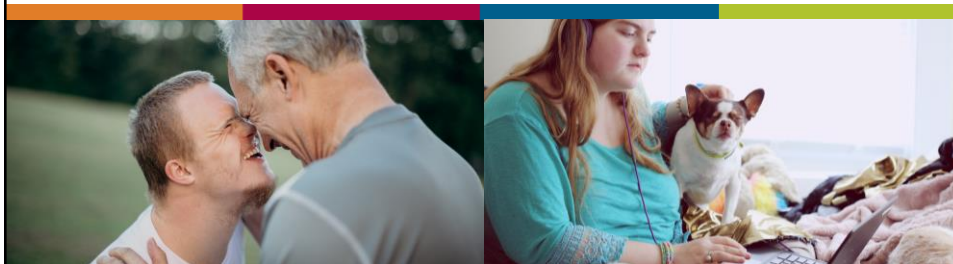


DISCRIMINATION ON THE GROUNDS OF DISABILITY



APPLYING EU ANTI-DISCRIMINATION LAW

ONLINE SEMINAR FOR LEGAL
PRACTITIONERS

25 JUNE 2021



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TO BEGIN WITH...

- Is Naomi Osaka a **person with a disability**?
- Should the tournament organizer have accepted her decision not to speak to the media as a **form of reasonable accommodation**?
- Was the fine for failing to attend the press conference and the threat of exclusion from the tournament a **form of disability discrimination**?



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Rest of images displaced in this presentation are available at <https://unsplash.com/>.

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POLL

Based on the information available, Naomi Osaka might be a person with disability.

- a) Agree
- b) Disagree



Downloaded merely for educational purposes from www.depositphotos.com.

Rest of images displaced in this presentation are available at <https://unsplash.com/>.

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AVAILABLE STATISTICAL DATA AT EU LEVEL

Functional and activity limitations statistics (2019)

- About a quarter of the EU population experienced **long-standing activity limitations** due to **health problems**.
- Men in the EU were less likely than women to report long-standing activity limitations.

Financial situation (2019)

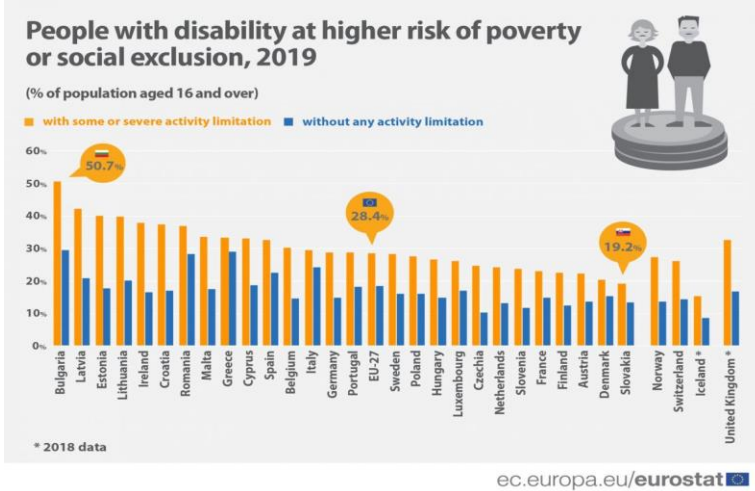
- 41.0 % of people in the EU with a disability could not afford a **one-week annual holiday**.
- 11.3 % of people in the EU with a disability could not afford to **eat meat, fish or a vegetarian equivalent every other day**.
- 40.9 % of people in the EU with a disability could not meet **unexpected financial expenses**.

Disability statistics, Eurostat, Statistics explained, 2019

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AVAILABLE STATISTICAL DATA AT EU LEVEL

Poverty and income inequalities (2019)



Disability statistics, Eurostat, Statistics explained, 2019

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5 MAIN GOALS OF MY TODAY'S PRESENTATION

- ❑ to acquaint you with the **legal definition of disability** according to UN CRPD and EU equality law
- ❑ to illustrate the general concepts enshrined in the law through **the judgments of the Court of Justice of the European Union (CJEU)**
- ❑ to guide you through the pitfalls associated with **adopting reasonable accommodation** in the field of employment
- ❑ raise awareness of **existing limitations and legal shortcomings** at EU level and possible ways to overcome them
- ❑ to equip you with **information resources** to help you deal with disability discrimination cases in your **day-to-day work**

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FIRST ON THE DEFINITION OF DISABILITY



Sonia's case

- employed by an undertaking specializing in catering, 8 months on sick leave – waiting for an operation
- certified as unfit to work on grounds of her sickness (medical grounds) – no more details about the health condition
- receipt of temporary incapacity benefit, the public health service: not in a position to return to work in the short term
- notice of her dismissal without stating any reasons, dismissal is based on “the cost benefit analysis” permitted by the national law

Jette' case

- employed by a housing association, absent on several occasions from 6 June to 24 November
- the medical certificates states - „constant lumbar pain which could not be treated“
- no prognosis can be made as regards the prospect of returning to full-time employment
- Jette is dismissed by letter with reference to the existing national law – her illness was too long (more than 120 days)

Sonia and Jette file an action and claim **disability discrimination**.

Their employers **dispute** that the applicants' state of health is covered by the concept of 'disability'.

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POLL



Based on the facts of both cases, who is a person with disability?

- a) Only Sonia
- b) Only Jette
- c) Both Sonia and Jette
- d) Neither of them

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UN CRPD AND ITS INTERACTION WITH EU LAW



EU law

- ❑ Art. 19 TFEU, art. 21 CFR, Directive 2000/78/EC (“Employment Equality Directive”)
- ❑ Policies: Strategy for the Rights of Persons with Disabilities 2021-2030
- ❑ Proposal of so called “Horizontal Directive”

Convention on the Rights of Persons with Disabilities (CRPD)

- ❑ 182 ratifications/accessions
- ❑ incorporated into EU law through Council Decision 2010/48/EC
- ❑ status of so called “mixed agreement”

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MEDICAL AND SOCIAL MODEL OF DISABILITY

Paradigm shift



Medical model

- ❑ **attempts to “cure” the functional limitations** of the person with disability in order to conform to the non-disabled “norm”
- ❑ focus lays on the impairment itself (**biological traits**) rather than on the barriers in the society
- ❑ **segregation** from mainstream society (due to their inability to cope with mainstream structures)

Social Model

- ❑ **equality** norm is the core of this model
- ❑ requires to address the **systemic or structural disadvantage**
- ❑ tackles processes by which the society marginalise people with disabilities
- ❑ the focus **shifts away from the individual with disability** towards broader re-examination of structural disadvantage
- ❑ endorses an increased role for persons with disabilities to express their **views**

BRODERICK, Andrea. The long and winding road to equality and inclusion for persons with disabilities. The United Nations Convention on the Rights of Persons with Disabilities. 1st ed. Cambridge – Antwerp – Portland: Intersentia, 2015. page 22 – 24. ISBN 978-1-78068-358-4. 10

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LET'S RETURN TO THE CASES OF SONIA AND JETTE



Sonia Chacón Navas v Eures Colectividades SA (2006) Case C-13/05

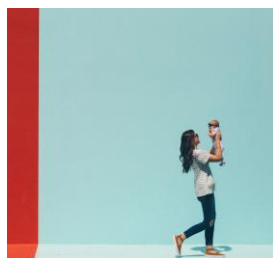
Disability is different from sickness. A person who has been dismissed by his employer solely on account of sickness does not fall within the general framework laid down by Employment Equality Directive.

HK Danmark v Dansk almennyttigt Boligselskab, and HK Danmark v Dansk Arbejdsgiverforening (2013) C-335/11, C-337/11

*“the concept of ‘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 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.**” (para 47)*

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OTHER IMPORTANT CJEU JUDGMENTS ON THE NOTION OF DISABILITY



**Z v A Government Department (2014)
Case C-363/12**



**Fag og Arbejde (FOA) v Kommunernes Landsforening (KL) (2014)
Case C-354/13**



**Daouidi v Bootes Plus SL and Others (2016)
Case C-395/15**

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INTERESTING JUDGMENTS ON THE TOPIC OF COMPARATORS (CJEU, ECTHR)



**Petya Milkova v
Izpalnitelen direktor
na Agentsiata
(2017)
Case C-406/15**



**VL v Szpital
Kliniczny
(2021)
Case C-16/19**



**Popović and others
v. Serbia
(2020)
applications nos.
26944/13 and 3
others**

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DISCRIMINATORY TERMINATION OF EMPLOYMENT

Discrimination by association

- Coleman v Attridge Law (2008) Case C-303/06
- Does the Directive include a prohibition of discrimination against a person other than a disabled person, such as the mother of a disabled person? Yes, it does.
- Follow-up at CJEU level: CHEZ Razpredelenie Bulgaria AD v Komisia za zashtita ot diskriminatsia (2015) Case C- C-83/14 (ethnic origin, goods and services, indirect discrimination)

Absenteeism at work

- Ruiz Conejero v Ferroservicios (2018) Case C-270/16
- Can an employer dismiss a worker on the grounds of intermittent absences from work, even if justified, even in a situation where those absences are the consequence of illnesses attributed to that worker's disability?
- National court must apply objective justification test.
- Follow-up at national level: The Spanish Government approved Royal Decree-Law 4/2020 which repeals the objective dismissal due to absences from work established in Article 52(d) of the consolidated text of the Law of the Statute of Workers.

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Definition – Article 5 Equality Employment Directive

- „an appropriate measure to enable a person with a disability to have access to, to participate or to advance in employment“
- Denial to provide RA is defined as discrimination (requirement of UN CRPD).
- Recital 17 and 20 – interpretation guidelines
- Disproportionate burden (recital 21, article 5)
- RA must be distinguished from
 1. accessibility standards - Art. 4 (f) and 9 CRPD, universal design
 2. positive action - Art. 7 Directive 2000/78

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EXAMPLES OF REASONABLE ACCOMMODATION

- Provision of a personal assistant at the workplace.
- Presence of a dog with special training at the workplace.
- Part-time.
- Flexible working hours.
- More frequent or longer breaks from work.
- Teleworking.
- Taking the employee out of direct contact with clients (called "back office").
- Purchasing special software or electronic magnifiers to read documents.
- Exempting the employee from making telephone calls (for a person with a hearing impairment).
- Reassigning the employee to a workplace closer to his/her home.
- A day of sick leave to maintain a compensatory device.

European Commission. How to put reasonable accommodation in practice. Guide of promising practices. [online] Luxembourg: Publications Office of the European Union, 2020. ISBN 978-92-76-19208-4. <https://ec.europa.eu/social/main.jsp?catId=738&langId=en&pubId=8341&furtherPubs=yes>

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EXAMPLES FROM CJEU CASE-LAW

Reasonable accommodation measure



**European
Commission v
Italian Republic
(2013)
C-312/11**



**HK Danmark v
Dansk almennyttigt
Boligselskab
(2013)
C-335/11, C-337/11**



**DW v Nobel
Plastiques Ibérica
SA
(2019)
C-397/18**

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PRACTICAL CHALLENGES

interesting national case law I



Inquiring during a job interview about a candidate's disability

- ❑ Germany, Federal Labour Court, 26 June 2014, 8 AZR 547/13

Employee disclosed disability only when addressing unsatisfactory work performance

- ❑ Spain, Constitutional Court, 15 March 2021, Nº 51/2021

The employer knew of the disability but failed to take reasonable accommodation

- ❑ Belgium, Labour Court Brussels, 20 February 2018, 2016/AB/959

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Can an employer ask a job applicant about his or her disability during a job interview?

- a) Yes, if the disability is visible.
- b) Yes, if the applicant discloses the disability in the communication before the selection process begins.
- c) No, this is sensitive personal information.

Although the employer adopted a reasonable accommodation, it was not sufficiently effective

- Norway, Equality and Anti-Discrimination Tribunal of Norway, 9 September 2013, Case 11/2013, A vs. B Company

Employer refused reasonable accommodation on grounds of undue burden

- Sweden, Labour Court, Södertörn University, Case A 146/16, Judgement 51/17
- Slovakia, the Regional Court in Bratislava, 27 August 2019, 8 CO/232/2018

SET OF SOFT RECOMMENDATIONS FOR EMPLOYEES



” Be open and communicate your needs so you can work effectively. “

- communicate openly with your employer
- provide evidence that your specific needs arise from the limitations caused by your disability
- suggest that some measures may only work for a certain period (a 'trial run')
- meet the employer again to assess how the measure has worked in practice
- tell the employer about resources that could cover the costs
- put the employer in touch with NGOs that specialize in particular disability

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SET OF SOFT RECOMMENDATIONS FOR EMPLOYERS



” Explain to employees without disabilities that RA means substantive equality. “

- inform all your employees that you are prepared to provide reasonable accommodation
- give practical examples and clearly describe how employees can request them
- include information about reasonable accommodation in job offers
- pay special attention to certain categories of employees (sick leave or returning to the workplace after a long break for health reasons)
- remember that every employee with a disability is different, adjustments should be discussed on individual basis
- work with reliable partners (NGO, trade unions, Employment Office, occupational health care provider)

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RIGHTS OF PEOPLE WITH DISABILITIES AT EU LEVEL BEYOND EMPLOYMENT



ombudsman
Public Defender of Rights



European Accessibility Act

Directive (EU)
2019/882



Audiovisual Media Services Directive

Directive (EU)
2018/1808



Accessibility of the websites and mobile applications of public sector bodies

Directive (EU)
2016/2102

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OVERCOMING EXISTING GAPS?



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Public Defender of Rights

UN Committee on the Rights of Persons with Disabilities

- ❑ Reports of States parties
- ❑ **General Comments** – e. g. General Comment No 6 on Article 5: Equality and non-discrimination (Adopted 9 March 2018)

❑ Individual and group communications under **Optional Protocol**

ECtHR

- ❑ Very positive developments in relation to **inclusive education**
 - Çam v. Turkey (no. 51500/08, 23 February 2016)
 - Enver Şahin v. Turkey (no. 23065/12, 30 January 2018)
 - G.L. v. Italy (no. 59751/15, 10 September 2020)
- ❑ criticism of recent decisions on the **right to vote** of persons with disabilities
 - Strøbye and Rosenlind v. Denmark (nos. 25802/18 and 27338/18, 2 February 2021)
 - Caamaño Valle v. Spain (no. 43564/17, 11 May 2021)

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CONCLUDING REMARKS



- ❑ **Anyone** can be a person with a disability. A disability does not have to be **visible**.
- ❑ Strive to apply the **Convention** on the Rights of Persons with Disabilities in your legal work.
- ❑ Remember the **social model of disability**.
- ❑ **Focus on the barriers** that prevent a person with a disability from participating effectively in life on an equal basis with others. Barriers may exist in **attitudes** (stigma, prejudices) or in the **physical environment** (its inaccessibility).
- ❑ EU law protects people with disabilities against **discrimination only in the field of employment**.

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CONCLUDING REMARKS



- ❑ **The CJEU** has developed case law on **the definition of disability** and other related issues (determination of comparator, reasonable accommodation, discriminatory conditions for termination of employment).
- ❑ The obligation to take **reasonable accommodation measures** towards employees with disabilities is an **essential tool for their inclusion** in working life.
- ❑ **Denial** of reasonable accommodation is a **form of discrimination**.
- ❑ Outside the field of employment, it is also possible to rely on the work of the **UN CRPD Committee** or the judgments of the **ECtHR** to support your argument.

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FOR FURTHER READING



- ❑ BELL, Mark, WADDINGTON, Lisa. **The Employment Equality Directive and supporting people with psychosocial disabilities in the workplace.** [online] Luxembourg: Publications Office of the European Union, 2016. ISBN 978-92-79-62626-5. <https://www.equalitylaw.eu/downloads/3966-the-employment-equality-directive-and-supporting-people-with-psychosocial-disabilities-in-the-workplace-a-legal-analysis-of-the-situation-in-the-eu-member-states>.
- ❑ FERRI, Delia, LAWSON, Anna. **Reasonable accommodation for disabled people in employment.** [online] Luxembourg: Publications Office of the European Union, 2016. ISBN 978-92-79-55335-6. <https://www.equalitylaw.eu/downloads/3724-reasonable-accommodation-for-disabled-people-in-employment>.
- ❑ LIU, Kimberly, O' CINNEIDE, Colm. **The ongoing evolution of the case-law of the Court of Justice of the European Union on Directives 2000/43/EC and 2000/78/EC.** [online] Luxembourg: Publications Office of the European Union, 2019. ISBN 978-92-76-08832-5. <https://www.equalitylaw.eu/downloads/5009-the-ongoing-evolution-of-the-case-law-of-the-court-of-justice-of-the-european-union-on-directives-2000-43-ec-and-2000-78-ec-pdf-766-kb>.
- ❑ WADDINGTON, Lisa, BRODERICK, Andrea. **Combatting disability discrimination and realising equality.** [online] Luxembourg: Publications Office of the European Union, 2018. ISBN 978-92-79-92775-1. <https://www.equalitylaw.eu/downloads/4760-combatting-disability-discrimination-and-realising-equality-a-comparison-of-the-uncrpd-and-eu-equality-and-non-discrimination-law-pdf-690-kb>.

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THANK YOU FOR YOUR ATTENTION!



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