Discrimination on the basis of disability: reasonable accommodation, the EU case law and the UN Convention on the Rights of Persons with Disabilities

Overview

• The European Union legal framework.
• Reasonable accommodation and other key concepts on disability discrimination and employment.
• The ECJ Case Law in the field of disability.
• The UN Convention of the rights of people with disabilities as an interpretation tool and legal status under EU law.
The EU legal framework

• Article 19 of the TFEU gives the EU the power to take action combating discrimination:

  “Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”

• The Charter of Fundamental Rights includes two explicit references to disability:
  • Art. 21 of the Charter lists disability as one of the grounds on which discrimination must be prohibited.
  • Art. 26 deals with the “Integration of persons with disabilities” and states: “The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.”

The EU legal framework (cont)


• This “general” framework entails “specific” provisions dealing with disability:
  • Art 2. (1) (b) - Indirect discrimination
  • Art 5. - Reasonable accommodation
  • Art 7 (2) – Positive action
  • Recitals (17), (20) and (21)
Indirect discrimination (art.2 (1)(b))

Indirect discrimination shall not be taken to occur when “as regards persons with a particular disability, the employer or any person or organization to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice”.

Reasonable accommodation (art 5)

“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”
Recitals

(17) This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

(20) Appropriate measures should be provided, i.e. effective and practical measures to adapt the workplace to the disability, for example adapting premises and equipment, patterns of working time, the distribution of tasks or the provision of training or integration resources.

(21) To determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial resources of the organization or undertaking and the possibility of obtaining public funding or any other assistance.

Positive action (art.7) (2))

“With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.”
The concept of reasonable accommodation

- First recognised with respect to religion.
- The concept of reasonable accommodation is a central tenet of the so-called “social model” of disability.
- The denial of reasonable accommodation as a sui generis form of discrimination.

Reasonable accommodation: key terms

- Reasonableness
- Disproportionate burden
- Fitness for work
- Reasonable accommodation vs. positive action
Definition of disability

• As with other grounds specified in the framework directive, no definition is provided of the term disability.

• “The Commission’s view that definitions of key concepts can simply be "left to Member States" is an over-simplification. EU-wide definitions will evolve as cases reach the Court of Justice. This will be a long process, and there will inevitably be a period of uncertainty as cases are taken through the courts”.

  House of Lords Select Committee (2000)

The jurisprudence of the ECJ on Disability discrimination

• Chacón Navas v Eurest Colectividades SA (2006) - Case C-13/05.
• Coleman v Attridge Law (2008) - Case C-303/06.
• Odar v Baxter Deutschland GmbH (2012) – Case C-152/11.
• Ring v Dansk almennyttigt Boligselskab (2013) DAB – Case C-335/11 en Werge v Pro Display A/S- Case C-337/11.
• Z v A Government Department and the Board of Management of a Community School (2014) - Case C-363/12.
• Glatzel v Cv Freistaat Bayern (2014) - Case C-356/12
• Kaltoft v Kommunernes Landsforening (2014) - Case C-354/13

Chacon Navas (Case C13/05). Background.

• Mrs Chacon Navas who had been certified as being ‘unfit for work’ on the grounds of sickness was given notice of dismissal by her employer, Eurest.

• Mrs Chacon Navas took a legal claim against Eurest on the basis that her dismissal amounted to disability discrimination.

• The Spanish court, to which the claim was taken, took the view that a dismissal on the grounds of sickness could amount to a form of disability discrimination. However, in the absence of a definition of disability under Spanish law, the court referred the case to the ECJ.

ECJ Ruling on Chacon Navas

• Someone dismissed solely on account of sickness could not fall within the general framework laid down in the directive for combating discrimination on grounds of disability.

• Disability must be understood as referring to “a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life”.

• In order for the limitation to fall within the concept of ‘disability’, it must therefore be probable that it will last for a long time.

• By embracing the medical model of disability, and focusing on the limitation caused by impairment and the need to prove such limitation, the Court’s decision flies in the face of values underlying the Directive and Community disability policy” Liza Waddington
Coleman (Case C303/06). Background.

• Mrs Coleman lodged a claim with the Employment Tribunal, London South, alleging that she had been subject to unfair constructive dismissal and had been treated less favourably than other employees because she was the primary carer of a disabled child.

• The Employment Tribunal referred the matter to the Court of Justice, asking whether the directive on equal treatment in employment and occupation must be interpreted as prohibiting direct discrimination on grounds of disability and harassment related to disability only in respect of an employee who is himself disabled, or whether the directive applies equally to an employee who is treated less favourably by reason of the disability of his child.

ECJ Ruling on Coleman

• The directive, the purpose of which is to combat all forms of discrimination, applies not to a particular category of person but by reference to the nature of the discrimination.

• An interpretation limiting its application only to people who are themselves disabled is liable to deprive the directive of an important element of its effectiveness and to reduce the protection which it is intended to guarantee.

• By placing the focus on the commission of the discriminatory act in preference to the condition of the employee, Coleman represents a fundamental development in EC equality Law. (Tim Connor)
Jette Ring (Case C-335/11) Background

• Mrs Ring and Mrs Werger were dismissed by their respective employers with a one month notice using a special rule in Danish labour law that makes it possible to dismiss on such short notice an employee who during a 12 months period has had 120 days of paid sickness leave.
• Mrs Ring and Werger claimed that they could have continued working if they would have been accommodated with some special office furniture and a reduction in working time.
• The women, with the help of their trade union (HK Danmark), issued proceedings at the national court, stating that their dismissal and the special one month notice rule amounted to discrimination on the ground of disability, as prohibited under Danish equal treatment law. Since this law in fact implements the EU Framework Equality Directive (2000/78/EC), the national court and asked preliminary questions to the CJEU in order to clarify the obligations under this Directive.

Jette Ring (Case C-335/11) Background – cont.

• Three key legal questions as regards disability discrimination were referred to the ECJ:
  • the definition of a disability: is any person who, because of physical, mental or psychological injuries, cannot or can only to a limited extent carry out his work in a period that satisfies the requirement as to duration specified in Navas case covered by the concept of disability within the meaning of the directive?
  • the question what can count as a reasonable accommodation: is a reduction in working hours among the measures covered by Article 5 of Directive 2000/78/EC?
  • the question whether national legislation under which it is possible to dismiss employees who have used their right for paid sickness leave on a shorter notice than other employees is in compliance with EU law?
ECJ Ruling on Jette Ring

- Disability must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from mental, physical or psychological impairments which in interaction with various barriers may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one.
- A reduction in working hours may constitute one of the accommodation measures.
- The Danish legislation may not be applied in a case where it concerns a disabled person and where in fact the disablement is partly due to the fact that the employer has not taken appropriate measures. The law could also be invalid since it may be presumed that disabled persons will more easily meet the 120 days criterion than non-disabled persons who are merely sick. It is for the national court to decide whether the Danish Government has an objective justification for having this legislation in place and applying it also to disabled persons.

Z (Case C363/16). Background

- Ms Z, a teacher working in Ireland, has a rare condition which has the effect that, she has no uterus and therefore cannot support a pregnancy. Ms Z and her husband had a child as a result of an agreement with a surrogate mother in California. Genetically, the child is the couple’s, and there is no reference to the surrogate mother’s identity on the child’s US birth certificate. Under Californian law, Ms Z and her husband are considered the baby’s parents.
- Ms Z applied for paid leave equivalent to maternity leave or adoption leave. The application was refused on the grounds that Ms Z had never been pregnant and the child not be adopted by the parents.
- The national tribunal before which the Ms Z brought actions had asked whether such a refusal is contrary to the Pregnant Workers Directive or whether it constitutes discrimination on grounds of sex or of disability (both types of discrimination being prohibited under the Equal Treatment Directive and Employment Equality Framework Directive respectively).
ECJ Ruling on Z.

- As regards the Employment Equality Framework Directive, the Court considers that it cannot be disputed that a woman's inability to bear her own child may be a source of great suffering for her. However, the concept of ‘disability’ within the meaning of that directive presupposes that the limitation from which the person suffers, in interaction with various barriers, may hinder that person's full and effective participation in professional life on an equal basis with other workers.
- In principle, the inability to have a child by conventional means does not, in itself, prevent the commissioning mother from having access to, participating in or advancing in employment.
- That being the case, the Court finds that the inability to have a child does not constitute a ‘disability’ within the meaning of the Employment Equality Framework Directive and, therefore, that that directive is not applicable in a situation such as that at issue here.

Glatzel (Case C356/12). Background

- Mr Glatzel was denied a driving licence for heavy goods vehicles (HGVs)) by the Bavarian Authorities because the visual acuity in his worse eye did not reach the minimum level required in point 6.4 of Annex III to the Directive of the European Parliament and of the Council of 20 December 2006 on driving licences
- The National referring court essentially asked the ECJ to determine the validity of point 6.4 of Annex III to Directive in the light of Articles 20, 21(1) and 26 of the Charter concerning equality before the law, non-discrimination on grounds of disability, and the integration of persons with disabilities.
ECJ Ruling on Glatzel.

• It is not necessary for the purpose of determining the validity of Directive 2006/126, in the light of Article 21(1) of the Charter, to determine definitively whether Mr Glatzel is considered to have a disability within the meaning of that provision. Even if the state of a person like Mr Glatzel could be considered as falling within the definition of 'disability' within the meaning of the Charter, the difference in treatment consisting in not issuing him with a driving licence for vehicles in categories C1 and C1E on the ground that his visual acuity is insufficient may be objectively justified in the light of overriding considerations of road safety.

• The principle of proportionality requires, in particular, the principle of equal treatment to be reconciled as far as possible with the requirements of road safety which determine the conditions for driving motor vehicles.

Kaltoft (Case C356/12). Background

• Mr Karsten Kaltoft worked for 15 years for the Municipality of Billund (Denmark) as a childminder. On 22 November 2010, the municipality terminated his employment contract. Throughout the duration of his employment contract, Mr Kaltoft was considered obese under the definition of the World Health Organization (WHO). Taking the view that the dismissal resulted from unlawful discrimination on grounds of obesity, the Fag og Arbejde (FOA), a workers’ union acting on behalf of Mr Kaltoft, brought proceedings before a Danish court seeking a declaration of that discrimination as well as compensation.

• In the context of assessing that request, the District Court of Kolding, Denmark (retten i Kolding) is asking the ECJ to specify whether EU law itself prohibits discrimination on grounds of obesity. It is also asking whether obesity can constitute a disability and therefore falls within the scope of the above directive.
ECJ Ruling on Kaltoft.

• The ECJ recalls that no provision of the Treaties or of secondary EU legislation prohibits discrimination on grounds of obesity as such.
• As far as whether obesity can constitute a disability, the Court finds that if, under given circumstances, the obesity of the worker entails a limitation which results in particular from physical, mental or psychological impairments which in interaction with various barriers may hinder the full and effective participation of that person in professional life on an equal basis with other workers, and the limitation is a long-term one, such obesity can fall within the concept of 'disability' within the meaning of the directive.
• Such would be the case, in particular, if the obesity of the worker hindered that participation on account of reduced mobility or the onset of medical conditions preventing that person from carrying out work or causing discomfort when exercising professional activity.

The UN Convention on the Rights of Persons with disabilities

• Adoption by the United Nations General Assembly - 13 December 2006
• Opened for signature - 30 March 2007
• Entry into force – 3 May 2008
• Signed by all the EU Member States
• Ratified by the European Union as a whole – 23 December 2010
The UNCRPD - The Key Principles

• Respect for inherent dignity, individual autonomy and independence.
• Non-discrimination.
• Full and effective participation and inclusion in society.
• Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity.
• Equality of opportunity.
• Accessibility.

The UNCRPD - The Content Areas

• **Civil and political rights**
  Right to life, Equal recognition before the law, Equality, Access to justice, Liberty and security of person, Freedom from torture or cruel, inhuman or degrading treatment or punishment, Freedom from exploitation, violence and abuse, Protecting the integrity of the person, Liberty of movement and nationality, Freedom of expression and opinion, and access to information, Respect for privacy, Respect for home and the family, Participation in political and public life.

• **Economic, social and cultural rights**
  Living independently and being included in the community, Personal mobility, Education, Health, Habilitation and rehabilitation, Work and employment, Adequate standard of living and social protection, Participation in cultural life, recreation, leisure and sport.
The accession of the European Union to the UNCPRD

- The instrument of ratification was deposited in December 2010, after the adoption of a Code of Conduct by the Council.

The UNCPRD ratification as a first time in history

- The EU competence to conclude the UNCPRD derives from Article 19 TFEU which addresses disability discrimination and article 114 TFEU which addresses the internal market.
- It is the first time ever that the EU becomes a party to an international human rights treaty.
- It is also the first time that an intergovernmental organization join a United Nations human rights treaty.
The UNCPRD as a mixed agreement

- Mixed agreements are signed and concluded by the EU and its Member States on the one hand, and by a Third Party on the other hand.
- Mixity is due to the fact that part of an international agreement falls within the scope of the EU powers and part within the scope of the powers of the Member States.
- The UNCPRD, as other multilateral agreements that make provision for participation by regional organisations such as the EU alongside its Member States, provides for a Declaration of competence specifying which areas of the agreement fall within the competence of the Regional organization and which within that of its Member States.

Effects of international agreements concluded by the Community in the EC’s legal order

- The ECJ has adopted a “monist” approach for evaluating the legal effects of international agreements: an international agreement has legal effect in the EU legal order and does not require further acts of implementation, as a regulation or directive (Case 181/73, Haegeman/État Belge).
- AND international agreements have a superior level to secondary legislation such as the EU directives.
- AND under certain condition they can be invoked before the court by an individual; there is direct effect (Demirel - Case 12/86). However, the provisions of the UNCPRD do not seem to meet these conditions (Glatzel – Case 356/12).
The UNCPRD as an interpretation tool of European Union law

- The primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements (ECJ Case C-61/94)

- The accession to the UN CRPD creates therefore an obligation to interpret EU law in manner that is consistent with the Convention (Ring vs Dansk almennyttigt Boligselskab DAB – ECJ Case C-335/11)