

Discrimination on the Grounds of Disability

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Paper

- Concept of Disability
- Reasonable Accommodation



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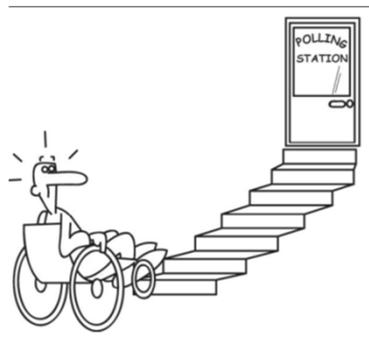
Concept of Disability and the “Paradigm Shift”

- Medical Model of disability
 - Focus on what is “wrong” with the individual
 - Focus on medical solutions and how to “fix” the person
- Social Model of disability
 - Focus on barriers to participation
 - Physical, attitudinal, societal
 - Focus on a rights based approach to inclusion.

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What is wrong with this picture?

- Apply the medical model
- Apply the social model



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Defining the concept of “disability”

- Degener: “when does a visual limitation constitute an impairment?”
- May depend on the purpose of legislation:
- Three approaches
 - Restrictive
 - Purposive
 - Non-definitional

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Directive 2000/78/EC Framework Employment Directive does not define disability

- Article 1: “The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of ... disability ... employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

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Impact of no definition

- *Chácon Navas v. Eurest Colectividades SA* (C-13/05), [2006] E.C.R. I-06467, [2006] I.R.L.R. 706.
 - persons “with serious functional limitations (disabilities) due to physical, psychological or mental afflictions.” (paragraph 76).
 - 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. (paragraph 45).
 - Does not cover sickness (paragraph 47)

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UN CRPD and the concept of “disability”

- No fixed definition of disability
 - “a soft threshold definition in the form of guidance which is open-ended and inclusive” de Búrca
- Preamble:
 - Disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

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Article 1 UNCRPD

- Persons with disabilities include those who have long-term physical, mental intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others
- Clear endorsement of the social model.
- One limitation – must be long-term.

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Joined Cases C-335/11 and C-337/11 *Ring and Skouboe Werge (1)*

- FED interpreted in light of CRPD
- International agreements have primacy over instruments of secondary law. Those instruments must be interpreted in a manner consistent with those agreements.
- CRPD “an integral part of the EU legal order”

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Joined Cases C-335/11 and C-337/11 *Ring and Skouboe Werge* (2)

- Concept of “disability” includes an illness if:
- That illness 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 the person concerned in professional life on an equal basis

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Case C-354/13 *Karsten Kaltoft v Municipality of Billund*.

- Obesity may be a disability if it causes:
- *'a limitation which results in particular from long-term physical, mental 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'.*

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Case C-363/12 Z (2014)

- CJEU held that the concept of disability:
 - 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.
- Therefore Z did not have a disability.

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Part II – Reasonable Accommodation

- Duty to accommodate as provided for in the CRPD
- Then set out the duty to provide for reasonable accommodation in the Framework Employment Directive (FED).
- Highlight the points of interest or conflict between the two.

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Reasonable Accommodation - CRPD

- Failure to provide reasonable accommodation is deemed to be an act of discrimination
- Individualised duty
- Process of dialogue
- Limits to the duty
 - Disproportionate or undue burden
 - Reasonable???

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UN CRPD and Reasonable Accommodation

- CRPD prohibits ‘all forms of discrimination including denial of reasonable accommodation.’
 - Duty to legislate
 - RA must be recognised as a punishable form of discrimination
 - (Concluding Observations – Germany May 2015)
 - Justiciable and immediately enforceable.

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Reasonable Accommodation

- Article 5(3) provides for reasonable accommodation
- Article 5(4) provides for positive or affirmative action
- Two separate and distinct concepts

- Fredman:
- “Instead of requiring disabled people to conform to existing norms, the aim is to develop a concept of equality which requires adaptation and change.”

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Article 2 CRPD

- “Reasonable accommodation” means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms;

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Individualised

- Individualised duty
- No 'one size fits all'
- Accommodation must address a barrier to participation of an individual and the impact on duty bearer
- Requires a case by case assessment

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Dialogue

- Duty 'triggered' when an individual needs an impairment
- Suggestive that dialogue between PWD and Duty-bearer is crucial
- Nature of dialogue dependent on nature of relationship

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Limits

- Disproportionate and undue burden – one term, not two separate restrictions.
- May look to: Cost, Duration, Frequency, Benefit and Disruptions
- Not valid – attitude or others.

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‘Reasonable’ Accommodation

- CRPD Cttee General Comment no. 4:
- ‘Reasonableness’ is understood as the result of a contextual test that involves an analysis of the relevance of the effectiveness of the accommodation, and the expected goal of countering discrimination. The availability of resources and the financial implications is recognised in assessing disproportionate burden.

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Reasonable Accommodation

- Directive 2000/78/EC Framework Employment Directive: Art.5:
 - ... 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.

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Guidance on Accommodations

- Recital 20 - Accommodations can include:
 - Effective and practical measures to adapt the workplace to the disability, i.e. adapting premises and equipment, patterns of working time, the distribution of tasks
- *Ring and Skouboe Werge*:
 - The concept must be understood as referring to the elimination of the various barriers that hinder the full and effective participation of persons with disabilities in professional life on an equal basis with others

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What is a disproportionate burden?

- Recital 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 organisation or undertaking and the possibility of obtaining public funding or any other assistance.

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Essential functions

- Recital 17
- The directive does not require the recruitment, promotion or maintenance in employment of a person who is not competent, capable and available to perform the essential functions of the post concerned, without prejudice to the obligation to provide reasonable accommodation for people with disabilities.

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Questions for the CJEU and National Courts

- FED does not define reasonable accommodation as a form of discrimination
- CRPD applies the principle of reasonable accommodation to ALL rights in the Convention. EU only applies it to employment via FED – impact most keenly felt in *Z case*.
- The issue of whether the term ‘reasonable’ is an independent modifier of the duty to accommodate must be reassessed throughout EU
- 27 countries in Europe have ratified – therefore it should form part of national legal interpretations.

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Questions?

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