



# **Reasonable Accommodation in the EU law**

## ***The Fight against Discrimination: the Race and Framework Employment Directives***

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# Outline

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- Implementation of the Framework directive: first cases in the Netherlands and UK
- Concluding remarks and questions.



## International law: some important provisions

- article 26 ICCPR
- ECHR art 14 (accessory nature)
- 12<sup>th</sup> Protocol ECHR

Future:

UN Convention on the Rights of persons with Disabilities (incl. optional Protocol)



# Concept of disability

- **No definition in texts**
- **Diverse**
- **Including: 'assumed' disabilities**
  
- **ECoJ 11 July 2006, Sonia Chacón Navas:**
  - **Sickness as such is not covered by ground disability**



## Disability Rights

- In essence two elements:
  - a. impairment of person
  - b. Environmental barriers

**See:**

**Preamble of Draft Convention sub (c)**

- Development from 'hand in cap' to participation.



# Framework directive 2000/78/EC:

Article 2.2.(b) (ii):

(in relation to indirect discrimination)

- as regards persons with a particular disability, the employer or any person or organization to whom this directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

Article 5:

- In order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided.



# Formal equality

- equality of treatment
- treating similar cases alike



## Substantial equality

- result of specific treatment is taken into account
- Treating different cases differently
- Related to concept of indirect discrimination



## Positive obligations

- Respect, fulfill and protect as Human Rights obligations
  - Fits into non-discrimination framework to take difference into account.
- Different forms of positive obligations defined by international and national courts and commissions.



## **Reasonable accommodation- general aspects**

- not only relevant in cases of disability
- e.g. obligation to have women's facilities in the workplace
- but: absolute necessity in disability cases.
- barriers are caused by the environment
- Refusal is sui generis form of discrimination, but no exception to equality.



## **Reasonable accommodation-specific aspects**

- no absolute duty
  - but: proportionality test
  - depends on concrete circumstances ,  
such as:
    - size of company
    - costs
    - possible allowances and grants
    - length of contract
- etcetera



# Conditions sine qua non

- Qualified candidate
- Accommodation sufficient condition



## Reasonable accomodation ≠ preferential treatment

- Not temporary
- Aim is to guarantee equality, not to repair inequalities or to accelerate equality.



## Case law

- ECoJ: Chacón Navas case
- Netherlands: some cases on workplace and higher education; ETC investigates accommodation but also other aspects
- UK (Ind. Law Jnl, Vol. 33, 2004, 358-366)
  - re-employment after disability may require transfer to existing vacancy
  - Refusal of adjustments caused constructive dismissal, which amounted to unlawful discrimination



## Pending case

- Case C-350/06, reference made on 10 July 2006, Coleman:

Does the Directive only protect from direct discrimination and harassment persons who are themselves disabled?



# Miscellaneous

- Burden of Proof
- Effective remedy



## Concluding remarks

- Interpretation CoJ will be important
- Not fundamentally different aspect but part of substantive approach of equality
- Impact of and on general concepts e.g. 'fair employer'
- Inherent in right to work, right to education for all



## Relevant websites

- SIM data base  
:http://sim.law.uu.nl/SIM/Dochome.nsf?Open
- Equal Treatment Commission of the Netherlands:  
[www.cgb.nl](http://www.cgb.nl)
- EU and disability:  
[http://ec.europa.eu/employment\\_social/disability/index\\_en.html](http://ec.europa.eu/employment_social/disability/index_en.html)
- UN and disability:  
<http://www.un.org/esa/socdev/enable/>
- UNHCR and disability:  
<http://www.ohchr.org/english/issues/disability/index.htm>
- Case law:
  - <http://cmiskp.echr.coe.int/>
  - <http://curia.europa.eu/>