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Speakers Notes – European Law Association, October 1st and 2nd, 2004

Reasonable accommodation

Introduction

In this session, propose to:

- Discuss the background to the concept of reasonable accommodation, and how it came to be included in the directive
- Look at how it should be conceptualised
- Consider Article 5 and its wording, as well as the indirect discrimination provisions and their interrelationship with reasonable accommodation
- Consider the UK DDA, how it works and some caselaw under it which illustrates how reasonable accommodation can be effected
- Finally, look briefly at the directive implementation in Belgium and the Netherlands

Introduction to me: barrister practising in disability law for most of my career, exclusively in the DDA since its implementation. Work at DRC – an independent body set up to "oversee" the Disability Discrimination Act in the UK. I am involved in reviewing and monitoring the legislation: also involved in redrafting employment code of practice following changes which will be implemented in October as a result of the UK government's transposition of the directive. Until June this year, practiced at the Royal National Institute of the Blind, taking DDA cases.

1. Background
    - Disability discrimination a relatively new concept
    - Previously issues relating to disability were dealt with by means of social welfare provisions. Disabled people were seen not as subjects with legal rights, but as objects of welfare, and charity programmes It was considered that disabled people were unable to participate in employment and wider society as a result of their disability – the medical model
    - Rise of "civil rights" movement of disabled people: began in the USA and based on the social model of disability which

has widely gained acceptance; led to introduction of the Americans with Disabilities Act 1990 (on which the reasonable accommodation principle in the directive and the UK DDA is largely based) – this drew explicitly on the race discrimination model in the Civil Rights Act of 1960 - leads to barriers which impede disabled peoples lives being perceived as a form of discrimination which should be addressed in anti-discrimination legislation; hence the concept of reasonable accommodation

- Considerable evidence that disabled people discriminated against in employment. Employers see not the abilities, but the inabilities – the barriers to participation. Reasonable accommodation requires that these barriers be removed.

2. How should it be conceptualised?
   - "sui generis" – on its own, a third form of discrimination
   - co-exists with direct discrimination and indirect discrimination, but in reality is the key to disabled people's participation
   - as discrimination law evolves, and (as Bell says in "Sexual Orientation Discrimination in employment: an evolving role for the European union) employers and others to whom it applies become more aware of the penalties for unlawful discrimination, the more overt prejudice is likely to migrate into increasingly covert forms of discrimination
   - not "special treatment" ; firmly rooted in the principle of equality (reflected in the directive)
   - strong overlap with indirect discrimination, but a different approach

3. Wording of the directive in relation to reasonable accommodation
   the scope of the provisions
   - "access to, participate in, or advance in employment, or to provide training"
   - covers recruitment – an employer will need to consider the suitability of an individual for a post taking into account any accommodations which could be made (e.g. wheelchair user applies for job but the office which they would occupy would be on the first floor, to which there is no lift: need to consider whether a lift could be installed, or whether their office could be moved to the ground floor), also covers any tests which an employer may set as part of the recruitment process
   - covers situation where an employee becomes disabled, and can no longer carry out all or part of their job – what

accommodations could be made to ensure that they continue in their employment, or may involve considering alternative employment
- covers promotion – certain requirements of a job may need to be waived if they prevent a disabled employee from progressing in their job
- training: may need extra training, or training in a different way (e.g. for someone with learning disabilities)

When is the duty triggered?

- "where needed in a particular case to enable…"
- no definition in the directive
- in some cases obvious (e.g. wheelchair user who cannot get into a building): other cases less so – may need extra evidence
- should be an objective test (i.e. court or tribunal cannot just "rubber stamp" the decision of an employer as to what is or is not needed so long as this is reasonable), so that the purpose of the directive is fulfilled.
- should take into account any "coping" mechanisms which a disabled employee has developed
- for example, an employee with a visual impairment does not have access to a large computer screen and large text software. He or she nevertheless copes with the job, but only in reality because she works extra hours in order to keep up with the work. An accommodation would clearly be "needed" in this case, despite the fact that the employee was carrying out the work: if it were to be held that it was not needed, it would defeat the object of the directive and "punish" disabled employees for coping with their disabilities
- implicit that the need must be to enable effective working, not just to work at all
- Return to this

4. Wording of indirect discrimination
   - Inextricably linked with reasonable accommodation although the wording clearly different
   - Clear that the "measures" to be taken under Article 5 must be sufficiently broad to cover "provision criterion or practice" which causes disadvantage, in order for employer to benefit from "get out" clause on indirect discrimination (which is why UK government have amended the duty on reasonable adjustments to include provision criterion or practice)

5. Comparison with indirect discrimination
   Disadvantages
   - Reasonable accommodation is individualised, aimed at the "group effect": requirement that you remove the provision for all, whereas reasonable accommodation focused on a solution for an individual
   - E.g.: a common problem for people who have a visual impairment, or who have epilepsy, is the requirement for a driving licence, when this is not key to the job but just something an employer prefers. If the employer in such a case makes changes to the requirement for a blind person or someone with epilepsy, by perhaps swapping some of his/her tasks with another person, or providing a taxi for the occasional travel, then the job requirement can remain in place, even if the employer would not have otherwise been able to provide an objective justification for the provision criterion or practice
   - In addition, knowledge of the disability is required for the duty to provide reasonable accommodation to apply (reference to appropriate measures where needed "in a particular case"), whereas no knowledge is required in relation to indirect discrimination (indirect discrimination "shall" be taken to occur where the provision criterion or practice etc)

   Advantages
   - Simpler mechanism to apply – focus on the need of the individual, do not have to consider the issue of disparate impact
   - It is a duty framed in the positive – employer shall take measures, rather than a negative prohibition on discriminatory provisions

6. Nature of the duty to accommodate
   - Preamble at paragraph 17 makes it clear that the duty to accommodate is part of the non-discrimination provisions
   - Worth remembering that the provision of accommodations is not a new concept – accommodations already made in society, escalators so that people do not have to walk, seating, restrooms, regularly made accommodations
   - Also the duty is to do what is reasonable

7. & 8 Nature of the duty to accommodate

- “appropriate” – need to consider the effectiveness of the adjustment, before going on to consider cost
- Adapting premises – not just installing a lift or a ramp, may also be the installation of an induction loop, or using colour contrast for visually impaired people
- Equipment – provision of adapted keyboards for someone with repetitive strain injury, arthritis, special chair for someone with a back problem
- Patterns of working time: allowing someone to come in later in the morning if their disability means that they will have difficulty travelling in the rush hour
- Distribution of tasks: e.g. as raised before, giving driving to someone else where a person cannot hold a driving licence because of their disability (and where it is not the key to the job)

9“Disproportionate burden

- when considering cost, also consider the benefit e.g. to other employees, or other users (e.g. parents with prams)
- scale and financial resources: costly accommodation likely to be more reasonable for organisation with greater resources to have to make than one with fewer resources
- need to consider sources of financial support: charities and state systems. In the UK, Access to Work scheme – very little awareness of this, though tribunals have been expecting employers to be aware of it
- should expect employers, now that these duties are in force, to begin budgeting for accommodations which they might have to make
- also, situations will change, cost of accommodations may reduce, resources may grow, so a decision not to make an accommodation at one point should not be the end of the matter
- directive also refers to protection of health and rights and freedoms of others (Article 2). As European Commission have indicated, this should be interpreted narrowly. Health and safety often used to discriminate against disabled people. DP no more a risk often than any other person: there are in any event specific requirements for all employees in relation to health and safety which should be followed.

10 ,11& 12 UK DDA

- 1995, following a sustained campaign by disabled people, the UK government introduced the DDA. Covers a wide range of areas, including employment

- The Act has been amended, from 1st October 2004 to take into account the provisions of the directive, changes being relatively minor in relation to reasonable adjustments (merely a matter of wording)
- Freestanding duty but is framed as a type of discrimination, as per overhead 9 (the Act makes it unlawful to discriminate in a number of situations)
- Duty itself is framed as per overhead 10
- Act accompanied by Codes of Practice, which have been very helpful in "fleshing out" the provisions of the Act, particularly useful to tribunals and courts who were largely unfamiliar with the issues relating to disability. The codes have to be taken into account by courts and tribunals where relevant, and most have relied quite heavily on them
- Requirement that disabled person is put at a "substantial disadvantage" compared to a non disabled person (no comparative element in the directive)
- However "substantial" is defined as meaning "more than minor or trivial" in the code, thus a relatively easy threshold to pass. Hardly any cases have turned on this (in reality, an individual not at a substantial disadvantage would be unlikely to want to go through the tortuous procedure of bringing a claim…)
- As a result of the amendment regulations it applies where a provision criterion or practice puts a disabled person at a substantial disadvantage, although the Regulations specifically state that it includes a variety of situations previously covered by the wording of this section, as per overhead 11
- Possible that "provision criterion or practice", as in indirect discrimination in the directive, is broader than the previous wording of the UK provisions, hence the change of wording for the UK (as they did not want to introduce a separate concept of indirect discrimination)

13 & 14 examples of reasonable adjustments

- The Act itself contains examples of reasonable adjustments, provide a useful reference point for employers, disabled people and tribunals
- This is not an exhaustive list, though, and the new code of practice on employment in the UK contains additional steps (e.g. disability equality training)

15. What is reasonable?

- Again, the Act itself provides factors to be used in determining what is reasonable. Regard shall be had in particular to the following factors, as outlined on the overhead
- Concept of cost and resources is included in these factors
- Not an exhaustive list
- Code of practice considers some other factors e.g. effect on other employees. By and large, will not be significant, unless e.g. employee with a particular disability wants heating in the office turned up to unbearable temperature for other staff, unlikely to be reasonable although may have to consider other adjustments (e.g. provision of own office)

16. Comparison of reasonable adjustment to reasonable accommodation

- Scope – wider in UK, as ra covers all aspects of the Act, as well as employers and trade organisations, education, and service provision. The directive, though, covers all employers and UK has had to alter legislation to ensure this (small employers and some occupations were excluded prior to October 1st 2004)
- Knowledge: require knowledge before the duty is triggered: as in the directive, with reference to “particular case”: in UK, imputed knowledge is covered (where employer knows, or ought reasonably to know) – not clear if this is the case with the directive
- Disproportionate burden: not specified in the definition of adjustment duty, but incorporated in the reasonable concept
- Justification: no justification for failure to make would be a reasonable accommodation, although this was possible in the UK prior to October 1st 2004. (although caselaw, however, has rendered this justification pretty worthless, and government was committed in any event to removing it)

17. Application of reasonable adjustment in the UK

- DDA implemented in relation to employment in 1996
- 2 research projects on its operation
- ,most recent, research by Income Data Services, in association with governments Department for Work and Pensions
- reasonable adjustment applications to the tribunal have highest success rate of all DDA claims
- employers tend to rely upon health and safety and cost as reason for not making adjustments
- health and safety, applicants successful as against employers in 36.8% cases

- cost success even higher 43.8%
- employers most successful when arguing that the adjustment would not have prevented the effect in question (e.g. disabled person states that employer should have provided adapted keyboard, and if so, would have been able to do typing test: however, with adapted keyboard would only have been able to type at 30 words per minute, whereas speed required was 50):effectiveness is key to the duties

18 & 19 An indication of the most common adjustments featured in cases

20. Some cases:

- early on, Morse laid down steps for tribunal to follow when considering reasonable adjustment duties
- key, though, is that the EAT made it clear that the test for determining what is or is not a reasonable adjustment is an objective one for the tribunal to determine – the tribunal can put itself into the shoes of the employer and decide what it thinks in all the circumstances would be reasonable
- rarely is a reasonable adjustment case argued without reference to this case

21. Archibald v Fife Council [2004] UKHL 32, 2004 IRLR 651 – very significant case. First time that the House of Lords had considered the matter of reasonable adjustment.
Mrs. A was employed as a road sweeper but following a minor operation was left with mobility problems and was unable to walk. She could no longer do her job and, following retraining which demonstrated that she was more than capable of doing office jobs, she applied for over 100 jobs with her employer but was unsuccessful, and was then dismissed. She claimed disability discrimination, including a failure to make reasonable adjustments, in that she was not slotted into a job without undergoing competitive interview. Her claim was dismissed by the Employment Tribunal, the Employment Appeal Tribunal, and the Scottish Court of Session. The House of Lords upheld her appeal, holding that the duty to make adjustments could include transferring without competitive interview a disabled employee from a post she can no longer do to a post which she can do. The employer's duty may require moving the disable person to a post at a slightly higher grade. A transfer can be upwards as well as sideways or downwards...what steps are reasonable depends on the particular circumstances of the case. The House of Lords also pointed out that – as per overhead – "The Disability Discrimination Act is different fro the Sex Discrimination and Race

Relations Acts in that employers are required to take steps to help disabled people which they are not required to take for others. The DDA does not regard the differences between disabled people as irrelevant. It does not expect each to be treated in the same way. The duty to make adjustments may require the employer to treat a disabled person more favourable to remove the disadvantage which is attributable to the disability"

22. Other cases:

Meikle v Nottinghamshire County Council: Ms. M was a teacher who became visually impaired. She brought proceedings alleging that the employer had failed to make adjustments to her work place, amongst other things, and that they had failed to adjust their sick pay policy of paying only half pay for the second six months of sickness absence. The tribunal found discrimination, but rejected certain allegations of failure to make reasonable adjustments.
On appeal, the EAT held that there had been a failure to make adjustments by failing to adjust their sick pay policy by putting her onto full pay (their policy allowed full pay for the first six months, and half pay for the second six months), as they had done when she broke her leg, and particularly in light of the fact that, but for their failure to make other adjustments, she would not have taken the time off sick. The Court of Appeal upheld this decision.

Cave v Goodwin & anor: Court of Appeal case, only case of which we are aware which considered the issue of "substantial disadvantage". Concerned a man with learning disabilities who was subjected to disciplinary proceedings following an inappropriate incident with another member of staff. Was given a letter to read, and not allowed to bring a friend to the hearing, just a work colleague. However, he discussed the matter with colleagues and was able to make representations himself at the disciplinary hearing (following which he was dismissed). As a result, it was held that there was no substantial disadvantage. As the EAT had overturned the finding of fact on this, the Court of Appeal overturned the EAT decision.

Ridout: considered the issue of knowledge of a disability in relation to the reasonable adjustment duty: Ms. R had photosensitive epilepsy controlled by Epilim, which she disclosed to the employers: when she arrived for the interview, the room had bright fluorescent lighting without diffusers or baffles. She was wearing sunglasses. When she entered the

room, she made some comments to the effect that she might be disadvantaged by the lighting. The employers considered though that this was an explanation relating to her sunglasses. She did not use the glasses and did not mention feeling unwell or disadvantaged. ET dismissed her complaint of discrimination by failing to make reasonable adjustments. EAT upheld that finding. EAT stated that the knowledge requirement in relation to reasonable adjustments requires the tribunal to measure the extent of the duty if any against he actual or assumed knowledge of the employers both as to the disability and its likelihood of causing the individual a substantial disadvantage in comparison with persons who are not disabled. Tribunals should be careful not to impose upon disabled people a duty to give a long explanation as to the effects of the disability merely to cause the employer to make adjustments which it probably should have made in the first place. On the other hand, it is equally undesirable that an employer should be required to ask a number of questions as to whether a person with a disability feels disadvantaged merely to protect themselves from liability

Kenny v Hampshire: considered the scope of the ra duty. Mr. K has cerebral palsy and needs assistance in urinating. He applied for the post of analyst/programmer with Hampshire constabulary; he was regarded as the best person for the post and was offered it, subject to the employers being able to make appropriate arrangements for his needs. They sought volunteers for this, but could not find the necessary staff. It was impracticable for security reasons for him to work at home. They made an application for a support worker through the access to work scheme but there had been no response after a month, so the employers withdrew the job offer as there was an urgent need to fill the vacancy. Mr. K brought tribunal proceedings: ET dismissed the claim K appealed. EAT rejected the appeal. Held that the employers had not discriminated in failing to make a reasonable adjustment. The arrangements which were necessary to enable the applicant to work with the respondents did not fall within the duty to make a reasonable adjustment under s.6. The duty is restricted to “job related” matters. Not every failure to make an arrangement which deprives an employee of a chance to be employed is unlawful. Although an employer is required to consider making physical arrangements for a disabled person to use the toilet and physical adjustments to accommodate the presence of a person carer, had parliament intended to impose on employers the duty to cater for an employees personal needs in the toilet it would have said so and the Code of Practice would have laid out the criteria to be applied.
Borderline case – may be arguable in light of the directive that this no longer holds, although obviously the issue of what is reasonable would clearly come into consideration here. Worth mentioning case remitted to

tribunal to consider whether justified in not awaiting the outcome of the access to work application.

Mid Staffordshire NHS Trust v Cambridge: applicant employed as a team leader for reception services. Due to building work being carried out, her throat and breathing became affected and she was certified as unfit to work. She was subsequently certified as fit to return to work for a limited period, but found it difficult to use public transport, and her condition was aggravated by e.g. scents at work. Manager suggested redeployment, but she had been advised this would be detrimental to her health. No thought was given by management to reasonable adjustments to her working arrangements. She was dismissed. She applied to tribunal, which found discrimination. Held that the duty to take reasonable adjustments included duty to take steps to enable the employers to decide what steps would be reasonable to prevent her from being at a disadvantage. Included obtaining a proper assessment of her condition and prognosis; the effect of her disability on her; and her ability to perform the duties of her post, and the steps which might be taken to reduce or remove the disadvantages to which she was subjected. Employers appealed but EAT upheld the ET decision. Held that a proper assessment of what is required to eliminate a disabled person's disadvantage is a necessary part of the duty imposed by s.6(1) since the duty cannot be complied with unless the employer makes a proper assessment of what needs to be done. To say that a failure to make inquiries in this way would render the duty practically unworkable in many cases and that could not have been parliament's intention.

Cosgrove v Messer's Caesar and Howie: Ms. C employed as a legal secretary by the employers. Absent from work for a year due to depression and dismissed. Claimed discrimination. ET dismissed claim on the basis that neither the applicant nor her medical witness were able to suggest adjustments which the employer could have made to facilitate a return. The EAT upheld an appeal by Ms. C. The duty to make adjustments is upon the employer. There will, no doubt, be cases where the evidence given on the applicants' side alone with establish a total unavailability of reasonable and effective adjustments. However it does not follow that because a former secretary, long absent from the firm and clinically depressed to the point of disability, and her gp could postulate no useful adjustment, that the s.6 duty on the employer should, without more, be taken to have been satisfied. The employers in the present case had never turned their mind to adjustments. Had they done so, there were possibilities of adjustments which might have facilitated a return to work such as a transfer to another office or an alteration of the applicant's working hours.

23. Beart v HM Prison Service: Mrs. B employed as an administrative officer at Prison in Swaleside. Ultimately, developed depression. Employers did not obtain medical report upon her for some time; occ health consultant expressed view that she would not recover fully until difficulties in her current job (problems with her supervisor) were addressed and that suitable redeployment at another prison might be the only answer to the situation. This recommendation was never acted upon. Mrs. B dismissed. ET upheld claim of disability discrimination. Failed to make a reasonable adjustment by way of relocation or redeployment, as recommended in the medical report. EAT dismissed employers appeal.
Court of Appeal upheld the findings of the ET: Clear that the employers were under a s.6 (1) duty. The employers had made arrangements for the employment of the applicant at swaleside prison. There was medical evidence that supported the fact that there was a relationship between the difficulties the applicant encountered at work and the onset of her illness. The applicant could not continue to work at swaleside as recognised in the report and she was therefore placed at a substantial disadvantage.
Test of reasonableness under s.6 is directed to the steps to be taken to prevent the employment from having a detrimental effect upon the disabled employee. The tribunal's conclusion that if the applicant had been relocated there was a substantial possibility that she would still be in employment was plainly directed to the extent to which taking the step would prevent the effect in question, as part of the test of reasonableness.
Remitted to tribunal and won: obtained approximately 300,000 pounds compensation.

24 – 27 – some examples of how other Member States have approached the reasonable accommodation obligations