

# Disability and reasonable accommodation: EU law and UNCRPD

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## Introduction

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Disability as a human rights issue: United Nations, Council of Europe, European Union

Concept of disability

Reasonable accommodation

# Disability as a human rights issue

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## **United Nations**

Concept of disability evolved over time: from medical model to social model.

Social model: any factor in society which imposes restrictions on persons with disabilities

Reflected in CRPD:

- Article 1 Concept of disability
- Article 8 Awareness-raising
- Article 9 Accessibility
- Article 12 Equality before the law

# Disability as a human rights issue

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## **European Court of Human Rights**

*Glor v. Switzerland* No. 13444/04, payment of military service tax

*Alajos Kiss v. Hungary* No. 38832/06, voting rights for person under partial guardianship

*Kiyutin v Russia* No. 2700/10, residence permit for HIV positive person

*Çam v. Turkey* No. 51500/08, inaccessibility of musical academy building

# European Union law on disability

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Article 19 TFEU: mandate to legislate

Charter of Fundamental Rights

- Article 21: prohibition of discrimination based on (a.o.) disability.
- Article 26: right of persons with disabilities to independence, integration and participation.

Framework Directive 2000/78

Pending since 2008: Broad Directive (access to goods and services); Commission promises to adopt it.

# European Union law on disability

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Latest developments

- Accessibility Act: rules for marketing goods and services. IT systems, smartphones, TV equipment, banking, e-commerce, transport. Adopted by the Council on 9 April 2019. Implementation period of 3 years starts after publication in Official Journal.
- Directive 2016/2102 on accessibility of public sector websites and apps.

# Concept of disability

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Disability as an evolving concept in CJEU case law:

- From medical to social model: Chacon Navas to HK Danmark
- Direct or indirect discrimination: Ruiz Conejero , VL vs Szpital Kliniczny
- Disability, yes or no?: Z , Daouidi and DW vs Nobel Plastiques
- A different concept: Coleman

# From medical to social model - 1

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*Chacon Navas (C-13/05):*

1. Court defined disability as:  
*'a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.'*
2. *Disability* is different from *sickness*: a person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down by Directive 2000/78.

## From medical to social model - 2

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Revised concept of disability in EU case law:

*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. Reference to Article 1 UNCRPD.*

Main cases:

*HK Danmark/Ring and Skouboe Werge (C-335/11 and C-337/11) and Kaltoft (C-354/13).*

## Direct or indirect discrimination?

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*Ruiz Conejero (C-270/16)*

Absent from work because of health condition: degenerative joint disease and polyarthrosis, aggravated by obesity. Spanish law permits dismissal on grounds of absence from work caused by sickness.

Preliminary question: Does the law discriminate on grounds of disability?

CJEU:

- Law applies to all workers – no direct discrimination. But a worker with a disability is more exposed to the risk of being dismissed than a worker without a disability – indirect discrimination.
- National court must apply objective justification test.

## Direct or indirect discrimination?

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*VL vs Szpital Klinczny (C-16/19; pending)*

A disabled worker was denied a supplementary payment paid to other disabled workers.  
Reason: she had submitted her disability certificate earlier than others.

*Opinion AG Pitruzzella, 18 June 2020:*

Is it discrimination if an employer treats two groups of disabled individuals differently?

There could be indirect discrimination, if: (a) the employer treats individual members of that group differently on the basis of an apparently neutral criterion; (b) that criterion, although apparently neutral, is inextricably related to the protected characteristic; (c) there is no objective justification.

Court decision in 2021!

## Disability, yes or no?

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*Daouidi vs. Bootes Plus SL (C-395/15)*

Kitchen worker falls and dislocates his elbow; is dismissed.

Preliminary question: is a temporary, but long-term limitation a disability?

CJEU: Temporary incapacity does not mean in itself a disability; long-term limitation and disability *may* exist

- If the incapacity of the person concerned does not display a clearly defined prognosis as regards short-term progress;
- Courts must use objective evidence, such as medical and scientific documents, to verify 'long-term'.

# Disability, yes or no?

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*Z. (C-363/12)*

Female employee, had a child through surrogate pregnancy - she was unable to bear a foetus herself. Applied for maternity leave, which was refused.

Preliminary question: Discrimination on grounds of sex or disability?

CJEU: No discrimination. *'The health state of Mrs. Z was not of the nature that limited her from full and effective participation in professional life on an equal basis with other workers'*.

- Critics: CJEU applies medical approach.

# Disability, yes or no?

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*DW. vs Nobel Plastiques Ibérica SA (C-397/18)*

DW. suffers from a tennis elbow and has had surgery. She is given easier tasks and she is qualified as a 'worker particularly susceptible to certain risks'. Later, she is dismissed on grounds of a general list of criteria, including low productivity and a high rate of absenteeism.

Preliminary questions:

- Is 'particularly susceptible to certain risks' equivalent to 'disability'? Court: 'In general: no'. The national court must assess whether the individual health state amounts to disability.
- Does the application of the mentioned criteria lead to (in)direct discrimination? Court: 'The selection criteria constitute indirect discrimination, unless the employer has beforehand provided that worker with reasonable accommodation. National court determines this.'

# A different concept

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*Coleman v Attridge Law (C-303/06)*

Newborn son with disabilities; made redundant because as the primary carer she needed to spend time with the child.

CJEU: 'discrimination by association'. Directive 2000/78 aims to prevent all forms of discrimination on grounds of disability, not just against disabled persons.

# Reasonable Accommodation

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Key element of Directive 2000/78

'an appropriate measure to enable a person with a disability to have access to, to participate or to advance in employment'

Aims at substantive equality

Refusal to provide RA is defined as discrimination.

# Reasonable Accommodation

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*Art. 5 Directive 2000/78*

Reasonable  
accommodation

*Art. 2 CRPD, Individual  
adjustment*

*Art. 7 Directive 2000/78,  
positive action*

Specific measures

*Art. 5(4) CRPD, de facto equality*

General accessibility

*Art. 4(f) CRPD, universal  
design*

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# Reasonable accommodation

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Disproportionate burden?

- Recital 21: 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.
- Article 5 Directive: 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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# Reasonable accommodation: examples

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Case law in NL:

- Employer did not investigate what accommodation was needed for worker with sleeping disorder. Discrimination (2018-148)
- Advertising agency refuses an internship to a woman with Ehlers-Danlos syndrome, a connective tissue disorder. She needs extra rest moments during a working day. The employer says that does not fit in the hectic job. Discrimination (2020-62)
- Applicant for gardeners' job turned down; employer says that the lasting effects of his severe meningitis make him unfit for the job. Proposed reasonable accommodation refused by employer, other possibilities not discussed. Discrimination (2020-71)

# Conclusion

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Disability rights are human rights.

An important driver for this development is the paradigm shift from the medical to the social model of disability.

The Court of Justice of the European Union has incorporated the UNCRPD as a tool to interpret the concept of disability in EU legislation. In most cases, the Court applies the social model.

The duty to apply reasonable accommodation has been fully incorporated in EU case law.

Thank you!

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