

Applying EU Anti-Discrimination Law

Webinar for members of the judiciary

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# Discrimination on Grounds of Disability: CRPD and EU Law

Galya Valkova, Sofia District Court



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Medical model



Social model



Human rights model

## EU Law

### ► CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

#### Article 21 Non-discrimination

*Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.*

### ► TREATY ON THE FUNCTIONING OF THE EU

#### Article 10

*In defining and implementing its policies and activities, the Union shall aim to **combat discrimination** based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*

- ▶ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

In force as of 2 December 2000, deadline for transposition: 2 December 2003

#### Article 2 Concept of discrimination

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.
2. For the purposes of paragraph 1:
  - a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;
  - b) 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:

- ▶ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

In force as of 2 December 2000, deadline for transposition: 2 December 2003

#### Article 2 Concept of discrimination

...2.

- i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or
- ii) as regards persons with a particular disability, the employer or any person or organisation 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.

- ▶ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation

In force as of 2 December 2000, deadline for transposition: 2 December 2003

#### Article 5

##### 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.

- ▶ UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD)

COUNCIL DECISION 26 November 2009 (2010/48/EC)

Art. 216 TFEU

#### Article 5 Equality and non-discrimination

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

► UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

**Article 2 Definitions**

“Discrimination on the basis of disability” means any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.  
It includes all forms of discrimination, including denial of reasonable accommodation;

► UN CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

Preamble - disability is an evolving concept

**Article 1 Purpose**

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.**

## CJEU case law

▶ Chacón Navas Case [C-13/05](#)

The concept of disability refers 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'. The limitations must appear to be long-term.

▶ *S. Coleman v Attridge Law, Steve Law* Case [C-303/06](#)

The prohibition of discrimination applies to an employee who is the parent of a child with a disability, whose care is provided primarily by that employee.

▶ *HK Danmark v Dansk Almennyttigt Boligselskab DAB and Pro Display A/S* Joined Cases [C-335/11](#) and [C-337/11](#)

By virtue of Article 216(2) TFEU, where international agreements are concluded by the European Union they are binding on its institutions, and consequently they prevail over acts of the European Union. It should also be recalled that the primacy of international agreements concluded by the European Union over instruments of secondary law means that those instruments must as far as possible be interpreted in a manner that is consistent with those agreements. It is apparent from Decision 2010/48 that the European Union has approved the UN Convention. Consequently, the provisions of that convention are, from the time of its entry into force, an integral part of the European Union legal order. It follows that [Directive 2000/78](#) must, as far as possible, be interpreted in a manner consistent with that convention.

## CJEU case law

▶ *HK Danmark v Dansk Almennyttigt Boligselskab DAB and Pro Display A/S* Joined Cases [C-335/11](#) and [C-337/11](#)

[The concept of 'disability' in Directive 2000/78](#) 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 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, and the limitation is a [long-term one](#). 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.

The state of health of a person with a disability who is fit to work, albeit only [part-time](#), is thus capable of being covered by the concept of 'disability'.

It should be noted here that the definition of the concept of 'disability' within the meaning of Article 1 of Directive 2000/78 [comes before](#) the determination and assessment of the appropriate accommodation measures referred to in Article 5 of the directive. The measures or adaptations referred to in recital 20 make it possible to [comply with the obligation](#) under Article 5 of the directive, but do not apply unless there is a disability.

[Reduction in working hours](#) may constitute one of the accommodation measures referred to in that [article 5](#). It is for the national court to assess whether, in the circumstances of the main proceedings, a reduction in working hours, as an accommodation measure, represents a disproportionate burden on the employer.

## CJEU case law

- ▶ Wolfgang [Glatzel](#) v Freistaat Bayern [C 356/12](#)

road safety requirements v. the right of persons affected by a visual disability to non-discrimination in a manner which cannot be regarded as disproportionate in relation to the objectives pursued.

- ▶ [Z.](#) v A Government department, the Board of management of a community school, [Case C 363/12](#)

The inability to have a child by conventional means does not in itself, in principle, prevent the commissioning mother from having access to, participating in or advancing in employment. In the present case, it is not apparent from the order for reference that Ms Z.'s condition by itself made it impossible for her to carry out her work or constituted a hindrance to the exercise of her professional activity. In those circumstances, it must be held that Ms Z.'s condition does not constitute a 'disability' within the meaning of Directive 2000/78.

The validity of that directive cannot be assessed in the light of the United Nations Convention on the Rights of Persons with Disabilities, but that directive must, as far as possible, be interpreted in a manner that is consistent with that Convention.

## CJEU case law

- ▶ Karsten [Kaltoft](#) v Billund Kommune, [Case C 354/13](#)

That concept of 'disability' must be understood as referring not only to the impossibility of exercising a professional activity, but also to a hindrance to the exercise of such an activity.

The concept of 'disability' within the meaning of Directive 2000/78 does not depend on the extent to which the person may or may not have contributed to the onset of his disability.

Directive 2000/78 must be interpreted as meaning that the [obesity](#) of a worker constitutes a 'disability' within the meaning of that directive [where](#) it entails a limitation resulting 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.

It is for the national court to determine whether, in the main proceedings, those conditions are met.

## CJEU case law

- ▶ Mohamed [Daouidi](#) v Bootes Plus SL, Fondo de Garantía Salarial, Ministerio Fiscal, [Case C 395/15](#)

In light of the foregoing, the answer to the fifth question is that Directive 2000/78 must be interpreted as meaning that:

- the fact that the person concerned finds himself or herself in a situation of temporary incapacity for work, as defined in national law, for an indeterminate amount of time, as the result of an accident at work, does not mean, in itself, that the limitation of that person's capacity can be classified as being 'long-term', within the meaning of the definition of 'disability' laid down by that directive, read in the light of the UN Convention;
- the evidence which makes it possible to find that such a limitation is 'long-term' includes the fact that, at the time of the allegedly discriminatory act, the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress or the fact that that incapacity is likely to be significantly prolonged before that person has recovered; and
- in the context of the verification of that 'long-term' nature, the referring court must base its decision on all of the objective evidence in its possession, in particular on documents and certificates relating to that person's condition, established on the basis of current medical and scientific knowledge and data.

## CJEU case law

- ▶ Carlos Enrique Ruiz [Conejero](#) v Ferroser Servicios Auxiliares SA, Ministerio Fiscal [Case C-270/16](#)

Article 2(2)(b)(i) of Council Directive 2008/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding national legislation under which an employer may dismiss a worker on the grounds of his intermittent absences from work, even if justified, in a situation where those absences are the consequence of sickness attributable to a **disability** suffered by that worker, unless that legislation, while pursuing the legitimate aim of combating absenteeism, **does not go beyond what is necessary in order to achieve that aim**, which is a matter for the referring court to assess.

- ▶ Petya [Milkova](#) v Izpalnitelen direktor na Agentsiata za privatizatsia i sledprivatizatsionen kontrol [C-406/15](#)

In the event that Article 7(2) of Directive 2000/78, read in the light of the UN Convention and in conjunction with the general principle of equal treatment, precludes legislation of a Member State such as that at issue in the main proceedings, the obligation to comply with EU law would require that the scope of the national rules protecting employees with a particular disability should be extended so that those protective rules also benefit civil servants with the same disability.

General comment no. 6 (2018) on equality and non-discrimination

Committee on the Rights of Persons with Disabilities

Inclusive equality is a new model of equality developed throughout the Convention. It embraces a substantive model of equality and extends and elaborates on the content of equality in:

- (a) a fair redistributive dimension to address socioeconomic disadvantages;
- (b) a recognition dimension to combat stigma, stereotyping, prejudice and violence and to recognize the dignity of human beings and their intersectionality;
- (c) a participative dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society; and
- (d) an accommodating dimension to make space for difference as a matter of human dignity. The Convention is based on inclusive equality.

General comment no. 6 (2018) on equality and non-discrimination

Committee on the Rights of Persons with Disabilities

The principles/rights of equality and non-discrimination are a cornerstone of the international protection guaranteed by the Convention.

Promoting equality and tackling discrimination are cross-cutting obligations of immediate realization. They are not subject to progressive realization.

“Intersectional discrimination” occurs when a person with a disability or associated to disability suffers discrimination of any form on the basis of disability, combined with, colour, sex, language, religion, ethnic, gender or other status.

“Multiple discrimination” according to the Committee is a situation where a person can experience discrimination on two or several grounds, in the sense that discrimination is compounded or aggravated.

*General comment no. 6 (2018) on equality and non-discrimination*

Committee on the Rights of Persons with Disabilities

Discrimination “on the basis of disability” can be against persons who have a disability at present, who have had a disability in the past, who have a disposition to a disability that lies in the future, who are presumed to have a disability, as well as those who are associated with a person with a disability.

The latter is known as “discrimination by association”.

*General comment no. 6 (2018) on equality and non-discrimination*

Committee on the Rights of Persons with Disabilities

**Article 13 - Access to justice**

The rights and obligations with respect to equality and non-discrimination outlined in article 5 raise particular considerations with respect to article 13, which, among others, call for the provision of procedural and age-appropriate accommodations. These accommodations are distinguishable from reasonable accommodation in that procedural accommodations are not limited by disproportionality.

An illustration of a procedural accommodation is the recognition of diverse communication methods of persons with disabilities standing in courts and tribunals. Age-appropriate accommodations may consist of disseminating information about available mechanisms to bring complaints forward and access to justice using age-appropriate and plain language.

*General comment no. 6 (2018) on equality and non-discrimination*

Committee on the Rights of Persons with Disabilities

In order to ensure effective access to justice, processes must allow participation and be transparent.

Actions that enable participation include:

- (a) delivery of information in an understandable and accessible manner;
- (b) recognition and accommodation of diverse forms of communication;
- (c) physical accessibility throughout all stages of the process;
- (d) financial assistance in the case of legal aid, where applicable, and subject to statutory tests of means and merits.

Thank you for your attention!

[galya.g.valkova@gmail.com](mailto:galya.g.valkova@gmail.com)