Capability Adjusted

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Introduction

Disabled people[1] have historically been under-represented in the workforce[2] and when in work, are paid less than their nondisabled colleagues[3] but in a contemporary climate of labour shortage and high turnover, employers may begin to recognise the advantages of diversifying their workforce[4]. Most effort in correcting this historic injustice has been invested in recruitment of disabled people[5], but what if part of the problem lies at the other end of the employment pipeline? There is some evidence[6] to indicate that employers are cautious about offering a chance to a disabled job applicant because they do not know how to manage poor performance and worry that they will be 'stuck' with

an underperformer, unable to let them go because of the protection afforded to them by their status as a disabled employee.

This discussion asks about the association between disability and workplace performance. Since we have little evidence to indicate that disabled workers perform less well than others[7], we assume that similar proportions of disabled workers will excel or perform unsatisfactorily as we find in the rest of the labour force. Adopting the pessimistic view that under performance will be more prevalent gives rise to discrimination, while the opposite idealised view that disabled workers will always be committed and competent is no less patronising. The section below on productivity investigates this issue in more depth.

Capability management is a broad concept that could apply to the rewards offered by companies for excellent performance but is more often a euphemism for the way that they respond to incapability or poor workplace performance. As one employer[8] put it; "*people who can't do the job rather than people who won't do the job".* Does capability management need to be adapted so that it treats disabled employees fairly? What practical things need to be set in place to make sure that disabled employees get the support they need to deliver the job requirements, while employers get the support they need to say goodbye when that is appropriate?

Such an approach will not work unless other essential stages on the employment pathway are also adjusted – role descriptions, recruitment and selection, induction, training[9], support, supervision, mentoring, coaching and promotion - so that capability procedures are part of a wider approach to uncovering and harnessing talent. In particular, capability management sits alongside policies that address probation at the start of the job, sickness absence, disciplinary responses to misconduct and grievances against the employer.

Our task is to find examples of reasonable adjustments (called 'accommodations' in the USA) and research evidence of their impact where this is available, so that we can be clear about what best practice would look like in capability management policy and practice. It is to unpick the process of capability management in order to identify good practice and look for a fidelity measure for adjusted capability policies.

The search is somewhat counter-intuitive to some campaigners who promote the workplace rights of disabled employees. Badly crafted, this material could reinforce negative stereotypes about the competence of disabled workers and invite 'fire at will' managers[10] to strip all disabled workers from their labour force. Our ambition is higher than this, and rests on the assumption that disabled workers should be subject to the same workplace pressures and demands for productivity as their colleagues and the same consequences for poor performance.

Employers have a duty to create a workplace where all staff are well trained, where they can thrive, where people can go home at the end of the day tired but valued for a job well done, and where workers with disabilities have their individual workplace needs met, just like their colleagues. If disabled employees are not thriving, this may reveal that the culture is unhealthy for all.

Scope

In this paper, we are interested in waged jobs in the open market, rather than sheltered environments. This means that this paper does not cover therapeutic workshops or other simulated workplaces, training, education and preparation programmes for work, or volunteering.

The focus of this paper is how Capability Management policies and procedures can be drafted so that they do not amplify discrimination against disabled persons. In order to reach this topic, a range of approaches will need to be set out first, to show how supportive employers are crafting their

relationship with all their staff and with the disabled worker in particular. Getting these things right will mitigate the need for formal Capability management procedures to be invoked.

Employment protection

OECD has summarised employment protection rules for around 40 countries[11] and then summarised the information into two scales that differentiate the extent of legal protection in individual countries. These scales provide an analytical framework with which to consider how to respond to potential dismissal. The first scale[12] addresses regular contracts and the second[13] temporary employment. The presence of anti-discrimination legislation is also considered in the OECD analysis and prompts reflection on the extent to which this influences capability management.

Laws in the UAE[14] protect disabled employees from having their job terminated or being referred to retirement due to disability or its occurrence after appointment, unless retirement age is reached or a competent medical committee states they are not fit to work. This highlights the need for equality of opportunity throughout the lifecourse and not just at the start of working life.

In the United Kingdom, employee rights increase with the length of tenure and may include:

- a written statement of the reasons for dismissal.
- A minimum notice period
- Severance pay
- The right to challenge dismissal as unfair (the claim must be made promptly)
- Compensation for unfair dismissal.

In the USA, small employers (< 15 employees) are exempt from the obligation to make reasonable accommodations.

From an international perspective, comparative studies have explored whether countries with strong legal protection for disabled employees have more disabled people in their workforce than those with weak protection. For example, in Canada, employers are required to make efforts to redesign job roles and policies right up to the point where additional actions would constitute 'undue hardship'. The general finding is that they do not, perhaps because, on the positive side, employment protection can fund reasonable adjustments in work and make employers hesitate before firing a disabled worker, but it also increases reluctance to hire a disabled worker in the first place. Results are also obscured by varying definitions of what counts as disability.

Recommendations
1. *Understand the legal framework for capability management.*

What counts as fair dismissal?

The United Kingdom has set out a definition of acceptable reasons for dismissal[15], including:

- The capability, qualifications or conduct[16] of the employee
- Redundancy. Employment tribunals will consider whether the employer has selected an appropriate pool of people who might be made redundant, consulted with them, applied

clear and consistent selection criteria and considered the availability of suitable alternative employment.

- Where continued employment would be illegal
- Another substantial reason.

Dismissing an employee for trade union activity, health and safety whistleblowing, pregnancy or maternity would count as unfair. Searching bibliographies for the terms 'unfair dismissal' and 'disability' yields useful material.

The purpose of any reasonable adjustments (see below) is to enable the worker to achieve the same capability and output of their nondisabled colleagues. In the USA, a clear statement has been made that any capability procedure that is started due to poor performance should not be rescinded if a disability is disclosed; but it may be suspended while adjustments are tried.

Employees who fall into the provisions of the capability policy may be offered an assessment with occupational health staff; additional supervision (usually weekly) including clear feedback on performance; support for other aspects of life through an Employee Assistance Programme; redeployment or changes to job role, terms and conditions; training; and a definite time period for delivering improvement (in the Denbighshire example above this is usually three and never more than six months). The Equalities Act 2010 requires employers in the UK to make 'reasonable adjustments' to working arrangements so that disabled employees are not subjected to direct or indirect discrimination.

The employee may be entitled to invite a colleague or Trades Union representative to attend formal capability meetings with them. Should the employee fail to attend a formal capability meeting, it will continue in their absence. Pay enhancements are conditional on satisfactory performance so may be withheld during the capability process.

Once achieved, improvement needs to be sustained. In Denbighshire, there is a twelve month 'linking rule' that means anyone who has been subject to the capability process must maintain their improved performance for a minimum of twelve months. If this is not achieved, then the capability process is restarted at the point it had reached previously, rather than starting again from the beginning.

Whilst the general reasons for dismissal will be set out in the employee handbook, some employees may benefit from this being made clear from the outset. The employer needs to treat all employees in the same way and so cannot single out disabled employees in this way, independent employment specialists may decide this will help in individual cases.

Recommendations
2. *Have reasonable adjustments been made to working conditions and requirements?*
3. *Does this disabled jobseeker need to know how the capability procedure and dismissal processes work?*

A working theory

Making sense of poor performance in the workplace and offering a comprehensive response will be assisted by use of one or more suitable theories. Such a model would provide a checklist of issues to be considered, a hypothesis for 'cause and effect' relationships and an indication of what steps might be taken to improve the disabled worker's workplace situation. Possible working theories are set out below:

- A COM-B analysis[17] of hiring decisions by managers found three main enablers (motivation to help others, working in a large organisation, and expecting a competitive advantage) and three barriers (expectations that people with disabilities are unproductive, expectations that people with disabilities cost a lot of money, and lack of knowledge about disabilities). It would be reasonable to assume that these predisposing factors not only drive hiring decisions, but also shape decisions to terminate employment.
- The Social Model of Disability separates out impairment from socially constructed disability and seeks adaptations to environment and the attitude and behaviour of others.
- The Job Demands-Resource Model of Burnout[18] is a validated tool that suggests that an imbalance of job demands to personal and work resources can lead to the loss of engagement in the workplace and eventual burnout.
- The Social Capital approach[19] suggests that the disabled worker can enjoy considerable social capital where they are seen as conscientious, a team player, loyal and honest. These reserves can be built up over time and act to stabilise the employee's job position when it is under threat from absenteeism or poor performance. Similarly, worker perceived to be lying, quarrelsome and lazy will have less social capital to protect them when things start to go wrong.
- Two complementary approaches to supporting people into open employment are known as Individual Placement and Support and Job Coaching. These models set out specific tasks that the employment specialist needs to accomplish, ranging from careful understanding of the employee's strengths, through collaboration with other health and social care professionals and liaison with welfare benefit systems to task analysis, training in soft workplace skills and enduring support for both employer and employee. It may be that the employee specialist has not done a good job and so the employee is struggling. Repairing this would entail revisiting the model and checking how each task has been completed.

See the worker in context

The Social Model of Disability attends to the environment in which an impaired person finds themselves and seeks to lower barriers to participation. Thus, a person using a wheelchair has a mobility impairment but this does not interfere with their work until someone builds a staircase, positions workbenches too close together and sets the kettle on a high cabinet. If one employee is less productive than some of their colleagues, the comparison may highlight the excellent performance of these co-workers rather than reframing the person's satisfactory level of productivity as inadequate.

Overlying this issue is the workplace culture and perhaps fluctuations in the culture of wider society have an impact too[20]. A bureaucratic culture may permit an employee to remain within their job description and never take work home, while elsewhere, the employer insists on unpaid overtime and relentless productivity and will fire anyone who does not display exceptional commitment[21]. The

core job role may present no performance difficulties, with differences between the high achiever and the poor performer manifesting themselves in 'voluntary overtime'.

Specific elements of the workplace culture may impact disabled employees disproportionately. Koch et al[22] found that, like bullying, harassment and abuse, routine incivility and microaggressions had a negative impact on disabled employees[23], increasing turnover intentions and burnout. The disabled person may need to consider using informal mechanisms or a formal grievance procedure to challenge discrimination and may need support from an advocate in workplace negotiations.

The review by De Beer et al[24] found that dyslexic employees did better when the workplace provided autonomy, so that workers could find their own ways to get the job done and this appears to be the case for all workers. Wissell's team[25] found that a workplace culture that supported disclosure of the disability reduced stress for the disabled employee.

Recommendations
4. *Establish a healthy workplace culture characterised by respect, appropriate work/life balance, staff turnover and morale.*
5. *Ensure sufficient autonomy so that employees can implement their own solutions.*
6. *Support employees to disclose disability and respond positively.*

Positive workplace relationships

We shall see below how workplace cultures and appraisal practices can impact the quality of the relationship between the disabled worker and their line manager, perhaps with relationships with peers acting as an intervening variable. Before this, a much simpler process can spoil the worker's chance of retaining the job. The disabled worker needs to be understood as a person and needs to understand their line manager as a person, and ideally respect and even like each other. This means that it is part of the employment specialist's role to facilitate this mutual 'getting to know you' phase, perhaps by prompting the disabled worker to disclose some information about their achievements and successes in life. By doing this, the line manager is then prompted to look for consistency rather than speed, or to repeat a personalised instruction several times rather than assume that the employee has picked it out in the staff briefing meeting.

If use of the Capability policy to terminate employment is a rare and exceptional event in the company, it will have a significant impact on work colleagues and the external reputation of the organisation. It may undermine belief in the consistency of ethical governance of the organisation, weaken shareholder or commissioner confidence in the seriousness with which the organisation lives out its policies, impact sales to the disabled community and their allies or damage the organisation's reputation in local media.

Productivity

Output requirements may be set for all employees by reference to the job description, induction training, job-specific training, departmental standards, professional standards and negotiated individual agreements with the line manager. The specificity and degree to which these requirements are specific and measurable varies and may include both an attendance component[26] and an output requirement. The disabled employee may have not been told what the output

requirements are or may not have understood. The line manager's criticism of the disabled worker's poor performance may be partly driven by guilt and embarrassment about their own failure to raise the matter before now. In the USA, legislation considers productivity in respect of the 'essential functions' of the postholder[27], rather than monitoring marginal and trivial aspects.

Some advocates rightly champion the business benefits[28] of employing disabled workers but may gloss over the question of individual productivity. A worker with paraplegia may need to use a wheelchair to reach their desk but once there will type at 100 words per minute; a person with tetraplegia will not. Aids and adaptations may allow the tetraplegic person using speech recognition software to dictate at 100 words per minute, but the point remains that some disabled jobseekers cannot reach this level of productivity, even with all available aids and adaptations[29]. Perhaps there is an alternative position where they would be as productive as non-disabled postholders in that environment. Some studies ask the employee if their disability has reduced their output, but this introduces the problem of self-assessment[30].

Some negotiators for disabled employees claim that the notion of worker productivity is flawed. Nineteenth century production lines and twentieth century call centres designed on Taylorist principles may assume that human beings work at a standard output rate for eight or ten hours a day; but for most workers, productivity, commitment, energy and enthusiasm will wax and wane. Some days, even the best of us do not do very much - so measuring the disabled worker's productivity against a fictional performance standard is disingenuous. Such an argument may help the employee who is underperforming for a brief period and to a marginal degree, but will not rescue those with a more serious gap between expectations and delivery.

All this is predicated on an assumption that productivity measures stand as an excellent proxy for all the value that the disabled worker brings to the workforce. To use the example above, the worker may be unable to reach 100 words per minute, but they may bring other unique contributions that do not appear on the performance evaluation form. Such an argument presses the employer to consider why the person is on the team and how they will distinguish good and poor performance.

Fluctuating conditions add a further layer of complexity, as illnesses that episodically remit and relapse (such as some mental health issues, arthritis, colitis, epilepsy, migraine, back pain and chronic fatigue) reduce the number of productive days and, for some, do so on an unpredictable timetable. The employee may know precisely how this works, but some disabilities may be perceived with suspicion by a manager, who then doubts the veracity of the employee's explanations or becomes fearful of other workplace problems, resulting in harsh ratings of current productivity and adverse predictions of future productivity.

Recommendations
7. *Recognise the business case for employing disabled workers.*
8. *Adopt a broad view of productivity in which it is not reduced to meaningless metrics.*
9. *Take a medium-term and corporate view of productivity by, first, reviewing the output of all workers over time, rather than singling out the disabled employee.*
10. *Ensure that output requirements set for the disabled worker are explicit, clearly communicated and achievable. Justify their adoption as a response to evidence rather than unfair demands on one worker while others escape scrutiny.*

Job Crafting

Before we look at negotiated changes to the job role (see below on Job Carving), it is important to recognise that all employees find ways to make personal adjustments to their work tasks, relationships and attitudes. Together, these have been described as job crafting and they reveal how employees either enhance their engagement and productivity or adopt survival strategies by withdrawing from aspects of the role. The analysis by Bruning and Campion[31] provides a useful framework for reflecting on what the worker does or might do in the workplace to survive, enjoy their work or achieve personal goals. Healthy workplaces permit the employee to exercise autonomy in these ways where the changes result in enhanced overall performance, whilst recognising that such changes often occur privately and may not be willingly discussed.

The seven kinds of job crafting listed below form a checklist that may help the line manager be more precise about the area in which they claim there is poor performance, and the employee to clarify how they might made changes.

1. **Work role expansion**, such as choosing to carry out tasks in addition to those in the job description.
2. **Social expansion**, such as building social networks with colleagues beyond that necessary to do the job.
3. **Work role reduction**, such as simply not doing some parts of the job description.
4. **Work organisation**, such as arranging the workspace and planning how to do the job.
5. **Adoption of technology**, such as use of a smartphone app.
6. **Metacognition**, such as choosing to think about work in a certain way.
7. **Withdrawal**, such as avoiding the boss so that extra tasks cannot be assigned.

> Recommendations
> *11. Retain a commitment to productivity, while giving the underperforming worker more freedom to implement their own solutions.*

Job matching

In recent decades, the jobs market has become much more turbulent, with faster worker turnover and business lifespan shortening. This means that the average stay in a single job is shorter and workers have more job interviews and new careers than before. This means that there are more entry points to the workforce for disabled jobseekers; but, at the same time, the casualisation of the workforce means it is easier to avoid employing disabled people or renewing contracts when the time comes.

Preparatory work may be needed before the employee starts the job. An employment specialist or job coach may need to thoroughly understand the tasks, perhaps by working a shift themselves prior to supporting the disabled employee to learn the job. The requirements of the role need to be clearly spelled out, including performance standards, appraisal mechanisms and the Capability Policy.

Job Carving

Whilst job crafting is carried out by the individual worker, usually privately, job carving is a negotiated response that is likely to affect the job description[32]. The goal is to determine the most engaging and productive activities for this particular disabled jobseeker and then find matching tasks in the workplace that can be combined to form a role. Here's an example. Where a team of personal assistants each spend part of their day at the photocopier/printer, these duties can be cut away from their busy schedule and allocated to a disabled worker who then spends all her time staffing the photocopier. This can be a useful solution when the company is expanding its labour force and reprofiling a number of job roles, but at its most basic, it requires an additional salary to be found rather than simply filling a vacancy. Carving a special role may also be viewed as a particular favour to that employee, so may create resentment in others[33], unless all staff are permitted to carve their work around their particular needs and preferences.

On the face of it, job carving will increase business efficiency as unwanted elements are carved out of several job roles and passed to a lower paid worker, releasing capacity for everyone to work at their full potential. However, these undemanding aspects of a challenging role might be used to take a 'brain break', to step back from the pressure for a moment and allow the mind to freewheel, which is often when new solutions appear and forgotten tasks return to mind. Packing full stretch tasks into every moment may have perverse consequences, such as increasing sickness absence or strengthening a culture of presenteeism, through which staff attend work but engage as little as possible.

Furthermore, when this approach is applied to disabled job applicants, it assumes that the disabled employee wants and needs low pressure, undemanding and poorly paid tasks. Such a stereotype may be appropriate for some candidates, but other disabled workers are high achievers who thrive under pressure and would prefer the most challenging elements of other roles to be carved out and passed to them. The ideal situation is where everyone benefits, rather than exploiting the disabled worker to improve job satisfaction for his colleagues, or vice versa. So if the disabled employee loves spreadsheets and hates phone calls while his colleague who favours the opposite, they may negotiate for work to be reassigned between them to create a win-win solution, just as long as this fits in with the group norms around reciprocity.

Negotiating such solutions can be a delicate task, involving the right to confidentiality, the need to protect the dignity of the workers and avoid creating power imbalances within the team. Sometimes job carving can be the little things which only require a supportive colleague and not a top-down approach from management. We might make a distinction between the following:

- Micro carving - small, day-to-day, ad-hoc changes; agreed casually
- Macro carving - procedural changes to the job tasks agreed informally and approved by the manager
- Meta carving - changes to job descriptions agreed formally

Recommendations
12. Redesign the disabled worker's role to enhance personal productivity and team relationships.

Reasonable adjustments

The law provides for reasonable adjustments to be made to the workplace to lower barriers for disabled employees. It normally requires a request to be made by the employee, either at the start of the job or at any time afterwards, rather than expecting the employer to guess what is required or infer it from the name of the disability. Reasonable adjustments are intended to help the disabled employee meet output requirements, not to excuse employees from meeting the requirements.

Legislation in the USA[34] provides for the possibility that the start of a performance improvement plan is delayed when an employee discloses a disability and requests reasonable adjustments in response to a poor performance evaluation. The disability disclosure triggers an evaluation to determine whether the adjustments are warranted and reasonable, which should be completed before the performance improvement plan commences.

Reasonable adjustments are a right, not a reward, so cannot be withdrawn in response to a poor performance rating. An ineffective adjustment can be replaced with another in an attempt to find a way to improve performance, but it cannot be withdrawn as a punishment for performing poorly. This presses employers to also consider what would count as reasonable in adjusting the workplace and the tipping point at which 'accommodate' becomes 'terminate'.

Assistive technology

Access to Work is a UK scheme run by the Department of Work and Pensions to support disabled people to get and keep work. Funding can pay for assistive technology and skilled support staff. Ideally, support needs are identified prior to starting the job, but they sometimes do not come to light until Capability Management processes are underway.

> Recommendations
> *13. Check out whether assistive technologies are available to resolve the capability issues.*

Performance standards – productivity and conduct

Medical education has been criticised[35] for developing asymmetric performance standards, that precisely define competence but remain vague about incompetence. This hampers assessors in providing clear feedback to underperforming students.

It is both reasonable and ethical to hold employees with disabilities to the same performance standards as employees without disabilities in the same job. Employers are not required to disregard, change, or eliminate performance standards as reasonable accommodation.

In the USA, employees with disabilities may be held to the same conduct rules as other employees, as long as the rule is job-related and consistent with business necessity and other employees are held to the same standard. Some conduct standards will always be considered as 'job-related and consistent with business necessity', such as prohibitions on violence, threats of violence, stealing, destruction of property, violation of health and safety rules, use of alcohol or illicit drugs in the workplace and frequent tardiness or absenteeism. Employers may also prohibit insubordination towards supervisors and managers and require that employees interact appropriately with co-workers, clients and customers. Thus they may yell, curse, shove, or make obscene gestures at each other at work, harass or threaten others. Additional conduct rules may be adopted by the employer,

such as banning use of the employer's computers and other equipment for purposes unrelated to work. The Americans with Disabilities Act does not protect employees from the consequences of violating conduct requirements even where the conduct is caused by the disability.

Appraisal mechanisms

Employment specialists and job coaches usually sit outside the specific employment setting and can hear about performance issues directly from the employer. This may trigger a 'catch-up' meeting away from the workplace, where the employment specialist and the employee can have a wide-ranging conversation about how they are in relation to home, family, friends and work. Such a session might bring to light issues that were adversely affecting workplace performance and suggest a way forward.

On occasions, the employment specialist is approached by the employer who is reluctant to broach their complaint with the employee. In this situation, it can be important to encourage the employer to treat the disabled worker in the same fashion as other workers by raising the matter directly with them, rather than to assume that a third party needs to be involved. This is challenging where the employee has not disclosed their disability, has not realised that there have been job difficulties, a change in performance or interprets the feedback as a personal threat.

Performance management systems are popular in some sectors and provide a way to test the competence of staff; but several challenges attend this approach. First, practical tests administered once have been found to be unreliable in helping medical students who underperform and it has been suggested that it may be better to combine the results of tests administered by multiple raters over a sustained period[36]. When reviewing the findings from 76 tribunal hearings, Williams-Whitt & Taras (2010)[37] found a high proportion of cases had been guided by experts in work performance assessment and yet had failed, suggesting that the experts would have done as well by tossing a coin when this study was carried out.

Second, tests can be designed to measure the wrong thing. A conversation between the employee and the line manager is often used to appraise performance[38]. Here, the ability to describe one's workplace performance and propose convincing explanations and next steps is a crucial survival skill that may have little to do with everyday workplace behaviour[39]. For individuals who are practically competent but lack sophisticated verbal and social skills, this becomes a highly stressful and artificial environment which may trigger performance anxiety, rejection sensitivity dysphoria or even post traumatic stress disorder. On the other hand, if informal assessments are being made on the basis of discriminatory stereotypes, then adopting an objective measure of performance will improve opportunities for highly productive disabled employees to be recognised.

A further example of tests that measure the wrong thing occurs when practical tasks are used as proxy for more subtle aspects of the job role that are harder to measure. For example, when the management of residential care homes monitor staff performance via an excessive focus on task accomplishment, this has a negative impact on the quality of relationship between direct care staff and residents, resulting in an increase in physical violence against staff[40].

Third, it is not always clear to the employee that a performance appraisal is being conducted. Take, for example, the recent phenomenon of 'stay interviews', through which line managers get to hear about the job satisfaction of their staff[41]. These are being used in businesses where turnover is too high and might be expected to reverse the usual power dynamics of appraisal meetings, since the

employee is appraising the employer. However, if the culture has remained hierarchical and the employee does not believe that the manager is open to criticism, subordinate staff will game these experiences rather than taking them at face value or will respond to the 'how can we persuade you to stay?" question as if it was a test to be passed rather than admission of intent.

Fourth, introducing performance appraisal can damage workplace relationships. Laasar[42] studied the UK banking sector and found that introducing a performance management system both degraded and intensified work demands through the introduction of detailed performance targets, close monitoring of work effort and harsh enforcement of disciplinary practices. As a result, antagonism between managers and frontline staff increased, driven by resentment that employees were being treated as disposable commodities and leading both groups to adopt negative stereotypes of the other, as well as increasing levels of hostility between them.

Laasar's work described the shift to performance management culture in the whole banking sector over several years and the consequence of growing workplace hostility. We might consider if there is a parallel with one worker's experience as they move from an ordinary working relationship into the tightly managed arrangement of a performance appraisal period. The circumstances are too dissimilar to be confident that the parallel can legitimately be drawn, but Laasar invites us to look out for the emergence of stereotypes and antagonism between the line manager and the employee, and to note that these reactions can occur in both directions.

Fifth, performance appraisal is one of a bundle of approaches designed to improve productivity (the bundle also includes competency testing, individual performance-related pay, teamworking, and functional flexibility) which, when used in combination, have been shown to exclude disabled people from the workforce unless the individual company also holds a strong commitment to social justice and equity[43].

All these factors may be in play for the licensed professions where employees need to sit an examination or submit a portfolio from time to time to retain the restricted title and therefore their job. A range of adjustments can be made to ensure that these mechanisms are responsive to disabled staff.

> Recommendations
> *14. Find out about work performance by measuring the right thing.*
> *15. Recognise that there is stress in submitting to a formal appraisal process and this can affect performance in that setting.*
> *16. Look out for unwanted consequences of introducing performance appraisal systems such as an increase in antagonistic relationships.*

Recognising poor performance

Claire Tregaskis carried out some research[44] into the experience of disabled people in a leisure centre and observed that one person with a learning disability had engaged in vandalism and racist abuse. Rather than addressing this unacceptable conduct, it was tolerated by indulgent staff who had perhaps adopted the stereotype of the 'eternal child'[45] and may have even thought that they were making allowances or reasonable adjustments to include her. The longstanding pattern of turning a blind eye to her behaviour sends out unhelpful signals to others, makes it difficult for the

manager to set a threshold beyond which disciplinary action is taken, and bewilders the person who has been trained by this regime to believe that unacceptable behaviour is acceptable.

When the employee has been recruited by the manager who subsequently invokes the capability policy, then the employee's underperformance can be seen as a personal threat to the competence of the manager in selecting the best candidate. The manager may feel that they have failed to adequately recruit and train the employee or that they have been deceived by a wily and dishonest candidate. If the employer routinely draws on medical advice and manages the capability process elsewhere, there can be concerns that the occupational health professional may be unaware of the specific demands of this job in this work environment and HR staff or senior managers are sidelining the first line manager of the disabled employee[46]. Both shame and blame can be powerful drivers for behaviour. These same processes can affect the employment specialist who has worked so hard to create the opportunity that any suggestion of poor performance can be received as an indictment of their skills.

Medical educationalists[47] have known for more than fifteen years that assessors have a problem when they encounter an underperforming trainee and respond in a host of ways that are known collectively as a 'failure to fail'. At first, they sustain disbelief by: holding on to alternative explanations that suggest the trainee is usually competent; neglecting their reporting obligations; inflating grades; and avoiding encounters where they might be perceived as overwhelming, criticising or punishing the underperforming trainee. The prospect of taking action to terminate a student's studies is too much for some assessors to bear. A range of strategies have been tried and found unsuccessful in eliminating the failure to fail phenomenon, despite the obvious intelligence and skill of the assessor and the obvious risks of releasing incompetent doctors into clinical practice.

While formal appraisals require a stocktake, it is more likely that 'noisy' observations of the employee's general conduct will coalesce at a different time into a pattern that is recognised and labelled as underperformance. Gingerich and colleagues[48] found line managers were reluctant to recognise this tipping point until it was triggered by an egregious failure or a negative report from a third party, whereupon the manager commonly reacted with anger. In her research, this emotion was likely to drive a judgemental response and punishment rather than curiosity and empathy, shaping the requirements and expectations for the next stage.

If these dynamics are present amongst career educationalists who are working with students and trainees to equip them for clinical practice and where a patient-focused orientation is a powerful ethos, it is entirely reasonable to expect that similar dynamics could arise in other sectors of the economy, where line managers may be less committed to a human development perspective.

The employer may be unsure whether performance or conduct standards have been breached and institute an investigation to find out. Because the consequences may be serious, such as termination of employment, it is particularly important to ensure that the disabled employee has the reasonable adjustments they need to facilitate them in telling their side of the story. The employer may ask for a medical report if the employee indicates that the performance issue is caused by a disability. The employer may ask if there is a medical reason or if the employee has seen a doctor, but only if there are no other reasonable explanations for the issue. For example, if the worker frequently falls asleep at work, the employer cannot insist that the employee sees a doctor, since there may be many non-medical explanations.

Performance Improvement Plan

Sometimes a probationary period of perhaps three months is used to test whether improvement can be obtained, and then at least a further year will demonstrate that the improvement is sustained. At UCL, a negotiated Performance Improvement Plan guides activity in this period[49], and during this probationary period, weekly supervision is given. While it is not a legal obligation to use a performance improvement plan it can give the employee a final opportunity to salvage the job and help to defend the employer against unfair dismissal claims. The performance improvement plan should consist of both written and oral feedback to the employee and clearly set out:

- Feedback on performance levels to date and precise and realistic performance expectations[50] going forward
- The seriousness of the concerns
- Any assistance that the company will provide the employee to help turn things around.

It has been noted that employees thrive when they have sufficient autonomy to implement their own workplace solutions. Some line managers may move in the opposite direction by attempting to micromanage the underperforming worker, erroneously assuming that the employee needs more 'command and control' management. This can have the effect of shifting too much of the responsibility for performance away from the employee and on to the manager.

If the underperforming employee alleges that the policy was only invoked because of a protected characteristic such as disability, then this is treated separately as a grievance. Alternatively, the employee may suggest that their underperformance is caused by a previously undisclosed disability. In this event, the feedback on performance remains valid and it would not be considered a reasonable adjustment to suppress this information or reduce performance standards. However, the disclosure will trigger a dialogue about reasonable adjustments, during which the start of the Performance Improvement Plan should be delayed until the adjustments are in place. Adjustments may not be withheld or removed as a punishment for poor performance.

Stepping away from the job

Just as the health of the economy, the welfare benefit system and its options for combining work and benefits will influence the start of the employment journey, it will have a similar impact on job termination. For example, if doctors are under pressure to return their patients to the workplace rather than authorise continuing sickness absence, the disabled employee may return before they are fully fit, underperform (perhaps through an excess of eagerness to do well) and trigger further action under the capability policy. If finishing this job means one is highly unlikely to get another and unemployment is a cataclysmic loss of income and status in society, then the negotiations around capability will be highly charged.

Eligibility for welfare benefits can also be affected by the manner in which a job ends[51]. The interplay between benefits and work occurs in more complex ways too. For example, where the value of welfare payments depends on self-report, there is a widespread belief that people are tempted to exaggerate the severity of their impairment[52]. This would create a disincentive to work, since benefits may total more than wages, but would also influence the person's self-belief about their ability to work, especially when they are required to repeat their self-assessment on a frequent basis to justify continuing eligibility.

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Recommendations

17. Ensure that the worker has a clear and accurate understanding of their options within and outside this workplace.

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Hope and despair

Build on the employer's goodwill and hope in overcoming prejudice and giving the disabled employee a chance in the first place by suggesting ways to resolve the current performance issue and fulfil the promise of the appointment by achieving successful performance.

Telling the employee that they are performing poorly may be a wake-up call that stirs them into action to fix the problems, but it may not. Individuals who have experienced failure before may feel that dismissal is inevitable and unwittingly exacerbate their performance issues by exhibiting pre-quitting behaviour. Research by Gardner et al[53] revealed that, while the employee who had decided to leave thought that their decision was a secret, their shift was manifest to all, consisting of changes to:

- **Productivity**: Reduced attendance, focus, effort, motivation and output
- **Teamwork**: Less like a team player, less interested in pleasing their manager
- **Withdrawal**: Less interest in customers, less enthusiasm for the mission and unwilling to commit to long-term timelines
- **Attitude**: negative and dissatisfied.

If these changes are a common response by successful workers to an autonomous decision to leave the job, it is possible that disabled employees who are brought into the capability procedure will react in a similar way. Survival may depend upon the extent to which the employee demonstrates capability in all four areas and not just in terms of productivity. Employers need to determine whether any performance challenges that continue in the capability period are a result of the longstanding issues faced by the employee or a damaging impact of the capability procedure itself.

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Recommendations

18. Pay attention to teamwork, customer satisfaction and attitude as well as productivity.

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Employment support interventions – do they work?

Tracking employment outcomes is not easy. Only some people who start a job are still working in the same post after a period of time. They may have been promoted, moved to a different post within the same company or be working for a different company. They may have taken time off sick, retired, resigned and waiting for their new job to start, or been suspended or dismissed. So what do we know?

- IPS is more effective than any other intervention intended to help people into work.
- In one study[54], fewer than 40% of people who started work through IPS were still employed 18 months later.

- Another study[55] found that the median time between starting IPS support and starting work was around 6 months, and the median number of days worked in the first 30 months after starting IPS support was around nine months.
- A comparison of IPS efficacy in different countries by Brinchmann et al[56] found that outcomes were not affected by regulation of temporary employment, generosity of disability benefits, type of integration policies, GDP, unemployment rate or employment rate for those with low education.
- However, Brinchmann et al found that legal protections against dismissal did have a modest effect on outcomes, reinforcing the importance of our topic. Intriguingly, stronger protections against dismissal reduced, rather than increased the impact of IPS. It is hypothesised[57] that this may be due to employer's reluctance to hire 'risky' employees where they were afforded legal protection, combined with the role of the IPS worker as an independent witness of the employer's conduct and an advocate for the employee.

> Recommendations
> 19. *Track capability measures such as promotion, commendation and bonuses as well as formal use of the Capability Policy against protected characteristics, including disability.*

Evidence sources

The following sources of evidence

- Insights from Experts by Experience
- Literature on Supported Employment (Anita Goldschmied invited to investigate) and Individual Placement and Support (some papers received from Miguel Juárez) – the two main approaches to supporting disabled jobseekers into open employment.
- Infrastructure organisations, such as BASE[58] (informal discussions underway with Laura Davies)
- Online fora such as the Mental Health at Work forum on LinkedIn (Joe Barrett to investigate).

What is the status of this paper?

Most of the documents we read are finished pieces of work, carefully crafted and edited in private before being shared with anyone else. This is a different kind of paper – it was shared online here from the first day, when the initial handful of ideas were incomplete, poorly phrased and tactless. The work has been edited many times, and on each occasion a revised version has replaced the earlier material online. This process is still under way, and so this paper may still be lacking crucial concepts, evidence, structure and grammar[59]. As readers continue to provide feedback[60], further insights will be used to update it, so please contact peter.bates96@outlook.com with your contributions[61].

It is one of a suite of documents that try to open up debate about how in practical terms to empower disabled people and share decision-making in health and social care services – in research, implementation and evaluation.

A consequence of this approach of constantly accumulating relevant information on this topic is that it eventually becomes more of a resource archive, heavily referenced and footnoted, more of a rambling resource document than a brief overview. The material may become sufficiently rich to justify the production of a precis fit for peer review or publication elsewhere. This further iteration of the material will be sufficiently different in scope to be considered as original work, thus meeting publisher requirements.

This way of writing is risky, as it opens opportunities to those who may misunderstand, mistake the stopping points on the journey for the destination, and misuse or distort the material. This way of writing requires courage, as an early version can damage the reputation of the authors and contributors. At least, it can harm those who insist on showing only their 'best side' to the camera, who want others to believe that their insights appear fully formed, complete and beautiful in their simplicity. It can harm those who are gagged by their employer or the workplace culture, silenced lest they say something in a discussion that is not the agreed party line. It can harm those who want to profit from their writing, either financially or by having their material accepted by academic journals.

In contrast, this way of writing can engage people who are not invited to a meeting or asked for their view until the power holders have agreed on the 'right message'. It can draw in unexpected perspectives, stimulate debate and crowdsource wisdom. It can provide free, leading edge resources.

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[1] Terminology is contested. When referring to 'autistic people', I am acknowledging the preference of people who choose identity-first language; 'disabled people' acknowledges that an unjust society restricts opportunities; and people-first language acknowledges that people are more than their impairments. See *Clients or what*?

[2] Heymann J, Wong E, Waisath W. A comparative overview of disability-related employment laws and policies in 193 countries. *Journal of Disability Policy Studies.* 2022 Jun;33(1):25-34.

[3] Jones M. Disability and labor market outcomes. *IZA World of Labor*. 2021 Mar 17.

[4] See https://hbr.org/2023/07/disability-as-a-source-of-competitive-advantage.

[5] For example, a recent study of IPS counted a positive outcome as achieving at least one day of open, waged employment, so our topic of inquiry was not explored. See Perkins R, Patel R, Willett A, Chisholm L, Rinaldi M (2022) Individual placement and support: cross-sectional study of equality of access and outcome for Black, Asian and minority ethnic communities. *BJPsych Bulletin.* Feb;46(1):10-5.

[6] Kim S, Rhee S. Measuring the effects of employment protection policies: Theory and evidence from the Americans with Disabilities Act. *Labour Economics.* 2018 Oct 1;54:116-34.

[7] Lee and Newman found that the performance of disabled employees was rated from average to excellent - see Lee B & Newman K (1995) Employer responses to disability: preliminary evidence and a research agenda *Employee Responsibilities and Rights Journal*, 8 (3): 209–29. Similarly, Adams-Shollenberger and Mitchell (1996: 59) found that intellectually disabled employees have superior performance on absenteeism and turnover – see Adams-Shollenberger G & Mitchell T (1996) A comparison of janitorial workers with mental retardation and their non-disabled peers on retention and absenteeism *Journal of Rehabilitation*, 62 (3): 56–60.

[8] Capability Procedure (denbighshire.gov.uk)

[9] Pagán found fewer disabled people involved in training compared to their nondisabled counterparts. Pagán R. Determinants of participation in further training among workers with disabilities. *Disability and Rehabilitation.* 2015 May 22;37(11):1009-16.

[10] The 2017 book "Fire at will" has been advertised as "How to derail claims of race, sex and age discrimination" which implies that the author believes discrimination claims are usually unfounded. Better.com fired 900 staff via a mass Zoom call in December 2021 – see Better.com CEO fires 900 employees

over Zoom | CNN Business. In November 2022, Mark Zuckerberg fired 11,000 workers at one go at Meta – see Facebook-owner Meta to cut 11,000 staff - BBC News.

[11] See OECD Indicators of Employment Protection - OECD. The UK summary is at United Kingdom.pdf (oecd.org).

[12] OECD. Methodology used to compile the OECD indicators of Employment Protection, 2018. Available from: http://www.oecd.org/employment/emp/oecdindicatorsofemploymentprotection-methodology.htm.

[13] The New OECD Employment Protection Legislation Indicators for Temporary Contracts

[14] See Employment of people of determination - The Official Portal of the UAE Government – although the details of Resolution 43 of 2018 are not found.

[15] Employment Rights Act 1996. The Employment Act 2002 and the Equality Act 2010 also apply.

[16] Conduct that may lead to termination of employment can include the following: reporting for work under the influence of alcohol or controlled substances; possession, use, sale, or distribution of controlled substances on company property; theft; engaging in harassing conduct; fabrication of business documents, including résumés and expense reports; excessive absenteeism or tardiness; fighting on business premises; abuse of equipment (including excessive personal use of office equipment); insubordination; other illegal conduct on company premises.

[17] Nagtegaal R, de Boer N, van Berkel R et al (2023) Why Do Employers (Fail to) Hire People with Disabilities? A Systematic Review of Capabilities, Opportunities and Motivations. *Journal of Occupational Rehabilitation* (2023). https://doi.org/10.1007/s10926-022-10076-1

[18] Demerouti E, Bakker AB, Nachreiner F, Schaufeli WB (2001) The Job Demands-Resources Model of Burnout. *Journal of Applied Psychology* 86, 499–512.

[19] Williams-Whitt K, Taras D. Disability and the performance paradox: can social capital bridge the divide?. *British Journal of Industrial Relations.* 2010 Sep;48(3):534-59.

[20] A news report indicated that in 2017, after President Trump took office, the federal government of the USA received an increased number of complaints about disability discrimination from its employees, and the number of disabled people fired from government jobs increased by 24% compared to the previous year, rising to twice the rate for employees without disabilities. This suggests that wider cultural changes can impact decisions to dismiss an employee. See Under Trump, discrimination complaints and firing of disabled federal workers rise (nbcnews.com).

[21] Press reports have suggested that Tesla is such a company. It would be interesting to know their employment and retention rate for disabled workers.

[22] Koch LC, Glade R, Manno CM, Zaandam A, Simon LS, Rumrill Jr PD, Rosen CC. (2022) On-the-job treatment of employees with disabilities: a grounded theory investigation. Rehabilitation Counseling Bulletin. Jul;65(4):294-309.

[23] Complex issues are in play here. Alongside the objective presence of abusive behaviour, another factor will be the disabled employee's subjective awareness of it. A community of disabled people may sensitise and politicise its members to abuse prior to entry into the workforce, reinforcing us/them thinking, reducing their tolerance and increasing their dissatisfaction in comparison to a disabled colleague who is resilient to these assaults. Job dissatisfaction usually has a negative impact on productivity. For a discussion of the relationship between discrimination, cohesion and resilience, see Florez E, Cohen K, Ferenczi N, Linnell K, Lloyd J, Goddard L, Kumashiro M, Freeman J. Linking recent discrimination-related experiences and wellbeing via social cohesion and resilience. *Journal of Positive Psychology and Wellbeing*. 2020 Jul 10;4(1S):92-104. In addition, developing a positive attitude towards your identity is likely to help you find healthy coping strategies to discriminatory behaviour, if we can extrapolate this finding from ethnically marginalised communities to the disabled community – see Cabrera Martinez L, Barrita A, Wong-Padoongpatt G. A systematic literature review on the resilience reported by BIPOC in the face of discrimination. *Spectra Undergraduate Research Journal*. 2022;2(1):1.

[24] De Beer J, Engels J, Heerkens Y, van Der Klink J (2014) Factors influencing work participation of adults with developmental dyslexia: A systematic review. *BMC Public Health* 14, 77.

[25] Wissell S, Karimi L, Serry T, Furlong L, Hudson J (2022) "You Don't Look Dyslexic": Using the Job Demands—Resource Model of Burnout to Explore Employment Experiences of Australian Adults with Dyslexia. *International Journal of Environmental Research and Public Health.* Aug 28;19(17):10719.

[26] Good mental health is associated with better attendance at the workplace, with poor mental health associated with sickness absence. See Santini ZI, Thygesen LC, Koyanagi A, Stewart-Brown S, Meilstrup C, Nielsen L, Olsen KR, Birkjær M, McDaid D, Koushede V, Ekholm O. Economics of mental wellbeing: A

prospective study estimating associated productivity costs due to sickness absence from the workplace in Denmark. *Mental Health & Prevention*. 2022 Dec 1;28:200247.

[27] Applying Performance and Conduct Standards to Employees with Disabilities | U.S. Equal Employment Opportunity Commission (eeoc.gov).

[28] Lindsay S, Cagliostro E, Albarico M, Mortaji N, Karon L. (2018) A systematic review of the benefits of hiring people with disabilities. *Journal of occupational rehabilitation.* Dec;28(4):634-55.

[29] Bates P, Peck E & Smith H (1997) Vocational rehabilitation and employment *Mental Health Review* Vol 2, Issue 2 pages 8-15. June.

[30] People rate themselves as above average on simple tasks and below average on complex tasks – see Kruger J. Lake Wobegon be gone! The "below-average effect" and the egocentric nature of comparative ability judgments. *J Pers Soc Psychol.* 1999 Aug;77(2):221-32. doi: 10.1037//0022-3514.77.2.221. PMID: 10474208.

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[32] Scoppetta A, Davern E, Geyer L (2019) *Job carving and Job crafting*. Joint paper of the Employment Thematic Network and Long-term Unemployment project (on behalf of AEIDL/European Commission), ESF Transnational Platform, Brussels. May 2019.

[33] Haile found that when disability equality policies were in place, job satisfaction amongst disabled employees was high, but it was low amongst non-disabled colleagues. See Haile GA (2022) Workplace disability and job satisfaction in Britain: A co-worker test? *Economic and Industrial Democracy.* Aug;43(3):1467-87.

[34] See Performance and Production Standards (askjan.org)

[35] Gingerich A, Sebok-Syer SS, Larstone R, Watling CJ, Lingard L (2020) Seeing but not believing: Insights into the intractability of failure to fail. *Medical Education.* Dec;54(12):1148-58.

[36] Barrett A, Galvin R, Steinert Y, Scherpbier A, O'Shaughnessy A, Horgan M, Horsley T (2016) A BEME (Best Evidence in Medical Education) review of the use of workplace-based assessment in identifying and remediating underperformance among postgraduate medical trainees: BEME Guide No. 43. *Medical Teacher.* Dec 1;38(12):1188-98.

[37] Williams-Whitt & Taras (2010) op cit.

[38] An interview is often used to predict performance too, as when it forms a key part of recruitment and selection procedures. The same challenge arises, that the skills needed to do well in an interview may not be the skills needed to do well in the work itself. Internships can help disabled people to demonstrate their skills in vivo, and this can work well as long as interns are not exploited.

[39] "In practice, employee appraisals frequently assess subjective factors such as organizational citizenship, personal development, collaboration, problem solving or conflict resolution… When they are included on appraisal forms, managers are required to attend to them." Scott S & Einstein W (2001) Strategic performance appraisal in team-based organizations: one size does not fit all *Academy of Management Executive,* 15 (2): 107–16.

[40] Brophy J, Keith M, Hurley M (2019) Breaking point: violence against long-term care staff. *New solutions: a journal of environmental and occupational health policy.* May;29(1):10-35.

[41] Bradbury MD, Martin M & Yokley-Krige E (2022) "The Stay Interview: A Tool for Retention." See Book Review: The stay interview: A manager's guide to keeping the best and brightest - Mark D. Bradbury, Meridith Martin, Elizabeth Yokley-Krige, 2022 (sagepub.com).

[42] Laaser K (2016) 'If you are having a go at me, I am going to have a go at you': The changing nature of social relationships of bank work under Performance Management. *Work, Employment and Society.* Dec;30(6):1000-16.

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[45] Wolfensberger W. A brief overview of social role valorization. *Mental retardation.* 2000 Apr;38(2):105-23.

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[47] Gingerich A, Sebok-Syer SS, Larstone R, Watling CJ, 2020 op cit.

[48] Gingerich A, Sebok-Syer SS, Lingard L, Watling CJ (2022) The shift from disbelieving underperformance to recognising failure: a tipping point model. *Medical Education*. Apr;56(4):395-406.

[49] See capability_policy_2017_-_appendix_a.pdf (ucl.ac.uk)

[50] In Phillips v. StellarOne Bank, W.D. Va. he American court decided that StellarOne Bank set out to specify unattainable goals in the Performance Improvement Plan. They found against the employer.

[51] In the UK, where an eligible adult leaves employment voluntarily or, without good reason, loses employment because of misconduct or fails to take up an offer of employment prior to applying for Universal Credit, a longer waiting period (of 13, 26 or 78 weeks) can be applied. Section 102 of the Universal Credit Regulations 2013. This may mean that the worker is caught in a trap where they must take a formal route through capability procedures to reduce the risk that welfare benefits will be sanctioned, but adding these events to their employment record will significantly reduce their chances of gaining future employment.

[52] Dorfman D. Fear of the disability con: Perceptions of fraud and special rights discourse. *Law & Society Review*. 2019 Dec;53(4):1051-91.

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[57] Barbieri P, Cutuli G (2016) Employment protection legislation, labour market dualism, and inequality in Europe. *Eur Sociol Rev* 32:501–516.

[58] Home | British Association for Supported Employment (base-uk.org).

[59] As a result, the author assumes no responsibility or liability for any errors or omissions in the content of this paper. The information contained is provided on an "as is" basis with no guarantees of completeness, accuracy, usefulness or timeliness.

[60] Contributions and challenges to this discussion have been offered by the following people, who bear no responsibility for any weaknesses of this paper: Dave Barras, Joe Barrett, Lucie Chiocchetti, Dulce Estêvão, Nitin Ghadge, Anita Goldschmied, Lyn Griffiths, Paul Gutherson, Miguel Juárez, Laila Kalan, Kate Linsky, Amanda Nally, Shameem Nawaz, Carol Robinson, Amanda Cyntia Lima Fonseca Rodrigues, Helen Toker-Lester and Magdalena Zielinska.

[61] Undated or early versions should be replaced with the most recent, available here.