

Discrimination on the grounds of Disability

The relationship between EU law and the
UNCRPD

The concepts of “Disability” and
“Reasonable Accommodation”



Funded under the Rights, Equality and Citizenship
Programme 2014-2020 of the European Commission

1



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In search of the definition of disability

The case-law of the Court of Justice of the European Union

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The jurisprudence of the CJEU on the definition of disability

- **Chacón Navas** v Eurest Colectividades SA (2006) - Case C-13/05.
- **Coleman** v Attridge Law (2008) - Case C-303/06.
- **Ring** v Dansk almennyttigt Boligselskab DAB (2013) – Case C-335/11 en **Werge** v Pro Display A/S- Case C-337/11.
- **Kaltoft** v. Kommunernes Landsforening (2015) – Case C-354/13
- **Daouidi** v Bootes Plus SL and Others (2016) – Case C-395/15

6

Article 1 Directive 2000/78

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, **disability**, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

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Who is protected ?



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A person should be considered **disabled** if his ability to earn a living is permanently reduced to less than one third caused by illness or other impairment
(Alters- und Invalidenversicherung 899)

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Chacón Navas v Eurest Colectividades SA (2006) Case C-13/05.



Is "**sickness**" included in the Directive, either as "disability" or as a separate ground ?

11

ECJ Ruling on Chacon Navas

- The concept of "disability" for the purpose of Directive must be given an **autonomous** and **uniform** interpretation throughout the Community
- The scope of the Directive **cannot be extended by analogy** on other grounds than those listed exhaustively in article 1 thereof. Sickness cannot be therefore regarded as such as a ground of discrimination.
- Disability must be understood as referring 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**".
- 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**.

12

• Remarks on Chacon Navas

- The CJEU exercised its power of interpretation to elaborate a rather narrow definition of disability and not a comprehensive one.
- The Court embraced a definition based on the “**medical model**” of disability.
- The CJEU’s reasoning seemed uninformed by the **historical, political and normative debate regarding the meaning of disability** in Europe and abroad.

13

• Coleman v Attridge Law (2008) Case C-303/06



Does the Directive include discrimination against **someone other than the disabled** person, such as the disabled person’s mother ?

14

CJEU Ruling on Coleman

- An interpretation limiting its application only to people who are themselves disabled is liable to deprive the directive of an important element of its **effectiveness** and to reduce the protection which it is intended to guarantee.
- The directive, the purpose of which is to combat all forms of discrimination, applies **not to a particular category of person but by reference to the nature of the discrimination.**
- **The prohibition of discrimination is not limited to people who are themselves disabled. It also includes less favourable treatment of an employee based on the disability of his child, whose care is provided primarily by the employee.**

15

Remarks on Coleman

- Court's approach explicitly rejected the calls for a **narrow interpretation** of the principle of equal treatment on the ground that such an interpretation would hamper the social and economic integration of persons with disabilities.
- By placing the focus on the commission of the discriminatory act in preference to the condition of the employee, Coleman represents a fundamental steps towards a **social model** of disability.

16

Ring v Dansk almennyttigt Boligselskab (2013) DAB Case C-335/11 en Werge v Pro Display A/S- Case C-337/11



Is any person who, because of physical, mental or psychological impairments, cannot or can **only to a limited extent** carry out his work during in a long period covered by the concept of disability within the meaning of the Directive?

is a **reduction in working hours** among the measures covered by the concept of **reasonable accommodation**?

17

CJEU ruling on Ring

- The Directive 2000/78 must, as far as possible, be interpreted **in a manner consistent** with the United Nations Convention on the Rights of Persons with Disabilities.
- The concept of 'disability' must be understood as referring to 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.
- The concept of disability must be understood as referring to an hindrance to the exercise of a professional activity, not as the impossibility of exercising such activity. **The state of a person with a disability who is fit to work, albeit only part time, is covered by the concept of disability.**

18

- CJEU ruling on Ring (2)

- **Article 5** of Directive 2000/78 regarding the duty to provide **reasonable accommodation** must be interpreted as meaning that a reduction in working hours may constitute one of the accommodation measures referred to in that article.

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- Remark on Ring



“The Directive 2000/78 must, as far as possible, be interpreted in a manner **consistent with the United Nations Convention on the Rights of Persons with Disabilities**”.

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The United Nations Convention on the Rights of Persons with disabilities

- Adoption by the United Nations General Assembly - 13 December 2006
- Entry into force – 3 May 2008
- Signed by all the EU Member States
- Ratified by the European Union as a whole – 23 December 2010



21

The UNCRPD - The Key Principles

- Respect for inherent **dignity**, individual **autonomy** and **independence**.
- **Non-discrimination**.
- Full and effective **participation** and **inclusion** in society.
- **Respect for difference** and acceptance of persons with disabilities as part of human diversity and humanity.
- **Equality of opportunity**.
- **Accessibility**.



22

The UNCPRD - The Content Areas

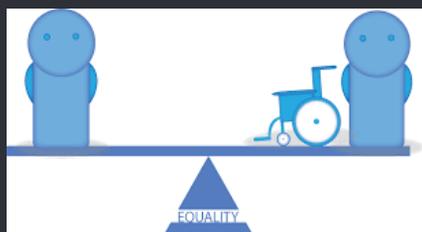
- **Civil and political rights**

Right to life, Equal recognition before the law, Equality, Access to justice, Liberty and security of person, Freedom from torture or cruel, inhuman or degrading treatment or punishment, Freedom from exploitation, violence and abuse, Protecting the integrity of the person, Liberty of movement and nationality, Freedom of expression and opinion, and access to information, Respect for privacy, Respect for home and the family, Participation in political and public life.

- **Economic, social and cultural rights**

Living independently and being included in the community, Personal mobility, Education, Health, Habilitation and rehabilitation, Work and employment, Adequate standard of living and social protection, Participation in cultural life, recreation, leisure and sport.

23



The Convention advances **substantive equality** for persons with disabilities as enshrined in its Article 5, including **equality of opportunities** and **equality of outcomes**.

It requires the transformation of existing social structures, systems and conceptions that perpetuate the exclusion of persons with disabilities

24

The accession of the European Union to the UNCPRD

- The European Union acceded to UN Convention on the Rights of Persons with Disabilities, with the Council Decision 2010/48/EC, formally adopted on 26 November 2009.
- The instrument of ratification was deposited in December 2010, after the adoption of a Code of Conduct by the Council.



25

The UNCPRD ratification as a first time in history

- The EU competence to conclude the UNCPRD derives from **Article 19 TFEU** which addresses disability discrimination and article **114 TFEU** which addresses the internal market.
- It is the **first time** ever that the EU becomes a party to an international human rights treaty.
- It is also the **first time** that an intergovernmental organization join a United Nations human rights treaty.

26

The UNCPRD as a mixed agreement

- Mixed agreements are signed and concluded by the EU and its Member States on the one hand, and by a Third Party on the other hand.
- Mixity is due to the fact that part of an international agreement falls within the scope of the EU powers and part within the scope of the powers of the Member States.
- The UNCPRD, as other multilateral agreements that make provision for participation by regional organisations such as the EU alongside its Member States, provides for a **Declaration of competence** specifying which areas of the agreement fall within the competence of the Regional organization and which within that of its Member States.

27

Effects of international agreements concluded by the Community in the EU legal order

- International agreements have legal effect in the EU legal order and do not require further acts of implementation, as a regulation or directive (Case 181/73, Haegeman/État Belge).
- International agreements have a **superior level to secondary legislation**. Any secondary EU legislation must be in conformity with the UNCPRD in so far as its provisions fall within the scope of Community competence. Any conflicting rule may be annulled by the ECJ.
- Under certain conditions they can be invoked before the court by an individual; there is **direct effect** (Demirel - Case 12/86).

28

● Z – Case 363/12



- **The provisions of the UNCRPD Convention are not, as regards their content, provisions that are unconditional and sufficiently precise to have direct effect** in European Union law.
- It follows from this that the validity of Directive 2000/78 cannot be assessed in the light of the UN Convention but that directive must, as far as possible, be interpreted in a manner that is consistent with that Convention.

29

The UNCRPD as an interpretation tool of European Union law

- The primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements (ECJ Case C-61/94)
- **The accession to the UN CRPD creates therefore an obligation to interpret EU law in manner that is consistent with the Convention (Ring vs Dansk almennyttigt Boligselskab DAB – ECJ Case C2335/11)**

30

The meaning of “disability” within the UNCRPD

Preamble

“Recognising that 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.”.

Article 1

Art.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.”.

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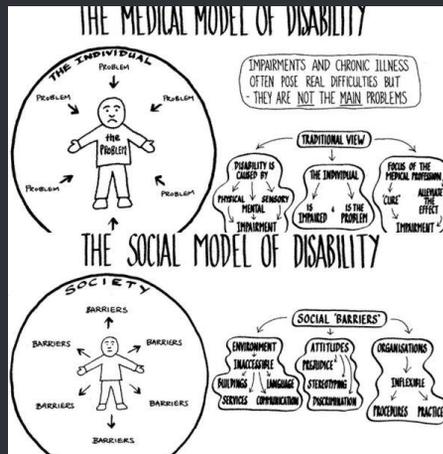
Typology of approaches of disability

The individual (medical) model

Disability as an **individual pathology** (locating the problem inside the individual)

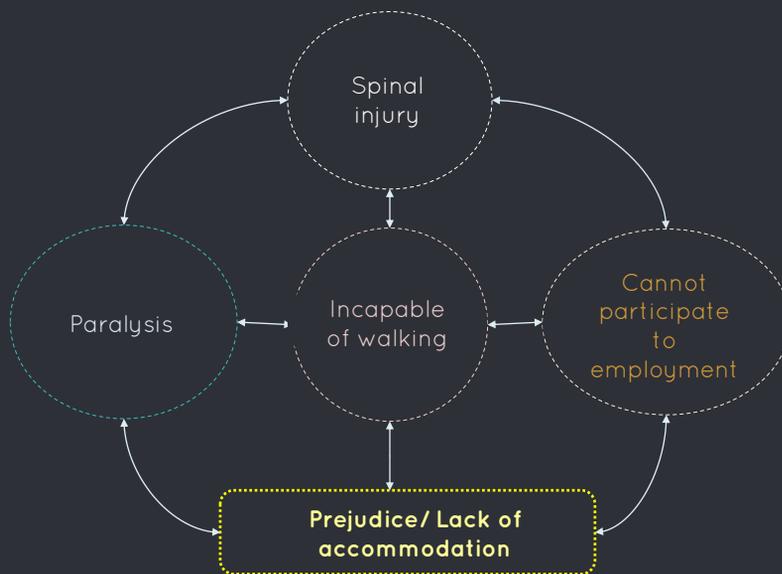
The social model

Disability as a **social pathology** (locating the problem outside the individual)



35

Understanding Disability from the International Classification of Functioning, Disability and Health (ICF) perspective – WHO 2001



36

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.

37

Reasonable accommodation : key elements

Reasonableness

Effectiveness and appropriateness of the requested adjustment

Individualization

Where needed in a particular case

Disproportionate burden

Balancing the rights of persons with disabilities and the economic interest of employers

38

Most requested accommodations



Flexible work schedules

Telework and home-based work

Modified or ergonomic workstation

39

This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, **without prejudice to the obligation to provide reasonable accommodation** for people with disabilities.



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C-335/12 Ring - The concept of reasonable accommodation encompasses not only material, but also organizational measures, which could include an alteration to the speed or rhythm at which work is done. As such, a reduction in working hours could constitute a reasonable accommodation where fewer hours would make it possible for a worker to continue to participate in employment

C-397/18 DW/Nobel Plastiques Ibérica SA - A dismissal of a disabled employee on the basis of criteria that imposes a particular disadvantage on disabled persons constitutes indirect discrimination **if an employer failed to provide that worker with reasonable accommodation prior to dismissal.**

41

The ECJ definition of disability after Ring

Disability must be understood as referring to limitations which result from :

- (i) **long-term...**
 - (ii) **physical, mental or psychological** impairments
 - (iii) which in **interaction with various barriers**
 - (iv) **may hinder** the full and effective participation of the person in professional life
 - (v) on an **equal basis** with other workers
- This definition covers not only disabilities that are congenital or result from accidents, but also those caused by illness.
 - Nothing in the wording of Directive 2000/78 indicates that its scope of application is limited to a certain **degree of severity** of disability.

42

Kalfstov vs Kommunernes Landsforening (KL) – Case C-354/1414



Must Directive 2000/78 be interpreted as meaning that the **obesity** of a worker can constitute a ‘disability’ within the meaning of that directive?

43

ECJ Ruling on Kaltoft

- Obesity does not in itself constitute a ‘disability’
- However, **obesity can be covered by the concept of disability** when the obesity of the worker concerned entails a limitation :
 - that is a long term one
 - which results in particular from physical, mental or psychological impairments that
 - in interaction with various barriers
 - may hinder the full and effective participation of that person in professional life
 - on an equal basis with other workers
- Such would be the case, in particular, if the obesity of the worker hindered his full and effective participation in professional life on an equal basis with other workers on account of reduced mobility

44



“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.”

45



Disability ?



Disability ?

46

● Daouidi v. Bootes Plus Case 395/15



Is someone **temporarily unable to work**, because of a dislocated shoulder, covered by the definition of disability ?

47

● Daouidi v. Bootes Plus Case 395/15

A temporary injury lasting for an indeterminate amount of time cannot automatically be considered 'long term', it would depend on the circumstances

If the evidence in a particular case was that the injury did not have a defined short-term prognosis, or if incapacity was likely to be significantly prolonged before recovery, something like a dislocated elbow might amount to a disability

48

Daouidi v. Bootes Plus Case 395/15



By insisting that impairment must be “long term”, the EU definition could exclude from the protection against discrimination a vast array of workers with short-term, fluctuating, or episodic impairments.

It should be recalled that the definition of disability in the UNCRPD is an inclusive rather than an exclusive definition. While article 1 UNCRPD refers to “long-term” impairments, this provision is not exhaustive of other impairments.

In that regard, the UN Committee on the Rights of Persons with Disability, in *Ms. S.C v Brazil* (2014), specified that under Article 1 of the Convention, “persons with disabilities include, but are not limited to those who have long-term impairments.

49

Evolution of the case-law

Using the UNCRPD as an interpretative tool for assessing the EU legislation, the European Court of Justice has progressively taken a positive and expanding approach to disability rights.

With regard to the definition of disability, the case law of the ECJ underlines steps towards a social model approach of disability, shifting the legal analysis away from the nature, the origin, the severity or the duration (?) of the medical condition or impairments of the person and towards the discriminatory social effects of such impairments.

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How to answer institutional concerns that a social model, effect-based interpretation of disability would make it nearly impossible for courts and tribunals to identify and dismiss abusive claims ?

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Petya Milkova v Izpanitelen Direktor (2017) Case C-406/15.



Does Article 7 of Directive 2000/78 permit employees with disabilities, but not civil servants with the same disabilities, to be afforded specific advance protection in the event of dismissal?

52

Article 7(2) of Directive 2000/78.

“With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.”

53

Petya Milkova - Case 406/15

The purpose of Article 7(2) of Directive 2000/78 is to authorise specific measures aimed at effectively eliminating or reducing actual instances of inequality affecting people with disabilities, which may exist in their social lives and, in particular, their professional lives, and to achieve **substantive**, rather **than formal equality** by reducing those inequalities.

Article 7(2) read in the light of the UN Convention and in conjunction with the general principle of equal treatment enshrined in Articles 20 and 21 of the Charter, allows for a national legislation which confers on employees with certain disabilities specific protection in the event of dismissal, without conferring such protection on civil servants with the same disabilities, unless it is established that there has been an infringement of the principle of equal treatment.

54

● **Substantive equality** entails both the conceptions of **equal opportunities** as well as **equality of results**,

○ Under the conception of equality of opportunities should individuals work and be paid in accordance with their abilities. (*"This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned"*)

This conception is thus most relevant to persons with disabilities whose productivity is relatively unimpaired by their health conditions and whose opportunities are limited by stigma and stereotyping. Justifications for discrimination must then not be accepted at face value but are to be examined critically, the possibility of indirect discrimination recognized, reasonable accommodation to be provided and burdens of proof may be shifted.

This conception of equality of opportunities implies logically a social model, effect-based definition of disability.

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● By contrast, an equality of results approach, entails elements of **redistribution** and **positive action**. It offers more to persons with disabilities who have substantial limitations.

○ Such approach suggests a definition nearer in conception to those found in social policies where targeting - mechanisms to identify eligible individuals for the purposes of transferring resources or preferential access to social services – is widely practiced,

Definitions under an equality of results approach target usually a different group of people with long term, moderate and substantial limitations,

The two conceptions imply different definitions of disability.

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Widening of the scope for disability discrimination claims ?

On 26 January 2021, In VL vs zpital Kliniczny (Case C-16/19), the Court ruled that direct disability discrimination may be established if the criterion for less favourable treatment is **inextricably linked to disability**.

The difference in treatment does not have to be in comparison with a non-disabled worker: it can be between disabled workers, for example **where treatment differs according to different types of disability (in terms of particular conditions or severity)** or potentially a difference in some other aspect of disability.

58