

Disability and Discrimination

Reasonable Accommodation, CJEU-Cases and CRPD

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ERA Seminar, Trier, March 28, 2017



This training session is funded under the 'Rights, Equality and Citizenship Programme 2014-2020' of the European Commission.

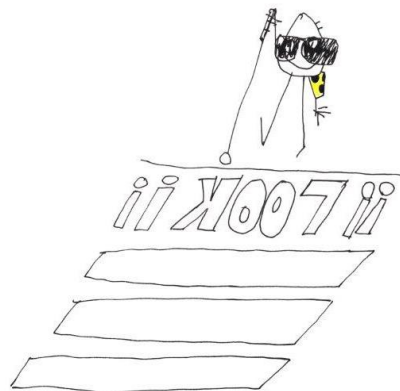
- Case Law CJEU on disability
- Reasonable Accommodation – the idea

Disability From WHO to CRPD

- WHO / Medical Model Old Style (still existing)
 - Disability: any restriction or lack of ability (resulting from an impairment) to perform an activity in the manner or within the range considered **normal for a human being**. WHO Classification of Impairments, Disabilities and Handicaps, 1980

Disability Human Rights Approach/ Social Model

- CRPD Preamble lit e:
 - Disability is an evolving concept
- CRPD Article 1:
 - 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



- Lack of reliable detailed data
- Employment Rate EU 2014 (20 to 64 years)
 - Disability: 48.7 %
 - Without Disability: 72.0 %
 - Severely disabled 78 % outside of Labor Force (2002)
 - Long-standing Health problem/ disability 27 % outside Labor Force (2002)
- People at risk of poverty or social exclusion (2011)
 - Disability: 36.7 %
 - Without Disability: 21.7 %

- Disability per definition: impairment plus barriers
- Barriers are the focus for political intervention to create/ enforce an inclusive Labor Force
- Abolishing barriers: not always possible
 - => Reasonable Accommodation
- Legal Framework:
 - Employment Directive 2000/78 EC
 - Article 2 CRPD
 - National Legislation (Germany: First Law mentioning „Reasonable Accommodation“ – Angemessene Vorkehrung – explicitly in force since 2017: § 7 BGG. But de facto § 81 Abs 4 SGB 9 established a duty to provide reasonable Accommodation)

Reasonable Accommodation

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Reasonable Accommodation and others

- Distinguish Reasonable Accommodation from:
 - General Accessibility Standards (Universal Design)
 - Positive action measures.

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Reasonable Accommodation

- CRPD Art 2:
 - “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
- 2000/78/EC Art 5:
 - Reasonable accommodation means: “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.”

Reasonable Accommodation Without barriers

- Reasonable Accommodation:
 - Individualized
 - Concrete circumstances
 - No absolute duty
 - Reasonable (no optimum)
 - Not disproportionate/ not undue
- Without barriers:
 - For a specific group
 - (Absolute) duty – no test if „reasonable“ or „disproportionate“

- For the disabled: reasonable accommodation = a key term of 2000/78/EG (still no provision of reasonable accommodation required: social protection, health care, education, provision of goods and services...)
- Substantial equality concept (vs. formal equality)
- No positive action in favor of disabled as a group, but breaking down stereotypical prejudices that have limited opportunities for disabled

- Recital 17: Limits of Reasonable Accommodation
 - Individual must be competent, capable and available to perform essential functions of the post concerned
- Recital 20: Appropriate Measures
 - Effective and practical measures
 - Adapt workplace to disability
 - For example: adapt premises and equipment,
 - Change patterns of working time, distribution of
 - Tasks or the provisions of training

- Recital 21:
 - To determine disproportionate burden : Take in account financial and other costs
 - Scale and financial resources of organisation or enterprise
 - Possibility of obtaining public funding or other public assistance

- Article 5 (3): no disproportionate burden, if:
 - Sufficiently remedied by measures within framework of disability policy of member state
 - Important role of national legislation
 - Different level of reasonable accommodation for people with disabilities in different member states?
 - Role of CRPD?
- Enterprise obliged to apply for remedies?
 - → No, but if not: no disproportionate burden

Reasonable Accommodation Requirements

- Worker/Applicant is qualified
- Employer is aware of needs of the Worker/Applicant
- Reasonable accommodation=> suitable condition for the worker to perform essential duties of job.
- Reasonable accommodation poses no disproportionate burden

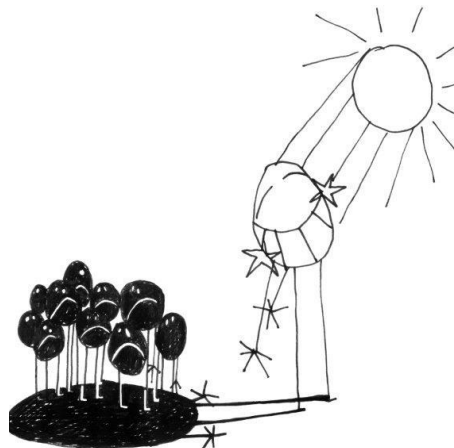
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Reasonable Accommodation Resumé

- CRPD
 - No reasonable accommodation = discrimination
 - ➔ direct discrimination, indirect discrimination
 - No Reasonable Accommodation (new type of discrimination sui generis)



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Concluding Observations Initial Report EC to CRPD (2015)

- 42 Recommendations:
- Examples:
 - Reasonable Accommodation not required in other areas than employment
 - No disability mainstreaming / no disability perspective in gender mainstreaming
 - Lack of procedural accommodation for persons with disability trying to access justice in EC member states
 - Training for member States on reasonable accommodation and accessibility in context of employment

Experiences

- Germany:
 - Reasonable Accommodation not part of the Antidiscrimination-Law „AGG“
 - SGB IX: Disability Law (rehabilitation, participation, workplace)
 - Regulations only for severely disabled : § 81 (4) SGB IX:
 - Disabled employee → accessible workspace, appropriate organisation of work, necessary resources

Reasonable Accommodation

- ECJ C-335/11 Ring & Skouboe Werge
 - Both secretaries with severe back pain (osteoarthritis, consequence of whiplash injury)
 - Long times of absence from the working place
 - Dismissed (without taking laws to protect persons with disabilities into account)
 - Both filed claims against dismissal and demand reasonable accommodation (working part time, height adjustable desk)
 - ECJ: Long Term 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 = Disability (not only congenital or by accident → also resulting from illness)
 - The nature of the measures to be taken by the employer is not decisive for considering that a person's state of health is covered by that concept (part-time work and height-adjustable desks are no special adaptations for Person with disability)

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Case Law

- „Flachschleifer“-Fall (surface grinding)
 - Employee needs to lift work pieces 30 kg and more
 - After operation couldn't lift more than 10 Kg
 - Employer dismissed him
 - Federal Labour Court: Appropriate Accommodation ☐ change of work organisation, special machine for work pieces of 10 kg. Dismissal unlawful
- Other Cases by German courts
- Reasonable Accommodation \neq Best imaginable Accommodation
- Different possibilities to accommodate: Employer has right to decide
- But: Right of self-determination § 9 SGB IX
- Example: Working Assistant for blind computer specialist

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- Ireland : Requirement to provide reasonable accommodation since 1998, provision has been amended to incorporate requirements of 2000/78/EC
 - Harrington v. East Coast Area Health Board
 - Wheelchair user
 - Pre employment interview was held in inaccessible venue
 - Equality Officer: Failure to provide reasonable accommodation for claimant

- Computer component company v. A Worker
 - Employee with epilepsy could not operate heavy machinerie
 - Court decided: Operations of heavy machinery is minor part of production system, arrangements need to take place to ensure A doesn't need to operate these machinerie

- **Feist v State of Louisiana**
 - Feist: assistant attorney general, had osteoarthritis, no free on-site-parking
 - LDOJ: reasonable accommodation only if it facilitates job performance
- **Fifth Circuit of Appeals:**
 - employers may be obligated to provide accommodations unrelated to the “essential functions” of the job if necessary to provide an employee with equal access to or benefits and privileges of employment.

Reasonable Accommodation in cases of interviews

- New situation (compared to 1990ies): Most cases not necessary to hide disability
- Knowledge of disability is prerequisite for reasonable accommodation
- Knowledge of possibilities to accommodate for disabled and for employers most important.

Reasonable Accommodations Examples

- Sign Language Interpreter
- Premises without barriers (wheelchairs, but also blind, learning disabled)
- Possibility to have a guide dog
- Possibilities to write (on computer) for blind or people without arms
- Possibility to give written answers for stammerer
- Appropriate more time for disabled in case of assessment test
- Documents in easy language

Resumé

- Disability: Distinction Disability/Sickness
- Focus not only on Disabled, but Discrimination on grounds of Disability
- Reasonable Accommodation: powerful instrument to overcome barriers / chance to participation
- Problem: Reasonable Accommodation might come late (deaf people in application process)
- Part of a changing image on Disability
- Reasonable Accommodation needs to be individualized / supports individual needs
- Dynamic concept /Needs development

- Signs, explanations, assistance for persons with intellectual disabilities
- Explanations of proceedings in simple language by the Court
- Sign language interpreters in the main proceedings and for public law advice
- Specially trained lawyers
- Accessible and technically well-equipped courtrooms

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