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To cite this article: Cara Molyneux (2023) Why employer inflexibility matters for the recruitment, retention and progression of disabled workers, *Disability & Society*, 38:4, 723-728, DOI: [10.1080/09687599.2023.2168180](https://doi.org/10.1080/09687599.2023.2168180)

To link to this article: <https://doi.org/10.1080/09687599.2023.2168180>



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Published online: 18 Jan 2023.



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Why employer inflexibility matters for the recruitment, retention and progression of disabled workers

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ABSTRACT

This article outlines recent debates in the UK on the requirement to enhance all employees' rights to request Flexible Working by making it the default position. I consider if, and how, this change could be beneficial for disabled people when competing against non-disabled people for good quality jobs.

ARTICLE HISTORY

Received 23 November
2022
Accepted 10 January
2023

KEYWORDS

Flexible working;
reasonable adjustments;
SME; disability;
flex-ability; employers

Introduction

A growing evidence base shows it is employer inflexibility that often places unnecessary restrictions on disabled people's experience of finding, keeping and progressing in work (Olsen 2022; Molyneux 2021). Consequently, employer inflexibility creates and sustains disability by placing additional barriers in the way of disabled people's recruitment, job retention, and career progression. Yet, UK Government policy to date has tended to ignore demand-side barriers, preferring instead to encourage (through various harmful mechanisms) disabled people to become job ready. Moving disabled people out of economic inactivity and unemployment into poorly designed part-time, low-wage, precarious jobs has dominated social security restructuring. This has discursively and structurally positioned disabled people as less productive, economically burdensome and therefore strategically placed on the side-lines of the labour market as part of the reserve army of labour (Grover and Piggott 2005).

Why employer inflexibility matters to disabled people

Whilst some disabled people may need specific aids, adaptations, or equipment in order to facilitate their ability to work, the vast majority only require

changes in the way in which work is organised. In the same way that it offers working parents the opportunity to balance family life with work, flexible working can offer disabled people a way to accommodate requirements arising from their impairment. However, a common complaint made by disabled people is a lack of employer flexibility in terms of where, when, and how work can be performed. Despite disabled workers having a legal right to flexible working as a reasonable adjustment under the provision of the [Equality Act \(2010\)](#), employers often refuse. Therefore, finding solutions to change employers' fondness for one-sided flexibility is critically important to ensure that low-quality, low-wage, and part-time jobs are not the only option available to disabled people.

My PhD study involving interviews with disabled people who work in small and medium size enterprises (SMEs) in the UK found that inflexible employer recruitment, retention and progression practices are the primary cause of experiencing disability at work (Molyneux 2021). However, on the whole participants were largely complementary about their experience of obtaining informal agreement from their SME employer to make work feel enabling rather than disabling. Often, this has been a reciprocal type of arrangement whereby employees could take time-out or work remotely in return for taking on additional work at times to suit business requirements. Despite a lack of resources and low levels of understanding of schemes such as Access to Work and Disability Confident, SME employers were able to respond to individual employee requests quickly and without the need for bureaucratic assessment of need or medical evidence of impairment. This was viewed as good practice by disabled people because it reduced the *disclosure dilemma* (Molyneux 2021) attached to talking about impairment effects (Thomas 1999, 2007).

Disabling barriers include poor employer attitudes that act to preserve or challenge what constitutes an 'ideal worker' and an ableist 'one best way' of working (Scholz and Ingold 2020). Also, when presented with a choice between identically qualified candidates, one disabled and the other not, employers can display a reluctance to hire a person with a visible or declared impairment. The unavailability of suitably individually personalised flexible job opportunities are perhaps the easiest to provide and yet the most difficult to get. That is because the degree to which workers are more or less able to manage their own time and work schedules is often dependent upon job status and the attitudes of line managers.

Forms of flexibility that disabled people may find helpful can include part-time working, job sharing, working from home, flexible hours, and annualised hours. Some disabled workers need flexibility to accommodate time off at short notice because of a need not to work on 'bad days' and at other times to accommodate medical appointments, whose timing can be outside their control. For people with progressive illnesses who may take

long periods of absence from work, they need flexibility to return to work gradually to help with adjusting back to work routines. For people with fluctuating and unpredictable impairments and chronic health conditions the chance to take annual leave strategically or having the chance to take unpaid leave to cover longer periods to manage 'flare ups' are viewed as good employer practices (Holland and Clayton 2020). Flexibility in the way that job roles are defined and adapted is also seen as important for people who acquire an impairment during their working career. However, employers are not very good at thinking flexibly about redistributing certain tasks as a form of reasonable adjustment, meaning that too often the employee is forced to leave their job.

Debates on the right to request flexible working

The experience of COVID-19 transformed our working lives, due to a shift in remote and hybrid working. But more importantly, it also exposed how, when forced to because of Government intervention and regulation, employers are able to reshape working practices. Employers can no longer claim that adjustments are impossible, although they may still try and claim they are unreasonable. The sudden reconfiguration gave workers, (many for the first time), a taste of freedom from disabling work barriers. An overwhelming majority of disabled workers who worked from home during the pandemic say they want to continue doing so permanently (TUC 2021a). They also report frustration that for years employers had denied remote and hybrid working as a reasonable adjustment saying it would be unworkable (TUC 2021b).

As it currently stands in the UK all employees have a statutory right under the *Employment Rights Act (1996)* to request flexible working after twenty-six weeks' continuous employment (DBEIS 2021). However, findings from the Chartered Management Institute (CMI 2019) suggest that only 25% of managers know this is an employee right. This is despite ACAS (2014) publishing a Code of Practice intended to help employers deal with written requests to change working hours or place of work. Employers can refuse the request for business reasons if they feel the change will create a burden of extra costs or have a detrimental impact on quality or performance.

In June 2022, Labour MP Yasmin Qureshi introduced a private members bill in the House of Commons: *The Employment Relations (Flexible Working) Bill* (House of Commons Library, 2022), to apply to England, Scotland and Wales but not Northern Ireland where employment law is a devolved matter. The Bill would amend the Employment Rights Act 1996 to change the current right to request flexible working in the following ways: removing the requirement for employees to explain in their applications what effect they think it will have on the employer, allowing employees to make two flexible

working requests per 12 months instead of the one currently allowed, requiring employers to consult with the employee before being allowed to refuse an application, and reducing the deadline for an employer decision on flexible working requests from three months to two months.

Interestingly, the changes were presented as primarily intended to help parents and people with caring responsibilities rather than a clear focus upon improving the experience of work for disabled people. The Bill was debated at second reading on Friday 28 October 2022 and has now been sent to a Public Bill Committee who will scrutinise it line by line. At the time of writing this article the date is still to be announced, so it is a case of 'wait and see' what happens next.

In theory, disabled people are able to access flexible working arrangements under the obligation on employers to make reasonable adjustments (within the duties of the [Equality Act 2010](#)). This requirement starts even before employment begins, throughout the recruitment process meaning it is a stronger 'right' - but in practice the same challenges related to disclosure arise. However, the statutory right to request flexible working can still be beneficial for disabled workers as it can protect them from negative employer attitudes, assumptions about perceived ability and the associated risks that poses when 'disclosing'. Whereas claiming rights under the Equality Act requires disabled people to clearly state the impact of their impairment on their ability to do their job, that is not the case for the statutory right under the Employment Rights Act. This means, that for people who wish to conceal or mask impairment effects, there is another option available to them - albeit with limitation if the outlined amendments are not agreed at the next stage.

Conclusion

This article has shown that Government policy and debates about the potential enhancements to the right to request flexible working are still missing a focus on ending experiences of disability at work. This is a major weakness. It appears that we are still a long way from finding a demand-side policy approach that will adequately tackle the structural inequalities that sustain the disability employment and pay gaps. In current form, the right to request and the right to reasonable adjustments are not doing enough to end disabled people's marginalisation in the labour market.

However, post-pandemic it is now far more difficult for employers to say they are unable to incorporate at least some degree of flexible working. Indeed, employees and job seekers are now becoming far more demanding of flexibility and employers will need to make a decisive stand on whether to embed and embrace employee-oriented flexibility or stick with more traditional working arrangements. If flexible working becomes standard practice, it will make it far more difficult for employers to refuse on the grounds

of unreasonableness. Accessing rights to work flexibly under the reasonable adjustment provision should become less challenging and reduce the need for claiming disability discrimination through an employment tribunal. Two-sided flexibility has the potential to ensure disabled people escape the reserve army of labour that has sustained their inequitable position in low-paid, insecure, part-time jobs.

For this reason, I suggest that policy must focus on compelling employers to embed policies that enable people to work *with*, rather than *against* the rhythms of their bodies. This is key to removing unnecessary inflexible barriers and ending disability in work. It also ensures employers are acting responsibly in terms of health and safety at work and equality legislation by removing the experience of disability. Giving workers the option to decide on the best working arrangements not only promotes better physical and mental wellbeing but is also important for reducing impairment and health related stigma. Allowing disabled workers to compete on an equal basis against other colleagues for career progression opportunities relies upon being able to demonstrate ability by removing barriers. In other words, employers who offer *flex-ability* are focused on the difficulty and how to remove it (Molyneux 2021). These employers realise they have the power to remove disability from work and take decisive actions to aid employee ability. However, the major weakness in the Government's current pragmatic approach is that it simply tries to encourage rather than impose cultural change in the workplace to develop flex-ability as an employee-orientated inclusive practice. Going forward it will be critical to disabled people that policies are two-sided, co-produced, and therefore developed by employers based on employee consultation on what works for them to remove the experience of disability in work.

Disclosure statement

No potential conflict of interest was reported by the authors.

Funding

Funded by ESRC: ES/X003760/1

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