

DISCRIMINATION ON THE GROUNDS OF DISABILITY



**APPLYING EU ANTI-DISCRIMINATION LAW
SEMINAR FOR LEGAL PRACTITIONERS**

MILAN
5-6 OCTOBER
2023



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CASE LAW CJEU, ECHR, UN CRPD COMMITTEE, NATIONAL

4 main themes – 18 cases

1. Notion of disability
2. Comparator
3. Termination of employment
4. Reasonable accommodation

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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

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FIRST ON THE DEFINITION OF DISABILITY



Jette's 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 QUESTION



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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



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Development

2001 – Ad Hoc Committee to draft CRPD is set up

2006 – The UNGA adopts the CRPD

2008 – Entry into force of the CRPD

30 September 2023 Status

Convention

☐ Ratifications/Accessions: 187

Optional Protocol

☐ Ratifications/Accessions: 104

Monitoring Framework

☐ [Committee on the Rights of Persons with Disabilities](#)

☐ [General comment No. 8 \(2022\) on the right of persons with disabilities to work and employment](#)

<https://social.desa.un.org/issues/disability/crpd/convention-on-the-rights-of-persons-with-disabilities-crpd>

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WHY IS UN CRPD SO IMPORTANT?



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- ❑ first legally **binding** document – seeks to ensure the equal enjoyment of all human rights by all persons with disabilities (PWD)
- ❑ a **paradigm shift** from medical model to **human rights model of disability**
- ❑ negotiations: involvement of highest level of civil society and disability persons organizations (DPOs)

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UN CRPD AND ITS INTERACTION WITH EU LAW



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Convention on the Rights of Persons with Disabilities (CRPD)

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

EU law

- ❑ Art. 19 TFEU, art. 21 CFR, Directive 2000/78/EC (“Employment Equality Directive” or “EED”)
- ❑ Policies: Strategy for the Rights of Persons with Disabilities 2021-2030
- ❑ Proposal of so called “Horizontal Directive” (protection against disability discrimination beyond employment)
- ❑ Other areas: accessibility of products (Directive 2019/882), audio-visual media services (Directive EU 2018/1808), accessibility of the websites and mobile applications of public sector bodies (Directive EU 2016/2102)

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THE (NON-) DEFINITION OF DISABILITY IN THE UN CRPD



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Preamble and
Article 1, para 2
- 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.»

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LET'S RETURN TO THE CASES OF SONIA AND JETTE



Sonia Chacón Navas v Eurest 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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CRPD COMMITTEE



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S. C. v. Brazil
CRPD/C/12/D/
10/2013

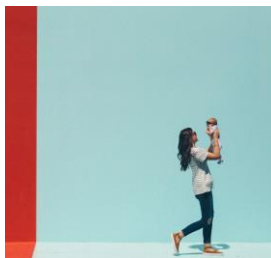
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- ❑ Communication declared inadmissible
- ❑ but CRPD Committee briefly elaborated on the concept of disability
 - «the difference between illness and disability is a **difference of degree** and **not a difference of kind**»
 - «A health impairment which initially is conceived of as illness **can develop** into an impairment in the context of disability as a consequence of its **duration or its chronicity.**»

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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**



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

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



**Petya Milkova v
Izpalnitelen direktor
na Agensiata
(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**

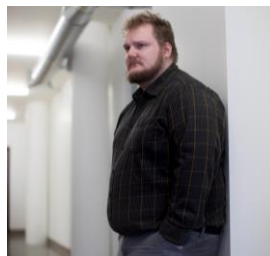
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INTERESTING JUDGMENTS ON THE TOPIC OF TERMINATION OF EMPLOYMENT



**Discrimination by
association
Coleman v Attridge
Law
(2008)
Case C-303/06**



**Indirect
discrimination
Ruiz Conejero v
Ferroser servicios
(2018)
Case C-270/16**



**Genuine and
Determining
Occupational
Requirement
XX v Tartu Vangla
(2021)
C-795/19**

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ACCESSIBILITY AND REASONABLE ACCOMMODATION

General Comments no. 2 and no. 6



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ACCESSIBILITY	REASONABLE ACCOMMODATION
Group related	Tailored to the individual
Ex ante duty	Ex nunc duty
Must be implemented gradually but unconditionally	Must be implemented if it does not entail a disproportionate burden on the duty bearer

Both General Comments of UN CRPD Committee are available at <https://www.ohchr.org/en/hrbodies/crpd/pages/gc.aspx>.

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REASONABLE ACCOMMODATION



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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

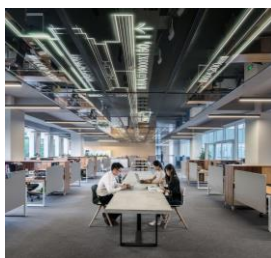


- ☐ Provision of a personal assistant in the workplace.
- ☐ Presence of a dog with special training in the workplace.
- ☐ Part-time.
- ☐ Flexible working hours.
- ☐ More frequent or longer breaks from work.
- ☐ Teleworking.
- ☐ Taking the employee out of direct contact with clients (called "back office").
- ☐ 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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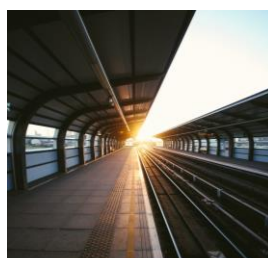
EXAMPLES FROM CJEU CASE-LAW Reasonable accommodation measure



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



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



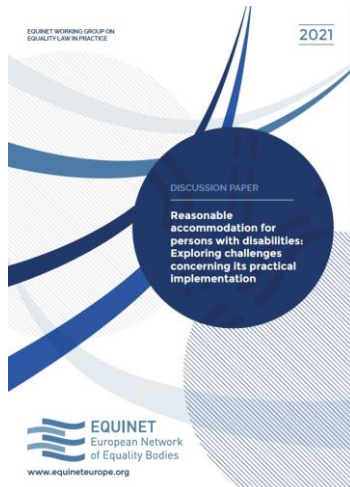
**XXXX v
HR Rail SA
(2022)
Case C-485/20**

See also UN CRPD case law against Spain (V.F.C. v. Spain, CRPD/C/21/D/34/2015 and others).

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PRACTICAL CHALLENGES



- ☐ **Equinet Discussion Paper, 2021**
- ☐ Annex (very useful tool)
- ☐ Case law from 14 different EU countries (courts, national equality bodies)
- ☐ Employment and beyond employment (goods and services, education)

Equinet – European Network of Equality Bodies. Annex - Case law compendium on reasonable accommodation for persons with disabilities [online] Brussels: Equinet Secretariat, 2021. <https://equineteurope.org/publications/reasonable-accommodation-for-persons-with-disabilities/>

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POLL QUESTION

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.

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PRACTICAL CHALLENGES

interesting national case law



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

- ❑ Norway, Equality and Anti-Discrimination Tribunal, 18 October 2007, Case 21/2007, B vs. A Company
- ❑ Spain, Constitutional Court, 15 March 2021, Nº 51/2021

Equinet – European Network of Equality Bodies. Annex - Case law compendium on reasonable accommodation for persons with disabilities [online] Brussels: Equinet Secretariat, 2021. <https://equineteurope.org/publications/reasonable-accommodation-for-persons-with-disabilities/>

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CONSTRUCTIVE KNOWLEDGE

UN CRPD Committee General Comment No. 6 (2018)



- ❑ RA is often but not necessarily requested by the person who requires access,
- ❑ RA requires the duty bearer to enter into dialogue with the individual with a disability,
- ❑ RA also applies in situations where a **potential duty bearer should have realized that the person in question had a disability** that might require accommodations to address barriers to exercising rights (**constructive knowledge**).

Implementation can take a great variety of forms depending on the facts and the context in each case.

*«The process of seeking reasonable accommodation should be **cooperative and interactive** and aim to strike the best possible balance between the needs of the employee and the employer.»* (UN CRPD Committee, V.F.C. v. Spain, point 8.7).

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SET OF SOFT RECOMMENDATIONS FOR EMPLOYEES



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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



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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 and onboarding training
- 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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CONCLUDING REMARKS



- ❑ The CRPD contains a **social/human rights model of disability**.
- ❑ EU law protects people with disabilities against **discrimination only in the field of employment**.
- ❑ **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 (and retention and continuance of existing employment).
- ❑ **Denial** of reasonable accommodation is a **form of discrimination**.
- ❑ Reasonable accommodation may take **different forms**. EU law contains non-exhaustive list of possible measures.
- ❑ The adoption of the measure should be the result of a **dialogue** between the employee and the employer.

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THANK YOU FOR YOUR ATTENTION!



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