

Contents

Fore	eword by Peter Blanck	page xv
Ack	nowledgements	xix
1	Introduction	1
	I Preliminary	1
	A Core Thesis	1
	B Comparative Research Method	2
	C A Note on Terminology: Mental Impairments and	
	Psychosocial Disabilities	4
	D Why Psychosocial Disability?	6
	II Inequalities, Oppression and Ableism at Work	7
	A Are Persons with Disabilities Experiencing Inequalities in	
	Exercising Their Right to Work?	8
	III Theorising Hierarchies of Impairment	12
	A Understanding Hierarchies of Impairment and Prejudice	
	at Work	12
	B How Sites of Oppression Are Constructed between	
	Impairment Categories	13
	C Prejudice against Psychosocial Disabilities	14
	Conclusion	16
2	International Disability Norms at Work: International Law on	1
	Ableism at Work and the Hierarchy of Impairments	18
	Introduction	18
	I How Has International Labour Law Historically	
	Problematised the Disabled Worker?	20



viii Contents

	A How the Collective Focus of the ILO Reduces	
	Protection for Workers with Disabilities	21
	B The ILO and the Problematising Disability through the	
	Medical Model	24
	C Workers with Disabilities and ILO Conventions and	
	Jurisprudence: Discounting Ability Diversity at Work	26
	D The Social Model and Developments in Ability Equality	
	at Work	27
	E ILO Embracing New Disability Human Rights Paradigm	30
	II The UN and the New Disability Human Rights Paradigm	31
	A The Emergence of the Disability Human Rights	
	Paradigm and the CRPD	31
	B The Right to Work and the CRPD	34
	C No Hierarchies of Impairments: How the CRPD	
	Promotes Ability Equality at Work	35
	Conclusion	37
	The CRPD Committee, Ableism and Hierarchies of	
3	Impairment at Work	38
	Introduction	38
	I The CRPD Committee and Its Role	40
	II The CRPD Committee and Understanding the Problem of	7~
	the Hierarchies of Impairments at Work	42
	A The Right to Work and the Interdependency of Rights	1 42
	B Understanding the Problem: The CRPD Committee and	'
	the Denial of the Right to Work	44
	III Regulatory Failures Which Promote Ableism at Work and	• • •
	Hierarchies of Impairment	47
	A The Ability Apartheid Is No Accident: Regulatory	• •
	Interventions That Aim to Exclude Workers with	
	Disabilities	47
	B Hierarchies of Impairments in Laws Which Fail to	
	Regulate Key Barriers to Ability Equality at Work	49
	IV Importance of Comparable and Disaggregated Data in	
	Identifying and Addressing the Hierarchy of Impairments	
	at Work	50
	A The CRPD on the Disaggregation of Data and	
	Hierarchy of Impairments	51
	B Disaggregation of Data and Hierarchy of Impairments	51
	Conclusion	53



Hierarchies of Impairment at Work in the Regulation and	1
Response to Sheltered Work	
Introduction	
I Introducing Sheltered Workshops	
A What Are Sheltered Workshops?	
B Funding Sheltered Work	
II The CRPD Committee and the Agenda against	
Sheltered Work	
A How Does the CRPD Distinguish between Acceptable	le and
Unacceptable Employment Options?	
B What Has the CRPD Committee Said on Sheltered	
Workshops?	
C Transitioning from Sheltered Work to	
Open Work Can Take Considerable Effort and	
Retraining	
D Why the CRPD Committee Is Opposed to	
Sheltered Work	
III Disability Scholarship That Supports the Position Taken	1
by the CRPD Committee	
A Separate Is Bad	
B Exploitative Not to Pay Equal for Workers with and	
without Disabilities	
C Inability to Transition out of Sheltered Work	
IV Ableism in the Open Labour Market and Transitioning	from
Sheltered Work to What?	
A Transitioning to What? From Sheltered	
Permanent Employment to Low-Skilled Casual	
Employment	
B Beyond Precarious Employment to Precarious Work:	
Unsheltered and Unregulated Work	
C Non-Ideal Employment to No Employment:	
Experiences When Sheltered Workshops Are Closed	
V We Know What Is Good for You: Everything about You	
without You	
A My Voice My Choice: Hear Me	
B You Have My Voice, Now Help Me Use It: Disability	y
Person Organisations	
Conclusion	



x Contents

5	The Arbitrary Exclusion of Episodic and Psychosocial		
	Disabilities from Legal Protection: The Duration		
	Test Promoting Ableism at Work	81	
	Introduction	81	
	I Psychosocial Disabilities as Episodic Disabilities	82	
	A What Are Episodic Disabilities?	82	
	B Episodic Disabilities Are Misunderstood	83	
	C Difference between Episodic and Stable Disabilities		
	at Work	84	
	II International Disability Norms: Protecting by	•	
	Categories and Not by Need	86	
	A Minority Group and Universalist Approach to		
	Disability	86	
	B The CRPD Adopts the Minority Group Approach	88	
	C The Duration Test in the CRPD	90	
	III Duration Tests and Disability Discrimination and		
	Diversity Laws	91	
	A Proving the Presence of a Psychosocial Disability	94	
	B Faking or Real: Challenges in Proving Episodic Disability	95	
	C Beyond Anti-discrimination Laws, How Do Other State	//	
	Interventions Approach Episodic Disabilities?	99	
	Conclusion	100	
6	Ability Apartheid at Work: The Policy of Stigmatising and		
	Excluding 'Unacceptable' Psychosocial Disabilities from		
	Anti-discrimination Laws	102	
	Introduction	102	
	I Examples of Psychological Conditions That Are Deemed		
	Outside Protection	105	
	A Psychological Conditions Where Propensity for Conduct		
	Deemed Unacceptable in Society	105	
	B Substance Abuse Addictions	108	
	II Is It Reasonable to Expect Workers with Psychosocial		
	Disabilities to Rehabilitate to Gain Protection?	113	
	A Attempts to Rehabilitate Can Enliven Anti-discrimination		
	Protections	113	
	B Mitigating an Impairment Is Normally Not Necessary	114	
	C Should the Decision to Refuse Treatment Be		
	Relevant in Considering What Are Reasonable		
	Accommodations?	115	



	Contents	xi
	III The Mutability of the Condition and the Immutability of the Legal and Social Stigma: Can Workers	
	Remove the Outsider Identity Once Marked?	117
	A Counter-Productive to Deny Protection	117
	B Criminal Spent Conviction Laws Have Time Limit Where	,
	'Unaccepted' Psychosocial Impairments Do Not	119
	Conclusion	121
7	Reasonable Accommodations in a Psychosocial	
	Diverse Workplace: Hierarchies of Impairment at Work	122
	Introduction	122
	I How Can Reasonable Accommodations Enable Persons with	
	Psychosocial Disabilities to Exercise Their Right to Work? A General Wellness Programs vs. Reasonable	124
	Accommodations	124
	B The Subjective Nature of Reasonable Accommodations II Hierarchies of Impairment and Reasonable Accommodations	124
	under International Law	127
	A Reasonable Accommodations and the ILO	127
	B Reasonable Accommodations and the CRPD	128
	1 The First Prong: Universal Design	129
	2 The Second Prong: Right to Reasonable	
	Accommodation	130
	C CRPD Committee on the Right to Access and Reasonable	
	Accommodations	131
	1 The CRPD Committee Promoting the Two-Prong	
	Approach	131
	2 The Right to Access and Hierarchies of Impairment	131
	3 The CRPD Committee and the Right of Reasonable	
	Accommodation	134
	III Law and Practices of Unreasonable Refusals to Accommodate	
	Psychosocial Diversity at Work	136
	A The Test for Reasonable Accommodations	136
	B Employers Designing Work Structures and the Business	
	Case for Exclusion: The Requirement for Standard	
	Range of Behavioural Abilities	140
	IV Challenges for Workers with Psychosocial Disabilities	
	in Making Reasonable Accommodation Requests	142
	A 'Coming Out' with Mental Disability as an Invisible	
	Impairment	142



xii Contents

	B Dilemma for Reasonable Accommodation: Emphasising Sameness or Difference	143
	C What Happens If the Accommodation Request Is	
	Rejected?	145
	D Employer Demanding Disclosure of Disability E Resistance to Psychosocial Diversity at Work and to Making	146
	Accommodations for Workers with Mental Impairments F Uncertainty on How to Accommodate Psychosocial	147
	Impairments G Functional Accommodations vs. Changing	147
	Workplace Norms	148
	H Role of Stigma	149
	I Co-Worker Sanism	150
	Conclusion	152
8	Using Occupational Safety and Health Laws to Promote	
	Psychological Health at Work	153
	Introduction	153
	I International Law Norms on Occupational Safety and	
	Health and Disability at Work	155
	II Helping Psychosocial Diversity: Occupational Safety and Health Duties to Promote the Psychological Health of	
	Workers	157
	A Employers' Duty to Manage Their Workers' Psychological Health	158
	B Failing to Discharge the Duty to Protect Workers' Psychological Health: When Asking for Help Results in	
	Unfavourable Treatment	162
	C Employers Failure to Protect Workers Psychological Health	
	Can Contribute to Bullying and Violence at Work	163
	III How Occupational Health and Safety Laws Can Restrict	(
	Psychosocial Diversity at Work	164
	A Employers' Occupational Safety and Health Duty to	(
	Respond to Non-Ideal Social Interactions at Work	165
	B Bullying and Mobbing Laws Intensify Employer Attention	C 0
	on Preventing Non-Ideal Social Interactions at Work	168
	C Limitations on Excluding Workers due to Manifestations	
	of Their Disability: The Limited Role of Anti-	
	discrimination Law	172
	Conclusion	177



	Contents	xiii
9	Sanism and Ableism in the Law's Response to Injured	
	Workers	180
	Introduction	180
	I Comparing and Analysing Systems for Compensating	
	Workers Injured at Work	182
	II Workers' Compensation Laws Failing Workers Mentally	
	Injured at Work and Enshrining a Hierarchy of Impairments	184
	A Higher Burden of Proof: Hierarchy of Impairments in	
	Who Is Entitled to Workers' Compensation Payments	184
	B Scrutinising the Event Which Led to the Mental Injury:	
	Traumatic or Unusual	187
	C Mental Injuries That Are Caused by the Exercising	
	of Managerial Prerogative Are Not Normally	
	Recognised	189
	D A Bizarre and Unfounded Assumption: Mental Injuries	
	without an Associated Physical or Sensory Injury Are	
	Not Real	192
	E Where Workers Mentally Injured at Work Are Deemed	
	Less Unworthy	193
	F Hierarchy of Impairments in Compensating Workers	
	for Mental Injuries	194
	III Negligence at Work: Judicial Distinctions between Physical	
	and Mental Impairments	197
	A The Gap between the Cause of Mental Injuries and	0
	the Legal Right to Seek Redress	198
	B Judicial Limitations on Damages for Mental Injuries	199
	C Litigants with Mental Impairments as Responsible for Their Own Well-Being	201
	Conclusion	201
	Conclusion	204
10	Advancing Psychosocial Diversity Using Contract and Unfair	
	Dismissal Laws	207
	Introduction	207
	I Fairness and Termination of Employment Contracts Under	,
	International Labour and Human Rights Laws	209
	II Statutory Unfair Dismissal Protections	211
	III Impairment Irrelevant: No Need to Identify or Prove the	
	Presence of Disability	213
	A Proving the Presence of Disability Can Be Challenging	213
	B The Disclosure Conundrum and Unfair Dismissal Laws	213



xiv	Contents	
	IV The Notion of 'Fairness' Incorporates Ability Diversity	216
	A Procedural Fairness in the Fair Work Act 2009 (Cth)	
	s 387(b)–(g)	216
	B Whether There Was a Valid Reason for the Dismissal	
	Related to the Person's Capacity or Conduct	
	(Including Its Effect on the Safety and Welfare of Other	
	Employees) – Fair Work Act 2009 (Cth) s 387(a)	22
	C Any Other Matters That the FWC Considers	
	Relevant – Fair Work Act 2009 (Cth) s 387(h)	222
	Conclusion	225
Inde	ex	22