adverse impact” ([9], p. 81) that the High Court refers to in relation to women as a group, thus potentially making the impact harder to justify. Additional evidence may also contribute to showing that some of the aims (that fees are taken to be a proportionate means of achieving) might not be as legitimate as the High Court assumed.

The findings of the author’s Disabled Workers Study provide some support for the argument that fees have had disproportionate adverse impacts on disabled workers (see Section 3.4). This includes in relation to barriers to legal redress for discrimination and in relation to the consequences of weakened enforcement. In relation to barriers to legal redress, there were, for example, indications that the fees remission scheme itself entailed indirect disability discrimination. First, disposable capital—which individuals are in effect expected to expend on fees to below a specified threshold before being granted a remission—can be of greater importance to disabled individuals. For example, an individual might need to finance medical treatment not available from the UK National Health Service. Second, it can be harder for work-limited disabled individuals to replenish disposable capital expended on fees during a case. In relation to the consequences of weakened enforcement, the study findings were consistent with Rose *et al.*’s ([12], pp. 6–7) more general finding that fees tilted the power balance in the workplace further against the employee. However, the Disabled Workers Study reported here more specifically indicated that fees could have contributed to disabled workers being subject to increased workplace ill-treatment, including possible discrimination (as discussed at Section 3.4). As regards the suggestion above that the courts may be minded to regard fees as a proportionate means of achieving a legitimate aim, the Disabled Workers Study, along with earlier studies (e.g., [11], p. 79), arguably chip away at the legitimacy of these stated aims. For example, the information from study respondents did not seem to suggest that fees were helping to achieve the government’s indicated aim of principally reducing unmeritorious claims and claims which could be settled informally ([45], p. 50). Indeed, it was telling that all the individuals who indicated that they had won a case in the past (suggesting, of course, that their case had merit), and who discussed fees, stated that they would not have taken the case if fees had been in place at the time. However, for the reasons discussed in the previous paragraph, it remains questionable as to whether a future indirect disability discrimination claim would have a realistic prospect of success.

4.4. *United Nations Convention on the Rights of Persons with Disabilities (UN CRPD)*

The UNCRPD was ratified by the UK on 8 June 2009 ([55], p. 428). A central motivation behind the Convention was to help ensure that disabled individuals can enjoy on an equal basis, with non-disabled individuals, rights provided for in international human rights treaties ([56], pp. 752–53); and the Convention aims to achieve this in part through requirements to make reasonable accommodations ([57], p. 5). CRPD Article 13 (Access to Justice) (1), for instance, requires—“procedural...accommodations, in order to facilitate” disabled persons’ “effective role...in all legal proceedings...”; with it being notable that the UK Employment Appeal Tribunal recently drew on this Article in considering the reasonable adjustments that courts are required to make for disabled litigants (*Rackman v NHS Professionals Ltd* [2015] UKEAT/0110/15/LA, para. 59). Reiss ([58], pp. 113–14) argues that to “properly comply”, with the CRPD, “governments may have to review nearly the entire corpus of existing law for lacunae, ignoring the needs of the disabled...”. The CRPD also imposes monitoring obligations on States Parties [59]. These include the requirement to submit periodic reports to the Committee on the Rights of Persons with Disabilities (the Committee) on the steps that the state has taken to implement the Convention, and to respond in these reports to concerns raised by the Committee in its concluding observations to previous reports. In addition, as Bartlett ([56], pp. 754–55) points out—“for those countries such as the UK that have signed the optional protocol to the CRPD, individuals or groups of individuals may complain to the Committee regarding alleged breaches of the CRPD, and the Committee adjudicates the matter in quasi-judicial fashion”; with the Committee also having “authority to undertake inquiries into systematic violations of the CRPD” ([55], p. 429).

A number of the barriers to justice discussed above (Sections 3.1–5) appear at possible variance with the CRPD. These include what was referred to above (at Section 3.5) as the “quite restrictive definition of disabled in the Equality Act”. In 2007, as Lane and Munkholm report ([60], p. 6), the European Union (EU) ratified the CRPD, “making it an integral part of the EU legal order, thus placing an obligation on the ECJ (European Court of Justice) to interpret the (EU Equal Treatment Framework) Directive in a manner consistent with the Convention” (wording in brackets added). Lane and Munkholm go on to note that, in the joined cases of *Jette Ring* and *Skoube Werge*, the Court of Justice of the European Union (CJEU) concept of disability was, in the light of the CRPD, brought “much more into line with the social model” ([60], p. 6). In essence, the social model focuses on external factors—such as inaccessible work environments—as a principal cause of a disabled person’s disadvantage ([61], pp. 29–36). With this CJEU change in how disability is understood, and reasonable adjustments required under the Framework Directive, it could be argued that the right to reasonable adjustments should not be restricted to those who meet the definition of disabled in the UK Equality Act 2010 (which focuses on the nature of the individual’s impairment and so is based on a predominantly medical model of disability) but instead should be extended (at least in relation to matters covered in the Framework Directive) to those who would meet the broader definition of disabled in the CRPD.

Where the arguments against fees have failed so far under domestic and EU legislation, similar arguments could potentially succeed under the CRPD. For example, as noted earlier (at Section 4.1), the Equality Act 2010 Public Sector Equality Duty (PSED) requires public authorities to have “due regard” to the “need to—(a) eliminate” unlawful discrimination, and *Moses LJ* appeared in *Unison 1* [16] to consider that the government’s impact assessments met this requirement, regardless of whether these assessments had led to any action to eliminate discrimination. In contrast, CRPD Article 4 (1) (e) requires States Parties “to take all appropriate measures to eliminate discrimination on the basis of disability...”. If fees for disability discrimination claims are emboldening a significant number of employers to discriminate against disabled workers—as the author’s Disabled Workers Study suggests could be happening (Section 3.4)—then abolishing fees (outright or for disability discrimination claims) might be taken to be an “appropriate” measure “to eliminate” this additional discrimination.

Some of the other CRPD Articles which, in combination with others, tribunal fees might be argued to have the potential to be at variance with include Articles 5 and 27. Under Article 5 (Equality and non-discrimination) (2), “States Parties shall...guarantee to persons with disabilities equal and effective legal protection against discrimination...”. The UK might be argued to be violating this article if, as the author’s study suggests could be the case (Section 3.4), the fees scheme has resulted in many disabled workers no longer being able to afford to enforce their rights at tribunal and so, for them, there is no “effective legal protection...”. Under Article 27 (Work and employment) (1), “...States Parties shall safeguard and promote the realization of the right to work,...by taking appropriate steps, including through legislation, to, inter alia:... (b) Protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work..., including protection from harassment, and the redress of grievances”. Tribunal fees could go against all of these specified obligations. This is most clearly indicated in relation to the Equality Act 2010 Reasonable Adjustments Duty, as this duty is in essence about safeguarding and promoting the realisation of the right to work (e.g., [31], p. 1511). However, if workers cannot afford, as a result of tribunal fees, to enforce their rights under the Reasonable Adjustments Duty, then the duty and its impact could be greatly diminished.

The impact of fees, in relation to these CRPD Articles, might provide the basis for an inquiry, by the UN Committee on the Rights of Persons with Disabilities, into whether the fees scheme entails systematic violations of the CRPD. There could also be grounds for individuals to bring complaints of violations of their rights under the Convention. Indeed, it is not impossible that such violations occurred in the case of some of the study respondents (though it was not possible to hear employer accounts of alleged incidents). One study respondent, for example, indicated that his workplace disability discrimination grievance was not taken seriously; and that the tribunal fee prevented him from going on to take legal action. The problem, he explained, was that his disposable capital was

just above the eligibility limit for a fee remission but he could not use this capital to pay the fee, since it was needed to fund care as his progressive condition deteriorated. It might be argued that, in these circumstances, he was denied his right under CRPD Article 5 (2) to “effective legal protection against discrimination” and under CRPD Article 27 (1) (b) to “redress of grievances”. While the Committee on the Rights of Persons with Disabilities will examine the impact of a national law on a particular individual (e.g., CRPD/C/12/D/5/2011, para. 10.2) [62], the Committee’s recommendations in these cases can have wider effect; and, in particular, in so far as the State Party can be placed under an obligation to take measures to prevent similar violations in future (e.g., CRPD/C/14/D/21/2014, para. 9. (b)) [63]. In addition, the CRPD periodic reporting requirements (referred to above) could provide opportunities to raise concerns about fees and for the UN Committee to recommend changes. Indeed, the Equality and Human Rights Commission writes that, as part of the UK Independent Mechanism on the CRPD, it contributed to a report which “called on the UN CRPD Committee to ask the UK government to provide evidence of the effect on disabled people of the introduction of fees for ET cases...” ([46], para. 19). There are also possibilities arising from the CRPD’s role in strengthening, from a disability rights perspective, international human rights agreements. For example, in so far as the CRPD is used as “a reference point for interpreting...ECHR (European Convention on Human Rights) law relating to discrimination on the grounds of disability...” ([64], p. 38), the CRPD could add weight to what might already be a good case under the ECHR against fees in the case of particular disabled individuals. Of particular note, in a number of non-UK cases (e.g., *Podbielski and PPU Popure v Poland* [2005] ECHR 543, para. 64), the application of court fees has been found to have compromised a claimant’s rights under Article 6 (covering the right to a fair trial); and, assuming that the UK fees regime has a particular impact on disabled people (which the study reported here suggests could be the case), Article 6 read with Article 14 (which guarantees non-discrimination in the enjoyment of the other Convention rights) might be engaged.

There are, however, major limitations on the potential usefulness of the CRPD. These include the slow pace at which UN procedures progress. For example, referring to the periodic reporting requirements, Lawson and Priestly ([59], p. 742) “estimate the likely time from submission of state parties’ reports to their scrutiny by the UN Committee on the Rights of Persons with Disabilities may now be approaching seven years”. In addition, domestic political priorities could render pyrrhic any victories in international law. In recent years, UK governments do not appear to have taken allegations from international bodies very seriously. For example, the 22 page letter to the UK government in 2014 from the Office of the United Nations High Commissioner for Human Rights [65] sets out, in considerable detail and with 116 citations, why austerity policies could amount to retrogressive measures prohibited under the International Covenant on Economic, Social and Cultural Rights. The heart of the UK government’s 2 page response [66], however, is—“We were disappointed that your letter cites generalised rather than specific allegations with few sources cited”. It seems possible that the government might give similarly short shrift to any recommendations regarding the CRPD and tribunal fees. Further, bearing in mind that the government is committed to abolishing the Human Rights Act 1998 ([67], p. 58), and the Prime Minister would not rule out quitting the European Convention on Human Rights [68], it would not be surprising if a series of adverse decisions from the Committee on the Rights of Persons with Disabilities prompted the government to talk about opting out of the inquiry procedure under the CRPD optional protocol. In such circumstance, in which national governments can ignore judgments or rescind international obligations, the impact of decisions under international law could depend to a considerable degree upon the state of domestic public opinion. It also seems that influencing public opinion in contradiction to dominant media and government narratives presents a major challenge. For example, government plans to abolish the Human Rights Act (HRA) might be expected to have provoked outcry from the public whose freedoms the Act is designed to protect; and yet the UK government has succeeded in portraying the HRA as akin to a terrorist’s charter [69]. A similarly hostile reception could well await any adverse CRPD decision on tribunal fees. Indeed, the media reaction to the ongoing UN CRPD inquiry might give a

taste of what to expect, with the Daily Mail headline [70] announcing—“Now UN sparks fury after launching human rights investigation into Britain’s disability benefit reforms”.

5. Conclusions and Discussion

Currie and Tegue ([71], p. 2) refer to a “huge expansion in individual employment rights that has occurred almost simultaneously across Anglo-American (sic) countries”, and which “can be traced back to the 1970s” ([71], p. 7). However, the authors go on to argue ([71], p. 11) that “active efforts are occurring to design institutional arrangements to dull the impact of” this expansion. These efforts might be argued to have accelerated under the UK coalition government (2010–2015) and to have focussed on weakening enforcement, including through curtailing the enforcement powers and resources of the Equality and Human Rights Commission 2011 ([72], p. 319); cuts to legal aid and to legal advice services ([40], para. 27), and (the focus of this paper) the introduction in 2013 of fees to have a case heard at a British employment tribunal. UK governments have also begun reversing the expansion of the individual employment rights themselves, with, for instance, a doubling in the qualification period for protection from unfair dismissal ([49], p. 206). A number of Currie and Tegue’s other so-called “Anglo-American” countries seem set to introduce or increase fees and/or make them non-refundable (see, for example, recommendation 17.1 of the Productivity Commission to the Australian government ([73], p. 56)). The picture with regards to fees, however, is different in jurisdictions neighbouring Britain. In the case of the devolved Northern Ireland administration, the Minister for Employment and Learning “ruled out the introduction of fees...” ([74], p. 2); and, in the Republic of Ireland, a fee is only payable where a party who failed to appear at the Workplace Relations Commission without good cause wishes to appeal the decision to the Labour Court [75]. In addition, within Britain, the ruling Scottish National Party has indicated that it would abolish tribunal fees if and when further devolution gives the Scottish government the power to do so ([76], p. 3).

With a majority UK government committed to fees, and the possibility of it continuing in power after the 2020 General Election, it seems that fees might be there to stay in England and Wales. That is unless fees are found unlawful. Fees have been successfully challenged in a number of jurisdictions. Of particular note, the Canadian Supreme Court (*Trial Lawyers Association of British Columbia v British Columbia (Attorney-General)* [2014] SCC 59) ([77], para. 46) found—“A fee that is so high that it requires litigants who are not impoverished to sacrifice reasonable expenses in order to bring a claim may, absent adequate exemptions, be unconstitutional because it subjects litigants to undue hardship, thereby effectively preventing access to the courts”. In addition, criticisms on constitutional grounds (e.g., [78], paras. 40–72) of the Productivity Commission’s recommendations on fees (referred to above) suggest the possibility of legal action if the Australian government implements these recommendations. Challenges to the lawfulness of the fees scheme have so far, however, failed in the UK High Court (*Unison v The Lord Chancellor* [2014] EWHC 218 (Admin) (“Unison 1”) [16] and *Unison v The Lord Chancellor* [2014] EWHC 4198 (Admin) (“Unison 2”) [9], and in the Court of Appeal (*Unison v Lord Chancellor* [2015] EWCA Civ 935 (“Unison 3”) [17]. This seems to have been in part on account of the courts requiring that fees cause more hardship (to be taken to be unlawful) than in the test that the Canadian Supreme Court indicated. There again, the door has in effect been left open for parties to return to the UK courts with additional evidence and argument. First, in relation to whether the EU “principle of effectiveness” had been breached (Section 4.2), the High Court indicated that more evidence was needed to show that fees make it virtually impossible or excessively difficult for individuals to take a case to an employment tribunal (e.g., [9], para. 60), with the Court of Appeal in general concurring ([17], para. 68). Second, as regards the indirect discrimination claim, the claimants—and, in their stead, the courts—focussed on the alleged disproportionate impact of the fees scheme on women as a group, with the court ruling that the latest tribunal statistics did not indicate such an impact, as well concluding that “the scheme taken overall...is justified” ([9], para. 90). There might, therefore, be thought to be some value in the High Court being presented with evidence of indirect *disability* discrimination (though, as returned to below, an indirect disability discrimination

claim may now have little prospect of success). Third, while the High Court dismissed Unison's argument that fees had been introduced in breach of the Public Sector Equality Duty (PSED) [16], the PSED is an ongoing duty, which might be argued to require the Ministry of Justice to re-assess the equality impact of the fees scheme now that it has been in place for several years (Section 4.1).

As discussed in this paper (Sections 4.1–4), the author's Disabled Workers Study produced findings of potential relevance to the effectiveness and indirect discrimination claims and to whether the PSED has been breached. A total of 265 disabled workers took part in the study; with the study including two qualitative surveys, emailed follow-up questions, and 11 in-depth semi-structured telephone interviews. As regards the principle of effectiveness (Section 4.2), the study suggested, for example, that fees, combined with the limited availability of legal aid, could have made it "virtually impossible or excessively difficult" for dozens of the study respondents to take their claims to tribunal. As regards indirect discrimination (Section 4.3), the study provided support for the argument that fees have had a disproportionate adverse impact on disabled workers. This includes in relation to barriers to legal redress for discrimination and in relation to the consequences of weakened enforcement. Of particular note, 19 of the 73 study respondents, who discussed tribunal fees, seemed to suggest that employers realised that employees could not afford tribunal fees, and that this realisation had or would embolden some employers to commit what might have been found to constitute unlawful acts if taken to tribunal. Study evidence of disproportionate adverse impacts on disabled individuals also adds weight to the argument that the Ministry of Justice should, so as to remain compliant with the PSED, reassess the equality impact of the fees scheme. There are, however, major obstacles to bringing about change through these domestic law approaches. The principle of effectiveness challenge, presented with the kind of evidence that the courts have called for, appears to have the greatest prospect of meaningful success. However, from the Court of Appeal judgement, it seems that the most that might be hoped for is that "the level of fees and/or the remission criteria will need to be revisited" ([17], para. 75), and presumably adjusted. A possible problem with an indirect disability discrimination claim is that, even if the courts were to accept that the fees scheme put disabled persons at a particular disadvantage, the tenor of the High Court judgement (in *Unison 2* and *3*) suggests that the courts may well decide that the particular disadvantage (that disabled people are put at) is justified in law. A PSED judicial review application might succeed. However, a finding against the Ministry of Justice would, at best, require a new assessment, subsequent to which there would appear to be no requirement under the PSED to make changes to the fees scheme.

In these circumstances, there could be value in additionally seeking remedy in international law and with European or international bodies. There are indications from the author's study (Section 4.4) that the fees scheme could be at variance with a number of Articles of the UN Convention on the Rights of Persons with Disabilities (CRPD), and that this could provide the grounds for an inquiry by the UN Committee on the Rights of Persons with Disabilities into possible systematic violations of the CRPD, as well as providing grounds for an individual to bring a complaint that their individual rights under the CRPD have been violated. Indeed, it seems possible that violations had occurred in the case of some of the study respondents. There are, of course, major obstacles to using international law to successfully oppose fees. Problems include the slow speed at which UN quasi-judicial wheels turn. However, the more substantial problem is that the UK government appears inclined to reject or ignore adverse decisions from the UN; with the foreign secretary, for example, describing as "ridiculous" the recent UN panel finding that Julian Assange [79] had been subject to "arbitrary detention". In addition, the media appears in general prepared to present government dismissal of UN decisions as defending British sovereignty (e.g., [70]) rather than as flouting international law that the UK has signed up to. Indeed, bearing in mind that the UK government has talked about leaving the ECHR [68], it seems unlikely to baulk at the prospect of opting out of the CRPD optional protocol inquiry mechanism. In these circumstances, an important challenge will be how to use the CRPD to help see off fees without the CRPD itself being seen off.

Indeed, none of the (domestic and international) legal options discussed above may be enough on their own or together to see off fees or the current fees scheme in England and Wales, even if the applicants are successful in court. In contrast, fees could well be abolished in Scotland without the need for any further legal action ([76], p. 3). The future of fees will ultimately be a political decision. With the UK government ideologically committed to charging fees ([45], pp. 49–50), any decision to end them in England and Wales is likely to depend upon it being made politically expedient to do so. Efforts to make it politically expedient might in turn benefit from combining legal actions and wider campaigning so as to generate coverage for the most egregious cases, provide a platform from which to address the more general arguments, and help persuade public opinion that tribunal fees are an unacceptable denial of access to employment justice. That the Lord Chief Justice has recently stated that “our justice system has become unaffordable to most” [80] can only bolster the effectiveness of these efforts. In addition, at the time of writing, Unison is waiting to find out if it has been granted permission to appeal its tribunal fees claim to the Supreme Court [81].

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Abbreviations

The following abbreviations are used in this manuscript:

DDA	Disability Discrimination Act 1995
EqA	Equality Act 2010
PSED	Public Sector Equality Duty
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities

Appendix 1

The following table lists every third website, facebook page and tweet which (during an internet search) was found to have publicised one or both of the qualitative surveys. Non-organisational tweets were not included for ethical reasons. The table provides links to the organisational home page or the page which publicises the survey.

Table A1. Sample of places publicising the study.

Name of Organisation	Link to Website, Facebook Page, or Tweet
Bakers Food and Allied Workers Union	http://www.bfawu.org/dpac_launches_survey_into_reasonable_adjustments_for_disabled_workers
Black Triangle Campaign	http://blacktrianglecampaign.org
Breakthrough UK	http://www.breakthrough-uk.co.uk
British Association for Supported Employment	http://base-uk.org/
Disabled Living Foundation	https://twitter.com/DLFUK
Disabled People Against Cuts	http://dpac.uk.net/
Ehlers-Danlos Support UK	https://www.facebook.com/EhlersDanlosUK/posts/10155456255180414
Legal Action Group	https://twitter.com/LegalActionGrp?cn=cmV0d2VldF9tZW50aW9uZW9fdXNlcg%3D%3D&refsrc=em
Sense	https://twitter.com/sensetweets/status/644083632370487296
SEN RT	https://twitter.com/rt_sen
Trade Union Congress	https://www.tuc.org.uk/equality-issues/disability-issues/campaigning-disability-equality/impact-uk-coalition-government

Appendix 2

The following is a short extract from the second qualitative survey. The complete surveys will be emailed on request. There were a total of 60 questions asked across the two surveys.

Why Were Reasonable Adjustments Made for You?

1. What reasonable adjustments have been made for you by an employer (you worked for or applied for a job with) and when were these adjustments made?
2. What factors do you think contributed to the adjustment(s) being made? For example,
 - (a) Who suggested an adjustment? Was it you or someone else?
 - (b) Who supported the request for an adjustment; who, if any one, opposed the request; and what form did any support or opposition take?
 - (c) Was an adjustment considered inexpensive and/or was it considered essential to you doing your job?
 - (d) Did you have to fight for an adjustment; and, if so, what did this involve?
 - (e) Did your organisation have a central fund to pay for reasonable adjustments?
3. Did the fact that there is a legal duty to make reasonable adjustments seem to contribute to you getting an adjustment, and, if so, how?"

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