

Discrimination on the grounds of Disability

The concepts of “Disability” and “Reasonable Accommodation”
The relationship between EU law and the UNCRPD



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1

The concept of “Disability”

- **Chacón Navas** v Eurest Colectividades SA (2006) - Case C-13/05.
- **Coleman** v Attridge Law (2008) - Case C-303/06.
- **HK Danmark** 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

2

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 ?*

3

CJEU 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*"
- 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**.

4

Remarks on Chacon Navas

- It is well-settled that the interpretation of a provision of EU law predicates that its **wording, context, and objectives** must all be taken into account. However, in Chacon Navas, the CJEU adopts a reasoning mainly focusing on the text and seems **uninformed** by the historical, political and normative debate regarding the meaning of disability in Europe and abroad.
- The interpretation of the concept of disability is heavily grounded in the "**medical model**" of disability.

5

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

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

6

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.**

7

Remarks on Coleman

- The CJEU ruling explicitly rejected the calls for a **narrow text interpretation** of the Directive on the ground that such an interpretation would hamper the social and economic integration of persons with disabilities.
- By allowing persons associated with a person with disability to be afforded protection, thus by introducing 'discrimination by association', the decision is reflective of the "social model" of disability in that places the focus on the commission of the discriminatory act in preference to the condition of the person.

8

C-335/11, C-337/11 - HK Danmark, acting on behalf of Jette Ring v Dansk Almennyttigt Boligselskab DAB and HK Danmark acting on behalf of Skouboe Werge v Pro Display A/S

*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**?*

*Does national provision allowing a period of notice to be shortened on account of absences due to sickness could give rise to **indirect discrimination** based on disability?*

9

CJEU ruling on HK Danmark

- 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.**

10

- **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.
- The Directive 2000/78 must be interpreted as **precluding national legislation** under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness,, where those absences are the consequence of his disability, **unless that legislation, as well as pursuing a legitimate aim, does not go beyond what is necessary to achieve that aim**, that being for the referring court to assess.

11

Remarks on Ring

- The ruling embraces a **wider concept of disability** than in Chacon Navas : a disability also includes a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a long-term limitation.
- The wider interpretation of the concept is underpinned by the **United Nations Convention on the Rights of Persons with Disabilities** (UNCRPD) ratified by the European Union.
- The concept of **reasonable accommodation** regulated in Article 5 of Directive 2000/78/EC is also comprehensively interpreted in the light of the UNCRPD meaning of disability.
- The ruling provides a some guidance on taking into account relevant factors relating to workers with disabilities when assessing the **legitimacy** and the **appropriateness** of legal provisions having a disparate impact on workers with disabilities.

12

The United Convention on the Rights of Persons with Disabilities

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

13

The UNCRPD : a disability lens on human rights

- The UN CRPD does not in principle create any new rights, but rather reaffirms and specifies existing ones along a set of basic 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.
 - **equality of opportunity**.
 - **accessibility**.
- The UNCRPD advances a **substantive equality** approach for persons with disabilities, including equality of opportunities and equality of outcomes.

14

The UNCRPD co-mingles a broad range civil and political rights with economic, social and cultural 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
- Freedom of expression and opinion, and access to information
- Respect for privacy
- Respect for home and the family, Participation in political and public life.
- **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.

15

The accession of the European Union to the UNCRPD

- 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.
- The EU competence to conclude the UNCRPD derives mainly 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.

16

The UNCPRD as a mixed agreement in EU law

- 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 such as the UNCPRD 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.

17

Effects of international agreements concluded by the European Union in the EU legal order

- International agreement **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). However, the provisions of the UNCPRD Convention are not, as regards their content, provisions that are unconditional and sufficiently precise to have direct effect in European Union law. (Case 363/12 Z v A Government department)

18

- 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)

The meaning of “Disability” within the UNCRPD

Preamble

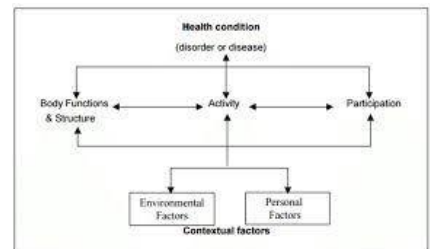
“Recognising that disability is an **evolving concept** and that **disability** results from the **interaction** between persons with **impairments** and attitudinal and environmental **barriers** that hinders their full and effective participation in society on an equal basis with others.”.

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.”.

Disability in the International Classification of Functioning, Disability and Health (WHO)

- The CRPD approach to disability is derived to that of the International Classification of Functioning, Disability and Health (ICF), adopted by the WHO in 2001
- In ICF, disability is viewed as the outcomes of interactions between health conditions (diseases, disorders and injuries) and contextual factors;
- Contextual factors are external environmental factors (for example, social attitudes, architectural characteristics, legal and social structures, and so forth) that influence how disability is experienced by the individual.
- This perspective backs the "social model" of disability in that it comprehends also disability as a product of prejudice instead of perceiving it as a purely individual problem (the "medica model")



21

Disability and reasonable accommodation

- If disability is conceptualized as the combined result (interaction) of individual functional diversities and the attitudinal barriers of persons and the environment, then the failure for persons to participate in the society must lead to some legal scrutiny of the responsibilities of different actors and institutions when their rights go unfulfilled.
- Under the UNCRPD, discrimination 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**" (Art.2 UNCRPD).

22

Article 5 Directive

"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" .

23

Reasonable accommodation : key elements

- **Reasonableness** : effectiveness and appropriateness of the requested adjustment. It is suggested that "reasonable" must be interpreted as an adjective that weakens the term "accommodation," that is, in the sense in which the word is applied in civil law (e.g., reasonable effort, reasonable care), indicating an ordinary attempt, and not the maximum possible or the maximum desirable
- **Individualization** : "where needed in a particular case". Reasonable accommodation is based on a particular individual and his or her unique disability experience, in the context of a specific job in a certain workplace. Practically, it involves the need for communication and an interactive process between the employer and the employee.
- **Disproportionate burden** : balancing the rights of persons with disabilities and the economic interest of employers

24

CJEU rulings on the concept of reasonable accommodation

- 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.**
- C-485/20 XXX/HR Rail : the concept of 'reasonable accommodation' for disabled persons requires that a worker (including one in traineeship) who, owing to a disability, has been declared incapable of resuming the essential functions of the post, **be assigned to another position** which he has the competence and capability of performing unless it poses a disproportionate burden on the employer.

25

The EU concept of disability after HK Denmark

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.

26

Kaltoft v. Kommunernes Landsforening (2015) – Case C-354/13

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

27

ECJ Ruling on Kaltoft

- 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
- This 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
- **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."**

28

Daouidi v. Bootes Plus Case 395/15

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

29

CJEU ruling on Daouidi

- 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

By insisting that impairment must be "long term", could the EU concept still exclude from the protection against discrimination a vast array of workers with short-term, fluctuating, or episodic impairments?

30

Szpital Kliniczny im. dra J. Babińskiego,
Samodzielny Publiczny Zakład Opieki
Zdrowotnej w Krakowie (Case C-16/19)

Does the practice adopted by an employer and consisting in the exclusion of some workers with disabilities form a benefit compared to other workers may constitute discrimination for the purposes of Article 2 of Directive 2000/78?

31

CJEU ruling on Szpital Kliniczny

- **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.

*The ruling **widens the scope of disability discrimination** since it usually involves comparing the treatment afforded to one worker with another and showing that the treatment is less favorable because of the 'protected characteristic'. The CJEU now has held that direct discrimination might also be established by comparing treatment between workers with disabilities.*

32

◦ Final thought

The concept of disability as framed under the Equal Treatment Directive derives from equal opportunities social model, effect-based approach of disability.

- Under such an approach, individuals should be recruited, employed and paid in accordance with their abilities. This is clearly reflected by the recital 17 of the Directive : *“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 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 maybe be shifted.
- However, it may offer less for persons with disabilities who have substantial limitations Hence the complementary need of an equality of results approach which entails elements of redistribution and positive action (see article 7 of the Directive). Under the latter approach, legal concepts to identify eligible individuals for the purposes of transferring resources or preferential access to social services – are widely practiced and remain necessary.