For the attention of:

Committee on the Rights of Persons with Disabilities

Human Rights Treaties Division

Office of the United Nations High Commissioner for Human Rights

United Nations Office at Geneva

CH – 1201 Geneva 10

30th November 2017

**Subject: Comments on the Draft General Comment on the right of persons with disabilities to equality and non-discrimination (Article 5)**

I welcome the opportunity to submit this reply on the draft general comment as part of the public consultation. I am submitting this as an individual with a disability who has personal experience of having being subject to discrimination.

I live in England which has not entered many of the United Nation's human rights principles or conventions (e.g. the ICCPR) into domestic legislation. Infact during the course of leaving the European Union the Government presents as weakening the human rights of individuals by refusing to bring the Charter of Fundamental Rights of the European Union into domestic law. As a disabled person I currently have access to human rights above and beyond many people in the United Kingdom owing to the European Union having committed itself to the CRPD. As such when the Committee rightly states that disabled people should have equal enjoyment of human rights as other individuals it should be aware that many people in the UK do not enjoy the legal right to many human rights, such as that of decent and dignified work.

I, therefore, view this General Comment as essential in helping to codify the CRPD, in law, for countries like the UK which do not have a history of recognising many human rights. I am grateful for the detail that this General Comment provides. However, I would be grateful if the Committee could expand the detail and examples in the Comment in regards to some issues so as to prevent national courts from interpreting the rights available under the Convention narrowly. I am also of the opinion that it would be of benefit for the Committee to refer to some other UN documents that I have either never seen noted in UK court cases or very rarely, such as 53/144. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. This will help to ensure consistency and codification of international law.

I am also of the view that including more detail about the rights of persons with disabilities will not only help these rights to be codified in international and national law but will save disabled persons from years of stress and expense in having to go to court to have these rights recognised. For instance, in the UK Mrs Archibald had to take her case to the highest court in the country before she had a finding that the law relating to reasonable accommodation "is capable of including the step of transferring a disabled person from a post she can no longer do to a post which she can do, provided that this is a reasonable step for the employer to have to take... None of this was considered by the Employment Tribunal, which disposed of the case on a ground which was clearly wrong. They did not address the question of reasonableness."[[1]](#footnote-22224)

The draft General Comment

In regards to paragraph 27 I am pleased to see that section (a) clarifies the need to identify and remove barriers that impact on the enjoyment of human rights, (therefore, providing decent work) and it is (in my opinion) essential that this remains in the final General Comment. This is not anything that I have ever seen a UK court consider as necessary when considering reasonable accommodation.

Indeed, UK courts currently find that a failure to provide further investigation or enquiry into reasonable adjustments is not a breach of UK law in regards to the requirement to provide reasonable adjustments.

"As for the ET’s Judgment on the Claimant’s reasonable adjustments claim, its reasoning was not to be read as including a finding that the Respondent had failed to make a reasonable adjustment by failing to carry out further investigation or enquiry (insufficient to found a breach of section 20 **EqA**, see **Tarbuck v Sainsbury’s Supermarkets Ltd** UKEAT/0136/06)"[[2]](#footnote-22547)

A/HRC/22/25 states,

"34. The determination of what constitutes “appropriate measures” is essential for the effective implementation of the duty to provide reasonable accommodation. It can be argued that measures are appropriate if they facilitate access to and participation in working life, job advancement and training on an equal footing with others for a person with disabilities requesting them. The identification of appropriate measures must be made on the basis of an individual assessment of the specific job, the needs of the person with a disability and a realistic assessment of what the employer is capable of providing.17 This process should be interactive and participatory to be effective, and all information related to the reasonable accommodation request should be handled with confidentiality."

I would be grateful if the Committee consider referring to A/HRC/22/25 and this definition of appropriate measures and that "The identification of appropriate measures must be made on the basis of an individual assessment of the specific job, the needs of the person with a disability and a realistic assessment of what the employer is capable of providing."

In my opinion this is important so that disabled persons, employers and courts have a consistent understanding of how the CRPD is codified and also an understanding of what constitutes a violation of the CRPD. As such if an employer does not carry out "an individual assessment of the specific job, the needs of the person with a disability and a realistic assessment of what the employer is capable of providing" and in this include the identification and removal of barriers that impact on the enjoyment of human rights are they in violation of article 5 of the CRPD? Currently the UK courts do not protect the right to this assessment, are they right or wrong in their assessment of the law?

Paragraph 27 c. states, "Proving that the accommodation is relevant, meaning necessary and appropriate, or effective in ensuring the realization of the right in question."

I would be grateful if the Committee would consider providing more detail in regards to this so that the employers and courts do not interpret this narrowly. This may entail a number of reasonable adjustments be provided (rather than just the one) to ensure that the realization of the right and that there does not have to be a guarantee that they will be effective before they are tried but that they are the best reasonable adjustments identified in the individual assessment and may be effective. Otherwise courts may refuse to ensure the identified reasonable adjustments on the basis that there is no guarantee that they will be effective. I also think it is important to add that reasonable adjustments should be reviewed periodically and in any case at the request of the individual or when there is a significant change to the job or service.

Paragraphs 32 to 36.

In helping to codify the CRPD and ensure consistency in how treaties are interpreted I would be grateful if the Committee would expand these paragraphs about enforcement and obligations.

The importance of rights and enforcement under the ICCPR is highlighted in General Comment No. 31 and I would welcome a similar statement recognising the fact that they equally apply to the CRPD. I would welcome the Committee highlighting that under the CRPD "every State Party has a legal interest in the performance by every other State Party of its obligations. This follows from the fact that the ‘rules concerning the basic rights of the human person’ are erga omnes obligations" and "there is a United Nations Charter obligation to promote universal respect for, and observance of, human rights and fundamental freedoms. Furthermore, the contractual dimension of the treaty involves any State Party to a treaty being obligated to every other State Party to comply with its undertakings under the treaty."[[3]](#footnote-28112)

General Comment 31 also states at paragraph 6 when restrictions to the Covenant can apply. As such this would be a reasonable place to repeat these principles. I would be grateful if the Committee restate the principles that restrictions must be in accordance with the law, including international human rights standards, compatible with the essence and spirit of the rights protected by the Covenant, in the interest of legitimate aims pursued, and strictly necessary for the promotion of the general welfare in a democratic society, to ensure the human rights of others or health and safety of the individual or others. That any necessary limitations must be proportional, i.e. the least restrictive alternative must be adopted where several types of limitations are available. Even where such limitations are permitted they should be of limited duration and subject to review. That under international law a state cannot claim necessity when they have contributed to the state of necessity.

In my opinion this statement is important in helping to safeguard the rights of individuals under the CRPD. Currently, UK courts do not consider the law of necessity in protecting individuals from dismissal or the requirement to provide rehabilitation under Article 25. They consider it reasonable to dismiss employees who employers have made ill.

"The Court of Appeal has confirmed that an employer can fairly dismiss an employee for incapacity even in circumstances where the employer’s conduct has caused – or contributed towards – the employee’s incapacity...The test in an unfair dismissal case is the reasonableness of the employer’s decision based on what it knew at the time, and for that purpose there should be no need to look at what caused the illness and who was responsible for it."[[4]](#footnote-32149)

I would also be grateful if the Committee would consider restating other principles that are stated in General Comment (ICCPR) 31 or drawing attention that they also apply to the CRPD. For instance, in regards to having the equal and effective benefit of the law I think it is important to note that a failure to investigate violations of the CRPD, provide restitution (including rehabilitation), compensation and cessation of the violation results in on going violation of the CRPD and a failure of the state to discharge its duty under the CRPD,

"A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.

16. Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations."[[5]](#footnote-7357)

I would also be grateful if the Committee would consider referring to other UN documents at this point to help international law be consistent and codified, e.g.

53/144. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms

E/CN.4/2005/102/Add.1 Updated Set of principles for the protection and promotion of human rights through action to combat impunity

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

Paragraph 36 a.

Under UK law there is no legal requirement for administrative procedures to provide prompt, thorough, independent and impartial investigations of violations of human rights. There is no independent body required (or funded) to do so and in employment law it is left to the employer. Therefore, in employment law the investigation of discrimination and breaches of the failure to make reasonable adjustments is left to the employer and is not independent. They only have to make a "reasonable" investigation and not a thorough one and they do not have to provide restitution and compensation including rehabilitation. This does not comply with E/CN.4/2005/102/Add.1 Updated Set of principles for the protection and promotion of human rights through action to combat impunity which states,

"PRINCIPLE 19. DUTIES OF STATES WITH REGARD TO THE ADMINISTRATION OF JUSTICE

States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights..."

Paragraph 36 b.

The committee could add "or any other arbitrary action" and a footnote referring to: -

*53/144. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*

*Article 12 (2). 2. The State shall take all necessary measures to ensure the protection by the competent authorities of everyone, individually and in association with others, against any violence, threats, retaliation, de facto or de jure adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to in the present Declaration.*

This would have the benefit of bringing that document to the attention of those who are not otherwise aware of it.

Paragraph 36 (e)

The Committee could consider helping to codifying what is meant by remedy. A footnote referring to the Updated Set of principles for the protection and promotion of human rights through action to combat impunity, Principle 34 would help to draw attention to that important document.

*"PRINCIPLE 34. SCOPE OF THE RIGHT TO REPARATION*

*The right to reparation shall cover all injuries suffered by victims; it shall include measures of restitution, compensation, rehabilitation, and satisfaction as provided by international law*."

Paragraph 24 lists some examples of reasonable accommodations. This could be expanded on there or examples of reasonable adjustments in the workplace could be listed in xi. Article 27 – Work and employment.

I fully recognise that the Committee will not be able to list every example of reasonable adjustments but providing a more detailed list does provide persons with disabilities, employers and courts a clearer understanding of what is required under the CRPD and help codify the law. For instance, is there a requirement for the employer to provide rehabilitation as a reasonable adjustment, especially when they have caused the situation or the state does not provide this as part of the national health service. Does this include access to a psychological specialist service? See for instance the case of Croft Vets Ltd v Lynda Butcher (UKEAT/0430/12/LA) "**SUMMARY:** An Employment Appeal Tribunal confirms that a reasonable adjustment would have been for the employer to pay for psychiatric treatment for an employee"[[6]](#footnote-3093)

Are employers under a duty to transfer disabled employees to another job vacancy (even at a slightly higher grade) that they could do after retraining when they can no longer do their previous job owing to disability? When the job contract allows does this duty extend to forcing a non-disabled work to swop jobs with a disabled worker when this would allow that disabled worker to stay in employment? For instance,

"1. In our view paragraph 9.2.6, read as a whole, simply reflects the evidence before them that no search for any suitable alternative jobs had been undertaken at any stage; and their view that if, hypothetically, a reasonable Respondent had carried out such a search, he would have realised both that PC Franklin and the Claimant could carry out each other’s jobs, and that it would be a reasonable adjustment for them both to swap jobs in the circumstances.

2. There was no error of law in so finding. In circumstances where the duty to make adjustments was established, and where the evidence showed both that there was an apparently reasonable adjustment which could be made, and that the Respondent understood the broad nature of the adjustment proposed, the burden of proof shifted to the Respondent to provide an adequate explanation why he did not act unlawfully. The only explanation advanced was that the Respondent did not consider himself required, legally, to swap the two posts, not that it would be unreasonable for him to do so. Once the Tribunal concluded that there was no legal bar to finding that a job swap was a reasonable adjustment, and that it would have been a reasonable step to take, section 17A required them to uphold the complaint."[[7]](#footnote-10944)

Paragraph 73

Section (b) I would be grateful if the Committee consider reinforcing the need to ensure access to administrative procedures to ensure prompt, impartial and effective protection of the rights of workers and redress of grievances, including failure to provide reasonable accommodation.

Section (I) I am aware that some courts state that the CRPD is not clear enough in its wording. I would be grateful if the Committee could expand on this point to ensure that the person with disability has effective protection from dismissal.

Firstly, it could add protection from dismissal or adverse treatment for bringing a complaint about discrimination, for instance,

"Article 11

Victimisation

Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment."[[8]](#footnote-19922)

Secondly, it could consider reinforcing that protection from dismissal should also be considered alongside Article 5(3) and Article 1.

For instance, if a person with disabilities is dismissed when there are reasonable adjustments that could be made or other barriers removed such as the right to decent work and these would enable the person to continue in work then this would be a violation of the CRPD. That restitution would be required including reinstatement of the job or transfer into another job.

Finally, I would like to thank the Committee for this opportunity to submit my views and hope that they find them beneficial.

Yours sincerely

Adrian Britliff

1. **Archibald (Appellant) v. Fife Council (Respondents) (Scotland) [2004] UKHL 32** [↑](#footnote-ref-22224)
2. Appeal No. UKEAT/0182/16/DM

   BIRMINGHAM CITY COUNCIL v MISS U LAWRENCE [↑](#footnote-ref-22547)
3. CCPR/C/21/Rev.1/Add. 13 paragraph 2 [↑](#footnote-ref-28112)
4. https://www.personneltoday.com/hr/case-of-the-month-fair-dismissal-for-incapacity-mcadie-v-royal-bank-of-scotland/ [↑](#footnote-ref-32149)
5. CCPR/C/21/Rev.1/Add. 13 paragraph 15 and 16 [↑](#footnote-ref-7357)
6. http://www.fgsolicitors.co.uk/tag/croft-vets-ltd-v-lynda-butcher-ukeat043012la/ [↑](#footnote-ref-3093)
7. CHIEF CONSTABLE OF SOUTH YORKSHIRE POLICE v MR M D JELIC UKEAT/0491/09/CEA

   [↑](#footnote-ref-10944)
8. EU directive 2000/78/EC [↑](#footnote-ref-19922)