

PEOPLE WITH INTELLECTUAL DISABILITIES AND LABOUR MARKET INCLUSION:
WHAT ROLE FOR EU LABOUR LAW?

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ABSTRACT

People with intellectual disabilities occupy a peripheral position in the labour market. They have low rates of participation in employment and this often takes the form of sheltered employment in settings segregated from persons without disabilities. Although their working lives have received limited attention in legal scholarship, this article argues that law can play a positive role in fostering greater inclusion. Taking into account the UN Convention on the Rights of Persons with Disabilities, this article analyses EU legislation and case-law in order to identify how these apply to those working in sheltered employment and how they may assist in tackling barriers to participating in the open labour market. While EU labour law already contains measures that have the potential to improve the position of people with intellectual disabilities, the article identifies scope for enhancing the effectiveness of these instruments.

KEYWORDS

Intellectual disability, sheltered employment, discrimination, reasonable accommodation, European Union, UN Convention on the Rights of Persons with Disabilities.

1. INTRODUCTION

The working lives of people with intellectual disabilities (ID) have often been neglected, both by law and by society. Historically, people with ID were frequently treated as incapable of participating in the ‘open’ labour market; that is, forms of employment that are normally competitive to obtain and that are performed both by those with and those without disabilities. Instead, people with ID were often placed in residential institutions and, insofar as opportunities for work were available, these were performed in segregated settings, typically referred to as ‘sheltered employment’.¹ The social research discussed in this article shows that the employment participation rate of people with ID is much lower than that of other persons, including persons with other types of disability. Yet research confirms that there can be significant social and economic benefits for people with ID when they are given the chance to perform work in the open labour market.² This insight has been reflected in a gradual shift in public policy since the 1980s. The idea of ‘supported employment’ encompasses initiatives to assist people with ID to make the transition into the open labour

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¹ See further, D. Braddock and S. Parish, ‘Social Policy Towards Intellectual Disabilities in the Nineteenth and Twentieth Centuries’ in S. Herr, L. Gostin and H. Hongju Koh (eds), *The Human Rights of Persons with Intellectual Disabilities: Different But Equal* (Oxford University Press, 2003) 83.

² eg R. Lysaght, H. Ouellette-Kuntz, and C. Lin, ‘Untapped Potential: Perspectives on the Employment of People with Intellectual Disability’, (2012) 41 *Work* 409; A. Cohen Hall and J. Kramer, ‘Social Capital Through Workplace Connections: Opportunities for Workers with Intellectual Disabilities’, (2009) 8 *Journal of Social Work in Disability & Rehabilitation* 146.

market. Examples of supported employment projects are now common in Europe.³ This trajectory responded to disability rights advocacy and its call for deinstitutionalisation coupled with full participation in the life of the community.⁴ It also chimed with broader trends in social policy that have sought to increase employment participation rates and to reduce economic dependence on state welfare systems.⁵

While this is a field where there has been a significant evolution in public policy, there has been relatively little attention paid to the role that law exercises in regulating the working lives of people with ID. This article seeks to address that gap by promoting greater reflection on how law can be used to foster labour market inclusion, with a spotlight on the role for EU labour law. At the outset, it must be acknowledged that the concept of ‘inclusion’ in the labour market is open to a range of interpretations. Lysaght et al found that research frequently equated inclusion to higher rates of employment in the open labour market.⁶ While this is an important indicator, they observe that inclusion also has qualitative dimensions, such as the value placed on the person’s contribution in the workplace, the relationships that they enjoy with co-workers and managers, or the degree to which the individual is satisfied with their work.⁷ To put it more simply, a balanced perspective on fostering inclusion needs to consider both the number of people finding a job and their treatment within the workplace.

Section 1 of the article begins by explaining some key terminology relating to ID and Section 2 reviews what social research tells us about the working lives of people with ID. Section 3 then turns to consider the role that EU labour law plays in relation to the employment of people with ID. This engages with concrete examples of how EU legislation and case-law impact upon people with ID in their working lives, both in respect of those working in sheltered employment and with regard to facilitating participation in the open labour market. Section 4 concludes by reflecting upon the role of EU labour law and the potential to enhance its effectiveness in this field.

2. INTELLECTUAL DISABILITY: TERMINOLOGY AND DEFINITIONS

Over time, terminology has been contested and changes in vocabulary have reflected wider shifts in socio-political outlook. ‘Mental retardation’ was a term commonly used in the second half of the twentieth century, but this term was gradually abandoned by advocacy groups and replaced with ‘intellectual disability’.⁸ ‘Mental disability’ is another term that remains in common usage in Europe. This is often an umbrella category that encompasses both persons with psychosocial impairments (eg depression) and those with intellectual impairments (eg Down Syndrome); this article concerns only the latter.

There is no international consensus on the definition of intellectual impairment (or disability), but a common point of reference is that adopted by the American Association on Intellectual and Developmental Disabilities (AAIDD):

³ S. Beyer, F. de Borja Jordán de Urrías, and M. Verdugo, ‘A Comparative Study of the Situation of Supported Employment in Europe’, (2010) 7 *Journal of Policy and Practice in Intellectual Disabilities* 130; European Commission ‘Supported Employment for People with Disabilities in the EU and EFTA-EEA: Good Practices and Recommendations in Support of a Flexicurity Approach’ (Publications Office of the European Union, 2012).

⁴ R. Lysaght, V. Cobigo and K. Hamilton, ‘Inclusion as a Focus of Employment-Related Research in Intellectual Disability from 2000 to 2010: a Scoping Review’, (2012) 34 *Disability & Rehabilitation* 1339 at 1340.

⁵ Lysaght et al (2012) n2 at 410 and 412.

⁶ Lysaght et al (2012) n4 at 1347.

⁷ Ibid.

⁸ P. Mittler, ‘Meeting the Needs of People With an Intellectual Disability: International Perspectives’ in S. Herr, L. Gostin, and H. Hongju Koh (eds), *The Human Rights of Persons with Intellectual Disabilities: Different But Equal* (Oxford University Press, 2003) 25 at 28.

Intellectual disability is a disability characterized by significant limitations in both **intellectual functioning** and in **adaptive behavior**, which covers many everyday social and practical skills. This disability originates **before the age of 18** (original emphasis).⁹

Intellectual functioning is often assessed by cognition tests, of which intelligence quotient (IQ) tests are the best known. These do not, however, capture the different levels of ‘adaptive ability’ amongst those with an intellectual impairment.¹⁰ Adaptive abilities include ‘the areas of social/interpersonal skills and responsibility, communication, self-care, home living, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety’.¹¹ Intellectual impairment is ‘a heterogeneous disorder’ with ‘large discrepancies’ in skills levels, both between individuals, but also in terms of the individual who may function at a higher level in some domains compared to others.¹² Reliable and comparable international data on ID is difficult to obtain. Harris notes that international studies suggest a prevalence rate of 1% in the general population.¹³

3. PEOPLE WITH INTELLECTUAL DISABILITIES IN THE LABOUR MARKET

3.1 LABOUR MARKET PARTICIPATION

In 2011, the World Report on Disability found that people with disabilities had lower employment rates than those without disabilities, with ‘individuals with mental health difficulties or intellectual impairments ... experiencing the lowest employment rates.’¹⁴ This general observation is borne out by the findings of individual studies. In the UK, data from 2015/16 recorded an employment rate of 19.9% for those with ‘learning difficulties or disabilities’ compared to 47.6% for those with disabilities and 79.2% for those without disabilities.¹⁵ In Ireland, data in the National Intellectual Disability Database from 2014 showed that of those people with ID participating in any kind of day services, 14.8% participated in a sheltered workshop and 9.9% received ‘employment support’, which included working in the open labour market.¹⁶ Other comparative research confirms a picture of very low employment participation rates for people with ID in Europe.¹⁷

Even when people with ID are active in the labour market, their experience of employment differs from that of other workers. In particular, they are more likely to be in

⁹ AAIDD, ‘Definition of Intellectual Disability’ available at <http://aaidd.org/intellectual-disability/definition#.WdZBnUy-LgE>

¹⁰ J. Harris, *Intellectual Disability – Understanding Its Development, Causes, Classification, Evaluation, and Treatment* (Oxford University Press, 2006) at 65.

¹¹ *Ibid.*

¹² Harris (2006) n10 at 47.

¹³ *Ibid.* 82.

¹⁴ WHO and the World Bank, ‘World Report on Disability’ (WHO, 2011) at 237.

¹⁵ Equality and Human Rights Commission (EHRC) ‘Being Disabled in Britain: a Journey Less Equal’ (EHRC, 2017) at 45-46.

¹⁶ R. McConkey, F. Kelly, S. Craig, and F. Keogh, ‘Changes in the Provision of Day Services in Ireland to Adult Persons With Intellectual Disability’ (2019) 16 *Journal of Policy and Practice in Intellectual Disabilities* 13 at 16.

¹⁷ Fundamental Rights Agency (FRA), ‘Choice and Control: the Right to Independent Living. Experiences of Persons with Intellectual Disabilities and Persons with Mental Health Problems in Nine EU Member States’ (Publications Office of the European Union, 2013) at 27; Inclusion Europe ‘Poverty and Intellectual Disability in Europe’ (Inclusion Europe, 2005) at 20.

part-time work,¹⁸ clustered in low status work,¹⁹ and receiving low wages.²⁰ One US study found that people with Down Syndrome were frequently employed in restaurant/food services, office/clerical work, and cleaning/housekeeping.²¹ Research findings differ on whether there are significant gender differences amongst people with ID in relation to working life. Some have found gaps between women and men,²² with higher participation of men in the open labour market. Yet other studies have not found any significant differences according to gender.²³ Age appears to be a significant factor in rates of participating in the open labour market. Siperstein et al found that ‘for every decade over the age of 21, the odds of an individual with ID being employed in a competitive setting were 1.3 times less likely’.²⁴ As discussed below, this may reflect the historic emphasis on sheltered employment as the appropriate setting for people with ID to engage in work.

3.2 SHELTERED EMPLOYMENT

Any analysis of the labour market situation of people with ID needs to take into account the different settings in which work is performed. Braddock and Parish argue that the large residential institutions that emerged in the mid-1800s were often sustained by unpaid labour performed by their residents.²⁵ The idea of separating people with ID from the open labour market takes a modern form in sheltered employment. In the post-war period, this became the principal setting in which people with ID performed work. As May-Simera observes, the diversity of approaches found internationally means that ‘arriving at a distinct definition of sheltered work is therefore almost impossible.’²⁶ Depending on the national context, people with a range of disabilities work in sheltered employment, but typically the majority are people with ID.²⁷ For example, Ventegodt Liisberg reported that 82% of those in sheltered workshops in Denmark had mental and intellectual disabilities.²⁸ In France, almost 120,000 people work in ‘établissements et services d’aide par le travail’,²⁹ which provide professional and personal support for those with reduced work ability. In Germany, 280,000 people are

¹⁸ L. Kumin and L. Schoenbrodt, ‘Employment in Adults with Down Syndrome in the United States: Results from a National Survey’, (2016) 29 *Journal of Applied Research in Intellectual Disabilities* 330 at 334; Lysaght et al (2012) n2 at 409.

¹⁹ R. Evert Cimera ‘The Percentage of Supported Employees with Significant Disabilities Who Would Earn More in Sheltered Workshops’, (2017) 42 *Research and Practice for Persons with Severe Disabilities* 108 at 118.

²⁰ *Ibid.*, at 118.

²¹ Kumin and Schoenbrodt (2016) n18 at 335.

²² E. Julius, H. Wolfson, and S. Yalon-Chamovitz, ‘Equally Unequal: Gender Discrimination in the Workplace Among Adults with Mental Retardation’, (2003) 20 *Work* 205.

²³ G. Siperstein, M. Heyman, and J. Stokes, ‘Pathways to Employment: a National Survey of Adults with Intellectual Disabilities’, (2014) 41 *Journal of Vocational Rehabilitation* 165 at 171; A. Martorell, P. Gutierrez-Recacha, A. Pereda, and J.L. Ayuso-Mateos, ‘Identification of Personal Factors that Determine Work Outcome for Adults with Intellectual Disability’, (2008) 52 *Journal of Intellectual Disability Research* 1091, 1096.

²⁴ Siperstein et al, *ibid.*, at 171.

²⁵ Braddock and Parish (2003) n1 at 88-89.

²⁶ C. May-Simera, ‘Reconsidering Sheltered Workshops in Light of the United Nations Convention on the Rights of Persons with Disabilities (2006)’, (2018) 7 *Laws* 60.

²⁷ International Labour Office ‘Decent Work for Persons with Disabilities: Promoting Rights in the Global Development Agenda’ (ILO, 2015) at 73.

²⁸ M. Ventegodt Liisberg, *Disability and Employment – a Contemporary Disability Human Rights Approach Applied to Danish, Swedish and EU Law and Policy* (Intersentia, 2011) at 312.

²⁹ Para. 267, Committee on the Rights of Persons with Disabilities (CmRPD) ‘Rapport initial soumis par la France en application de l’article 35 de la Convention, attendu en 2012’ CRPD/C/FRA/1, 16 October 2017.

employed in sheltered workshops;³⁰ it has been estimated that 77% are people with ID.³¹ In Spain, 56,000 work in Special Employment Centres.³²

The key characteristic of sheltered employment is that it is performed mainly by persons with disabilities, so it is premised upon segregation from the open labour market where people without disabilities are employed.³³ It reflects a ‘medical’ model of disability that views impairment as having disabling effects on the capacity of the individual to participate in work.³⁴ Workshops are linked with the idea of rehabilitation, underscoring the premise that individual limitations require segregated facilities.³⁵ Normally, recruitment to sheltered employment is not competitive, but after an assessment of capacity. Visier found that the most common forms of activity were ‘subcontracting of an industrial nature (packaging, assembly or manufacturing), manufacturing *per se*, services, agriculture, and commercial activities.’³⁶ Sheltered employment takes a variety of forms with considerable diversity between countries in the nature of its organisation.³⁷ At one end of this spectrum, there are programmes where any work undertaken is purely therapeutic/developmental in nature: an example in one Irish study was a programme that included baking, arts and crafts where the products were not normally sold to the public, except occasionally through coffee mornings for a nominal price.³⁸ At the other end of the spectrum, sheltered employment includes the provision of services within businesses that seek to be commercially viable, but which are composed predominantly of workers with disabilities. For example, in Sweden, sheltered employment is provided via a state-owned company that competes with other companies under market conditions.³⁹ Some commentators make a distinction here between sheltered employment and the growing phenomenon of ‘social enterprises’. The latter includes not-for-profit businesses that operate under market conditions, pay a living wage for jobs with a career path, but which have a defined social purpose of providing employment opportunities for people with disabilities.⁴⁰ It is not uncommon for different forms of sheltered employment to be available at national level. For example, in Spain, Special Employment Centres engage economically productive workers in a sheltered setting, while

³⁰ Para. 239, CmRPD ‘Initial Reports of States Parties: Germany’ CRPD/C/DEU/1, 7 May 2013.

³¹ J. Mallender, Q. Liger, R. Tierney, D. Beresford, J. Eager, S. Speckesser, and V. Nafilyan, ‘Reasonable Accommodation and Sheltered Workshops for People with Disabilities: Costs and Returns of Investments’ (European Parliament, 2015) at 24.

³² Para. 131, CmRPD ‘Respuestas del Gobierno de España a la lista de cuestiones (CRPD/C/ESP/Q/1) que deben abordarse al examinar el informe inicial de España (CRPD/C/ESP/1)’ CRPD/C/ESP/Q/1/Add.1, 27 July 2011.

³³ L. Waddington, ‘Evolving Disability Policies: From Social-Welfare to Human Rights – An International Trend from a European Perspective’, (2001) 19 *Netherlands Quarterly of Human Rights* 141 at 153.

³⁴ D. Dorfman, ‘Re-Claiming Disability: Identity, Procedural Justice, and the Disability Determination Process’, (2017) 42 *Law & Social Inquiry* 195 at 199.

³⁵ T. Degener, ‘A Human Rights Model of Disability’ in P. Blanck and E. Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Routledge 2016) 31 at 33.

³⁶ L. Visier, ‘Sheltered Employment for Persons with Disabilities’, (1998) 137 *International Labour Review* 347 at 351.

³⁷ ILO (2015) n27 at 73.

³⁸ Health Service Executive, ‘New Directions: Review of HSE Day Services and Implementation Plan 2012-2016. Personal Support Services for Adults with Disabilities’ (2012) at 37, available at <https://www.hse.ie/eng/services/list/4/disability/newdirections/new-directions-personal-support-services-for-adults-with-disabilities.pdf>

³⁹ Ventegodt Liisberg (2011) n28 at 311. See further: <https://samhall.se/in-english/operations/>

⁴⁰ P. Smith, K. McVilly, J. McGillivray and J. Chan, ‘Developing Open Employment Outcomes for People with an Intellectual Disability Using a Social Enterprise Framework’, (2018) 48 *Journal of Vocational Rehabilitation* 59.

Occupational Centres offer non-economically productive activities in workshops.⁴¹ This pattern can also be witnessed in France⁴² and Ireland.⁴³

A key distinction for different types of sheltered employment is whether domestic labour legislation is applicable to their activities, in particular, laws on minimum wages. A 2015 study for the European Parliament concluded that the majority of workshops operating in the EU did not fall under the national labour code.⁴⁴ Comparative analysis by the Academic Network of European Disability Experts (ANED) illustrates the complexity of the relationship between labour law and sheltered employment. While there are some states where it is clear that labour law either does or does not apply in its entirety to sheltered workshops, there are also others where it is partially applicable or its application depends upon the nature of the programme.⁴⁵ Austria, Denmark, Germany, Greece, Hungary, and Latvia were identified as those states where labour law is generally not applicable to sheltered workshops.⁴⁶ The situation in relation to entitlement to the minimum wage demands more specific analysis because national legislation may either exclude sheltered employment from its scope (e.g. Austria) or permit reductions in the level of wage based upon reduced productivity of workers with disabilities (e.g. Bulgaria).⁴⁷ In some states (e.g. Ireland and Spain), certain types of sheltered employment are covered by minimum wage legislation, but other forms are excluded.⁴⁸

3.3 EMPLOYMENT IN THE OPEN LABOUR MARKET

Sheltered employment can provide a stable and secure environment. Depending upon its structure, there may be opportunities for some workers to assume greater responsibilities reflecting their capacity. Some find a rewarding social network amongst the other workers⁴⁹ and some derive benefit from participating in ‘perceived’ employment,⁵⁰ even if their activities are not recognised as ‘work’ by labour law. It is clear, however, that sheltered employment provides limited assistance in aiding people with ID to make a transition into the open labour market.⁵¹ Sheltered employment can be a dead end, placing a cap on the potential of individuals to maximise their skills. Socially, sheltered employed is characterised by segregation. Workers have few opportunities to interact with people without disabilities (and vice versa). It is fundamentally antithetical to the goal of enabling people with disabilities to

⁴¹ Martorell et al (2008) n23 at 1092.

⁴² CmRPD (2017) n29 at para. 275.

⁴³ In Ireland, there is a distinction between ‘sheltered work centres’, which cater for those deemed unable to take up other forms of employment, and ‘sheltered employment centres’, where participants receive wages and pay social security contributions in respect of the work performed: C. May-Simera, ‘Is the Irish (Republic of) Comprehensive Employment Strategy Fit for Purpose in Promoting the Employment of People with Intellectual Disabilities in the Open Labor Market? A Discussion Using Evidence from the National Intellectual Disability Database’, (2018) 15 *Journal of Policy and Practice in Intellectual Disabilities* 284 at 291.

⁴⁴ Mallender et al, n31 at 23.

⁴⁵ ANED, ‘Mainstreaming Disability Rights in the European Pillar of Social Rights – a Compendium’ (ANED, 2018) at 195.

⁴⁶ *Ibid.*, at 193-194.

⁴⁷ *Ibid.*, at 177.

⁴⁸ *Ibid.*, at 179-180.

⁴⁹ Cohen Hall and Kramer (2009) n2 at 153 and 162.

⁵⁰ E. McGlinchey, P. McCallion, E. Burke, R. Carroll and M. McCarron, ‘Exploring the Issue of Employment for Adults with an Intellectual Disability in Ireland’, (2013) 26 *Journal of Applied Research in Intellectual Disabilities* 335 at 342.

⁵¹ ILO (2015) n27 at 73; Visier (1998) n36 at 353; Siperstein et al (2014) n23 at 173; Ventegodt Liisberg (2011) n28 at 312.

participate fully in the community⁵² and arguably it reinforces a perception of disability as ‘incapacity’.⁵³ Sheltered employment is frequently characterised by very low salaries that constrain any prospect of economic independence; individuals remain reliant on other social welfare benefits. Research in Ireland found that people with ID in sheltered employment earned an average of EUR 29.60 per week and worked a weekly average of 30 hours; in contrast, those in the open labour market earned an average of EUR 77.02 per week with a weekly average of 13.8 hours.⁵⁴

Research provides a strong basis for believing that many people with ID have the capacity to perform work in the open labour market⁵⁵ and that they derive significant benefits from doing so in comparison to sheltered employment.⁵⁶ People with ID often have small social networks, dominated by family, carers and other people with ID.⁵⁷ Studies report that many of those who are able to work in the open labour market value the opportunity for greater autonomy and to expand their social connections.⁵⁸ These social benefits are coupled with the economic advantages of performing work that receives a better rate of remuneration (compared to sheltered employment).⁵⁹ There is often greater variety in the type of work available in the open labour market, which combats boredom and encourages personal development.⁶⁰ Some studies also indicate health benefits that flow from working in the open labour market, particularly in terms of mental well-being.⁶¹ Just like others, people with ID value ‘the sense of feeling productive and staying busy’.⁶²

Although many benefits are associated with finding a job in the open labour market, Lysaght et al critique research that equates this with the achievement of social inclusion.⁶³ People with ID may confront prejudice or stereotypes that lead to their concentration in certain types of occupation, rather than a true appraisal of the individual’s aspirations and capabilities. Although those with jobs in the open labour market earn higher wages than those in sheltered employment, research in the USA found that income frequently remained below the poverty line.⁶⁴ As discussed further in Section 4, case-law also indicates that some people with ID experience harassment in the open labour market.

Despite the consensus that working in the open labour market is generally preferable for people with ID, it is also clear that many barriers make this difficult in practice. Literature highlights factors such as: education and vocational training systems that do not prepare people with ID for the open labour market;⁶⁵ lacking the skills frequently sought by

⁵² Lysaght et al (2012) n4 at 1340.

⁵³ May-Simera (2018) n26 at 62.

⁵⁴ McGlinchey et al (2013) n50 at 338.

⁵⁵ Martorell et al (2008) n23 at 1097.

⁵⁶ P. Blanck and H. Scharzt, ‘Studying the Emerging Workforce’ in S. Herr, L. Gostin, and H. Hongju Koh (eds), *The Human Rights of Persons with Intellectual Disabilities: Different But Equal* (Oxford University Press, 2003) 347 at 353.

⁵⁷ Cohen Hall and Kramer (2009) n2 at 147.

⁵⁸ Ibid 157.

⁵⁹ Kumin and Schoenbrodt (2016) n18 at 337.

⁶⁰ J. Cramm, H. Finkenflügel, R. Kuijsten and N. van Exel, ‘How Employment Support and Social Integration Programmes are Viewed by the Intellectually Disabled’, (2009) 53 *Journal of Intellectual Disability Research* 512 at 516.

⁶¹ R. Kober and I. Eggleton, ‘The Effect of Different Types of Employment on Quality of Life’, (2005) 49 *Journal of Intellectual Disability Research* 756 at 759.

⁶² B. Kirsh, M. Stergiou-Kita, R. Gewurtz, D. Dawson, T. Krupa, R. Lysaght, and L. Shaw, ‘From Margins to Mainstream: What Do We Know About Work Integration for Persons with Brain Injury, Mental Illness and Intellectual Disability?’, (2009) 32 *Work* 391 at 394.

⁶³ Lysaght et al (2012) n4 at 1347.

⁶⁴ Evert Cibera (2017) n19 at 118.

⁶⁵ Lysaght et al (2012) n2 at 419.

employers;⁶⁶ reluctance of companies to hire people with ID;⁶⁷ a shortage of accessible transport;⁶⁸ social security benefit traps (ie the risk of being worse-off financially through entering employment);⁶⁹ and reservations on the part of family members.⁷⁰ In some legal systems, legislation on legal capacity may even deprive people with ID of the possibility to enter into a contract of employment.⁷¹

It seems that relatively few people with ID enter the open labour market through the conventional route of competing for an advertised vacancy. Instead, since the 1980s there has been a growth in the ‘supported’ employment model.⁷² This is based upon support that is tailored to the individual that allows them to enter the open labour market and then to be successful in retaining their position. It is often described as a sequential process with the following main elements: (i) assessment of the individual’s competencies and preferences; (ii) finding employers with potential jobs; (iii) analysis of the job functions; (iv) matching individuals to available jobs; (v) job coaching.⁷³ Comparative research reveals significant differences between EU states in how supported employment functions in practice.⁷⁴ The job coaching stage is especially important for people with ID. This entails ‘intensive, individualized coaching’ in order to assist the person to learn how to perform the job, both at the outset and often with ongoing support.⁷⁵ This aims to ensure that the individual can perform the job appropriately without placing all the responsibility for additional support onto the employer.

The shift from sheltered to supported employment also reflects a transition in public policy away from the medical model of disability and towards a ‘social’ model. Disability Studies is rich in literature that analyses what the social model entails.⁷⁶ It anchors the concept of disability ‘in the social environment, rather than impairment, and carries with it the implication of action to dismantle the social and physical barriers to the participation and inclusion of persons with disability’.⁷⁷ The approaches commonly reflected in supported employment programmes are premised upon the idea that people with ID are excluded from the labour market because of a range of barriers in the way in which work is organised and that, with appropriate support, people with ID can fully participate in the life of the community. Unlike the medical model, impairment is not viewed as the main causal factor for labour market exclusion. Although inclusion is now frequently endorsed as the goal of

⁶⁶ McGlinchey et al (2013) n50 at 335; Kumin and Schoenbrodt (2016) n18 at 338.

⁶⁷ Lysaght et al (2012) n2 at 415.

⁶⁸ A. Migliore, T. Grossi, D. Mank, and P. Rogan, ‘Why do Adults with Intellectual Disabilities Work in Sheltered Workshops?’, (2008) 28 *Journal of Vocational Rehabilitation* 29 at 34.

⁶⁹ Cohen Hall and Kramer (2009) n2 at 159.

⁷⁰ Ibid 160. eg about personal safety, treatment by co-workers, and instability of employment: Migliore et al (2008) n68 at 30-31.

⁷¹ FRA, ‘Legal Capacity of Persons with Intellectual Disabilities and Persons with Mental Health Problems’ (Publications Office of the European Union, 2013) at 47.

⁷² P. Wehman, J. Taylor, V. Brooke, L. Avellone, H. Whittenburg, W. Ham, A. Molinelli Brooke, and S. Carr, ‘Toward Competitive Employment for Persons with Intellectual and Developmental Disabilities: What Progress Have We Made and Where Do We Need to Go’ (2018) 43 *Research and Practice for Persons with Severe Disabilities* 131 at 132.

⁷³ E. Hoekstra, K. Sanders, W. van den Heuvel, D. Post, and J. Groothoff, ‘Supported Employment in the Netherlands for People with an Intellectual Disability, a Psychiatric Disability and a Chronic Disease. A Comparative Study’, (2004) 21 *Journal of Vocational Rehabilitation* 39 at 41.

⁷⁴ Beyer et al (2010) n3 at 135.

⁷⁵ Hoekstra et al (2004) n73 at 42.

⁷⁶ eg M. Oliver and C. Barnes, *The New Politics of Disablement* (2nd edn, Palgrave MacMillan 2012) at 22; T. Shakespeare, *Disability Rights and Wrongs Revisited* (2nd edn, Routledge 2014) ch 2; S. Mitra, ‘The Capability Approach and Disability’, (2006) 16 *Journal of Disability Policy Studies* 236.

⁷⁷ R. Kayess and P. French, ‘Out of Darkness Into Light? Introducing the Convention on the Rights of Persons with Disabilities?’, (2008) 8 *Human Rights Law Review* 1 at 6.

public policy, this co-exists with an ongoing reality where sheltered employment remains a core feature of working life for many people with ID; indeed, in certain Member States, there is evidence that this sector has grown over time rather than diminished.⁷⁸

4. EU LABOUR LAW AND PEOPLE WITH INTELLECTUAL DISABILITIES

Having described the situation of people with ID in the labour market, the remainder of this article is focused upon the contribution that EU labour law makes (and could make) to foster inclusion. It does so first in relation to those people with ID who work in sheltered employment and then with regard to employment in the open labour market. While the analysis below concentrates on EU legislation and case-law, these have to be viewed in the light of the UN Convention on the Rights of Persons with Disabilities (CRPD). In 2009, the EU decided to ratify the CRPD.⁷⁹ As such, the Union has assumed obligations in international law to respect its requirements.⁸⁰ On the one hand, the Court of Justice (CJEU) has held that this creates a general obligation to ensure that EU legislation is ‘as far as possible interpreted in a manner that is consistent’ with the CRPD.⁸¹ On the other, the Court concluded that the provisions of the CRPD ‘are not, as regards their content, provisions that are unconditional and sufficiently precise ... , and that they therefore do not have direct effect in European Union law’.⁸² This constrains the capacity of the Convention to generate any ‘free-standing’ rights that go beyond the current state of EU law.

4.1 SHELTERED EMPLOYMENT AND EU LABOUR LAW

Sheltered employment is normally in public ownership or delivered with public subsidies. As an organisation, the EU does not directly operate any sheltered employment schemes. Nevertheless, there are various aspects of EU law and policy that directly or indirectly provide support for such programmes. For example, there are certain exceptions to the normal rules on state aid in respect of sheltered employment, which is defined as: ‘employment in an undertaking where at least 30% of workers are workers with disabilities’.⁸³ In terms of policy, the EU’s Disability Strategy (2010-2020) prioritises employment in the open labour market,⁸⁴ but the Council has specified that sheltered

⁷⁸ C. May-Simera, ‘Framing the Immediate Application of Labour Standards in Segregated Employment, a Demand by the CRPD Committee: Can the European Court of Justice’s Case-Law Offer Guidance?’, unpublished, on file with the author.

⁷⁹ Council Decision 2010/48/EC concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ L23/35.

⁸⁰ See further, A. Broderick and D. Ferri, *International and European Disability Law and Policy – Text, Cases and Materials* (Cambridge University Press, forthcoming); L. Waddington, ‘The Influence of the UN Convention on the Rights of Persons with Disabilities on EU Anti-Discrimination Law’ in U. Belavusau and K. Henrard (eds), *EU Anti-Discrimination Law Beyond Gender* (Hart Publishing, 2019) 339.

⁸¹ Para. 29, Cases C-335/11 and 337/11 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab; HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S*, EU:C:2013:222.

⁸² Para. 90, Case C-363/12 *Z v A Government Department, The Board of Management of a Community School*, EU:C:2014:159.

⁸³ Art 2(100) and Art 34, Commission Regulation 651/2014/EU Declaring Certain Categories of Aid Compatible with the Internal Market in Application of Articles 107 and 108 of the Treaty [2014] OJ L187/1. See further, Ventegodt Liisberg (2011) n28 at 138-139. See also, Art 20(1), Directive 2014/24/EU on Public Procurement and Repealing Directive 2004/18/EC [2014] OJ L94/65.

⁸⁴ Commission ‘European Disability Strategy 2010-2020: a Renewed Commitment to a Barrier-Free Europe’ COM (2010) 636 at 7.

employment is one mechanism for improving employment opportunities ‘where necessary’.⁸⁵ Indeed, in 2008, the Commission recommended that Member States provided support for sheltered employment ‘as a vital source of entry jobs for disadvantaged people’.⁸⁶

It is beyond the scope of this article to provide an exhaustive review of all possible ways that the EU interacts with sheltered employment; however, these brief examples illustrate that the EU is part of the legal and policy framework that informs the continued reliance on sheltered employment in many Member States. Insofar as the EU directly or indirectly influences the operation of sheltered employment schemes, then it has responsibilities to do so in a manner compatible with the CRPD. Article 27 CRPD addresses ‘work and employment’. Unlike earlier international instruments,⁸⁷ it does not explicitly address sheltered employment. May-Simera charts the diverse range of views that emerged amongst States, human rights institutions, civil society and the ILO during the drafting of the Convention on this issue.⁸⁸ As a way to avoid an impasse, the Convention remained silent on sheltered employment.⁸⁹ For some, this silence was interpreted as reflecting the view that the practice of segregation in the labour market was undesirable.⁹⁰ Instead, Article 27 is premised upon inclusion:

States Parties recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.

The thrust of Article 27 lies in cataloguing the wide range of measures that states must take in order to remove the barriers that can prevent participation in the open labour market. Nevertheless, the silence on sheltered employment left space where some argued that it remained open to justification.⁹¹ Ventegodt Liisberg concluded that sheltered employment may be compatible with the CRPD, but only if it is truly the ‘last resort’.⁹² Although Article 27 does not refer to sheltered employment, neither does it exclude those who are performing work in such settings from its protection. This includes the right of persons with disabilities ‘on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value’.⁹³ This balance between promoting the open labour market and protecting those in sheltered employment is reflected in the General Comment on Equality and Discrimination of the UN Committee on the Rights of Persons with Disabilities (CmRPD). It calls on states to:

facilitate the transition away from segregated work environments for persons with disabilities and support their engagement in the open labour market, and in the meantime also ensure the immediate applicability of labour rights to those settings.⁹⁴

⁸⁵ Para. 15(3)(iv), Council Conclusions on the Support of the Implementation of the EU’s Disability Strategy 2010-2020 [2011] OJ C300/01.

⁸⁶ Para. 4(b)(ii), Commission Recommendation 2008/867/EC on the Active Inclusion of People Excluded from the Labour Market [2008] OJ L307/11.

⁸⁷ eg ILO Vocational Rehabilitation and Employment (Disabled Persons) Convention 1983 (No. 159).

⁸⁸ May-Simera (2018) n26 at 68.

⁸⁹ *Ibid.*, at 69.

⁹⁰ Ventegodt Liisberg (2011) n28 at 285.

⁹¹ May-Simera (2018) n26 at 69.

⁹² Ventegodt Liisberg (2011) n28 at 287.

⁹³ Art 27(1)(b).

⁹⁴ Para. 67(a), CmRPD, General Comment No. 6 (2018) on Equality and Non-Discrimination, CRPD/C/GC/6, 26 April 2018.

The Committee has acknowledged that the process of deinstitutionalisation must be planned over time,⁹⁵ so it is not an alibi for states simply to withdraw public funding from sheltered employment. There is, though, a positive obligation to ensure that inclusion in the open labour market is the principal objective of law and policy.

Therefore, the duty flowing from the CRPD to promote a transition away from sheltered employment implies that the EU should review its own impact upon national practice and how it can assist in this transition process. Arguably, the CRPD requires that any available EU funding should be used to help Member States develop alternatives to sheltered employment rather than sustaining segregated work environments. The CmPRD raised this issue in connection with the EU's compliance with Article 19 CRPD on 'living independently and being included in the community'. In its Concluding Observations on the EU's initial report, it recommended that the EU 'guide and foster deinstitutionalisation' and ensure that EU Structural Funds are not used to redevelop or expand existing institutions.⁹⁶ While these remarks were specifically directed towards the funding of residential institutions, they may be applicable also to institutions that provide sheltered employment. For example, in its first report on Lithuania's compliance with the CRPD, the CmPRD drew attention to the fact that EU funds were being directed towards the maintenance of 'segregated work environments' and recommended that these should be eliminated.⁹⁷

Ultimately, the process of transitioning away from sheltered employment lies predominantly in the hands of the Member States, who are the primary operators and funders of these bodies. EU law is more directly engaged in relation to the labour rights of those who perform work in sheltered employment. As indicated above, the CmPRD takes the view that Article 5 (equality and non-discrimination) and Article 27 (work and employment) require the 'immediate applicability of labour rights' to segregated work environments.⁹⁸ Yet, as discussed in Section 2, it is not uncommon for national law to distinguish between types of sheltered employment that fall within the scope of labour legislation and those that remain outside. This reflects the spectrum of work-related activities that may occur under the umbrella of sheltered employment/workshops.

Where the individual is seeking to enforce rights derived from EU labour law, then the question arises as to whether their activity falls within the concept of being a 'worker' for the purposes of EU law.⁹⁹ Occasionally, this has been at the centre of litigation on the employment status of those in sheltered employment.¹⁰⁰ This can be illustrated via two decisions of the CJEU. In *Bettray*,¹⁰¹ the Court was confronted with the Social Employment Law of the Netherlands. Individuals with a mental or physical disability could apply for admission to a 'social' undertaking, where work was performed on a not-for-profit basis.¹⁰² Participants had a contractual relationship with the local municipality running the scheme,

⁹⁵ Para. 42, CmPRD 'General Comment on Article 19: Living Independently and Being Included in the Community' CRPD/C/GC/5, 27 September 2017.

⁹⁶ Para. 51, CmPRD, Concluding Observations on the Initial Report of the European Union, CRPD/C/EU/CO/1, 4 September 2015.

⁹⁷ Paras 51-52, CmPRD, Concluding Observations on the Initial Report of Lithuania, CRPD/C/LTU/CO/1*, 11 May 2016. On CmPRD comments on sheltered employment in its reports on EU Member States, see C. May-Simera, n78.

⁹⁸ Para. 67(a), CmPRD (2018) n94.

⁹⁹ NB whereas EU law normally adopts 'worker' as the generic label for employment relationships, some national legal systems use a wider variety of terms: eg UK employment law distinguishes between the status of 'worker' and that of 'employee'.

¹⁰⁰ See further, M. Bell, 'Disability, Rehabilitation and the Status of Worker in EU Law: *Fenoll*', (2016) 53 *Common Market Law Review* 197.

¹⁰¹ Case 344/87 *I. Bettray v Staatssecretaris van Justitie* [1989] ECR 1621.

¹⁰² *Ibid.*, paras 11-12, Opinion of AG Jacobs.

but they were neither public servants, nor employees.¹⁰³ Wages were determined by a variety of criteria, including the level of work performed.¹⁰⁴ The CJEU accepted that the ‘essential feature of an employment relationship’ existed because services were performed under the direction of another person and in exchange for remuneration.¹⁰⁵ Difficulties arose, though, with the Court’s additional requirement that the status of ‘worker’ entailed the performance of ‘effective and genuine economic activity’, in this case in order to enjoy the rights found in former Article 48 EEC¹⁰⁶ on the free movement of workers. The Court concluded that:

work under the Social Employment Law cannot be regarded as an effective and genuine economic activity if it constitutes merely a means of rehabilitation or reintegration for the persons concerned and the purpose of the paid employment, which is adapted to the physical and mental possibilities of each person, is to enable those persons sooner or later to recover their capacity to take up ordinary employment or to lead as normal as possible a life.¹⁰⁷

It is surprising that the Court’s emphasis was upon the subjective dimension: what was the ultimate purpose of the work performed? It viewed this form of sheltered employment as transient in nature, merely a stepping stone to ‘genuine’ economic activity. In practice, sheltered employment is often performed for extended periods. The ILO cites data that only between 1% and 5% of workers in sheltered employment make a transition to the open labour market.¹⁰⁸ The rehabilitative nature of sheltered employment has not prevented it from being the end destination for many workers.

The 1989 judgment in *Bettray* erected significant obstacles to those in sheltered employment enjoying the status of ‘worker’ for the purposes of EU free movement law. More recent case-law indicates a shift in outlook.¹⁰⁹ Of particular relevance is the Court’s 2015 judgment in *Fenoll*.¹¹⁰ This case concerned a claim for payment in lieu of annual leave to which Mr. Fenoll was entitled (but that he had not taken) arising from his former employment. In France, a distinction is drawn between work performed in ‘entreprises adaptées’, where the Labour Code applies,¹¹¹ and ‘établissements et services d’aide par le travail’ (ESAT). The latter are intended for disabled adults or adolescents who, temporarily or permanently, are unable to undertake work in the open labour market or pursue a self-employed activity.¹¹² The participant receives a guaranteed salary,¹¹³ but the relationship is not based upon a contract of employment for the purposes of the Labour Code.¹¹⁴ Alongside the performance of work, the centres also have a role in providing medico-social and educational support with a view to enhancing personal development and social integration.¹¹⁵ Mr. Fenoll’s work was performed in a centre for people with intellectual disabilities that did

¹⁰³ Ibid., para. 15.

¹⁰⁴ Ibid.

¹⁰⁵ Para. 14, Judgment of the CJEU.

¹⁰⁶ Now Art 45 TFEU.

¹⁰⁷ Para. 17, Judgment of the CJEU.

¹⁰⁸ ILO (2015) n27 at 73.

¹⁰⁹ eg Case C-456/02 *Trojani v Centre public d’aide sociale de Bruxelles* [2004] ECR I-7573.

¹¹⁰ Case C-316/13 *Fenoll v Centre d’aide par le travail ‘La Jouvène’, Association de parents et d’amis de personnes handicapées mentales (APEI) d’Avignon*, EU:C:2015:200.

¹¹¹ At least 80% of those employed in entreprises adaptées are people with disabilities: CmRPD (2017) n29 at 48.

¹¹² Art L. 344-2, Code de l’action social et des familles.

¹¹³ Ministère du Travail ‘Les établissements ou services d’aide par le travail’ available at <http://travail-emploi.gouv.fr/droit-du-travail/contrats-et-carriere/travailleurs-en-situation-d-handicap/article/les-etablissements-ou-services-d-aide-par-le-travail>

¹¹⁴ Ibid.

¹¹⁵ Art L. 344-2, Code de l’action sociale et des familles.

not fall within the scope of the Labour Code, which led to the initial rejection of his claim for paid annual leave.

On appeal, the Court of Cassation asked the CJEU to clarify, *inter alia*, whether Mr. Fenoll could be regarded as a worker for the purposes of the Working Time Directive, which includes a right to paid annual leave.¹¹⁶ As with Mr. Bettray, the Court accepted that the core characteristics of an employment relationship were present; this was not affected by the fact that his level of remuneration was ‘substantially less’ than the minimum wage in France.¹¹⁷ Unlike the decision in *Bettray*, the Court was persuaded that Mr. Fenoll’s work could be regarded as ‘effective and genuine economic activity’:

Those activities, although adapted to the capabilities of the persons concerned, have a certain economic value too. This is all the more true because those activities make it possible to give value to the productivity of severely disabled persons, however reduced it may be, while at the same time ensuring the social protection they are entitled to.¹¹⁸

While the Court leaned in favour of regarding Mr. Fenoll as a ‘worker’, and hence covered by the Working Time Directive, it concluded that it was up to the Court of Cassation to determine whether his activities could be ‘regarded as forming part of the normal labour market’.¹¹⁹ In a subsequent decision, the Court of Cassation did not challenge the CJEU view that Mr. Fenoll could be regarded as a ‘worker’, although his appeal was ultimately unsuccessful on other grounds.¹²⁰

Stepping back from the detail of these specific cases, it seems evident that the legal labels applied to the work performed in sheltered employment demand interrogation, especially where the participants are placed outside the protective scope of labour legislation. This has important practical consequences, most typically the non-application of minimum wage laws. Even though the Court’s decision in *Fenoll* is significantly broader than that in *Bettray*, its interpretation of the concept of worker is wholly within a market economy paradigm where ‘work’ is defined according to economic value and the extent to which it can be assimilated to the ‘normal’ labour market. It is only fair to acknowledge that it is difficult to draw a neat boundary between non-work activities and those that should enjoy the recognition of labour law. A feature of some forms of sheltered employment is that work activities are blended together with non-work activities. There are also pragmatic dilemmas when considering the consequences of bringing these within the scope of labour law. Specifically, some have argued that applying minimum wage laws could have the effect of reducing employment opportunities for those people with ID who have lower levels of productivity.¹²¹ From a purely financial perspective, the costs of sheltered employment tend to exceed any economic output that is generated;¹²² legal reforms that increase the cost of running these organisations might pose risks to their viability.

In seeking to navigate this difficult terrain, it is arguable that firmer foundations are needed to guide courts and legislators. The market value of the goods produced or services

¹¹⁶ Art 7(2), Council Directive 2003/88/EC concerning certain aspects of the organization of working time [2003] OJ L299/9.

¹¹⁷ Para. 33, *Fenoll*, judgment of the Court.

¹¹⁸ *Ibid.*, para. 40.

¹¹⁹ *Ibid.*, para. 42. This test was also used in *Trojani*: para. 24, n109.

¹²⁰ *M. X. v Centre d'aide par le travail (CAT) La Jouvène et autre*, Cour de Cassation, Soc. 16 December 2015, R. 263 11-22.376. The Court held that national law could not be interpreted in conformity with EU law in respect of the period prior to a legislative amendment that entered into force on 1.1.2007; Mr. Fenoll’s claim arose earlier than this date. Changes introduced in 2017 have extended certain provisions of the Labour Code relating to paid annual leave to those working in ESAT centres: Ministère du Travail, n113.

¹²¹ Lysaght et al (2012) n2 at 416.

¹²² Mallender et al (2015) n31 at 13.

provided is undoubtedly a relevant consideration when considering whether the activity constitutes work for the purposes of labour law; it would be surprising if someone who was working in a commercial undertaking was not treated as a worker. Yet to reduce the status of worker to a purely economic test sits uncomfortably with the nature of sheltered employment, which typically does not generate profit.¹²³ In *Fenoll*, Advocate-General Menegozzi argued that recognising those working in sheltered employment as workers could be justified, in part, by the need to protect the ‘social dignity’ of the persons affected.¹²⁴ The CRPD was not discussed by the CJEU in the *Fenoll* case. This was a missed opportunity, because it provides a clearer basis for how to approach the employment status of those in sheltered employment.¹²⁵ As discussed above, the CmRPD has interpreted the Convention as requiring the application of labour rights to segregated work environments. This indicates that there should, at least, be a presumption that those working in sheltered employment are covered by EU labour law. There will, of course, ultimately be a boundary line between activities that fall within the scope of labour law and those that are purely therapeutic in nature. For instance, the Revised European Social Charter (of the Council of Europe) has been interpreted as requiring the application of labour law to ‘production-oriented’ forms of sheltered employment.¹²⁶ Reliance upon the CRPD does not preclude an assessment of individual circumstances, but it casts doubt on the enduring practice in some Member States of placing broad categories of sheltered employment outside the scope of domestic labour law.¹²⁷ Insofar as this means that such workers are also deprived of their rights in EU labour law, then the EU has a responsibility under Article 27(1)(b) CRPD to ‘protect the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value ...’. While the decision in *Fenoll* marked an important recognition that EU labour law can apply to sheltered employment, there is little evidence of any concerted effort at EU level to ensure that Member States are extending the protection of EU labour rights to those working in this sector.

4.2 EMPLOYMENT IN THE OPEN LABOUR MARKET

As discussed in Section 3, there are a variety of barriers that hinder the participation of people with ID in the open labour market. Many of these are beyond the scope of labour law; for example, the uncertainties of employment in the open labour market can make individuals reluctant to jeopardise existing social security entitlements that may be retained while in sheltered employment.¹²⁸ While acknowledging that EU labour law is only one piece in a much larger jigsaw, it holds potential to contribute to tackling the barriers that can arise. In particular, discrimination is one factor that can create obstacles to participating in the open labour market. This can take a variety of forms, including overt prejudice towards people with ID, irrespective of their abilities. Scior points out that ID can provoke responses of ‘anxiety, avoidance, hostility, and even hatred and disgust’.¹²⁹ Some employers may be reluctant to hire people with ID due to engrained stereotypes about their likely productivity or

¹²³ Ibid.

¹²⁴ Case C-316/13 *Fenoll v Centre d’aide par le travail ‘La Jouvène’, Association de parents et d’amis de personnes handicapées mentales (APEI) d’Avignon*, EU:C:2014:1753.

¹²⁵ May-Simera, n78.

¹²⁶ Committee of Independent Experts, Conclusions XIV-2 (1998), Statement of Interpretation, Art 15(2).

¹²⁷ May-Simera provides examples of litigation in Denmark and Austria where domestic courts rejected claims from those working in sheltered employment to rights under employment legislation: May-Simera, n78.

¹²⁸ Cohen Hall and Kramer (2009) n2 at 159.

¹²⁹ K. Scior, ‘Toward Understanding Intellectual Disability Stigma: Introduction’ in K. Scior and S. Werner (eds), *Intellectual Disability and Stigma – Stepping Out from the Margins* (Palgrave Macmillan 2016) at 3.

potential for learning,¹³⁰ as well as uncertainty about what type of work would be suitable for a person with ID.¹³¹ Yet research has indicated that the actual performance and capability of workers with ID may exceed initial expectations.¹³² Discrimination can also arise from the organisation of the working environment in ways that render it inaccessible for people with ID. For example, including an unnecessary written test in a recruitment procedure could have the effect of excluding some people with ID, even though there are other methods through which they could demonstrate their ability to perform the job.¹³³

Given the role that discrimination plays in creating barriers to labour market participation, it is, therefore, relevant to consider the contribution that EU anti-discrimination legislation makes to promoting inclusion for people with ID. In respect of labour law, the key instrument is the Employment Equality Directive, which, *inter alia*, prohibits discrimination on grounds of disability in employment and vocational training.¹³⁴ While it is not possible to examine every aspect of how this Directive applies in respect of people with ID, this section will briefly explore some key issues that arise: the definition of disability; the prohibition of discrimination; and enforcement mechanisms.

4.2.1 DEFINITION OF DISABILITY

There is no definition of disability within the Employment Equality Directive and no cases involving people with ID have arisen before the CJEU. It is, however, reasonable to conclude that ID falls within the scope of the Directive. Following the EU's ratification of the CRPD, the CJEU adopted the position that the meaning of 'disability' had to be interpreted in a manner consistent with the Convention.¹³⁵ Article 1 CRPD states:

People with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

This is a non-exhaustive definition and recital (e) in the preamble of the CRPD recognises that disability is 'an evolving concept'. It is, though, clear that the CRPD rejects a medical model understanding of disability that views this purely in terms of impairment.¹³⁶ Crucially, the CRPD distinguishes impairment and disability.¹³⁷ It views the latter as resulting from the interaction between impairment and barriers to participation, such as social attitudes or the way in which the environment is currently organised.¹³⁸ Various commentators have viewed the (partial) definition of disability in Article 1 CRPD as reflecting an embrace of the social

¹³⁰ Ibid.

¹³¹ A. Kocman, L. Fischer, and G. Weber, 'The Employers' Perspective on Barriers and Facilitators to Employment of People with Intellectual Disability: a Differential Mixed-Method Approach' (2018) 31 *Journal of Applied Research in Intellectual Disabilities* 120 at 129.

¹³² M. Gormley, 'Workplace Stigma Towards Employees With Intellectual Disability: a Descriptive Study', (2015) 43 *Journal of Vocational Rehabilitation* 249 at 253.

¹³³ eg EEOC, 'EEOC sues Adecco USA for Disability Discrimination': <https://www.eeoc.gov/eeoc/newsroom/release/8-29-18b.cfm>

¹³⁴ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

¹³⁵ Para. 32, *Ring and Skouboe Werke*, n81.

¹³⁶ L. Waddington and A. Broderick, 'Combatting Disability Discrimination and Realising Equality – a Comparison of the UN Convention on the Rights of Persons with Disabilities and EU Equality and Non-Discrimination Law' (Publications Office of the European Union, 2018) 55.

¹³⁷ Degener, n35 at 33.

¹³⁸ Recital (e) CRPD.

model,¹³⁹ although debate continues on how best to characterise the CRPD's understanding of disability.¹⁴⁰

The CJEU drew upon Article 1 CRPD to fashion its own definition of disability for the purposes of the Employment Equality Directive:

... the concept of 'disability' must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the persons concerned in professional life on an equal basis with other workers.

In addition, it follows from the second paragraph of Article 1 of the UN Convention that the physical, mental or psychological impairments must be 'long-term'.¹⁴¹

As can be seen, the wording adopted by the CJEU is not identical to that used in Article 1 CRPD. Whereas the latter expressly refers to 'intellectual' impairments, this language is not used by the CJEU. Instead, the Court distinguishes between 'mental or psychological' impairments. The latter term appears to refer to psychosocial impairments, such as depression. Logically, it seems likely that intellectual impairments, such as Down Syndrome, would fall under the scope of 'mental' impairments in the terminology of the CJEU.

Notwithstanding the Court's apparent endorsement of the social model (as reflected in the language of the CRPD), subsequent case-law on the meaning of disability has continued to place emphasis upon medical evidence of the degree of impairment (and its prognosis) as a significant element in establishing disability for the purposes of the Directive.¹⁴² Waddington has argued that such reasoning reveals that the Court 'clings to the remnants of the medical or individual model' of disability rather than fully applying the approach reflected in the CRPD.¹⁴³ In relation to people with ID, many will have received a medical diagnosis during childhood. ID is a long-term condition, so it will normally satisfy that component of the definition of disability. This suggests that many people with ID will, in comparison to others, encounter less difficulties in establishing evidence of the existence of a long-term impairment. That said, experience in other jurisdictions indicates that legal tests regarding the degree of impairment can still pose difficulties for certain litigants with ID. In the USA, case-law includes examples of claims failing because the person's intellectual impairment was not held to have sufficient severity in order to fall within the definition of disability that initially applied under the Americans with Disabilities Act.¹⁴⁴ If courts place excessive emphasis on degree of impairment, then litigants can find themselves caught between arguing

¹³⁹ eg L. Waddington, 'A New Era in Human Rights Protection in the European Community: The Implications of the United Nations' Convention on the Rights of Persons with Disabilities for the European Community', Maastricht Working Papers, 2007-4, Maastricht University, Faculty of Law, 4; E. Flynn, 'Ireland's Compliance with the Convention on the Rights of Persons with Disabilities: Towards a Rights-Based Approach for Legal Reform?', (2009) 31 *Dublin University Law Journal* 357. For a more critical perspective on CRPD's concept of disability, see Kayess and French (2008) n77 at 21.

¹⁴⁰ Degener has argued that the CRPD in fact 'goes beyond the social model of disability and codifies the human rights model of disability': n35 at 33.

¹⁴¹ Paras 38-39, *Ring and Skouboe Werke*, n81.

¹⁴² eg para. 60, Case C-354/13 *FOA, acting on behalf of Karsten Kaltoft v KL, acting on behalf of the Municipality of Billund*, EU:C:2014:2463; para. 57, Case C-395/15 *Daouidi v Bootes Plus SL, Fondo de Garantía Salarial, Ministerio Fiscal*, EU:C:2016:917.

¹⁴³ L. Waddington, 'Saying All the Right Things and Still Getting It Wrong: the Court of Justice's Definition of Disability and Non-Discrimination Law', (2015) 22 *Maastricht Journal of European and Comparative Law* 576 at 591. See also, D. Ferri, 'Daouidi v Bootes Plus SL and the Concept of 'Disability' in EU Anti-Discrimination Law' (2019) 10 *European Labour Law Journal* 69.

¹⁴⁴ See further, M. Bell, 'People with Intellectual Disabilities and Employment Discrimination Law: a US Case Study', (2019) 35 *International Journal of Comparative Labour Law and Industrial Relations*, forthcoming.

simultaneously that they have sufficient abilities to be able to perform the job in question, yet also showing evidence that they are sufficiently limited by their impairment in order to fall within the definition of disability.¹⁴⁵

4.2.2 PROHIBITION OF DISCRIMINATION

The Employment Equality Directive prohibits direct and indirect discrimination, including harassment, based on disability.¹⁴⁶ In principle, these are important protections that could tackle some of the barriers that people with ID encounter in the labour market. While data is limited, some existing sources indicate that some people with ID encounter discrimination when they participate in employment. In the UK, one survey that controlled for type of impairment found that workers with ‘a learning difficulty, psychological or emotional condition were most likely to experience unfair treatment at work.’¹⁴⁷ In Canada, one study found that, for those who had been active in the labour market, 50.6% of respondents with ID had experienced employment discrimination, compared to 23.2% of those with other types of disability.¹⁴⁸ Research in the US found that harassment was raised in 12% of complaints of discrimination related to intellectual disability¹⁴⁹ and that is also prominent in examples of cases that have been resolved in this area.¹⁵⁰ While it seems very likely that some people with ID experience discrimination at work, it is difficult to find evidence of litigation in the EU Member States on this issue.

Of course, the very low rates of participation in the open labour market by people with ID is one factor that partially explains why there seems to be less litigation by people with ID compared to those with other types of impairment (where employment rates are higher). In this regard, perhaps the key contribution of the Directive could be to assist in the process of dismantling those barriers that currently exclude a large proportion of people with ID from the open labour market. A pivotal role thus lies with the duty on employers (and others¹⁵¹) to provide reasonable accommodation, which is defined as:

appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.¹⁵²

Frequently, people with ID need accommodations in order to take up employment in the open labour market. For example, research in Canada found that, of those active in the labour market, a higher proportion of people with ID reported needing accommodations (65.1%)

¹⁴⁵ E. Emens, ‘Disabling Attitudes: U.S. Disability Law and the ADA Amendments Act’ (2012) 60 *American Journal of Comparative Law* 205 at 216; M.A. Stein, A. Silvers, B. Areheart and L. Pickering Francis, ‘Accommodating Every Body’ (2014) 81 *The University of Chicago Law Review* 689 at 713.

¹⁴⁶ Art 2, Directive 2000/78.

¹⁴⁷ N. Coleman, W. Sykes, and C. Groom, ‘Barriers to Employment and Unfair Treatment at Work: a Quantitative Analysis of Disabled People’s Experiences’ Research Report No. 88 (EHRC 2013) at 44.

¹⁴⁸ C. Crawford, ‘The Employment of People with Intellectual Disabilities in Canada: a Statistical Profile’ (Institute for Research and Development on Inclusion and Society, 2011) at 18.

¹⁴⁹ D. Unger, L. Campbell and B. McMahon, ‘Workplace Discrimination and Mental Retardation: the National EEOC ADA Research Project’, (2005) 23 *Journal of Vocational Rehabilitation* 145 at 150.

¹⁵⁰ EEOC ‘Selected List of Pending and Resolved Cases Involving Intellectual Disabilities’ available at https://www.eeoc.gov/eeoc/litigation/selected/intellectual_disabilities.cfm

¹⁵¹ eg the Directive also applies to a wider range of bodies, such as providers of vocational guidance or training (Art 3(1), Directive 2000/78).

¹⁵² *Ibid.*, Art 5. See further, D Ferri and A Lawson ‘Reasonable Accommodation for Disabled People in Employment – a Legal Analysis of the Situation in EU Member States, Iceland, Liechtenstein and Norway’ (Publications Office of the European Union, 2016).

than those with other types of disability (44.8%).¹⁵³ Notably, 22.7% of people with ID said that they needed with accommodation in the form of ‘human support’ compared to only 3.5% of those with other types of disability.¹⁵⁴ Employment is usually obtained with some kind of external support, such as the ‘supported employment’ approach discussed in Section 3. This includes a major role for job coaches who assist the individual both at the outset of a new job and often on an ongoing basis. It may be necessary to configure the job to match the aptitudes of the individual, to allow more time for the completion of tasks, as well as providing workplace information in a format that is easy to understand.¹⁵⁵ Intellectual impairment can affect communication skills, so interaction with managers or other workers is another area where accommodation may be required.¹⁵⁶

One constraint on the potential contribution of reasonable accommodation is found in Recital 17:

This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

While this has not yet been the focus of litigation before the CJEU, it may be interpreted as meaning that employers are not required to recruit or retain an individual who is not able to perform the ‘essential functions’ of a post, even after the provision of reasonable accommodation. For present purposes, it is worth highlighting the significance that this can have for people with ID. Intellectual impairment affects intellectual functioning, which may render it impossible for a person with ID to perform certain functions, such as those requiring complex literacy or numeracy skills. This will, of course, vary according to the specific capabilities of each person. Nonetheless, this makes the definition of ‘essential functions’ particularly sensitive in the context of people with ID. For example, in the US case of *EEOC v Dollar General Corporation*,¹⁵⁷ the employer sought to argue that it was justified in dismissing an employee with ID because being able to operate the cash register was part of the essential functions of being a ‘clerk’ in the supermarket. In practice, however, she had only been required to perform cleaning and tidying, and these were tasks that she was able to do satisfactorily. In that case, the Court found that the ‘essential functions’ reflected what she did in practice, rather than the broader list of duties found in the written description of the job.

Given that there may be constraints on the range of functions that a person with ID can perform (even with accommodation), then access to employment will sometimes entail designing a job role with functions that correspond to the capabilities of the individual. One form of supported employment has been described as ‘customized employment’ where negotiation takes place with the potential employer in order to create a job description that matches the needs of the business and the competences of the individual; this approach has been applied for those with the most significant disabilities.¹⁵⁸ Yet this process of adapting job roles, which can involve altering the essential functions of the position, may go beyond

¹⁵³ Crawford, n148 at 16.

¹⁵⁴ Ibid.

¹⁵⁵ Equal Employment Opportunity Commission ‘Questions & Answers about Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act (ADA)’ available at https://www.eeoc.gov/laws/types/intellectual_disabilities.cfm

¹⁵⁶ P. Blanck, *The Americans with Disabilities Act and the Emerging Workforce: Employment of People with Mental Retardation* (American Association on Mental Retardation, 1998) at 45.

¹⁵⁷ 252 F. Supp. 2d 277 (M.D.N.C. 2003).

¹⁵⁸ Wehman et al, n72 at 134.

the current understanding of what reasonable accommodation requires under the Directive. In this regard, Article 27 CRPD couples the obligation to provide reasonable accommodation with an explicit duty on states to employ people with disabilities in the public sector and to take measures to promote their employment in the private sector.¹⁵⁹ Moreover, unlike in other international instruments, positive action is not limited to temporary special measures.¹⁶⁰ Broderick argues that this recognises a reality that people with ID often experience a ‘permanent and ongoing reduction in equal opportunities and possibilities for participation and inclusion in society’.¹⁶¹ This goes beyond the requirements of the Employment Equality Directive, which does not impose any equivalent *duty* on the Member States to engage in positive action (although it is permissible¹⁶²).

4.2.3 ENFORCEMENT MECHANISMS

A characteristic of EU anti-discrimination legislation is the considerable weight that it places upon enforcement by individual complaint and litigation.¹⁶³ There is a long-standing debate about whether there is a need to strengthen other mechanisms for enforcement,¹⁶⁴ but in the current context it is appropriate to draw attention to the particular barriers that people with ID face to enforcing their rights. As indicated in Section 3, people with ID often have low incomes and are working in low status jobs. Apart from the financial constraints that this implies, they may need additional support to understand their rights, to formulate a complaint and to navigate workplace grievance procedures.¹⁶⁵ Some people with ID may need accommodations within the judicial process; giving evidence could be a challenging experience¹⁶⁶ and problems can arise where courts question the credibility of evidence from people with ID.¹⁶⁷ Tarulli et al underlined the role played by informal social supports.¹⁶⁸ They argued that the smaller social circles that people with ID often experience can deter them from jeopardising any existing employment relationship. Alternatively, Herr argued that the assertiveness needed to bring a complaint may be an obstacle for some (but not all) people with ID.¹⁶⁹ Although it may be difficult to pinpoint the exact cause, existing evidence suggests very low levels of litigation by people with ID under employment discrimination laws. This has been most closely documented in the USA, where claims relating to ID have been persistently low under the Americans with Disabilities Act of 1990.¹⁷⁰ It is difficult to

¹⁵⁹ Art 27(g), (h), (i) CRPD.

¹⁶⁰ A. Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities – the United Nations Convention on the Rights of Persons with Disabilities* (Intersentia, 2015) 125.

¹⁶¹ *Ibid.*, at 128.

¹⁶² Art. 7, Directive 2000/78.

¹⁶³ T. Makkonen, *Equal In Law, Unequal In Fact – Racial and Ethnic Discrimination and the Legal Response Thereto in Europe* (Helsinki University Printing House, 2010) at 193.

¹⁶⁴ eg S. Benedi Lahuerti, ‘Enforcing EU Equality Law Through Collective Redress: Lagging Behind?’, (2018) 55 *Common Market Law Review* 783.

¹⁶⁵ D. Tarulli, D. Griffiths, and F. Owen, ‘Human Rights and Persons with Intellectual and Developmental Disabilities: an Elusive But Emerging Paradigm’ in J. Gordon, J. Poder, and H. Burckhart (eds), *Human Rights and Disability: Interdisciplinary Perspectives* (Routledge 2017) 50 at 63.

¹⁶⁶ S. Mor, ‘With Access and Justice for All’ (2017) 39 *Cardozo Law Review* 611 at 640.

¹⁶⁷ A. Lawson, ‘Disabled People and Access to Justice: From Disablement to Enablement?’ in P. Blanck and E. Flynn (eds), *Routledge Handbook of Disability Law and Human Rights* (Routledge 2016) 88 at 93.

¹⁶⁸ Tarulli et al, n165 at 63.

¹⁶⁹ S. Herr ‘The Potential of Disability Non-Discrimination Laws’ in S. Herr, L. Gostin, and H. Hongju Koh (eds) *The Human Rights of Persons with Intellectual Disabilities: Different But Equal* (Oxford University Press, 2003) 203 at 204.

¹⁷⁰ T. Van Wieren, A. Armstrong, B. McMahon, ‘Autism Spectrum Disorders and Intellectual Disabilities: a Comparison of ADA Title I Workplace Discrimination Allegations’ (2012) 36 *Journal of Vocational Rehabilitation* 159 at 165; Unger et al, n149 at 151.

find similar data in relation to the EU, but the dearth of information on litigation by people with ID itself suggests that such under-representation is also present in Europe.

This picture indicates that the potential of the Employment Equality Directive to tackle discrimination experienced by people with ID is unlikely to be fully realised if it relies on the individual litigation model of enforcement. One response is to take measures that enable people with ID to enforce their rights. Article 12(3) CRPD requires states ‘to provide access by persons with disabilities to the support they may require in exercising their legal capacity’; this can include putting in place advocacy support.¹⁷¹ It is, though, necessary to consider other strategies. The Directive identifies a specific role for dialogue with the social partners as a means to foster equal treatment, which might result in instruments such as ‘collective agreements’ or ‘codes of conduct’.¹⁷² There is also a requirement for states to encourage dialogue with non-governmental organisations to promote equal treatment.¹⁷³ Used in a targeted way, these could be vehicles to create greater momentum around improving the labour market situation of people with ID. Bodies for the promotion of equal treatment are also actors that hold the potential to make a constructive contribution in this field. For example, in the US, the Equal Employment Opportunity Commission has provided legal support and representation in cases involved workplace discrimination against people with ID.¹⁷⁴ It has also developed specific guidance for employers on the employment of people with ID.¹⁷⁵ This exposes an enduring regulatory gap in the Employment Equality Directive. Unlike other EU legislation on sex and ethnic discrimination, it does not include any obligation on Member States to establish a body for the promotion of equal treatment. The European Commission has recommended that states extend the remit of equality bodies to include, inter alia, disability discrimination¹⁷⁶ and it is true that almost all Member States have done so.¹⁷⁷ Yet there seems scope for the Union to provide more leadership in stimulating initiatives by equality bodies that concentrate upon the situation of people with ID. For example, it could be helpful to develop EU-wide guidance on how reasonable accommodation can be applied to remove the particular barriers encountered by workers with ID.

5. CONCLUSION

Social research sustains the view that, in many cases, intellectual impairment does not prevent individuals from participating in the open labour market; instead, it is the disabling effects of other barriers in society. Notwithstanding the benefits that can be derived from working in the open labour market, most people with ID either do not have a job or only perform work in a segregated setting. The latter is often a grey zone in labour law where legal protections may be inapplicable. This compounds the isolation of such workers and heightens the risk of exploitation.

This article sought to demonstrate that law has a meaningful role to play in fostering labour market inclusion for people with ID. In its General Comment on Equality and

¹⁷¹ Para 17, CmRPD ‘General comment No. 1 (2014). Article 12: Equal Recognition Before the Law’ CRPD/C/GC/1, 19 May 2014.

¹⁷² Art 13, Directive 2000/78.

¹⁷³ Art 14, *ibid*.

¹⁷⁴ EEOC, n150.

¹⁷⁵ EEOC, n155.

¹⁷⁶ Para. 1.1.1, Commission Recommendation 2018/951/EU on Standards for Equality Bodies [2018] OJ L167/28.

¹⁷⁷ Portugal and Spain remain exceptions to this trend: I. Chopin, C. Conte and E. Chambrier, ‘A Comparative Analysis of Non-Discrimination Law in Europe 2018’ (Publications Office of the European Union, 2018) at 107.

Discrimination, the CmRPD has identified two core requirements: facilitating the transition away from segregated work environments (in favour of inclusion in the open labour market), and ensuring the immediate applicability of labour rights to those settings.¹⁷⁸ Having ratified the CRPD, the EU is obliged to ensure that, within its sphere of competence, it is implementing the requirements of the Convention. Section 4 of this article identified a number of areas where EU labour law already plays a role in regulating the working lives of people with ID, but also the need for more effective application of existing instruments. The seminal decision in *Fenoll* is largely consistent with the approach of the CmRPD that those performing work in sheltered employment are entitled to equal enjoyment of labour rights. Although EU labour law does not extend to all aspects of the employment relationship, ensuring that those who work in sheltered employment are fully covered by all aspects of EU labour law would be a significant advance for many workers. For the reasons explained in section 4, progress will be slow and uneven if individual workers have to initiate litigation in order to bring about such changes in domestic labour law. In the light of the Union's obligations under the CRPD, there is an onus on the EU institutions to take steps in order to ensure that its labour law provisions are being fully applied to those working in sheltered employment. In a similar vein, the Employment Equality Directive already provides a legal framework to address those barriers to participation in the labour market that arise from discrimination, such as failure to provide reasonable accommodation. Yet there is little evidence that the potential benefits of the Directive are currently being enjoyed by people with ID. A more vigorous and targeted approach that seeks to promote (in particular) reasonable accommodation as a route to rendering the labour market more inclusive of people with ID is needed; almost 20 years after the Directive's adoption, individual litigation has not emerged as a sufficiently effective route through which people with ID can enforce their rights in the labour market.

Fundamentally, the response of public authorities to the position of people with ID reveals much about the depth of commitment to forging an inclusive society and economy. As Nussbaum has highlighted, this is particularly acute when considering the situation of those who may be constrained in the range of job functions that they can perform, but whose inclusion will enhance human dignity.¹⁷⁹ Law occupies just one part of a wider network of policy interventions that are necessary to bring about deep change in the working lives of people with ID. Nevertheless, this cog in the machine, and its potential to turn some levers of change, should not be forgotten.

¹⁷⁸ Para. 67(a), CmRPD (2018) n94.

¹⁷⁹ M. Nussbaum, *Frontiers of Justice – Disability, Nationality, Species Membership* (Harvard University Press, 2006) at 118.