

REASONABLE ACCOMMODATION OF RELIGION AND OTHER DISCRIMINATION GROUNDS IN EU LAW

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Duty of reasonable accommodation

- Howard, E (2013) 'Reasonable Accommodation of Religion and other Discrimination Grounds in EU law', *European Law Review* 38, 3, pp 360-375
- Specific focus on the accommodation of religious manifestations and practices
- Could be extended to all grounds on which discrimination has been prohibited

Reasonable accommodation



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Art 5 Dir 2000/78/EC: Reasonable accommodation for disabled persons

- In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned.
- **Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation OJ L 303 , 02/12/2000, 16-22**
- Case C-130/75, *Vivien Prais v EU Council*, EU:C:1976:142,18.

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Existing duties

EU: duty disability
disproportionate burden

US: duty religion and
disability
undue hardship

Canada: duty all grounds
of discrimination
undue hardship

All three are linked to a finding of discrimination if the duty
has not been fulfilled

Proportionality

Proportionality
Balancing

Right of employee to
manifest religious or other
practices

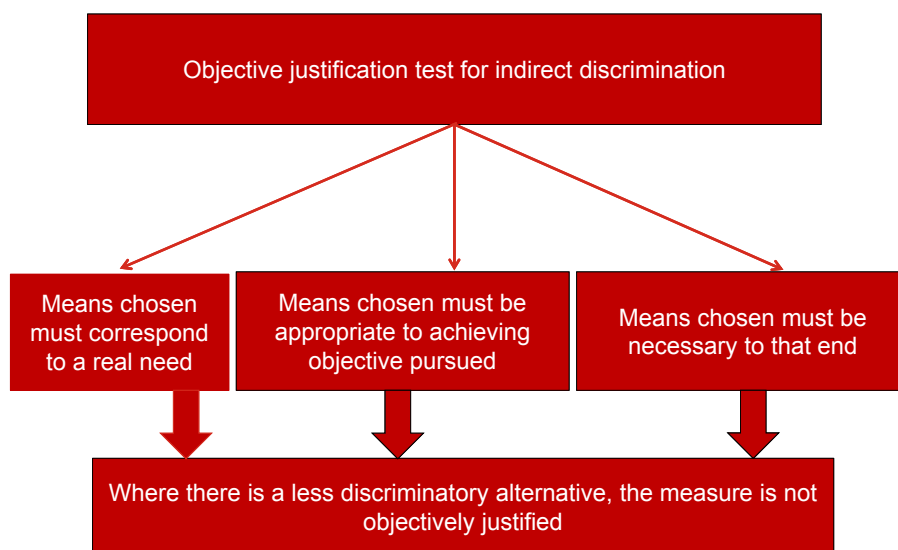
Interests of employer and
operation/management of his/her
business



Indirect discrimination EU Law

Article 2(2)(b) Directive 2000/78/EC: indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put **persons** having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless that provision, criterion or practice is **objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary**

Bilka Kaufhaus GMBH v Karin Weber von Hartz C-170/84, ECLI:EU:C:1986:204, para. 36



*HK Danmark v Dansk Almennyttigt Boligselskab and
HK Danmark v Dansk Arbejdsgiverforening, C-
335/11/C-337/11, ECLI:EU:C:2013:222*

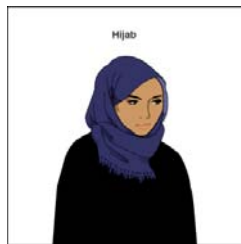
- **CJEU**: it must be examined whether that difference of treatment is objectively justified by a legitimate aim and whether the means used to achieve that aim are appropriate and **do not go beyond what is necessary** to achieve the aim pursued by the Danish legislature (ECLI:EU:C:2013:222, para.77)
- **AG Kokott**: the provision, criterion or practice must also be necessary, which is to say that the legitimate aim pursued **must not be capable of being achieved by more moderate but equally appropriate means** (ECLI:EU:C:2012:775, para. 70)

*Napoli v Ministero della Giustizia, Dipartimento
dell'Amministrazione penitenziaria, C-595/12,
ECLI:EU:C:2014:128, para. 38*

- it seems possible to conceive of measures **which would interfere less** with the principle of equal treatment between men and women than the measure at issue in the main proceedings. **CJEU** repeated alternative suggested by the referring court

Examples national cases

- *Commissie Gelijke Behandeling, Netherlands* (Equal Treatment Commission ETC), Judgment 2004-112. Since 2 October 2012 the ETC has become part of the *College voor de Rechten van de Mens* (Netherlands Institute for Human Rights). All judgments of the ETC are available (in Dutch) from the Institute's website: www.mensenrechten.nl



- *Azmi v Kirklees Metropolitan Borough Council* [2007] IRLR 484 (EAT)

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Duty of reasonable accommodation?

Case law suggests:

- standard of necessity requires an investigation of alternative measures that are less invasive of the right not to be discriminated against
- comes close to a duty of reasonable accommodation

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ECHR and ECtHR

Art 14 ECHR

Principle of equality not violated if distinction has objective and reasonable justification

To be objectively justified, difference in treatment must pursue a legitimate aim and there must be a reasonable relationship of proportionality between means employed and aim sought

Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v Belgium, 1474/62, 1677/62, 1691/62, 1796/63, 1994/63, 2126/64, 23 July 1968

Article 9 ECHR

- (1): Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or in private, **to manifest his religion or belief**, in worship, teaching, practice and observance.
- (2): Freedom to **manifest one's religion or beliefs** shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health and morals, or for the protection of the rights and freedoms of others.

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ECtHR cases

Glor v Switzerland, App. No. 13444/04, 30 April 2009, paras 96-97: reasonable accommodation for disabled people is part of Article 14 ECHR justification test

Thlimmenos v Greece, App. No. 34369/97 6 April 2004: duty of reasonable accommodation of religion in justification test of Article 14 ECHR?

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ECtHR Cases

- *Jakobski v Poland* App. No. 18429/06, 7 December 2010: **duty of reasonable accommodation in justification test Article 9 ECHR?**
- *Gatis Kovalkovs v Latvia* App. No. 35021/05, 31 January 2012: **duty of reasonable accommodation in justification test Article 9 ECHR?**
- *Francesco Sessa v Italy* App. No. 28790/08, 3 April 2012: **3 dissenters:** proportionality requires that, where there are several alternative means to achieve the pursued legitimate aim, the authorities should choose the one that is least restrictive to the rights and liberties protected. **The search for reasonable accommodation could lead to a less restrictive means to achieve the aim sought.**

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Missed chance?

Eweida, Chaplin, Ladele and McFarlane v. the United Kingdom, App. Nos 48420/10, 59842/10, 51671/10 and 36516/10, 15 January 2013

- **missed chance to clarify whether such a duty was part of the justification tests under Articles 9 and 14 ECHR.**
- **Explanation given by UK Supreme Court:**

Bull and Another v. Hall and Another [2013] UKSC 73

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Bull and Another v. Hall and Another
[2013] UKSC 73

*I am more than ready to accept that the scope for reasonable accommodation is part of the proportionality assessment, at least in some cases. This is reinforced by the decision in *Eweida v United Kingdom* (2013) 57 EHRR 8, where the Strasbourg court abandoned its previous stance that there was no interference with an employee's right to manifest her religion if it could be avoided by changing jobs. Rather, that possibility was to be taken into account in the overall proportionality assessment, which must therefore consider the extent to which it is reasonable to expect the employer to accommodate the employee's right.*

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Balancing test



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